A/CN.4/SER.A/1998/Add.1 (Part 1)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1998

Volume II
Part One

Documents of the fiftieth session

UNITED NATIONS
New York and Geneva, 2008

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook* …, followed by the year (for example, *Yearbook … 1997*).

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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The reports of the special rapporteurs and other documents considered by the Commission during its fiftieth session, which were originally issued in mimeographed form, are reproduced in the present volume, incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.

A/CN.4/SER.A/1998/Add.1 (Part 1)

UNITED NATIONS PUBLICATION

Sales No.: E.00.V.11 (Part 1)
ISBN 978-92-1-133637-5

ISSN 0082-8289

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ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
BIS	Bank for International Settlements
ECE	Economic Commission for Europe
EEC	European Economic Community
EIA	environmental impact assessment
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILA	International Law Association
ILO	International Labour Organization
IMF	International Monetary Fund
IMCO	Intergovernmental Maritime Consultative Organization
IMO	International Maritime Organization
ISO	International Organization for Standardization
ITU	International Telecommunication Union
LAIA	Latin American Integration Association
MIGA	Multilateral Investment Guarantee Agency
OAS	Organization of American States
OAU	Organization of African Unity (now African Union (AU))
OECD	Organization for Economic Cooperation and Development
OSCE	Organization for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
UNCC	United Nations Compensation Commission
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	Office of the United Nations High Commissioner for Refugees
UNITAR	United Nations Institute for Training and Research
UNIDO	United Nations Industrial Development Organization
UPU	Universal Postal Union
WCO	World Customs Organization
WEU	Western European Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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I.C.J. Reports	ICJ, *Reports of Judgments, Advisory Opinions and Orders*
ILM	*International Legal Materials* (Washington, D.C.)
LGDJ	Librairie générale de droit et de jurisprudence
P.C.I.J., Series A	PCIJ, *Collection of Judgments* (Nos. 1–24: up to and including 1930)
P.C.I.J., Series A/B	PCIJ, *Judgments, Orders and Advisory Opinions* (Nos. 40–80: beginning in 1931)
P.C.I.J., Series B	PCIJ, *Collection of Advisory Opinions* (Nos. 1–18: up to and including 1930)
RGDIP	*Revue générale de droit international public* (Paris)
UNRIAA	United Nations, *Reports of International Arbitral Awards*

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In the present volume, the "International Tribunal for the Former Yugoslavia" refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and the "International Tribunal for Rwanda" refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

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NOTE CONCERNING QUOTATIONS

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

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.4/490 and Add. 1–7*

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

[*Original: English and French*]
[*24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998*]

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*Incorporating documents A/CN.4/490/Add.2/Corr.1, A/CN.4/490/Add.4/Corr.1 and A/CN.4/490/Add.7/Corr.1.

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Hague Convention concerning the Laws and Customs of War on Land (Convention IV) (The Hague, 18 October 1907)	*The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., J. B. Scott, ed. (New York, Oxford University Press, 1918), p. 100.
Treaty of Peace with Italy (Paris, 10 February 1947)	United Nations, *Treaty Series*, vol. 49, p. 3.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	Ibid., vol. 78, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	Ibid., vol. 75, p. 31.
Geneva Convention relative to the Treatment of Prisoners of War	Ibid., p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	Ibid., p. 287.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977)	Ibid., vol. 1125, pp. 3 and 609.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	Ibid., vol. 500, p. 95.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968)	*International Legal Materials* (Washington, D.C.), vol. 8 (1969), p. 229.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, p. 331.
Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)	Ibid., vol. 2051, p. 363.
United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	*Official Records of the General Assembly, Fifty-first Session, Supplement No. 49*, resolution 51/229, annex.
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Introduction

A. Outline of the work of the Commission on State responsibility

1. The subject of State responsibility was one of the 14 topics originally selected by the Commission for "codification and progressive development" in 1949.[1] Work began in 1956 under Mr. F. V. Garcia-Amador as Special Rapporteur. It focused on State responsibility for injuries to aliens and their property, that is to say on the content of the substantive rules of international law in that field. Although Mr. Garcia-Amador submitted six reports between 1956 and 1961, the Commission barely discussed them, because of the demands of other topics, including diplomatic immunities and the law of treaties. It was also felt that the disagreements over the scope and content of the substantive rules relating to the protection of aliens and their property were such that little progress was likely to be made.

2. Thus the Commission reconsidered its approach to the topic. In 1962, an intersessional subcommittee, chaired by Mr. Roberto Ago, recommended that the Commission should focus on "the definition of the general rules governing the international responsibility of the State".[2] It added that, in doing so,

> there would be no question of neglecting the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility.[3]

In 1963, the Commission approved the proposed definition and appointed Mr. Ago Special Rapporteur.

3. Between 1969 and 1980, Mr. Ago produced eight reports, together with a substantial addendum to the eighth report, produced after his election to ICJ. During that time, the Commission provisionally adopted 35 articles, together making up part one of the proposed draft articles (Origin of State responsibility).

4. In 1979, following the election of Mr. Ago to ICJ, Mr. Willem Riphagen was appointed Special Rapporteur. Between 1980 and 1986, he presented seven reports, containing a complete set of draft articles on part two (Content, forms and degrees of international responsibility) and part three (Settlement of disputes) together with commentaries. Owing to the priority given to other topics, however, only five draft articles from part two were provisionally adopted during this period.

5. In 1987, Mr. Riphagen being no longer a member of the Commission, Mr. Gaetano Arangio-Ruiz was appointed Special Rapporteur. In the period 1988–1996, he presented eight reports. The Drafting Committee dealt with the remainder of parts two and three in the 1992–1996 quinquennium, enabling the Commission to adopt the text with commentaries on first reading.[4] No attempt was made, however, to reconsider any issues raised by part one of the draft articles. The coordination of articles in the different parts was left to the second reading.

6. At its forty-ninth session in 1997 (Mr. Arangio-Ruiz having ceased to be a member), the Commission adopted a provisional timetable which envisaged a two-track process, with the aim of completing the second reading by the end of the quinquennium, i.e. by 2001. This process would involve reports by a special rapporteur, together with a series of working groups to consider major unresolved issues. Three such issues were tentatively identified as requiring special consideration: international crimes, the regime of countermeasures and the settlement of disputes.[5]

B. Scope of the present report

7. The present report deals first, in the introduction, with a number of preliminary and general issues as to the scope and form of the draft articles. Chapter I discusses what has so far proved the most controversial aspect of the draft articles as a whole: the distinction drawn in article 19 between international crimes and international delicts. This is perhaps the most striking way in which the draft articles sought to deal with "the possible repercussions which new developments in international law may have had on responsibility" (para. 2 above). Chapter II undertakes the task of reviewing and, where necessary, revising the draft articles in part one (other than article 19). It makes specific proposals, taking into account the comments of States and developments in doctrine and practice since the adoption of part one.

C. Comments received so far on the draft articles

8. Before turning to the substance, a word should be said about comments of Governments on the draft articles. A few written comments were received on part one in the period 1980–1988.[6] More recently, the General Assembly invited comments on the draft articles as a whole. Eighteen Governments have so far responded.[7] Many Governments have also commented on the evolution of particular draft articles in the course of the debate in the Sixth Committee of the General Assembly on the work of the Commission, and these comments will also, as far as possible, be taken into account. The Special Rapporteur would welcome further comments both on the draft

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[1] *Yearbook ... 1949*, p. 281, para. 16.

[2] *Yearbook ... 1963*, vol. II, document A/CN.4/152, p. 228, para. 5.

[3] Ibid.

[4] See *Yearbook ... 1996*, vol. II (Part Two), pp. 58 et seq.

[5] *Yearbook ... 1997*, vol. II (Part Two), p. 11, para. 30, and p. 58, para. 161.

[6] See *Yearbook ... 1980*, vol. II (Part One), p. 87, document A/CN.4/328 and Add.1–4; *Yearbook ... 1981*, vol. II (Part One), p. 71, document A/CN.4/342 and Add.1–4; *Yearbook ... 1982*, vol. II (Part One), p. 15, document A/CN.4/351 and Add.1–3; *Yearbook ... 1983*, vol. II (Part One), p. 1, document A/CN.4/362; and *Yearbook ... 1988*, vol. II (Part One), p. 1, document A/CN.4/414.

[7] See A/CN.4/488 and Add.1–3, reproduced in the present volume.

articles and on the proposals contained in the present report.[8]

9. Comments of Governments so far fall essentially into two categories. The first consists of comments on the draft articles as a whole, with observations on the overall economy of the text, or proposing the deletion of certain topics or issues, or, less often, the inclusion of new topics. These raise a number of general issues, some of which are discussed below. The second group includes comments on particular issues. They will be dealt with as necessary in the discussion of the relevant draft articles.

D. Some general issues

10. A number of comments discuss the balance between codification and progressive development in the draft articles. This is an important and perennial issue for the Commission. But one difficulty is that discussions in these terms tend to be rather impressionistic and risk substituting debate about generalities for attention to the particular provisions. At the current stage it is sufficient to note the suggestion made (e.g. by France, and impliedly by the United Kingdom of Great Britain and Northern Ireland and the United States of America) that the draft articles err on the side of "progressive development", in a way that is likely to be counter-productive and unacceptable to States.[9] Other comments take a more positive line (e.g. Argentina, Czech Republic, Italy, Nordic countries, Uzbekistan). But the overall balance of the draft articles can only be assessed after the second reading process is further advanced.

11. Certain general issues do warrant some discussion at this stage. They are:

(*a*) The distinction between "primary" and "secondary" rules of State responsibility;

(*b*) Issues excluded from the draft articles or insufficiently developed;

(*c*) The relationship between the draft articles and other rules of international law;

(*d*) The inclusion of detailed provisions on countermeasures and dispute settlement;

(*e*) The eventual form of the draft articles.

1. Distinction between "primary" and "secondary" rules of State responsibility

12. As noted above, the Commission initially approached the subject by considering the substantive law of diplomatic protection (protection of the persons and property of aliens abroad). But it became clear that this area was not ripe for codification. A decision to return to certain aspects of the topic, under the rubric of "Diplomatic protection", was only made in 1997; at the same time it was decided to focus largely on the secondary rules applicable to that topic.[10] The issue of potential overlap with the draft articles on State responsibility will need to be kept under review.

13. When it reconsidered the issue in 1962–1963, the Commission saw the present topic as concerning "the definition of the general rules governing the international responsibility of the State",[11] by which was meant responsibility for wrongful acts. The emphasis was on the word "general". The draft articles were to concern themselves with the *framework* for State responsibility, irrespective of the content of the substantive rule breached in any given case. The distinction between "primary" and "secondary" rules was formulated by the Special Rapporteur, Mr. Ago, as follows:

> The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility. Consideration of the various kinds of obligations placed on States in international law and, in particular, a grading of such obligations according to their importance to the international community, may have to be treated as a necessary element in assessing the gravity of an internationally wrongful act and as a criterion for determining the consequences it should have. But this must not obscure the essential fact that it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate the hope of a successful codification of the topic.[12]

14. The distinction between primary and secondary rules has had its critics. It has been said, for example, that the "secondary" rules are mere abstractions, of no practical use; that the assumption of generally applicable secondary rules overlooks the possibility that particular substantive rules, or substantive rules within a particular field of international law, may generate their own specific secondary rules, and that the draft articles themselves fail to apply the distinction consistently, thereby demonstrating its artificiality.

15. On the other hand, to abandon the distinction, at the current stage of the work on the topic, and to search for some different principle of organization for the draft articles, would be extremely difficult. It would amount to going back to the drawing board, producing substantial further delays in the work. Moreover, it is far from clear what other principle of organization might be adopted, once the approach of selecting particular substantive areas for codification (such as injury to aliens) has been abandoned. The point is that the substantive rules of international law, breach of which may give rise to State responsibility, are innumerable. They include substantive rules contained in treaties as well as in general international law. Given rapid and continuous developments in both custom and treaty, the corpus of primary rules is, practically speaking, beyond the reach of codification, even if that were desirable in principle.

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[8] In addition several non-governmental bodies are contributing comments, including ILA (which is establishing a working group), a panel of Japanese scholars nominated by the Government of Japan, and a panel of the American Society of International Law.

[9] See A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by France under General remarks, paras. 6–7.

[10] *Yearbook … 1997*, vol. II (Part Two), p. 11, para. 30, and p. 58, paras. 158–161.

[11] *Yearbook … 1963*, vol. II, p. 228, para. 5.

[12] *Yearbook ... 1970*, vol. II, p. 306, para. 66 (*c*).

16. Indeed the distinction has a number of advantages. It allows some general rules of responsibility to be restated and developed without having to resolve a myriad of issues about the content or application of particular rules, the breach of which may give rise to responsibility. For example, there has been an extensive debate about whether State responsibility can exist in the absence of damage or injury to another State or States. If by damage or injury is meant economically assessable damages, the answer is clearly that this is not always necessary. On the other hand in some situations there is no legal injury to another State unless it has suffered material harm.[13] The position varies, depending on the substantive or primary rule in question. It is only necessary for the draft articles to be drafted in such a way as to allow for the various possibilities, depending on the applicable primary rule. A similar analysis would apply to the question whether some "mental element" or culpa is required to engage the responsibility of a State, or whether State responsibility is "strict" or even "absolute", or depends upon "due diligence".

17. There remains a question whether the draft articles are sufficiently responsive to the impact that particular primary rules may have. The regime of State responsibility is, after all, not only general but also residual. The issue arises particularly in relation to article 37 of part two (*Lex specialis*). It is discussed below.

18. Finally, there is a question whether some of the articles do not go beyond the statement of secondary rules to lay down particular primary rules. This is true, at least apparently, for the definition of international crimes in article 19, and especially paragraph 3. Article 19, however, raises broader issues, which are discussed in chapter I below. Another article which, it has been suggested, infringes the distinction between primary and secondary rules is article 35, dealing with compensation in cases where the responsibility of a particular State is precluded by one of the circumstances dealt with in articles 29 to 33.[14] On the other hand article 35 is a without prejudice clause, and does not specify the circumstances in which such compensation may be payable. It can be argued that it thereby usefully qualifies the "circumstances precluding wrongfulness" in articles 29 to 33 although whether it is equally applicable to each of those circumstances is a question to which it will be necessary to return.

2. Issues excluded or insufficiently developed

19. Many of the comments made so far with regard to the scope of the draft articles relate to issues which should be excluded (e.g. international crimes, countermeasures, dispute settlement). But a number of topics have been identified which require further treatment. For example, the provisions dealing with reparation, and especially the payment of interest, have been said to be inadequately developed.[15]

20. Another such issue is obligations *erga omnes*. Since its well-known dictum in the *Barcelona Traction* case,[16] ICJ has repeatedly referred to the notion of obligations *erga omnes*, most recently on the admissibility of Yugoslavian counter-claims in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[17] The matter is presently dealt with in the definition of "injured State" in article 40, where it is linked to the concept of international crimes.

21. Comments of Governments on obligations *erga omnes* are very varied.

22. France is generally critical of the notion, while not denying that in special circumstances a State may suffer legal injury merely by reason of the breach of a commitment. However, it says that "in the case of a commitment under a multilateral treaty, the supposedly injured State must establish that it has suffered special material or moral damage other than that resulting from a simple violation of a legal rule".[18] This may appear to deny the possibility of obligations *erga omnes*, whose very effect, presumably, is to establish a legal interest of all States in compliance with certain norms.

23. Germany, by contrast, sees in the clarification and elaboration of the concepts of obligations *erga omnes* and *jus cogens*, in the field of State responsibility, a solution to the vexed problems presented by article 19.[19]

24. The United States takes an intermediate position, supporting the clarification and in some respects the narrowing of the categories of "injured State" in article 40, especially in relation to breaches of multilateral treaties, while accepting the notion of a general or community interest in relation to defined categories of treaty (e.g. human rights treaties). But it denies that injured States acting in the context of obligations *erga omnes* (or of an *actio popularis*) should have the right to claim reparation as distinct from cessation.[20]

25. The United Kingdom likewise raises issues of the definition of "injured State" in the context of multilateral treaty obligations. In particular it questions the consistency of article 40, paragraph 2 (*e*) (ii), with article 60, paragraph 2 (*c*), of the 1969 Vienna Convention on the Law of Treaties, which allows the parties to multilateral treaties to suspend the operation of the treaty in relation to a defaulting State only "if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty".[21]

26. These and related questions will be referred to in chapter I of the present report, in the context of international crimes, and (depending on the decisions to be taken

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[13] See, for example, the *Lake Lanoux* arbitration, UNRIAA, vol. XII (Sales No. 63.V.3), p. 281.

[14] See, for example, A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by France on article 35.

[15] Ibid., comments by the United States on article 42, comments by France under General remarks, para. 5; and comments by Mongolia on article 45.

[16] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32.

[17] *Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 258, para. 35.

[18] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by France on article 40, para. 3.

[19] Ibid., comments by Germany under part two, chap. IV.

[20] Ibid., comments by the United States on article 19, para. 2.

[21] Ibid., comments by the United Kingdom on article 40, para. 2.

by the Commission as to the treatment of international crimes) they will be considered in more detail in relation to part two of the draft articles, and especially article 40.

3. Relationship between the draft articles and other rules of international law

27. This issue has already been referred to in the context of the distinction between primary and secondary rules. It is addressed in the introductory articles to part two, in particular articles 37 to 39. Of particular significance is article 37 (*Lex specialis*), which recognizes that States are normally free to regulate issues of responsibility arising between them by special rules, or even by "self-contained regimes", notwithstanding the general law of responsibility. A number of Governments have suggested that the *lex specialis* principle should be applied to part one as well.[22] In the Special Rapporteur's view, this suggestion has much to commend it. But there remains a question whether the relocation of article 37 would be sufficient to cope with the implications of "soft" obligations, e.g. obligations to consult or to report. This will be discussed when considering draft articles 37 and 38.

4. Inclusion of detailed provisions on countermeasures and dispute settlement

28. Apart from the question of international crimes, there is controversy about the inclusion of two other major elements in the draft articles, countermeasures and dispute settlement.

29. A number of Governments are strongly critical of the inclusion of detailed rules on countermeasures in the draft articles, although again there is a spectrum of views.

30. Some Governments accept the need for the inclusion of countermeasures as a circumstance precluding responsibility, at least as against the wrongdoing State (art. 30), but deny that the detailed elaboration of a regime of countermeasures in part two is appropriate.[23]

31. Others accept that countermeasures should figure in the draft articles not only in article 30, but also in more elaborate form in part two. In some cases, however, they raise questions about the formulation of relevant articles, including questions of a fundamental kind.[24]

32. By contrast, a few regard countermeasures as outside the scope of the draft articles entirely, on the basis that they cannot excuse unlawful conduct and that they tend to exacerbate rather than prevent inter-State disputes.[25]

33. A range of views is also expressed in relation to the issues of dispute settlement raised by part three. Of particular significance is the point that most disputes between States (including even some territorial disputes) can be presented as disputes about State responsibility. Any compulsory system of dispute settlement under the draft articles potentially becomes a general dispute settlement mechanism for inter-State disputes. No doubt preference can be given to any other third-party mechanism which the parties may have chosen. But except in specialized fields, there is no such mechanism for most States in most cases. Some Governments (e.g. Italy, Mexico, Mongolia) regard this as a reason for supporting and even strengthening part three. Others (e.g. France, United States) regard it as a reason for deleting it. Still others welcome some provision for dispute settlement but urge caution in its formulation (e.g. Argentina, Czech Republic, Germany, Ireland, Nordic countries).[26] It should be noted that this issue is intimately linked to the question of the form the draft articles should take, an issue discussed below.

34. A related question is whether the draft articles should incorporate procedural elements, such as references to the onus or standard of proof. In the normal practice of the Commission, such adjectival issues have been avoided, although occasionally a substantive rule is formulated in terms implying that it is to be read narrowly or by way of exception: e.g. the negative formulation in the 1969 Vienna Convention of certain grounds for challenging the validity of or terminating a treaty (see articles 46, 56 and 62, paragraph 1).

35. France, while opposing the inclusion of separate, and especially compulsory, provisions for the settlement of disputes, argues in favour of the inclusion of a range of procedural safeguards.[27] *A fortiori*, such presumptions or other safeguards would be in order in a set of articles which did properly include measures for compulsory dispute settlement. They would be of particular significance in relation to international crimes, if that notion is retained. The normal requirement that criminal conduct should be duly and fully proved against the entity in question must presumably apply to States, as it does to any other natural or legal person.

36. The draft articles do include some such provisions. For example, article 8 attributes to a State the conduct of persons acting in fact on its behalf if:

"(*a*) *It is established that** such person or group of persons was in fact acting on behalf of that State; "

37. Article 27 proscribes certain measures of aid or assistance to a wrongdoing State "if *it is established that** [the aid or assistance] is rendered for the commission of

[22] Ibid., comments by Germany on article 1, para. 3; by the United States on article 30; and by France on article 37.

[23] Ibid., comments by France under part two, chap. III; and by the United Kingdom on article 30.

[24] Ibid., comments by the United States on article 30, and under part two, chap. III; by Germany and Mongolia under part two, chap. III; by the Czech Republic under part two, chap. III, and on article 48; by Austria under part two, chap. III, and on article 48, para. 1; by Ireland and the Nordic countries under part two, chap. III. See also the detailed suggestions made in the alternative by France, under part two, chap. III, and on article 48.

[25] Ibid., comments by Mexico on article 30.

[26] Ibid., comments by the Czech Republic, France, Germany, Mexico, Mongolia, the Nordic countries, the United Kingdom and the United States under part three.

[27] Ibid., comments by France under part three.

an internationally wrongful act carried out by the latter". It is not clear why this formula is used in these articles and not others. For example, article 16 (Existence of a breach of an international obligation) is in neutral terms. It provides merely that:

"There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation."

38. There is a case for more systematic attention to such issues. This can best be done in the context of the overall issues of dispute resolution, which in turn depend to a great extent upon the eventual form of the draft articles.

5. Eventual form of the draft articles

39. A question of considerable strategic importance is whether the draft articles should be proposed as a convention open to ratification, or whether they should take some other form, e.g. a declaration of principles of State responsibility to be adopted by the General Assembly. The latter approach would have major implications for dispute settlement: a General Assembly resolution could not establish more than a facility for dispute resolution, and would be unlikely even to go that far.

40. The views of Governments so far range widely. Some (e.g. Italy, Mexico, Nordic countries) expressly or by implication favour a convention, since without one substantive provisions for dispute settlement are impossible. Others (e.g. Austria, United Kingdom) advocate a non-conventional form. One argument which is particularly stressed is that the process of subsequent debate and the possible non-adoption or non-ratification of a convention would cast doubt on established legal principles. Some Governments (e.g. Argentina, Czech Republic, France, Germany, United States) take no position at the current stage.[28]

41. The normal working method of the Commission is to prepare its proposals in the form of draft articles, leaving it to the completion of the process to decide what form the text should take. The Special Rapporteur believes that the normal method has much to commend it, and that the case for departing from it has not been made *at the current stage*. Discussion of the eventual form of the draft articles is premature, at a time when their scope and content have not been finally determined. States unhappy with particular aspects of a text will tend to favour the non-conventional form, but the option of a declaration or a resolution should not detract attention from an unsatisfactory text. In other words, deferring consideration of the form of the instrument has the desirable effect of focusing attention on its content. The precedent of the 1969 Vienna Convention is instructive. At one stage it was thought that the codification and progressive development of the law of treaties in the form of a treaty rather than a "restatement" was undesirable, and even logically excluded. Yet the Convention is one of the Commission's most important products, and it seems likely that it has had a more lasting and a more beneficial effect as a multilateral treaty than it could have had, for example, as a resolution or a declaration.

42. For these reasons, in the Special Rapporteur's view the question of the eventual form of the draft articles should be deferred for the time being. There will be occasion to return to it in the context of the treatment of the provisions on dispute settlement, at which stage the eventual scope of the draft articles with respect to such issues as crimes and countermeasures should be clearer.

[28] Ibid., under General remarks, comments by Austria, paras. 6–11; by France, para. 4; by Mexico, para. 3; by the United Kingdom, paras. 6–8; and by the United States, para. 6.

Chapter I

The distinction between "criminal" and "delictual" responsibility

Introduction

43. The single most controversial element in the draft articles on State responsibility is the distinction between international crimes and international delicts. That distinction was first accepted in 1976, when article 19 was provisionally adopted. But its substantive consequences were not finally formulated by the Commission until 1996, and then only after a difficult and fraught debate.[29] There is a marked contrast between the gravity of an international crime of a State, as expressed in article 19, on the one hand, and the rather limited consequences drawn from such a crime in articles 51 to 53, on the other. There is a further contrast between the strong procedural guarantee associated with countermeasures under article 48 and part three, and the complete absence of procedural guarantees associated with international crimes.

44. When article 19 was first adopted, many Governments preferred to reserve their written comments until the definition of an international crime had been completed by the elaboration of specific consequences and procedures. In the debates in the Sixth Committee a majority of States which expressed views in the period 1976–1980

[29] As a result of the decision not to reopen issues raised by part one of the draft articles, the Commission during this period did not reconsider article 19 itself. See the footnote to article 40, cited in paragraph 51 below. The principal Commission reports dealing with international crimes are: *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/291 and Add.1 and 2, pp. 23–54; *Yearbook ... 1982,* vol. II (Part One), document A/CN.4/354 and Add.1 and 2, pp. 48–50; *Yearbook ... 1983*, vol. II (Part One), document A/CN.4/366 and Add.1, pp. 10–24; *Yearbook … 1995*, vol. II (Part One), document A/CN.4/469 and Add.1 and 2, pp. 3–31; and *Yearbook … 1996*, vol. II (Part One), document A/CN.4/476 and Add.1, pp. 1–13.

supported the distinction between crime and delict; an even larger majority favoured some distinction being drawn between more and less serious wrongful acts.[30]

45. Following the adoption of parts two and three, all the Governments which have so far commented have dealt with the issue of international crimes. Their comments reveal a wide range of views and include many criticisms and suggestions: they are summarized below. A similarly wide range of views is contained in the extensive literature.[31] It is time to take stock.

A. The treatment of State crimes in the draft articles

46. Article 19, paragraph 1, provides that:

> An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

This is a statement of the obvious. It has sometimes been argued that an international obligation has not been, or could not have been, assumed with respect to a particular subject (e.g. because it is domestic or internal to the State).[32] There appears, however, to be no case where a State has claimed to be exempt from responsibility with respect to an acknowledged international obligation, merely because of the subject matter of that obligation. Nor is there any reported case where an international tribunal has upheld such an argument. No contrary view or authority is cited in the commentary. Article 19, paragraph 1, does no more than express what is clearly implied by articles 1 and 3, and can safely be left to be clarified in the commentaries to those articles.

47. Article 19, paragraph 4, proclaims a distinction between international crimes and international delicts:

> Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

The category of "delict" is thus defined in purely negative terms, in contradistinction to the definition of "international crimes".

48. That definition is contained in article 19, paragraph 2, which defines as "an international crime":

> An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole.

The circularity of this definition has often been noted. On the other hand, it is no more circular than the definition of peremptory norms of general international law (*jus cogens*) contained in article 53 of the 1969 Vienna Convention, a definition now widely accepted. But it is possible to define the category of "crimes" in other ways. This might be done, for example, by reference to their distinctive procedural incidents. "Crimes" might be distinguished from "delicts" by reference to the existence of some specific system for investigation and enforcement. Or the distinction might be made by reference to the substantive consequences. Thus "delicts" might be defined as breaches of obligation for which only compensation or restitution is available, as distinct from fines or other sanctions. Article 19, paragraph 2, adopts neither course. And as will be seen, the draft articles nowhere specify any distinctive and exclusive consequence of an "international crime". Nor do they lay down any authoritative procedure for determining that a crime has been committed.

49. Conscious of the difficulties of applying the bare definition contained in article 19, paragraph 2, the Commission sought to clarify the position in paragraph 3. This provides:

> Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
>
> (*a*) A serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
>
> (*b*) A serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
>
> (*c*) A serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
>
> (*d*) A serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

Even supporters of the principle underlying article 19 are strongly critical of paragraph 3, and for good reason.[33] First, it is an illusory definition. A crime merely "may result" from one of the enumerated acts. Secondly, it is wholly lacking in specificity. A crime "may" result, but subject to paragraph 2 and to unspecified "rules of international law in force". The problem is not that paragraph 3 only provides an inclusive list; it could hardly do otherwise. It is rather that it provides no assurance that even the breaches enumerated would constitute crimes, if proved. Whether they "may" do so depends, *inter alia*, on "the rules of international law in force". No doubt it was not the function of the draft articles, including article 19, paragraph 3, to restate primary rules, but that is no reason to give the appearance of doing so. Thirdly, the various subparagraphs are disparate both in their content and in

[30] A careful analysis of the views of the 80 Governments which expressed themselves at that time is contained in Spinedi, "International crimes of State: the legislative history", pp. 45–79.

[31] See the items contained in the bibliography annexed to the present report. Among these, Weiler, Cassese and Spinedi, eds., *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, is of particular importance. The most persuasive defence of article 19 is Pellet, "Vive le crime! Remarques sur les degrés de l'illicite en droit international", p. 287. Contrary views expressed by present or past members of the Commission include: Rosentock, "An international criminal responsibility of States?", p. 265; Bowett, "Crimes of State and the 1996 report of the International Law Commission on State responsibility", p. 163; Brownlie, *System of the Law of Nations: State Responsibility*, pp. 32–33; Simma, "From bilateralism to community interest in international law", pp. 301–321.

[32] PCIJ in an early case pointed out that international obligations could in principle be assumed by States on any subject: see *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, pp. 23–27. The development of international law-making bears out this remark. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 131.

[33] See, for example, Pellet, loc. cit., pp. 298–301.

their relation to existing international law.[34] Having regard to its merely illustrative role and its lack of independent normative content, paragraph 3 should be substituted by a more detailed commentary, if the distinction between crimes and delicts is retained in the draft articles.[35]

50. An analysis of paragraph 3 leads directly back to paragraph 2, but the illustrations offered in paragraph 3 raise a further question. The emphasis in paragraph 2 is on norms which are essential for the protection of fundamental interests of the international community, such that the community regards a breach of those norms as constituting a "crime". By contrast, paragraph 3 focuses not on the importance of the norms but on the seriousness of their breach: it is only "serious" breaches that are crimes, in some cases further qualified by such phrases as "on a widespread scale" or "massive". But international law does not contain a norm which prohibits, for example, "widespread" cases of genocide: it simply prohibits genocide. In other words, paragraph 3 adds an additional element of seriousness of breach, independently of the legal definition of the crime itself. It is not unusual for criminal law norms to incorporate a definitional element corresponding to the scale or seriousness of the conduct to be prohibited; but paragraph 3 appears to add yet a further unspecified element of seriousness. Taken together the two paragraphs can be read as saying that if (for example) a case of aggression, or of genocide, is so serious that the international community as a whole stigmatizes that act as criminal, then it is to be accounted a crime. To which it must be objected that this is not a definition of international crimes at all.[36]

51. The consequences of international crimes are dealt with in part two:

(*a*) Under article 40, paragraph 3, all other States in the world are defined as "injured States" with respect to an international crime. The corollary is that all States may seek reparation under articles 42 to 46, and may take countermeasures under articles 47 and 48. This is perhaps the single most significant consequence of an international crime. However, it is not a *distinctive* consequence of such crimes, since many or all States may be "injured" by a delict pursuant to article 40, paragraph 2 (*e*) or (*f*), for example by a breach of an obligation under a multilateral treaty or under general international law for the protection of human rights and fundamental freedoms. Article 40, paragraph 2 (*e*) (iii), does not require that such a breach should have been "serious", or that the obligation should have been "of essential importance";

(*b*) Under article 52, certain rather extreme limitations upon the obtaining of restitution or satisfaction do not apply in case of crimes. Thus in the case of crimes an injured State is entitled to insist on restitution even if this seriously and fruitlessly jeopardizes the political independence or economic stability of the "criminal" State;

(*c*) Under article 53, there is a limited obligation of solidarity in relation to crimes. For example, States are under an obligation "not to recognize as lawful the situation created" by a crime (art. 53 (*a*)). This may suggest, *a contrario*, that States are entitled to recognize as lawful the situation created by a delict, no matter how serious that delict may be.

By contrast, the draft articles do not provide for "punitive" damages for crimes, let alone fines or other sanctions. Nor do they lay down any special procedure for determining authoritatively whether a crime has been committed, or what consequences should follow: this is left for each individual State to determine *qua* "injured State". Detailed proposals for such a procedure were rejected by the Commission in 1995 and again in 1996;[37] attempts to draft lesser alternative procedures were not accepted.[38] Overall it can be said that the specific consequences attached to international crimes in parts two and three are rather minimal, at least if the notion of "crimes" reflected in article 19 is to be taken at face value. Indeed this can be implied from a footnote added to article 40, which reads:

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

This possibility will be discussed in paragraphs 81–82 below.

B. Comments of Governments on State crimes

52. A number of Governments which have so far commented in the current round on the draft articles have been

[34] This can be illustrated, for example, by reference to paragraph 3 (*d*). Its opening words evidently do not refer to a single "obligation ... for the safeguarding and preservation of the human environment"; international law contains a range of environmental norms and cannot be expressed in terms of a single rule. Depending on the circumstances, a large number of rules can be described as safeguarding and preserving the "human environment", a term which also raises issues about its relationship to "the natural environment" or to the environment as a whole. The second clause ("such as") raises further difficulties: (*a*) the phrase "such as" provides yet a second level of inclusiveness; (*b*) the word "those" cannot grammatically refer back to the singular "obligation"; and (*c*) general international law does not contain a norm prohibiting "massive" pollution: whether the threshold for the prohibition may be set (and it may be different in different contexts), it is clearly less stringent than "massive" pollution.

[35] It should be noted that the version of article 19 originally proposed by the Special Rapporteur, Mr. Ago, was very different: see his fifth report, *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/291 and Add.1 and 2, p. 54, para. 155. It was both much broader in its ambit (for example, any breach of Article 2, paragraph 4, of the Charter of the United Nations was designated an "international crime") and more definite in its content. The tentative and qualifying language of article 19, paragraph 3, was added in the Drafting Committee. The original draft is better read as an attempt to express the notion of obligations *erga omnes*, and indeed the term "international crime" was placed in inverted commas. At that stage, of course, no attempt had been made to define the range of States affected or injured by a breach of obligation.

[36] See *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 65*, pp. 52–53.

[37] For the proposals see *Yearbook … 1995*, vol. II (Part One), document A/CN.4/469 and Add.1 and 2, pp. 17–26, paras. 70–119, and pp. 29–31, paras. 140–146; and *Yearbook … 1996*, vol. II (Part One), p. 1, document A/CN.4/476 and Add.1. For a summary of the debate, see *Yearbook … 1995*, vol. II (Part Two), pp. 54–61, paras. 304–339; and *Yearbook … 1996*, vol. II (Part Two), p. 58, para. 61, and pp. 70–71, commentary to article 51.

[38] These proposals are briefly described in *Yearbook … 1996*, vol. II (Part Two), p. 71, paras. (7)–(14) of the commentary to article 51.

critical of the inclusion of State crimes in the draft articles:

(*a*) The *United States of America* strongly opposes the provisions dealing with State crimes for which, in its opinion, "there is no support under customary international law and which undermine the effectiveness of the State responsibility regime as a whole". It bases this view on the "[i]nstitutional redundancy" of the notion of international crimes, given the existing role of the Security Council and its subordinate organs and the proposed international criminal court; the "[a]bstract and vague language" of article 19, paragraph 2; the tendency of article 19 to diminish "the import of and the attention paid to other violations of State responsibility"; its contradiction with the "principle of individual responsibility", and the confusion it tends to produce as between the notion of States' "interest" in compliance with the law generally and their "standing" to protest a particular violation;[39]

(*b*) *France* complains that article 19 "gives the unquestionably false impression that the aim is to 'criminalize' public international law", contrary to existing international law which emphasizes reparation and compensation. In the view of France, "State responsibility is neither criminal nor civil" but is *sui generis*. While some wrongful acts are more serious than others, the dichotomy between "crimes" and "delicts" is "vague and ineffective", and "breaks with the tradition of the uniformity of the law of international responsibility". France stresses that

> no legislator, judge or police exists at an international level to impute criminal responsibility to States or ensure compliance with any criminal legislation that might be applicable to them … It is hard to see who, in a society of over 180 sovereign States, each entitled to impose punishment, could impose a criminal penalty on holders of sovereignty.

By contrast, Security Council measures under Chapter VII of the Charter of the United Nations are not intended to be "punitive"; where they are "coercive" it is because the restoration of international peace and security requires them to be effective;[40]

(*c*) *Germany* expresses "considerable scepticism regarding the usefulness of the concept" of international crimes, which are in its view "not sustained by international practice", would tend to weaken the "principle of individual criminal responsibility" and is inconsistent with the principle of the equality of States. In its view, "universally condemned acts can now be expected to find their adequate legal and political response by the community of States" acting through existing institutional means, in particular Chapter VII of the Charter. By contrast with international crimes, "the concepts of obligations *erga omnes* and, even stronger, *jus cogens* have a solid basis in international law"; the Commission is encouraged to develop the implications of these ideas in the field of State responsibility;[41]

(*d*) The *United Kingdom of Great Britain and Northern Ireland* sees "no basis in customary international law for the concept of international crimes" nor any "clear need for it". Instead it points to what it regards as "a serious risk that the category will become devalued, as cases of greater and lesser wrongs are put together in the same category, or as some wrongs are criminalized while others of equal gravity are not". Moreover the actual consequences attached to international crimes appear to be "of little practical significance and, to the extent that they do have significance, to be unworkable". At a technical level, article 19 is criticized as giving "no coherent account ... of the manner in which the international community as a whole may recognize" international crimes, and of confusing the question of the seriousness of a norm (art. 19, para. 2) and the gravity of its breach (art. 19, para. 3);[42]

(*e*) *Austria* proposes the deletion of articles 19 and 51 to 53. In its view, "inter-State relations lack the kind of central authority necessary to decide on subjective aspects of wrongful State behaviour". Action should be taken within the framework of Chapter VII of the Charter, or against individuals (including State officials) through the development of organs for the enforcement of international criminal law: these mechanisms "may provide a more effective tool against grave violations of basic norms of international law such as human rights and humanitarian standards than the criminalization of State behaviour as such". On the other hand, the Commission should "concentrate on the regulation of the legal consequences of violations of international law of a particularly grave nature";[43]

(*f*) *Ireland* doubts that existing international law recognizes the criminal responsibility of States, as distinct from State responsibility for the criminal acts of individuals. It notes that the well-known dictum of ICJ in the *Barcelona Traction* case supports the notion of obligations *erga omnes*,[44] but suggests that there is a "quantum leap" from that notion to the criminal responsibility of States. Nor does it support the concept of international crimes as a matter of progressive development. To penalize the State is neither feasible nor just, since in many cases it is the people of the State itself who are the principal victims of the crime;[45]

(*g*) *Switzerland* likewise doubts the existence or utility of the distinction between crimes and delicts: indeed it describes the distinction as "an attempt by the international community to conceal the ineffectiveness of the conventional rules on State responsibility behind an ideological mask".[46]

53. However, these views are by no means universally shared:

(*a*) The *Czech Republic*, for example, expresses the view that a distinction between more and less serious wrongful acts is "to be found in positive law and in State practice, although ... no doubt in a relatively fragmentary, unsystematic or indirect form". In that regard it refers to the notion of obligations *erga omnes*, the activity of the Security Council under Chapter VII of the Charter and

[39] A/CN.4/488 and Add.1–3 (reproduced in the current volume), comments by the United States under General remarks and on articles 19 and 40, para. 3.

[40] Ibid., comments by France on article 19.

[41] Ibid., comments by Germany under part two, chap. IV.

[42] Ibid., comments by the United Kingdom on article 19.

[43] Ibid., comments by Austria on article 19.

[44] See footnote 16 above.

[45] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by Ireland on article 19.

[46] Ibid., comments by Switzerland on article 19.

the concept of *jus cogens*. Despite supporting the distinction between crimes and delicts, it affirms that "the law of international responsibility is neither civil nor criminal, and that it is purely and simply international", noting in addition that in some legal systems the term "delict" has an exclusively penal connotation. It therefore proposes adopting more neutral terms, or even making the distinction by other means, e.g. by differentiating more clearly the consequences of wrongful acts depending on whether they affect particular States or the interests of the international community as a whole. "As a result, the terms used in the articles would be neutral but would leave the necessary room for widely acceptable terms to be developed subsequently in the sphere of State practice and doctrine." On the other hand, it points out the difficulties in attaching specific consequences to international crimes of State, which consequences are intimately linked to questions relating to the relevant primary rules;[47]

(*b*) *Mongolia* supports the distinction between crimes and delicts, on condition that the determination of State criminal liability cannot be left to the decision of one State but should be "attributed to the competence of international judicial bodies",[48] which is not the case under the present draft articles;

(*c*) *Uzbekistan* proposes a new version of article 19, paragraph 2, focusing on "[i]nternationally wrongful acts of exceptional gravity which pose a threat to international peace and security and also infringe upon other vital foundations of peace and of the free development of States and peoples";[49]

(*d*) *Denmark*, on behalf of the Nordic countries, notes that they continue to support the "most spectacular feature of part one", the distinction between international delicts and international crimes. The "systemic" responsibility of States for crimes such as aggression and genocide ought, in their view, to be recognized "in one forum or another, be it through punitive damages or measures affecting the dignity of the State". On the other hand, some other less "sensitive" terminology, such as "violations" or "serious violations", might be considered, provided it carries more severe consequences, and that the distinction between the two categories is clear;[50]

(*e*) *Mexico* observes that "[t]here is inadequate differentiation of the terms 'crime' and 'delict' in the draft articles". This appears to be directed as much to the consequences of international crimes, spelled out in part two, as to the definitional issues dealt with in article 19;[51]

(*f*) *Argentina* affirms that "the consequences of an internationally wrongful act cannot be the same where that act impairs the general interests of the international community as where it affects only the particular interests of a State". On the other hand, now that "the international legal order tends to draw a clear distinction between the *international responsibility of the State* and the *international criminal responsibility of individuals*, it does not seem advisable to apply to the former a terminology appropriate to the latter". It also calls upon the Commission to "elaborate as precisely as possible the different treatment and the different consequences attaching to different violations";[52]

(*g*) *Italy* likewise supports maintaining a distinction between the most serious internationally wrongful acts, of interest to the international community as a whole, and other wrongful acts, but it calls for further development both of the substantive consequences and the procedural incidents of the distinction, within the framework of parts two and three of the draft articles. In its view, once the existence of such a category is accepted, then the consequences of the distinction must be dealt with in the draft articles: "it is precisely in this area that an effort to clarify and, where necessary, integrate existing rules is needed". On the other hand, this special regime of State responsibility has nothing in common with penal sanctions such as those imposed under national criminal laws, and the use of some other term than "international crimes" could perhaps be envisaged;[53]

54. These comments have been summarized in some detail, because they give a full and insightful account of the current debate over international crimes of State. This is true even if the comments so far received cannot necessarily be regarded as representative of the views of the international community as a whole. Clearly, no simple conclusion can be drawn from them. Nonetheless there is a significant degree of support for a number of propositions. They may be summarized as follows:

(*a*) Article 19 is generally seen as an exercise not of codification but of development. Different views are expressed as to whether the development is "progressive" but few Governments believe that the concept of international crimes has a strong basis in existing law and practice;

(*b*) The definition of "international crimes" in articles 19, paragraphs 2 and 3, needs further clarification;

(*c*) The consequences drawn from the distinction create difficulties to the extent that they allow for reactions by individual States acting without regard to the position of the international community as a whole;

(*d*) There is little or no disagreement with the proposition that "the law of international responsibility is neither civil nor criminal, and that it is purely and simply international".[54] As a corollary, even those Governments which support the retention of article 19 in some form do not support a developed regime of criminal responsibility of States, that is to say, a genuine "penalizing" of the most serious wrongful acts;

(*e*) Consistent with this view, it is quite widely felt that the terminology of "crimes" of State is potentially misleading. Many comments accept that a distinction should be drawn, along the lines of the *Barcelona Traction* dic-

[47] Ibid., comments by the Czech Republic on article 19.

[48] Ibid., comments by Mongolia on article 19.

[49] Ibid., comments by Uzbekistan on article 19.

[50] Ibid., comments by the Nordic countries on article 19.

[51] Ibid., comments by Mexico on article 19.

[52] Ibid., comments by Argentina on article 19.

[53] Ibid., comments by Italy on article 19.

[54] This is the view both of the Czech Republic (para. 53 (*a*) above) and France (para. 52 (*b*) above), despite their different emphases and conclusions.

tum,[55] between the most serious wrongful acts, of interest to the international community as a whole, and wrongful acts which are of concern only to the directly affected States. But this distinction need not and perhaps should not be expressed in the language of "crime" and "delict". Instead, some different terminology should be explored; alternatively the different characteristics of wrongful acts could be more systematically articulated in part two of the draft articles, within the framework of a single generic conception of State responsibility.

C. Existing international law on the criminal responsibility of States

55. The traditional position of international law on the question of international crimes of States was expressed by the Nürnberg Tribunal, which stated that:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[56]

The treaties recognizing or establishing international crimes took the same position. Neither Germany nor Japan were treated as "criminal States" by the instruments creating the post-war war crimes tribunals, although the Charter of the Nürnberg Tribunal specifically provided for the condemnation of a "group or organization" as "criminal".[57] The first of the post-war criminal law conventions, the Convention on the Prevention and Punishment of the Crime of Genocide, specifically provided in article IX for State responsibility with respect to the crime of genocide, a crime characteristically associated with acts of government. Yet it was made clear at the time that article IX did not envisage any form of State criminal responsibility.[58]

56. At the time article 19 was proposed and adopted, there had been no judicial decisions affirming that States could be criminally responsible. The commentary to draft article 19 notes the absence of international judicial or arbitral authority for a distinction between crimes and delicts.[59] It cites as indirect support for such a distinction certain cases on reprisals or countermeasures,[60] and places particular emphasis on the "essential distinction" drawn by ICJ in the *Barcelona Traction* case.[61] According to the commentary this passage provides "an important argument in support of the theory that there are two separate regimes of international responsibility depending on the subject-matter of the international obligation breached, and consequently that, on the basis of that distinction, there are two different types of internationally wrongful acts of the State".[62]

57. Judicial decisions since 1976 certainly support the idea that international law contains different kinds of norms, and is not limited to the "classical" idea of bilateral norms. On the other hand there is no support in those decisions for a distinct category of international crimes of States.

(*a*) In the *Velásquez Rodríguez* case, the Inter-American Court of Human Rights was asked to award punitive damages in respect of the "disappearance" of a citizen, one of a large number of persons who had been abducted, possibly tortured and almost certainly executed without trial. The breach was an egregious one but the Court nonetheless rejected the claim to punitive damages. Relying in part on the reference to "fair compensation" in article 63, paragraph 1, of the American Convention on Human Rights, the Court asserted that:

> Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time.[63]

(*b*) In *Letelier and Moffitt*, a Chile-United States of America International Commission was charged to determine the amount of compensation payable to the United States arising from the assassination by Chilean agents in Washington, D.C., of a former Chilean Minister, Orlando Letelier, and another person.[64] The payment was to be made *ex gratia* but was to be assessed "in conformity with the applicable principles of international law, as though liability were established". The Commission assessed damages in accordance with ordinary principles, taking

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[55] See footnote 16 above.

[56] *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. XXII, p. 466.

[57] Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279), arts. 9–10, at p. 290. Such a declaration could only be made after a trial of a member of the organization "in connection with any act of which the individual may be convicted", and there were certain procedural safeguards for other members. The 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.), contained no such provisions. See also the *Touvier* case (*International Law Reports*, vol. 100 (1995), p. 337; and *La Semaine juridique: jurisclasseur périodique (JCP)*, 1993, No. 1, 21977, pp. 4–6).

[58] Sir Gerald Fitzmaurice as co-sponsor of article IX stated that "the responsibility envisaged by the joint Belgian and United Kingdom amendment was the international responsibility of States following a violation of the convention. That was civil responsibility, not criminal responsibility" (*Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records*, 103rd meeting, p. 440).

[59] *Yearbook ... 1976*, vol. II (Part Two), p. 98, para. (8) of the commentary to article 19.

[60] Specifically the *Portuguese Colonies* case (Naulilaa incident) (UNRIAA, vol. II (Sales No. 1949.V.1), p. 1025); and *Responsibility of Germany arising out of acts committed after 31 July 1914 and before Portugal took part in the war* (*Cysne* case), ibid., p. 1052. See *Yearbook … 1976*, vol. II (Part Two), pp. 98–99, para. (9) of the commentary to article 19. Neither of these cases involved "crimes" as defined in article 19.

[61] *Yearbook … 1976*, vol. II (Part Two), p. 99, para. (10) of the commentary to article 19.

[62] Ibid., pp. 99–100, para. (11) of the commentary to article 19.

[63] Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Compensatory Damages, Judgment of 21 July 1989 (Art. 63(1) American Convention on Human Rights), Series C, No. 7, para. 38; and *International Law Reports*, vol. 95 (1994), p. 315–316.

[64] UNRIAA, vol. XXV (Sales No. E/F.05.V.5), p. 1. The United States courts had earlier awarded US$ 5 million, including US$2 million in punitive damages, on account of the incident, in a default judgement which had not been satisfied: *Letelier* v. *Republic of Chile*, 502 F Supp 259 (1980); *International Law Reports*, vol. 63 (1982), p. 378. The Commission awarded approximately US$ 2.6 million in full and final settlement.

into account moral damage but not punitive damage: in fact no claim for punitive damages was made.[65]

(*c*) In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ upheld its jurisdiction to hear a claim of State responsibility for genocide under article IX of the Convention.[66] The applicant's primary claim concerned the direct involvement of the respondent State itself, through its high officials, in acts of genocide, although other bases of claim were also alleged. In response to an argument that State responsibility under article IX is limited to responsibility for failure to prevent or punish genocide (as distinct from cases of direct attribution), the Court said:

> the reference in Article IX to "the responsibility of a State for genocide or for any of the other acts enumerated in Article III", does not exclude any form of State responsibility.
>
> Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by "rulers" or "public officials".[67]

The Court's reference to "any form of State responsibility" is not to be read as referring to State criminal responsibility, but rather to the direct attribution of genocide to a State as such.[68] It may be noted that neither party in that case argued that the responsibility in question would be criminal in character.[69]

(*d*) In *Prosecutor* v. *Tihomir Blaskic*, the Appeals Chamber of the International Tribunal for the Former Yugoslavia had to consider, *inter alia*, whether the Tribunal could subpoena evidence directly from States pursuant to its statute and rules. The evidence in question related to the alleged commission by State agents, including the accused, of crimes within the jurisdiction of the Tribunal. In other words, it related to alleged crimes imputable to the State. The Appeals Chamber held that no power to issue subpoenas against States existed. It said, *inter alia*:

> the International Tribunal does not possess any power to take enforcement measures against States. Had the drafters of the Statute intended to vest the International Tribunal with such a power, they would have expressly provided for it. In the case of an international judicial body, this is not a power that can be regarded as inherent in its functions. Under current international law States can only be the subject of countermeasures taken by other States or of sanctions visited upon them by the organized international community, i.e., the United Nations or other intergovernmental organizations … Under present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems.[70]

The qualification in the last sentence ("akin to those provided for in national criminal systems") must be noted. Nonetheless the Court held that the Tribunal was not authorized to issue orders termed "subpoenas" to States, although it was clearly authorized by article 29, paragraph 2, of its statute to issue orders with which States were required to comply.[71] Other cases which might be cited to similar effect include the various phases of the *Rainbow Warrior* affair.[72]

58. The position in State practice as at 1976 was more complex. The language of "crimes" was used from time to time with respect to the conduct of States in such fields as aggression, genocide, apartheid and the maintenance of colonial domination, and there was concerted condemnation of at least some cases of the unlawful use of force, of systematic discrimination on grounds of race or of the maintenance by force of colonial domination.[73] The Commission concluded from a review of action taken within the framework of the United Nations that:

> [I]n the general opinion, some of these acts genuinely constitute "international crimes", *that is to say*,* international wrongs which are more serious than others and which, as such, should entail more severe legal consequences. This does not, of course, mean that all these crimes are equal—in other words, that they attain the same degree of seriousness and necessarily entail all the more severe consequences incurred, for example, by the supreme international crime, namely, a war of aggression.[74]

59. State practice in the period from 1976 to 1995 was reviewed by Mr. Arangio-Ruiz in his seventh report;[75] his review need not be repeated here. A number of features of the practice of this period may, however, be recalled. They include:

(*a*) The "rebirth" of activity of the Security Council under Chapter VII of the Charter of the United Nations, with vigorous action taken, for example, against Iraq in respect of Kuwait, and against the Libyan Arab

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[65] In a separate concurring opinion, Commissioner Orrego Vicuña expressed the view that "international law has not accepted as one of its principles the concept of punitive damages", and that any award which was punitive in its effect because the amount was "excessive or disproportionate" would be "entirely unwarranted and contrary to the principles of international law" (UNRIAA (see footnote 64 above), pp. 14–15).

[66] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595.

[67] Ibid., p. 616.

[68] See, by contrast, the joint declaration of Judges Shi and Vereshchetin (ibid., pp. 631–632).

[69] In its Order of 17 December 1997 on the admissibility of Yugoslavia's counter-claims in that case, the Court reiterated the *erga omnes* character of the prohibition against genocide but held that "the argument drawn from the absence of reciprocity in the scheme of the Convention is not determinative as regards the assessment of whether there is a legal connection between the principal claim and the counter-claim, in so far as the two Parties pursue, with their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of the Genocide Convention" (*I.C.J. Reports 1997* (footnote 17 above)). In a separate opinion, Judge Lauterpacht noted that:

> "The closer one approaches the problems posed by the operation of the judicial settlement procedure contemplated by article IX of the Genocide Convention, the more one is obliged to recognize that these problems are of an entirely different kind from those normally confronting an international tribunal of essentially civil, as opposed to criminal, jurisdiction. The difficulties are systemic and their solution cannot be rapidly achieved."

(Ibid., p. 243, para. 23)

[70] Judgment of 29 October 1997, *International Law Reports*, vol. 110 (1998), pp. 697–698, para. 25.

[71] It was not argued in that case that the Tribunal itself had the power to enforce "subpoenas" issued to States: this would have been a matter for the Security Council itself.

[72] For the ruling of the Secretary-General of 6 July 1986, see UNRIAA, vol. XIX (Sales No. E/F.90.V.7), pp. 197 et seq. For the decision of the Arbitral Tribunal, see volume XX (Sales No. E/F.93.V.3), p. 215.

[73] *Yearbook … 1976*, vol. II (Part Two), pp. 100–109, paras. (12)–(32) of the commentary to article 19.

[74] Ibid., p. 109, para. (33) of the commentary to article 19. For the Commission's review of the literature, see pages 110–116, paras. (35)–(49).

[75] *Yearbook … 1995*, vol. II (Part One), document A/CN.4/469 and Add.1 and 2, pp. 18–20, paras. 78–84.

Jamahiriya in respect of its alleged involvement in a terrorist bombing;[76]

(*b*) The progressive development of systems of individual accountability for certain crimes under international law, through the ad hoc tribunals for the former Yugoslavia and Rwanda and, prospectively, the International Criminal Court;[77]

(*c*) The further development of substantive international criminal law across a range of topics, including, most recently, the protection of United Nations peacekeeping forces and action against terrorist bombings;[78]

(*d*) Continued development of legal constraints against the use of chemical, biological and bacteriological weapons, and against the further proliferation of nuclear weapons.

On the other hand, this period has been characterized by a degree of inconsistency. No international action was taken, for example, in response to the Cambodian genocide,[79] or to the aggression which initiated the 1980–1988 Iran–Iraq war.[80] Perhaps more relevantly, the measures taken by the Security Council since 1990 have not involved "criminalizing" States, even in circumstances of gross violation of basic norms. For example, the two ad hoc tribunals established by the Security Council have jurisdiction only over individual persons in respect of defined crimes against international law, and not over the States which were, prima facie, implicated in those crimes.[81] Iraq has to all intents and purposes been treated as a "criminal State" in the period since its invasion of Kuwait, but the Security Council resolutions relating to Iraq have not used the terminology of article 19. Chapter VII resolutions passed since 1990 have consistently used the formula "threat to or breach of the peace", and not "act of aggression". The notion of "threat to or breach of the peace" has been gradually extended to cover situations of essentially humanitarian (as distinct from inter-State) concern. But those resolutions have not relied on the concept of an "international crime" in the sense of article 19, despite numerous references to the prosecution of crimes under international and national law.

[76] As to the latter, see the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 114; and ibid., *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9.

[77] The draft statute for an international criminal court limited the jurisdiction of the Court to crimes of individual persons. See *Yearbook ... 1994*, vol. II (Part Two), pp. 20–74. No change to this aspect of the draft statute has been proposed in subsequent discussions.

[78] Convention on the Safety of United Nations and Associated Personnel and International Convention for the Suppression of Terrorist Bombings.

[79] See General Assembly resolution 3238 (XXIX) of 29 November 1974 on restoration of the lawful rights of the Royal Government of National Union of Cambodia in the United Nations; and General Assembly resolution 44/22 of 16 November 1989 on the situation in Kampuchea, calling, *inter alia*, for "the non-return to the universally condemned policies and practices of a recent past".

[80] See Further report of the Secretary-General on the implementation of Security Council resolution 598 (1987) (S/23273) of 9 December 1991, para. 7, referring to "Iraq's aggression against Iran which was followed by Iraq's continuous occupation of Iranian territory during the conflict in violation of the prohibition of the use of force, which is regarded as one of the rules of *jus cogens*".

[81] Similarly the draft Code of Crimes against the Peace and Security of Mankind as completed by the Commission in 1996 provides exclusively for individual responsibility. See *Yearbook … 1996*, vol. II (Part Two), commentary to article 2, pp. 18–22. This is "without prejudice to any question of the responsibility of States under international law" (art. 4, ibid., p. 23).

D. Relations between the international criminal responsibility of States and certain cognate concepts

60. At the same time, certain basic concepts of international law laid down in the period 1945–1970 have been consolidated.

1. Individual criminal responsibility under international law

61. The Nürnberg principles,[82] involving the accountability of individuals, whatever their official position, for crimes against international law, have been reinforced by the development of additional conventional standards and, perhaps more importantly, by new institutions. The two ad hoc tribunals were established under Chapter VII of the Charter of the United Nations. Their creation and operation have added impetus to the movement for a permanent international criminal court. The position was summarized by the Secretary-General in 1996 in the following words:

> [T]he actions of the Security Council establishing international tribunals on war crimes committed in the former Yugoslavia and in Rwanda, are important steps towards the effective rule of law in international affairs. The next step must be the further expansion of international jurisdiction. The General Assembly in 1994 created an ad hoc committee to consider the establishment of a permanent international criminal court, based upon a report and draft statute prepared by the International Law Commission. The Assembly has since established a preparatory committee to prepare a draft convention for such a court that could be considered at an international conference of plenipotentiaries. This momentum must not be lost. The establishment of an international criminal court would be a monumental advance, affording, at last, genuine international jurisdictional protection to some of the world's major legal achievements. The benefits would be manifold, enforcing fundamental human rights and, through the prospect of enforcing individual criminal responsibility for grave international crimes, deterring their commission.[83]

In addition, trials and inquiries have been instituted in a number of States in the past decade in respect of crimes under international law.[84]

[82] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 95–127.

[83] Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies (A/51/761, annex, Supplement to reports on democratization), p. 34, para. 114.

[84] See, for example, *Polyukhovich* v. *Commonwealth of Australia and Another, International Law Reports*, vol. 91 (1993), p. 1 (Australia, High Court); *Regina* v. *Finta*, ibid., vol. 82 (1990), p. 424 (Canada, High Court); on appeal, ibid., vol. 98 (1994), p. 520 (Ontario Court of Appeal); and on further appeal, ibid., vol. 94 (1994), p. 284 (Supreme Court); Barbie, ibid., vol. 78 (1988) (France, Court of Cassation), pp. 125 and 136; and ibid., vol. 100 (1985), p. 330; *Touvier*, ibid. (1995), p. 337 (France, Court of Appeal and Court of Cassation). See also *Border Guards Prosecution Case*, ibid., p. 364 (Germany, Federal Supreme Court).

2. Peremptory norms of international law (*jus cogens*)

62. The 1969 Vienna Convention (which came into force in 1980) has been widely accepted as an influential statement of the law of treaties, including the grounds for the validity and termination of treaties.[85] Although one or two States have continued to resist the notion of *jus cogens* as expressed in articles 53 and 64 of the Convention,[86] predictions that the notion would be a destabilizing factor have not been borne out.[87] There has been no case of invocation of article 66 (*a*) of the Convention, and ICJ has not had to confront the notion of *jus cogens* directly. It has however taken note of the concept.[88] Indeed, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated that "because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' ... they constitute intransgressible principles of international customary law".[89]

3. Obligations *erga omnes*

63. Most significant for present purposes is the notion of obligations *erga omnes*, introduced and endorsed by the Court in the *Barcelona Traction* case, and heavily relied on by the Commission in its commentary to article 19. The Court there referred to "an essential distinction … between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection". The Court instanced "the outlawing of acts of aggression, and of genocide" as well as "the basic rights of the human person, including protection from slavery and racial discrimination" as examples of obligations *erga omnes*.[90] It is true that, in a passage less often cited, it went on to say that "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality".[91] This may imply that the scope of obligations *erga omnes* is not coextensive with the whole field of human rights, or it may simply be an observation about the actual language of the general human rights treaties.

64. On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations *erga omnes*, although it has been cautious in applying it. Thus in the *East Timor* case, the Court said:

> Portugal's assertion that the right of peoples to self-determination ... has an *erga omnes* character, is irreproachable. The principle of self-determination ... is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.[92]

In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case the Court, after referring to a passage from its judgment in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, said that "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*".[93] This finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound *inter se* by the Convention.[94]

65. For present purposes it is not necessary to analyse these decisions, or to discuss such questions as the relation between "obligations" and "rights" of an *erga omnes* character.[95] What can be said is that the developments outlined above confirm the view that within the field of general international law there is some hierarchy of norms, and that the importance of at least a few basic substantive norms is recognized as involving a difference not merely of degree but of kind. Such a difference would be expected to have its consequences in the field of State responsibility. On the other hand it does not follow from this conclusion that the difference in the character of certain norms would produce two distinct regimes of responsibility, still less that these should be expressed in terms of a distinction between "international crimes" and "international delicts".

66. It is relevant to note here the preliminary, even exploratory, way in which the Commission in 1976 adopted that distinction and that terminology.

67. As to the distinction between the categories of more and less serious wrongful acts, in the first place, the Commission was rigorous in "resist[ing] the temptation to give any indication ... as to what it thinks should be the régime of responsibility applicable to the most serious internation-

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[85] See the judgment of 25 September 1997 in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 57–68, paras. 89–114.

[86] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by France on article 19, para. 2.

[87] ICJ has placed great stress on the stability of treaty relations: see, for example, the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad*), *Judgment, I.C.J. Reports 1994*, p. 6; and that concerning the *Gabčíkovo-Nagymaros Project* (footnote 85 above), p. 68, para. 114.

[88] See, for example, the case concerning *Military and Paramilitary Activities in and against Nicaragua* (footnote 32 above), pp. 100–101.

[89] *I.C.J. Reports 1996*, p. 257. Despite its reference to "intransgressible principles", the Court held that it had no need to pronounce on the issue of *jus cogens*. The question before it related not to the "legal character of the norm ... the character of the humanitarian law which would apply to the use of nuclear weapons", but to "the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons" (ibid., p. 258).

[90] *I.C.J. Reports 1970* (see footnote 16 above).

[91] Ibid., p. 47, para. 91.

[92] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102.

[93] *I.C.J. Reports 1996* (see footnote 66 above), p. 616.

[94] Ibid., p. 617.

[95] International law has always recognized the idea of "rights *erga omnes*", although the phrase was rarely used. For example, coastal States have always had a right *erga omnes* to a certain width of territorial sea; all States have a right *erga omnes* to sail ships under their flag on the high seas. Yet these rights give rise to purely bilateral relationships of responsibility in the event that they are infringed by another State. The notion of obligation *erga omnes* has distinct and broader implications.

ally wrongful acts".[96] These issues were left completely open. Secondly, it seemed to deny that all "international crimes" or all "international delicts" would themselves be subject to a uniform regime. In short, not merely was there not a single regime for all internationally wrongful acts; it was doubtful whether there were two such regimes: "international wrongs assume a multitude of forms and the consequences they should entail in terms of international responsibility are certainly not reducible to one or two uniform provisions."[97] No doubt there is always the possibility that a particular rule will prescribe its own special consequences in the event of breach, or will be subject to its own special regime: this is true, in particular, of the paradigm international crime, the crime of aggression.[98] On the other hand, if the category of international crimes were to fragment in this way (bearing in mind that there are relatively few such crimes), one might ask: (*a*) what was left of the category itself; (*b*) how it could be resolved in advance that the category existed, without reference to the consequences attaching to particular crimes; and (*c*) how that investigation could be concluded without in effect codifying the relevant primary rules. Thirdly, the Commission denied that the way to proceed in developing the regime of responsibility for crimes was to establish "a single basic régime of international responsibility ... applicable to all internationally wrongful acts ... and ... to add extra consequences to it for wrongful acts constituting international crimes".[99] This "least common denominator" approach to international crimes—it might be called the "delicts plus" approach—was firmly rejected.[100] But it was essentially the approach later adopted by the Commission in determining the consequences of international crimes.

68. As to the terminology of "crimes" and "delicts", the Commission was strongly influenced by the use of the term "crime" in relation to the crime of aggression.[101] It is not clear what alternatives were considered. The commentary says only that:

> [I]in adopting the designation "international crime", the Commission intends only to refer to "crimes" of the State, to acts attributable to the State as such. Once again it wishes to sound a warning against any confusion between the expression "international crime" as used in this article and similar expressions, such as "crime under international law", "war crime", "crime against peace", "crime against humanity", etc., which are used in a number of conventions and international instruments to designate certain heinous individual crimes.[102]

This raises, but does not answer, the question why a term was adopted which had immediately to be distinguished from ordinary uses of that term in international law. It should be noted that since 1976 the term "international crime" has gained even wider currency as a reference to crimes committed by individuals, which are of international concern, including, but not limited to, crimes against international law.[103] Thus the risk of terminological confusion has been compounded.

69. Now that a complete set of draft articles exists, it is for the Commission to decide whether the issues left open in 1976 have been, or can be, satisfactorily resolved.

E. Possible approaches to international crimes of States

70. It is possible to envisage five distinct approaches to the question of State criminal responsibility, as posed by article 19 and related provisions:

(a) ***The approach embodied in the present draft articles***. As has been noted, the draft articles take a "delicts plus" approach.[104] The text, and in particular part two, sets out a range of consequences which flow from all breaches of international obligations and then modifies those consequences in certain respects to cope with cases of international crimes;

(b) ***Replacement by the concept of "exceptionally serious wrongful act"***. A second possibility, adumbrated in the footnote to article 40,[105] is to replace the term "crime" by some other term such as "exceptionally serious wrongful act", while going on in part two to distinguish the regime applicable to such acts from that applicable to "ordinary" wrongs;

(c) ***A full-scale regime of State criminal responsibility to be elaborated in the draft articles***. A third possibility, which was apparently envisaged when article 19 was adopted, would involve a full-scale regime of State criminal responsibility for such crimes as aggression, genocide, apartheid and other international crimes of State;

(d) ***Rejection of the concept of State criminal responsibility***. At the other end of the spectrum is the view that international law neither recognizes nor should recognize any separate category of State criminal responsibility, and that there is accordingly no place for the notion of international crimes in the draft articles;

(e) ***Exclusion of the notion from the draft articles.*** A further approach would exclude the notion of State criminal responsibility from the draft articles but for a rather different reason, viz. that the development of an adequate regime of criminal responsibility, even assum-

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[96] *Yearbook … 1976*, vol. II (Part Two), p. 117, para. (53) of the commentary to article 19.

[97] Ibid.

[98] Under Articles 12, para. 1, 24, para. 1, and 39 of the Charter, the Security Council has a certain priority with respect to the determination, *inter alia,* of an act of aggression and its consequences. See the Commission's commentaries to articles 20 (b) and 23, para. 3, of the draft statute for an international criminal court (*Yearbook ... 1994*, vol. II (Part Two), pp. 38–39 and 44–45); and article 16 of the draft Code of Crimes against the Peace and Security of Mankind (*Yearbook … 1996,* vol. II (Part Two), pp. 42–43).

[99] *Yearbook … 1976*, vol. II (Part Two), p. 117, para. (54) of the commentary to article 19.

[100] Ibid.

[101] For example, in the Definition of Aggression, art. 5, para. 2, annexed to General Assembly resolution 3314 (XXIX) of 14 December 1974.

[102] *Yearbook … 1976*, vol. II (Part Two), p. 119, para. (59) of the commentary to article 19.

[103] A search of the United Nations documentary database (1994–1998) reveals 174 references to the term "international crime", usually in phrases "such as terrorism, international crime and illicit arms transfers, as well as illicit drug production, consumption and trafficking, which jeopardize the friendly relations among States" (General Assembly resolution 52/43 of 17 December 1997 on strengthening of security and cooperation in the Mediterranean region, para. 8).

[104] See paragraph 67 above.

[105] See paragraph 51 above.

ing that this is desirable in principle, is not a matter which it is necessary or appropriate to attempt at this stage and in this text.

71. Before turning to discuss these five alternatives, it should be noted that the disagreements in this field arise at different levels and concern distinct kinds of question.[106] For example, there is disagreement over whether international law presently recognizes State criminality; there is disagreement over whether it ought to do so. But there is also disagreement over whether any existing or possible regime of State criminality is aptly located within the general field of State responsibility. Most legal systems treat crimes as distinct from the general law of obligations, both procedurally and substantively. There is also a question as to what the consequences may be for the draft articles as a whole of any attempt to elaborate the notion of international crimes of State, which will likely apply to only a very small fraction of all unlawful State conduct. In short, there are differences over the existing law and over the appropriate policy; there are differences of classification; and there are pragmatic and empirical issues about the useful scope of the Commission's work. No doubt there are links between these issues, but they are distinct. It is possible to hold the view, for example, that although international law does not currently recognize the notion of State crime, it ought to do so; at the same time it is possible to hold the view that any regime for State criminality needs to be as distinct from general State responsibility as criminal and civil responsibility are in most national legal systems.

1. Two preliminary issues

72. Before considering the various possible approaches, two preliminary issues should be mentioned: first, the relevance or otherwise of Chapter VII of the Charter of the United Nations; secondly, the relevance or otherwise of common conceptions of "crime" and "delict" deriving from other international and national legal experience.

73. When article 19 was first adopted, the Security Council was playing only a limited role under Chapter VII, and it was not envisaged that it could become a major vehicle for responding to international crimes of State. The commentary to article 19 merely noted that even in the form of a convention, the draft articles could neither qualify nor derogate from the provisions of the Charter relating to the maintenance of international peace and security.[107] The matter was given further consideration in the context of part two, both before and after the adoption of article 39.[108] Comments of Governments so far have supported the principle underlying article 39, while raising some questions concerning its formulation.[109]

74. The draft articles cannot modify or condition the provisions of the Charter or action duly taken under it. But such action can certainly be taken in response to an international crime, as defined in article 19, and not only in the case of aggression specifically envisaged by the Charter. At the very least, this contributes to the difficulty of dealing fully and effectively with international crimes in the draft articles. In an area where the relevant rules of international law are peremptory, the draft articles will be relegated to a secondary, residual role. This contrast suggests that any development of the notion of international crimes in the draft articles must be constrained to a great degree.

75. A second preliminary point relates to the issue of the so-called "domestic analogy". When adopting article 19, the Commission warned that the term "international crime" should not lead to confusion with the term as applied in other international instruments or in national legal systems.[110] But it is difficult to dismiss so readily the extensive international experience of crimes and their punishment. It is true that in proposing the category of State crimes the Commission was entering into a largely uncharted area. But the appeal of the notion of "international crime", especially in the case of the most serious wrongful acts such as genocide, cannot be dissociated from general human experience. The underlying notion of a grave offence against the community as such, warranting moral and legal condemnation and punishment, must in some sense and to some degree be common to international crimes of States and to other forms of crime.[111] If it is not, then the notion and the term "crime" should be avoided. Moreover, many of the same problems arise in considering how to respond to offences against the community of States as a whole, as arise in the context of general criminal law. It is no less unjust to visit on the community of the State the harsh consequences of condemnation and punishment for a serious crime without due process of law, than it would be to visit such consequences on an individual. Whatever transitional problems there may be in establishing institutions of criminal justice at the international level, the international community surely cannot govern itself by any lesser standards than those it sets for individual States. Great caution is always required in drawing analogies from national to international law.[112] But equally if a concept and terminology is to be adopted which is associated with a wealth of national and international legal experience, it can hardly be objected that that experience, and the legal standards derived from it, are also regarded as potentially relevant.

2. Consideration of the alternatives

(a) *The status quo*

76. When the Commission first adopted the distinction between international delicts and international crimes, it

[106] For the extensive literature on international crimes and their consequences, see the bibliography annexed to the present report.

[107] *Yearbook ...1976*, vol. II (Part Two), p. 118, para. (55) of the commentary to article 19.

[108] See *Yearbook ... 1992*, vol. II (Part Two), pp. 38–39, paras. 260–266. As a result, despite misgivings expressed by members including the then Special Rapporteur, no change to article 39 was made.

[109] See A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments of Governments on articles 37, 38 and 39.

[110] See paragraph 68 above.

[111] For this purpose it makes no difference whether the "international community" is conceived as a community of States or in some wider and more inclusive sense; the crimes which are of concern are an affront to both.

[112] See, for example, the case of the *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 132; and the separate opinion of Sir Arnold McNair, ibid., p. 148.

called for the elaboration of two distinct regimes.[113] But in the event the draft articles were developed on the basis of a single notion of the "internationally wrongful act", until the time came to ask what additional and further consequences were to attach to international crimes. Thus a rather ambitious concept of international crimes is sketched in article 19, but it is barely followed through in the remainder of the text. This can be seen by considering three aspects of the present draft articles, corresponding to its three parts.

77. Except for article 19 itself, the rules for the "origin of international responsibility" as set out in part one make no distinction between international crimes and international delicts. Thus the rules for attribution are the same for the two categories. Yet it might be expected that, for a State to be held criminally responsible, a closer connection to the actual person or persons whose conduct gave rise to the crime would be required. On the other hand, the rules for implication of a State in the internationally wrongful act of another State might well be more demanding for international crimes than for international delicts. Whatever the case with delicts, one should in no way assist or aid another in the commission of a crime. Yet article 27 makes no such distinction. The definition of the circumstances precluding wrongfulness in articles 29 to 34 is formally the same for international crimes and international delicts.[114] Yet it is not obvious that the conditions applicable, for example, to *force majeure* or necessity should be the same for both, and the notion of "consent" to a crime would seem to be excluded. Above all, the notion of "objective" responsibility, which is a keynote of the draft articles, is more questionable in relation to international crimes than it is in relation to international delicts, and the case for some express and general requirement of fault (*dolus*, *culpa*) is stronger in relation to international crimes. It may be said that these matters are to be resolved by the primary rules (e.g. by the definition of aggression or genocide), and some relevant primary rules do indeed contain such elements. But the category of "international crime", if it exists, cannot be closed, and it would be expected that such a category would include at least some common rules relating to the requirement of fault in the commission of a crime. No such rules are to be found in the draft articles.

78. The "content, forms and degrees of international responsibility", as set out in part two of the draft articles, do distinguish in certain respects between international crimes and international delicts, as noted above. But these distinctions do not amount to very much:

(*a*) As to the definition of "injured State" (art. 40), while it is true that all States are injured by an international crime, so too are all States defined as "injured", for example, by any violation of any rule "established for the protection of human rights and fundamental freedoms", and no further distinction is drawn in the draft articles as between the different categories of "injured State";

(*b*) As to the rights of the injured State in the field of cessation and reparation, the differences are those set out in article 52. Restitution may be insisted upon although it disproportionately benefits the injured State, as compared with compensation (art. 52 (*a*)). Restitution for crimes may seriously jeopardize the political independence or economic stability of the criminally responsible State (ibid.). Demands for satisfaction may be made which impair the dignity of that State (art. 52 (*b*)). On the other hand nothing is said in article 52 about punitive damages, let alone fines or other forms of prospective intervention in the Government of the criminal State which might restore the rule of law.[115] Moreover, the consequences provided for in article 52 are conceived within the framework of requests for restitution by one or more injured States. There is no express provision for coordination of these consequences. While the additional consequences provided for in article 52 are not trivial, it must be concluded that they are neither central to the notion of an "international crime" as defined in article 19, nor sufficient of themselves to warrant that notion;

(*c*) As to the possibility of taking countermeasures under articles 47 to 50, no distinction is drawn between States injured by crimes and other injured States. Within the categories of "injured State" as defined in article 40, no distinction is drawn between those "directly" affected by the breach and other States. Nor is there any provision for coordination of countermeasures on the part of all injured States in cases of crimes;[116]

(*d*) As to the obligations for all States arising from international crimes, these are defined in article 53. Three of them are negative obligations: (i) not to recognize as lawful the situation created by the crime; (ii) not to assist the criminal State in maintaining that illegal situation; and (iii) to cooperate with other States in carrying out these (negative) duties. As to article 53 (*a*), however, the obligation not to recognize the legality of unlawful situations is not limited by international law to international crimes. For example, States should not recognize the legality of an acquisition of territory by the use or threat of force, whether or not that use of force is a crime, or is even unlawful.[117] Nor could a third State properly recognize the legality of, for example, the unlawful detention or killing of a diplomat. As to article 53 (*b*), it may be asked whether a third State is entitled to assist a wrongdoing State in maintaining the illegal situation created by an act

[113] See paragraph 67 above.

[114] It is true that the conditions set out in articles 29 to 34 would often preclude their application to crimes, e.g. in relation to consent (art. 29), the requirement that the consent be "validly given". This shows that it is possible to draft key provisions in such a way as to be responsive to very different wrongful acts.

[115] In the case of many of the most serious crimes (e.g. genocide, crimes against humanity) the loss or injury cannot be reversed; this is also true of many of the side effects of a war of aggression. Apart from cessation, which is required in any event by international law, the main consequences of such crimes will lie in the fields of compensation and satisfaction. Some of the elements of "satisfaction" under article 45 (e.g. trial and punishment of the responsible persons) are very important, but they are not confined to international crimes. The only distinctive consequence relates to measures of satisfaction impairing the "dignity" of the criminally responsible State. The intangible and abstract notion of "dignity" is a thin reed on which to base a distinction between international crimes and delicts.

[116] Article 49 requires that countermeasures not be "out of proportion to ... the effects ... on the injured State". This could indirectly act as a limitation.

[117] See, for example, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annexed to General Assembly resolution 2625 (XXV) of 24 October 1970, para. 1.

which is not a crime. At least according to article 27 of the draft articles, this is not the case; article 27 obliges States not to aid or assist in the commission, or continuing commission, of an unlawful act by another State, whether or not that act constitutes a crime. Thus there is potential incoherence on this point within the draft articles themselves. Over and above these negative duties, article 53 (*d*) provides that States are obliged "[t]o cooperate with other States in the application of measures designed to eliminate the consequences of a crime". This is a modest obligation of solidarity, though it involves no obligation to take any initiatives. Again, however, the *a contrario* question must be asked: does article 53 (*d*) imply that States have no obligation to cooperate in eliminating the unlawful consequences, for example, of a serious breach of human rights not amounting to a crime, or of some other obligation *erga omnes*?

79. The provisions for the settlement of disputes contained in part three of the draft articles make no special provision whatever for crimes. This is in sharp contrast to the special provision made for settlement of disputes in cases of countermeasures.

80. For these reasons it can be seen that the consequences attached to international crimes in the present draft articles are limited, and for the most part non-exclusive, and that the procedural incidents of the concept are wholly undeveloped. It might be argued that in the present state of international law this "compromise" position is all that can be achieved, and that it does at least form a basis for further developments both in law and practice. In the Special Rapporteur's view, this argument is difficult to accept. The draft articles as they stand fail to do what the Commission set out to do in 1976, that is to say, to elaborate a distinct and specific regime for international crimes.[118] On the contrary, in minimizing the consequences of crimes, they tend to trivialize delicts as well, yet the latter may cover very serious breaches of general international law.[119]

(b) *Substituting for "international crime" the notion of "exceptionally serious wrongful act"*

81. A second possibility, referred to in the footnote to article 40 as adopted on first reading, is to substitute the notion of "exceptionally serious wrongful act", thereby "avoiding the penal implication of the term" international crimes.[120] Although this idea has attracted some support in the comments of Governments (as compromise solutions often tend to do), it suffers, in the Special Rapporteur's view, from a central difficulty. Either the term "exceptionally serious wrongful act" (or any cognate term which may be proposed) is intended to refer to a separate category of wrongs, associated with a separate category of obligations, or it is not:

(*a*) If it does not refer to a separate category, but simply to the most serious breaches of international law in some general sense, there is no reason to believe that one is dealing with a separate regime of wrongful acts, or that a suitably graduated regime of reparation and countermeasures would not allow a proper response to the most serious breaches. Breaches of international law range from the most serious to relatively minor ones, and part two already seeks to reflect these gradations, independently of any question of crimes;

(*b*) On the other hand, if the proposed new term does refer to a separate category, it does not name it. Under existing international law, two possible categories are obligations *erga omnes*, and rules of *jus cogens*.[121] Yet, although they consist by definition of norms and principles which are of concern to the international community as a whole, those categories do not correspond in any simple way to the notion of the "most serious breaches". There can be very serious breaches of obligations which are not owed *erga omnes*— breaches of diplomatic immunity, for example—and minor breaches of obligations which are owed *erga omnes*. No doubt there is room in part two of the draft articles for spelling out in a more systematic way the specific consequences that breaches of norms of *jus cogens*, or of obligations *erga omnes*, might have within the framework of secondary rules of State responsibility. The draft articles already do so, although only to a limited extent.[122] But there is no reason to believe that a more systematic accounting for these consequences within the draft articles would produce two (or three) separate regimes of responsibility.

Thus the proposed renaming of international crimes presents a dilemma. On the one hand, that renaming might reflect the great variation in the seriousness of internationally wrongful acts; alternatively it might refer to the existence of certain norms involving the international community as a whole (*jus cogens*, obligations *erga omnes*). On the other hand, it might be merely a disguised reference to the notion of crime, the crime that dare not speak its name. In the former case there is no indication that there exists a separate regime for responsibility for the most serious breaches, or for breaches of obligations *erga omnes* or of *jus cogens* norms, as distinct from variations in the consequences attaching to the particular acts in question. In the latter case, there is no justification for a merely cosmetic exercise.

82. For these reasons, in the Special Rapporteur's view, it is necessary to turn from the two possible approaches adumbrated in the draft articles to other, more fundamental options.

(c) *Criminalizing State responsibility*

83. Perhaps the most fundamental approach is to take the premise of article 19 seriously, and to propose a regime for international crimes of State which does precisely involve treating such crimes with the legal conse-

[118] See paragraph 67 above.

[119] It should be noted that neither the proponents nor the opponents of article 19 within the Commission are satisfied with the provisions of the draft articles; see, for example, the items cited in paragraph 45, footnote 31, above.

[120] See paragraph 51 above.

[121] See paragraphs 62–65 above.

[122] In particular, the notion of obligations *erga omnes* is not reflected in the definition of "injured State" in article 40.

quences that morally iniquitous conduct ought to entail. The underlying appeal of this approach is twofold:

(*a*) First, it appeals to the reality that State structures may be involved in wholesale criminal conduct in genocide, in attempts to extinguish States and to expel or enslave their peoples. It is true, as the Nürnberg Tribunal pointed out, that such attempts will necessarily be led by individuals and that at some point in the governmental hierarchy individuals will necessarily be acting criminally. But those individuals may be difficult to trace or apprehend, and the leadership of the few in situations of mass violation requires the cooperation of many others. It is a characteristic of the worst crimes of the period since 1930 that they have been committed within and with the assistance of State structures;

(*b*) Secondly, it appeals to the rule of law. International law does now define certain conduct as criminal when committed by individuals, including in their capacity as heads of State or senior State officials, and it disqualifies those individuals from relying on the superior orders of their State as a defence. Yet it would be odd if the State itself retained its immunity from guilt. It would be odd if the paradigm person of international law, the State, were treated as immune from committing the very crimes that international law now characterizes as crimes in all cases whatsoever.

84. If the international crimes referred to in article 19 are real crimes and not merely a pejorative way of describing serious breaches of certain norms—as the account in the preceding paragraph assumes—the question must be asked what kind of regime would be needed to respond to them. What would be expected of the draft articles if they were to contain a regime of international crimes of States in the proper sense of the term? It should be noted here that international law does say things about how allegations of crimes are to be handled. It has a developing notion of due process.[123] That notion has in turn been applied by analogy to corporate crime at the international level, by such bodies as the European Commission of Human Rights and the European Court of Justice.[124] It may be true that not all the elements of due process applicable under international law to national criminal proceedings are equally applicable to international criminal proceedings.[125] But it would be odd if international law had totally different notions of due process in relation to international crimes of States than it has of due process in relation to other international crimes.

85. It is suggested that five elements would be necessary for a regime of State criminal responsibility in the proper sense of the term. First of all, international crimes of States must be properly defined: *nullum crimen sine lege*. Secondly, there would need to be an adequate procedure for their investigation on behalf of the international community as a whole. Thirdly, there would need to be adequate procedural guarantees, in effect, a system of due process in relation to charges of crimes made against States. Fourthly, there must be appropriate sanctions consequential upon a determination, on behalf of the community, that a crime had been committed, and these would have to be duly defined: *nulla poena sine lege*. These sanctions would be independent of any liabilities that might flow from such acts as wrongs against particular persons or entities. Fifthly, there must be some system by which the criminal State could purge its guilt, as it were, could work its way out of the condemnation of criminality. Otherwise the stigma of criminality would be visited on succeeding generations.

86. No doubt considerable imagination would be called for in giving effect to requirements such as these in relation to international crimes of State. But the task is not a priori impossible. It used to be said that *societas delinquere non potest*, but forms of corporate criminal responsibility are rapidly developing at the national level, and are proving to perform a useful function.[126] What is critical for present purposes, however, is to note that, of the five conditions for a regime for international crimes of States properly so-called, which were identified in the preceding paragraph, the draft articles provide for none. Admittedly the task of definition of crimes is largely a matter for the primary rules. But the extreme imprecision of article 19 has already been noted, and the equation of all the conditions for crime with those for delict (imputability, complicity, excuses, etc.) in part one is highly implausible.[127] The other four conditions are, however, a matter for the draft articles, if they are to cover international crimes of State in a satisfactory way. As the above analysis shows, the draft articles do not satisfy any of these conditions. Articles 51 to 53 do not specify special, let alone stringent, consequences of crimes, penalties properly so-called.[128] Of the other three elements, none is provided for at all. Addressing these issues would be a major exercise.

(d) *Excluding the possibility of State crimes*

87. According to another view, quite widely held in the literature, there is no sufficient basis in existing international law for the notion of international crimes of State, and no good reason to develop such a notion. There is no clear example of a State authoritatively held to have committed a crime. Nor is there any clear need for the concept, given the generality of the normal regime of State responsibility, and the breadth of the powers of the Security Council under the Charter to deal with threats to or breaches of international peace and security, powers which are now being vigorously used and which the draft articles cannot in any way affect. Many State crimes primarily affect the population of the "criminal State" itself; to punish the State in such cases amounts, indirectly, to punishing the victims.

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[123] See, for example, the International Covenant on Civil and Political Rights, art. 14, and its equivalents in other instruments.

[124] See, for example, *Case of Société Sténuit* v. *France*, European Commission of Human Rights, *Series A, Judgments and Decisions*, vol. 232–A, *Judgment of 27 February 1992* (Registry of the Court, Council of Europe, Strasbourg, 1992) discussed by Stessens, "Corporate criminal liability: a comparative perspective", pp. 505–506.

[125] As the Appeals Chamber of the International Tribunal for the Former Yugoslavia stated in its judgement in the *Prosecutor* v. *Duško Tadić* case, *International Law Reports*, vol. 105 (1997), pp. 472–476, paras. 42–46.

[126] See, for example, Fisse and Braithwaite, *Corporations, Crime and Accountability*.

[127] See paragraphs 49, 50 and 76 above.

[128] See paragraphs 51 and 77 above.

88. The comments of Governments hostile to article 19 have been summarized above; they provide a range of further reasons against the notion of international crimes of States.[129] The need for that notion may also be reduced by the development of institutions for prosecuting and trying individuals for international crimes, as exemplified by the proposed international criminal court.

89. On the other hand, there are some difficulties with the view that the draft articles should entirely exclude the possibility of State crimes. In the first place, there is some support in State practice for the notion of international crimes of State, at least in the case of a few crimes such as aggression. Only States can commit aggression, and aggression is characteristically described as a crime.[130] Moreover, even though there are very few cases of State conduct actually being treated as a crime, there are cases in which States have been treated as virtual criminals, and a more regular procedure is called for, one which is not so dependent on the extraordinary powers of the Security Council. As a matter of policy, it might be argued that legal systems as they develop seem to need the notion of corporate criminal responsibility for various purposes; it is not clear that the Commission can or should exclude that possibility for the future in relation to the State as a legal entity.

90. For these and other reasons a number of Governments continue to support the distinction between crimes and delicts as formulated in article 19. It should also not be forgotten that at earlier stages of the discussion of part one the distinction achieved quite wide acceptance.[131]

(e) *Decriminalizing State responsibility*

91. In the Special Rapporteur's view, it is neither necessary nor possible to resolve for the future the question of State crimes. There is some practice supporting the notion, but with the possible exception of the crime of aggression, which is specially dealt with in the Charter, that practice is embryonic. A coherent system for dealing with the criminal conduct of States is at present lacking, both from a procedural and from a substantive point of view; both points of view are of equal significance. There is no prospect that the draft articles could fill that gap, having regard, *inter alia*, to the many other issues which the draft articles do have to address and the need to avoid overburdening them, increasing the risk of outright failure.

92. On the other hand, there is already a concept of obligations *erga omnes*, obligations owed to the international community as a whole, and there is also the concept of non-derogable norms (*jus cogens*). Both of these concepts need to be reflected in the draft articles, as appropriate. Doing so would not reintroduce the notion of "international crimes" under another name. Historically the general regime of State responsibility has been used to cover the whole spectrum of breaches of international law, up to the most serious ones. It is not the case that responses to the most serious breaches are the exclusive prerogative of international organizations, in particular the Security Council. States, acting in solidarity with those most directly injured, also have a role.

93. It is perfectly coherent for international law, like other legal systems, to separate the question of the criminal responsibility of legal persons from questions arising under the general law of obligations. Particular links between the two categories may be established. For example, victims may be able to seek redress by an order for compensation following upon a determination of guilt. But the categories remain distinct, and the general law of obligations is understood to operate without prejudice to issues of the administration of criminal justice. Under such a system the law of obligations remains quite general in its coverage, extending to the most serious wrongs *qua* breaches of obligation, notwithstanding that those wrongs may also constitute crimes. It is suggested that this is the most appropriate and coherent solution to the problem of international crimes raised by article 19. It does not preclude the development in future of the notion of international crimes of State, in accordance with proper standards of due process attendant on any criminal charge. At the same time it does not trivialize other serious breaches of international law, as the coexistence of a category of international crimes and international delicts in the draft articles would be almost certain to do.

3. Recommendation

94. For the reasons given above, the recognition of the concept of "international crimes" would represent a major stage in the development of international law. The present draft articles do not do justice to the concept or its implications for the international legal order, and cannot be expected to do so. The subject is one that requires separate treatment, whether by the Commission, if the Sixth Committee should entrust it with this task, or by some other body.

95. It is recommended that articles 19 (and, consequently, articles 51 to 53) be deleted from the draft articles. In the context of the second reading of part two, article 40, paragraph 3, should be reconsidered, *inter alia*, so as to deal with the issue of breaches of obligations *erga omnes*. It should be understood that the exclusion from the draft articles of the notion of "international crimes" of States is without prejudice (*a*) to the scope of the draft articles, which would continue to cover all breaches of international obligation whatever their origin; and (*b*) to the notion of "international crimes of States" and its possible future development, whether as a separate topic for the Commission, or through State practice and the practice of the competent international organizations.

[129] See paragraph 52 above.

[130] See footnote 117 above.

[131] See paragraphs 44 and 53 above.

Chapter II

Review of draft articles in part one (other than article 19)

A. Preliminary issues

96. The present report turns now to the initial consideration of the draft articles in part one (other than article 19). It can only be an initial consideration for several reasons. First, so far only relatively few Governments have commented in detail on individual draft articles, and it will be necessary to consider further comments and suggestions as they are made. Secondly, so far there has been no systematic coordination of the draft articles in part one with those in parts two and three, and it is desirable not to finalize part one until the latter articles have been reviewed. Thirdly, the Commission's normal practice on second reading is to maintain all the articles formally under review in the Drafting Committee until the text and the commentaries are completed. There is every reason to adopt this procedure in the case of State responsibility. For these reasons, the second reading will involve a process of "rolling review" of the draft articles until their completion.[132]

1. Questions of terminology

97. Unlike many other of the Commission's texts, the draft articles contain no separate definition clause. Instead terms are explained as they are used (see, for example, articles 3, 19, para. 3, 40, 43, 44, para. 2, and 47, para. 1). In general this is a satisfactory and even elegant technique, which should be retained. One point that does, however, require review is the range of terms used throughout the text to describe the responsibility relationship. The most important of these are set out in table 1 below. Generally these terms are used consistently in the draft articles, and appear to present no problem either in English or, as far as can be ascertained, in the other official languages. A question of substance arises with respect to the notion of "circumstances precluding wrongfulness": this will be dealt with in the context of the relevant articles. Several of these terms do, however, merit some further consideration.

98. ***The "State which has committed an internationally wrongful act"***. This term, which is used frequently in the draft articles,[133] raises a question of substance and one of terminology:

(*a*) As a matter of substance, the term perhaps creates the impression that in a given case it will be clear that the State concerned has committed an internationally wrongful act. In many disputes both parties deny responsibility, while asserting that it is the other which is in the wrong. Both may have committed some wrongful act, as ICJ has found on several occasions.[134] But at the time of the dispute it may well be disputed and disputable where responsibility lies, and the use of the term "the State which has committed an internationally wrongful act" may tend to obscure this reality. On the other hand, this is a general problem within the field of international law, one which can only finally be resolved by appropriate procedures for dispute settlement. It certainly cannot be resolved by any different description of the States whose responsibility is invoked;

(*b*) As a matter of terminology, however, the term "the State which has committed an internationally wrongful act" is cumbersome, and the use of the past tense may imply, wrongly, that it concerns only completed rather than continuing wrongful acts. The shorter and more convenient term "wrongdoing State" was used by ICJ in the case concerning the *Gabčíkovo-Nagymaros Project*, and for both these reasons is to be preferred.[135] Table 2 below sets out that term in the various official languages. The Drafting Committee should consider whether to substitute it for the longer phrase.

99. ***Injury and damage***. Two terms which also need preliminary mention are "injury" and "damage". The draft articles do not use the term "injury", but the term "injured State" is defined in article 40 and is thereafter used repeatedly. The term "damage" is used to refer to actual harm suffered;[136] a further distinction is drawn between "economically assessable damage" and "moral damage" in articles 44 and 45. The term "damages" is also used twice, to refer to the amount of monetary compensation to be awarded (art. 45, para. 2 (*b*)–(*c*)). More detailed questions of terminology can be left to the discussion of part two, where the issues mostly arise. As to the basic distinction between "injury" and "damage", it is clear that the concept of "injury" in the term "injured State" involves the concept of a "legal injury" or *injuria*, whereas the term "damage" refers to material or other loss suffered by the injured State. The substantive question whether damage is a necessary component of injury, is considered in

[132] A further difficulty is that no final decision can be made as to the articles in part one until it is decided whether to retain the distinction between crimes and delicts. For the reasons given in paragraph 77, significant changes to part one will be necessary if that distinction is retained. These would include, *inter alia*, changes to articles 1, 3 and 10. The discussion in this section of the report proceeds on the basis that the recommendation made in paragraph 95 may be adopted in some form, even if provisionally.

[133] Viz., in articles 28, para. 3, 36, 42, paras. 1 and 4, 43 (twice), 44, para. 1, 45, paras. 1 and 3, 46, 47, paras. 1 and 3, 48, paras. 2–4, 50 and 53 (*Yearbook … 1996*, vol. II (Part Two), pp. 61 et seq.).

[134] For example, *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4 (where Albania was held to be internationally responsible for the damage to the British ships, but the United Kingdom was held to have acted unlawfully in conducting its subsequent unilateral mine-sweeping operation in Albanian waters); and *Gabčíkovo-Nagymaros Project* (footnote 85 above), p. 3 (where Hungary was held to have acted unlawfully in suspending and terminating work on the project but Slovakia was held to have acted unlawfully in continuing the unilateral operation of a unilateral diversion scheme, Variant C).

[135] *I.C.J. Reports 1997* (see footnote 85 above), p. 56, para. 87.

[136] The term is used in articles 35, 42, 44, para. 1, and 45, para. 1.

Table 1
KEY TERMS IN THE DRAFT ARTICLES ON STATE RESPONSIBILITY

Arabic	Chinese	English
فعل غير مشروع دوليا	国际不法行为	internationally wrongful act
انتهاك التزام دولي	违背国际义务	breach of an international obligation
فعل الدولة	国家的行为	act of a State
التحميل	归于	attribution
الظروف النافية لعدم المشروعية	解除不法行为的情况	circumstances precluding wrongfulness
الدولة المضرورة	受害国	injured State
الدولة التي ارتكبت الفعل غير المشروع دوليا	实行国际不法行为的国家	the State which has committed an internationally wrongful act
الأضرار	损害	damage

French	Russian	Spanish
fait internationalement illicite	международно-противоправное деяние	hecho internacionalmente ilícito
violation d'une obligation internationale	нарушение международного обязательства	violación de una obligación internacional
fait d'un État	деяние государства	hecho de un Estado
attribution	присвоение	atribución
circonstances excluant l'illicéité	обстоятельства, исключающие противоправность	circunstancias que excluyen la ilicitud
État lésé	потерпевшее государство	Estado lesionado
l'État qui a commis un fait internationalement illicite	государство, которое совершило международно-противоправное деяние	el Estado que haya cometido el hecho internacionalmente ilícito
dommages	ущерб	daño

Table 2
KEY TERMS RELEVANT TO THE DRAFT ARTICLES ON STATE RESPONSIBILITY

Arabic	French	Chinese	Russian	Spanish	English
الدولة المرتكبة للفعل غير المشروع	l'État fautif	不法行为国	государство-нарушитель	el Estado infractor	the wrongdoing State

the context of article 1.[137] Whatever conclusion may be reached on that question, the terminological distinction is useful and should be retained.

2. General and savings clauses

100. The draft articles do not contain the range of general and savings clauses which have often been included in texts prepared by the Commission. There are no equivalents to the following articles contained in the 1969 Vienna Convention: article 1 (Scope of the present Convention); article 2 (Use of terms); article 3 (International agreements not within the scope of the present Convention); and article 4 (Non-retroactivity of the present Convention).

101. On the other hand, chapter I of part two does contain certain clauses which are arguably appropriate to the draft articles as a whole, and which could therefore be included in an introductory group of articles. They are: article 37 (*Lex specialis*); article 38 (Customary international law); and article 39 (Relationship to the Charter of the United Nations).

102. Several Governments have noted that article 37, in particular, should be made applicable to the draft articles as a whole.[138] This seems clearly right in principle. However, it is convenient to consider the formulation and placement of these articles in the context of the review of part two. At the same time, it will be necessary to consider which, if any, further preliminary and savings clauses may be desirable.[139]

103. Part one is entitled "Origin of international responsibility".[140] It consists of five chapters: chapter I (General principles) (arts.1–4); chapter II (The "act of the State" under international law) (arts. 5–15); chapter III (Breach of an international obligation) (arts. 16–26); chapter IV (Implication of a State in the internationally wrongful act of another State) (arts. 27–28); and chapter V (Circumstances precluding wrongfulness) (arts. 29–35).

B. Part one, chapter I. General principles (arts. 1–4)

104. According to the commentary, chapter I is intended to cover "rules of the most general character applying to the draft articles as a whole".[141] It would perhaps be more accurate to say that chapter I lays down certain gen-

[137] See paragraphs 108–116 below.

[138] See A/CN.4/488 and Add.1–3 (reproduced in the present volume), views expressed by France, Germany and the United Kingdom.

[139] Ibid. For example, France suggests that article 1 should contain a without-prejudice clause with respect to "questions which may arise with respect to injurious consequences arising out of acts not prohibited by international law".

[140] The use of the term "origin" has been criticized. France proposes instead using the term "basis", which has the merit of focusing on the legal basis for responsibility rather than, for example, on the historical or even psychological origins.

[141] *Yearbook ... 1973*, vol. II, p. 173.

eral propositions defining the basic conditions for State responsibility, leaving it to part two to deal with general principles which determine the consequences of responsibility.

1. Article 1 (Responsibility of a State for its internationally wrongful acts)

(a) *General observations*

105. The first such proposition, stated in article 1, is that: "Every internationally wrongful act of a State entails the international responsibility of that State." On an initial reading, article 1 seems only to state the obvious. But there are several things it does not say, and its importance lies in these silences. First, it does not spell out any general preconditions for responsibility in international law, such as "fault" on the part of the wrongdoing State, or "damage" suffered by any injured State.[142] Secondly, it does not identify the State or States, or the other international legal persons, to which international responsibility is owed. It thus does not follow the tradition of treating international responsibility as a secondary legal relationship of an essentially bilateral character (a relationship of the wrongdoing State with the injured State, or if there happens to be more than one injured State, with each of those States separately). Rather it appears to present the situation of responsibility as an "objective correlative" of the commission of an internationally wrongful act.

106. Before turning to these two aspects, certain less controversial points may be noted about article 1; a number of these are already dealt with in the commentary:

(*a*) The term "internationally wrongful act" is intended to cover all wrongful conduct of a State, whether it arises from positive action or from an omission or a failure to act.[143] This is more clearly conveyed by the French and the Spanish than by the English text, but the point is made clear also in article 3, which refers to "[c]onduct consisting of an action or omission";

(*b*) Conduct which is "internationally wrongful" entails international responsibility. Draft articles 29 to 34 deal with circumstances which exclude wrongfulness and, thus, international responsibility in the full sense. Article 35 reserves the possibility that compensation may be payable for harm resulting from acts otherwise unlawful, the wrongfulness of which is precluded under certain of these articles. The commentary to article 1 goes further; it leaves open the possibility of "'international responsibility' if that is the right term for the harmful consequences of certain activities which are not, at least for the moment, prohibited by international law".[144] Since 1976, the Commission has been grappling with the question of "liability" for harmful consequences of acts not prohibited by international law. Its relative lack of success in that endeavour is due, in part at least, to the failure to develop a terminology in languages other than English which is capable of distinguishing "liability" for lawful conduct causing harm, on the one hand, and responsibility for wrongful conduct, on the other. That experience tends to suggest that the term "State responsibility" in international law is limited to responsibility for wrongful conduct, even though article 1 was intended to leave that question open. Obligations to compensate for damage not arising from wrongful conduct are best seen either as conditions upon the lawfulness of the conduct concerned, or as discrete primary obligations to compensate for harm actually caused. In any event, except in the specific and limited context of article 35, such obligations fall entirely outside the scope of the draft articles;[145]

(*c*) In stating that every wrongful act of a State entails the international responsibility of that State, article 1 affirms the basic principle that each State is responsible for its own wrongful conduct. The commentary notes that this is without prejudice to the possibility that another State may also be responsible for the same wrongful conduct, for example, if it has occurred under the control of the latter State or on its authority.[146] Some aspects of the question of the involvement or implication of a State in the wrongful conduct of another are dealt with in articles 12, 27 and 28. By contrast, other aspects, in particular the question of so-called "joint responsibility" and its possible implications for reparation and countermeasures, are not dealt with.[147] Whether they should be covered, either in chapter IV of part one or in part two, is a question. But it casts no doubt on the formulation of article 1 itself.

107. Turning to the two issues (identified in paragraph 105 above) as to which article 1 is silent, the first of these is the question whether the draft articles should specify a general requirement of fault (*culpa* or *dolus*), or of damage to another State, as a condition of responsibility.

(b) *A general requirement of fault or damage?*

108. A number of Governments question whether a specific requirement of "damage" should not be included in article 1 or 3:

(*a*) Argentina calls for article 3 to be reconsidered. In its view:

> [I]n the case of a wrongful act caused by one State to another ... the exercise of a claim makes sense only if it can be shown that there has been real financial or moral injury to the State concerned. Otherwise, the State would hardly be justified in initiating the claim.
>
> In a similar vein, it has been stated that even in the human rights protection treaties ... the damage requirement cannot be denied. What

[142] These silences pertain to article 3 as much as, or even more than, article 1, since they relate to the question whether there has been a breach of an international obligation. For the sake of convenience, the issues are discussed here.

[143] *Yearbook … 1973*, vol. II, p. 176, para. (14) of the commentary to article 1.

[144] Ibid., para. (13) of the commentary to article 1.

[145] See footnote 139 above, for the French suggestion of a without-prejudice clause with respect to the injurious consequences of lawful conduct.

[146] *Yearbook … 1973*, vol. II, p. 175, para. (7), and p. 176, para. (11) of the commentary to article 1.

[147] Such issues were raised, for example, in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240.

is involved is actually a moral damage suffered by the other States parties.

> ... [T]he damage requirement is, in reality, an expression of the basic legal principle which stipulates that no one undertakes an action without an interest of a legal nature.[148]

(*b*) France likewise argues strongly that responsibility could only exist vis-à-vis another injured State, which must have suffered moral or material injury. In its view:

> [T]he existence of damage is an indispensable element of the very definition of State responsibility ...
>
> International responsibility presupposes that, in addition to an internationally wrongful act having been perpetrated by a State, the act in question has injured another State. Accordingly, if the wrongful act of State A has not injured State B, no international responsibility of State A with respect to State B will be entailed. Without damage, there is no international responsibility.

It thus proposes the addition to article 1 of the words "vis-à-vis the injured States", and a comprehensive redrafting of article 40 to incorporate the requirement of "material or moral damage" in all cases except for breaches of fundamental human rights.[149]

109. A number of other Governments, by contrast, approve the principles underlying articles 1 and 3. They include Austria, Germany, Italy, Mongolia, the Nordic countries and the United Kingdom. Germany, for example, regards article 1 as expressing a "well-accepted general principle".[150]

110. No Government has argued in favour of the specification of a general requirement of fault. Nonetheless the question of "fault" has figured prominently in the literature, and it is a question of the same order as the question whether "damage" is a prerequisite for responsibility. Both questions need to be discussed, the more so since, it is suggested, the same answer should be given to both.

111. An initial point to make is that, if the recommendation in part one of the present report (para. 95) is accepted, the draft articles will no longer seek to deal directly with the question of international crimes. Were they to do so, there would be good reasons for spelling out a requirement of fault: a State could not possibly be considered responsible for a crime without fault on its part. Equally there would be compelling reasons not to add any distinct requirement of damage or harm to other States. State conduct would not be considered criminal by reason of the damage caused to particular States but by reason of the character of the conduct itself. These questions will have to be revisited if the Commission should decide to undertake a full-scale treatment of "international crimes" within the scope of these draft articles.

112. ***Damage as a general prerequisite***. Neither article 1 nor article 3 contains a general requirement of "damage" to any State or other legal person as a prerequisite for a wrongful act, still less any requirement of material damage. This position has been generally approved in the literature on these articles since their adoption in 1973.[151] So far as subsequent case law is concerned, the most directly relevant decision is the *Rainbow Warrior* arbitration, which concerned the failure by France to keep two of its agents in confinement on the island of Hao, as had been previously agreed between France and New Zealand.[152] It was argued by France that its failure to return the agents to the island did not entitle New Zealand to any relief. Since there was no indication that "the slightest damage has been suffered, even moral damage", there was no basis for international responsibility. New Zealand referred, *inter alia*, to articles 1 and 3 of the draft articles, and denied that there was any separate requirement of "damage" for the breach of a treaty obligation. In oral argument France accepted that in addition to material or economic damage there could be "moral and even legal damage". The Tribunal held that the failure to return the two agents to the island "caused a new, additional non-material damage ... of a moral, political and legal nature".[153]

113. Although the Tribunal was thus able to avoid pronouncing directly upon articles 1 and 3, the breadth of its formulation ("damage ... of a moral, political and legal nature") does not suggest that there is any logical stopping place between, on the one hand, the traditional and relatively narrow concept of "moral damage" and, on the other hand, the broader conception of legal damage arising from the breach of a State's right to the performance of an obligation. It has long been accepted that States may assume international obligations on virtually any subject and having, in principle, any content.[154] Within those broad limits, how can it be said that a State may not bind itself, categorically, not to do something? On what basis is that obligation to be reinterpreted as an obligation not to do that thing only if one or more other States would thereby be damaged? The other States that are parties to the agreement, or bound by the obligation, may be seeking guarantees, not merely indemnities. But as soon as that possibility is conceded, the question whether damage is a prerequisite for a breach becomes a matter to be determined by the relevant primary rule. It may be that many primary rules do contain a requirement of damage, however defined. Some certainly do. But there is no warrant for the suggestion that this is necessarily the case, that it is an a priori requirement.

114. Similar reasoning is set out, albeit rather briefly, in the commentary to article 3.[155] This points out that all sorts of international obligations and commitments are

[148] See A/CN.4/488/Add.1–3 (reproduced in the present volume), comments by Argentina on article 3.

[149] Ibid., comments by France on articles 1 and 40, para. 3.

[150] Ibid., comments by Austria, Denmark (on behalf of the Nordic countries), Germany, Italy, Mongolia and the United Kingdom.

[151] See, for example, Reuter, "Le dommage comme condition de la responsibilité internationale"; and Tanzi, "Is damage a distinct condition for the existence of an internationally wrongful act?".

[152] Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair (UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215).

[153] Ibid., pp. 266–267.

[154] See paragraph 46 above. This is subject to any limitations which may be imposed by peremptory norms of general international law.

[155] *Yearbook … 1973*, vol. II, p. 183, para. (12) of the commentary to article 3. Somewhat disconcertingly, in paragraph (3) of the commentary to article 1, the following article, adopted in first reading by the Third Committee of the 1930 Hague Conference for the Codification of International Law, is cited with approval:

> "International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obliga-

entered into, covering many fields in which damage to other individual States cannot be expected, would be difficult to prove or is not of the essence of the obligation. This is not only true of international human rights (an exception allowed by France in its comments), or of other obligations undertaken by the State to its own citizens (another example given by the Commission in its commentary to article 3). It is true in a host of areas, including the protection of the environment, disarmament and other "preventive" obligations in the field of peace and security, and the development of uniform standards or rules in such fields as private international law. For example, if a State agrees to take only a specified volume of water from an international river, or to adopt a particular uniform law, it breaches that obligation if it takes more than the agreed volume of water, or if it fails to adopt the uniform law, and it does so irrespective of whether other States or their nationals can be shown to have suffered specific damage thereby. In practice, no individual release of chlorofluorocarbons or other ozone-depleting substances causes identifiable damage: it is the phenomenon of diffuse, widespread releases that is the problem, and the purpose of the relevant treaties is to address that problem. In short, the point of such obligations is that they constitute, in themselves, standards of conduct for the parties. They are not only concerned to allocate risks in the event of subsequent harm occurring.

115. There is a corollary, not pointed out in the commentary to article 3. If damage was to be made a distinct prerequisite for State responsibility, the onus would be on the injured State to prove that damage, yet in respect of many obligations this may be difficult to do. The "wrongdoing State" could proceed to act inconsistently with its commitment, in the hope or expectation that damage might not arise or might not be able to be proved. This would tend to undermine and render insecure international obligations establishing minimum standards of conduct. There is also the question by what standard "damage" is to be measured. Is any damage at all sufficient, or is "appreciable" or "significant" damage required? This debate already occurs in specific contexts;[156] to make damage a general requirement would inject it into the whole field of State responsibility.

116. It may be argued that failure to comply with international obligations creates a "moral injury" for other States in whose favour the obligation was assumed, so that the requirement of damage is readily satisfied.[157] But the traditional understanding of "moral damage" was much narrower than this, as the commentary to article 3 points out. The reason why a breach of fundamental human rights is of international concern (to take only one example) is not because such breaches are conceived as assaulting the dignity of other States; it is because they assault human dignity in ways which are specifically prohibited by international treaties or general international law.

117. For these reasons the decision not to articulate a separate requirement of "damage", either in article 1 or in article 3, in order for there to be an internationally wrongful act seems clearly right in principle. But too much should not be read into that decision, for the following reasons:

(*a*) First, as already noted, particular rules of international law may require actual damage to have been caused before any issue of responsibility is raised. To take a famous example, principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) is formulated in terms of preventing "damage to the environment of other States or of areas beyond the limits of national jurisdiction";[158]

(*b*) Secondly, articles 1 and 3 do not take a position as to whether and when obligations are owed to "not-directly injured States", or to States generally, or to the international community as a whole. That question is dealt with, at present, in articles 19 and 40. The requirement of damage as a prerequisite to a breach could arise equally in a strictly bilateral context, as it did in the *Rainbow Warrior* arbitration;[159]

(*c*) Thirdly, articles 1 and 3 do not, of course, deny the relevance of damage, moral and material, for various purposes of responsibility.[160] They simply deny that there is a categorical requirement of moral or material damage before a breach of an international norm can attract responsibility.

118. ***"Fault" as a general requirement***. Similar arguments apply to the suggestion that international law impos-

tions of the State which causes damage to the person or property of a foreigner on the territory of the State."

The commentary goes on to identify that article with the "fundamental principle" enunciated in paragraph (4) (ibid.).

[156] For example, article 5 of the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses.

[157] Cf. the French response in the *Rainbow Warrior* arbitration (para. 112 above). In its comments on the draft articles, France notes that it:

> "is not hostile to the idea that a State can suffer legal injury solely as a result of a breach of a commitment made to it. However, the injury must be of a special nature, which is automatically so in the case of a commitment under a bilateral or restricted multilateral treaty. By contrast, in the case of a commitment under a multilateral treaty, the supposedly injured State must establish that it has suffered special material or moral damage other than that resulting from a simple violation of a legal rule. A State cannot have it established that there has been a violation and receive reparation in that connection if the breach does not directly affect it."

(A/CN.4/488 and Add.1–3 (reproduced in the present volume), para. 3 of France's comments on article 40)

But it is not the function of the draft articles to say in respect of which treaties, or which category of treaties, particular requirements of damage may exist. Exactly the same commitment (e.g. to compensation for expropriation, or to the protection of a linguistic minority) may be made in a bilateral and in a multilateral treaty. As soon as it is accepted that a State may suffer legal injury as a result of a commitment made to it, the question whether this is the case becomes a matter for the interpretation and application of the particular commitment, i.e. a matter for the primary rules.

[158] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I. Similar language is used in principle 2 of the Rio Declaration (*Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution I, annex I). Cf., however, the ICJ formulation of the principle in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 242, para. 29. The text of the advisory opinion is also reproduced in "Advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons: note by the Secretary-General" (A/51/218, annex).

[159] See footnote 152 above.

[160] In part two, damage is relevant, *inter alia*, under articles 43 (*c*), 44 and 49.

es any general requirement of "fault" (*culpa, dolus*) as a condition of State responsibility. Again the answer is that the field of State obligations is extraordinarily wide and that very different elements and standards of care apply to different obligations within that field. Thus, there is no a priori requirement of particular knowledge or intent on the part of State organs which applies to all obligations, and could be stated as a prerequisite in article 1 or article 3. The point was made, for example, by Denmark on behalf of the Nordic countries:

> If the element of fault is relevant in establishing responsibility, it already follows from the particular rule of international law governing that situation, and not from being a constituent element of international responsibility.[161]

A similar conclusion is now drawn in the literature, despite certain earlier tendencies to the contrary.[162]

(c) *Relationship between internationally wrongful conduct and injury to other States or persons*

119. The second question identified in paragraph 105 with respect to article 1 is the absence of any specification of the States or entities to whom responsibility is owed. As noted, France criticizes the draft articles for not specifying that "the injured State is the State that has a subjective right corresponding to obligations incumbent on clearly identified States", and it proposes changes to articles 1 and 40 to resolve this question. Argentina suggests that the question of the responsibility of the wrongdoing State to the injured State is the *ratio legis* of the draft articles.[163]

120. An initial point which needs to be stressed is that the draft articles are not limited to State responsibility arising from primary obligations of a bilateral character, or from obligations owed by one State to another in any defined field of "inter-State relations" (even assuming that such a field could be defined a priori). This seems to be accepted in all the comments from Governments received so far, as well as by commentators.

121. It is another question whether the draft articles are limited to secondary responsibility relationships between States (even if those relationships arise from primary rules which are general in their scope, e.g. under multilateral treaties or general international law in the field of human rights). The commentary to article 1 notes that:

> by using the term "international responsibility" in article 1, the Commission intended to cover every kind of new relations which may arise, in international law, from the internationally wrongful act of a State, whether such relations are limited to the offending State and the directly injured State or extend also to other subjects of international law, and whether they are centred on the duty of the guilty State to restore the injured State in its rights and repair the damage caused, or whether they also give the injured State itself or other subjects of international law the right to impose on the offending State a sanction admitted by international law. In other words, the formulation adopted for article 1 must be broad enough to cater for all the necessary developments in the chapter which is to be devoted to the content and forms of international responsibility.[164]

This needs to be read in the light of the following passage in the commentary to article 3:

> in international law the idea of breach of an obligation can be regarded as the exact equivalent of the idea of infringement of the subjective rights of others ... The correlation between legal obligation on the one hand and subjective right on the other admits of no exception.[165]

122. It should be noted that the term "injured State" is not used in part one. On the other hand, it is a central term in part two, which defines most of the obligations of restitution and reparation in terms of the entitlements of an "injured State". The definition of an "injured State" in article 40 is thus pivotal to the draft articles; careful attention will have to be given to that definition in due course.

123. As to the question of scope raised by article 1, the draft articles deal with the responsibility of States, and not with the responsibility of other legal persons such as international organizations. Part two goes on to deal with the rights and entitlements of injured States arising from the responsibility of a wrongdoing State. But the focus in part one on the wrongdoing State was not intended to imply that State responsibility can exist, as it were, in a vacuum. In its commentary to paragraph (3), the Commission expressly accepted that all cases of State responsibility have as a correlative an infringement of the actual rights of some other person. The reason this was not spelled out expressly in article 1 was that "the formulation adopted for article 1 must be broad enough to cater for all the necessary developments in the chapter which is to be devoted to the content and forms of international responsibility".[166] In the event, that chapter (which became part two) did not take full advantage of the broad formulation of article 1.

124. Thus, there are again two questions: one of substance and one of form. At the level of substance, the question is whether something more is required in part two to cover the ground pegged out in article 1, and specifically the question of the responsibility of States to other persons. At the level of form, the question is whether the persons to whom responsibility is owed should be identified in part one, and specifically in article 1.

125. The Special Rapporteur's tentative view is that no change is required in either respect. At the level of substance, it would be very difficult and would significantly expand the scope of the draft articles if part two were to deal with the rights and entitlements of injured persons other than States. At the level of form, the commentary already makes it clear that State responsibility involves a relationship between the wrongdoing State and another State, entity or person whose rights have been infringed. Thus, there is no question of a merely abstract form of responsibility; responsibility is always to someone. On the other hand, to limit part one to obligations owed exclusively to States would be unduly to limit the scope of the draft articles, and to do so at a time when international law is undergoing rapid changes in terms of the scope and

[161] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by Denmark on part one of the draft articles.

[162] See Brownlie, op. cit., pp. 38–48, and authorities there cited.

[163] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by Argentina on article 3.

[164] *Yearbook … 1973*, vol. II, pp. 175–176, para. (10) of the commentary to article 1.

[165] Ibid., p. 182, para. (9) of the commentary to article 3.

[166] Ibid., pp. 175–176, para. (10) of the commentary to article 1; see also paragraph 121 above.

character of obligations assumed and the range of persons and entities engaged by those obligations or concerned with their performance. No specific difficulties have been pointed to which arise from the present open-ended formulation of article 1. Again, however, the matter will need to be revisited in the context of article 40.

(d) *Recommendation*

126. For these reasons, it is recommended that article 1 be adopted unchanged. The question of its relation to the concept of "injured State", as defined in article 40 and applied in part two, should, however, be further considered in that context.

2. Article 2 (Possibility that every State may be held to have committed an internationally wrongful act)

(a) *Observations*

127. Article 2 provides that:

> Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

As expressed, article 2 is a truism. No State is immune from the principle of international responsibility. That proposition is implicit in articles 1 and 3, which apply to every internationally wrongful act of every State. It is affirmed in the commentaries to those articles, which could be reinforced. It is therefore very doubtful whether article 2 is necessary.[167]

128. The commentary[168] cites no writer and no decision supporting the contrary view to article 2, and this is not surprising. The proposition that a particular State was in principle immune from international responsibility would be a denial of international law and a rejection of the equality of States, and there is no support whatever for that proposition. Instead the commentary discusses a number of different issues. These include the problem of "delictual capacity" in national law (as in the case of minors); the question of the responsibility of the component units of a federal State; the responsibility of a State on whose territory other international legal persons are operating; and the issue of circumstances precluding wrongfulness. It concludes that none of these situations constitutes an exception to the principle of the international responsibility of every State for internationally wrongful conduct attributable to it. This conclusion is obviously correct.

129. Most of the issues identified in the commentary are dealt with elsewhere in the draft articles and do not need to be discussed here.[169] As to the question of "delictual capacity", the Commission in 1973 decided not to formulate article 2 in such terms, since it was paradoxical to assert that international law could confer the "capacity" to breach its own rules.[170] A further difficulty with the notion of "delictual capacity" is its undue focus on the question of breach. In the case of non-State entities, a bundle of questions about their legal personality, to what extent international law applies to them and their international accountability for possible breaches do indeed arise. So far as States are concerned, however, the position is clear: all States are responsible for their own breaches of international law, subject to the generally available excuses or defences which international law itself provides and which are dealt with in chapter V of part one. The draft articles deal only with the international responsibility of States, and accordingly it is not necessary to discuss the broader range of questions.

(b) *Recommendation*

130. Article 2 deals only with the possibility of responsibility, which in the context of draft articles dealing with State responsibility is an unnecessarily abstract notion. The proposition affirmed in article 2 is unquestioned and unquestionable. It will be sufficient to confirm it in the commentaries to articles 1 and 3. Article 2 is unnecessary and can be deleted.

3. Article 3 (Elements of an internationally wrongful act of a State)

(a) *Observations*

131. According to article 3:

> There is an internationally wrongful act of a State when:
>
> (*a*) Conduct consisting of an action or omission is attributable to the State under international law; and
>
> (*b*) That conduct constitutes a breach of an international obligation of the State.

132. Though in a sense axiomatic, this is a basic statement of the conditions of State responsibility. The issues it raises have already been discussed in relation to article 1. Indeed, there is a case for placing article 3 before article 1, since article 3 defines the general prerequisites for the responsibility which article 1 proclaims.

133. The inclusion of both acts and omissions within the scope of the phrase "internationally wrongful act" has already been discussed. In addition, France proposes that it be made clear that the phrase extends both to "legal acts and material conduct"; by "legal acts" is meant "acts in law" (e.g. the legal act of enacting a law, or denaturalizing a person), not "lawful acts".[171] Acts in law are certainly intended to be covered, but it seems sufficient to make this clear in the commentary.

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[167] Its deletion was proposed by the United Kingdom (A/CN.4/488 and Add.1–3 (reproduced in the present volume), in its comment on article 2.

[168] *Yearbook ... 1973*, vol. II, pp. 176–179.

[169] For the component units of a federal State, see article 7. For the responsibility of a State on whose territory other international legal persons are operating, see articles 12 and 13. For circumstances precluding wrongfulness, see articles 29 to 35.

[170] *Yearbook ... 1973*, vol. II, p. 182, para. (10) of the commentary to article 3.

[171] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by France on article 3.

134. Article 3 has the further important role of structuring the draft articles that follow. Chapter II deals with the requirement of attribution of conduct to the State under international law. Chapter III deals, so far as the secondary rules can do so, with the breach of an international obligation. Chapters IV and V deal with more specific issues, which do not need to be referred to in the text of article 3; their relationship to the basic principle can be made clear in the commentary.

(b) *Recommendation*

135. Essentially for the reasons given in relation to article 1 and on the same basis, it is recommended that article 3 be adopted unchanged.

4. Article 4 (Characterization of an act of a State as internationally wrongful)

(a) *Observations*

136. Article 4 provides:

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.

137. There appears to be no objection to or difficulty with this basic but important proposition. The second sentence does not of course mean that issues of "internal" law are necessarily irrelevant to international law: for example, national law may be relevant as a fact in an international tribunal.[172] But the characterization of conduct as lawful or not is an autonomous function of international law. The long line of authorities supporting this proposition is surveyed in the commentary.[173]

138. So far none of the governmental comments raises doubts about or proposes changes to article 4.[174]

(b) *Recommendation*

139. It is recommended that article 4 be adopted unchanged.

C. Part one, chapter II. The "act of the State" under international law (arts. 5–15)

1. Introduction

140. This part of the report examines and makes proposals on chapter II (arts. 5–15) of the draft articles. It first deals with issues of terminology, outlines the general comments of Governments on chapter II as a whole, and identifies certain general principles (see paragraphs 141–155 below). It then reviews in turn each of the articles, taking into account, in particular, the comments and observations of Governments, as well as proposing one additional article (paras. 156–283). Finally, the proposed articles are set out with brief explanatory notes (para. 284).

141. Chapter II defines the conditions in which conduct (acts or omissions of human beings or of other entities) is attributable to the State under international law, something which has already been specified as an essential requirement for the internationally wrongful act of a State under article 3 (*a*). It is plainly central to the definition of State responsibility.

142. Chapter II consists of 11 articles, in three groups. Five articles specify the circumstances in which conduct is attributable to the State (arts. 5, 7–9 and 15). They apply in the alternative; that is to say, conduct is attributable to the State if any one of the articles is satisfied. The first group of articles is subject to certain clarifications, provided for in articles 6 and 10. Finally, four articles state the circumstances in which conduct is not attributable to the State (arts. 11–14). In accordance with article 3 (*a*), however, it is a necessary condition for State responsibility that conduct is actually attributable to the State. Strictly speaking, it is not necessary to say when conduct is not attributable, except to create an exception to one of the clauses providing for attribution. None of the "negative" articles creates such an exception.

143. There is a measure of duplication. The conduct of organs of other States is dealt with in articles 9 and 12 (article 28, paragraph 1, might also be characterized as a rule of attribution). The conduct of international organizations is dealt with in articles 9 and 13. The conduct of insurrectional movements is dealt with in articles 14 and 15. The relation between these provisions requires consideration.

144. Some of these articles have been frequently referred to in judicial decisions and in the literature. In addition, there have been major developments in the law of attribution, in decisions of ICJ and of other international tribunals, including the Iran-United States Claims Tribunal[175] and the various human rights courts and committees.[176] These developments will need to be carefully taken into account.[177]

145. Before turning to the individual articles, a number of general issues about chapter II as a whole need to be mentioned.

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[172] As, for example, in *Elettronica Sicula S.p.A (ELSI), Judgment, I.C.J. Reports 1989*, p. 15.

[173] *Yearbook … 1973*, vol. II, pp. 185–188, paras. (3)–(13) of the commentary to article 4. The commentary convincingly explains why the language of article 27 of the 1969 Vienna Convention ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty") was not more closely reflected in article 4 (see page 188, paras. (15)–(17).

[174] See A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments on article 4.

[175] For a thorough account of issues of attribution before the Claims Tribunal see Caron, "The basis of responsibility: attribution and other trans-substantive rules". See also Brower and Brueschke, *The Iran-United States Claims Tribunal*, pp. 442–456; Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, pp. 174–215; and Avanessian, *Iran-United States Claims Tribunal in Action*, pp. 209–233.

[176] Usefully reviewed by Dipla, *La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation*.

[177] For the extensive literature on attribution see the bibliography annexed to the present report.

(a) *Questions of terminology*

146. When he first proposed this group of articles, the Special Rapporteur, Mr. Ago, used the term "imputability",[178] which is also common in the literature. The same term has been used by ICJ in later cases.[179] The Commission itself, however, preferred the term "attribution", to avoid any suggestion that the legal process of connecting conduct to the State was a "fiction".[180] The State can act only through individuals, whether those individuals are organs or agents or are otherwise acting on behalf of the State. In the words of one author: "Imputability implies a fiction where there is none, and conjures up the idea of vicarious liability where it cannot apply".[181] For these reasons, it is suggested that the term "attribution" should be retained.

147. The title of chapter II rather awkwardly places inverted commas around the phrase "act of the State", which also tends to recall the distinct notion of "act of State" current in some national legal systems. A more informative title might be preferable, such as "Attribution of conduct to the State under international law"; this would have the further advantage of corresponding exactly to the language of article 3 (*a*). Of course, under article 3, the rules of attribution are established for the purposes of the law of State responsibility; different rules of attribution exist, for example, for the purposes of the law of treaties.[182] This point is conveyed by the words "For the purposes of the present articles" in article 5, and is reinforced in the commentary.[183]

(b) *Comments of Governments on chapter II as a whole*

148. A number of Government comments relate to the balance and structure of chapter II as a whole.

149. Germany doubts whether this chapter

> sufficiently covers acts of natural persons and juridical persons, who, at the time of committing a violation of international law, do not act as State organs but nevertheless act under the authority and control of the State ... States increasingly entrust persons outside the structure of State organs with activities normally attributable to a State.[184]

It notes, however, the element of flexibility introduced by article 7, paragraphs 2 and 8.

150. A similar concern may underlie the comment of France with regard to article 5, that "the term 'State organ' is too restrictive. It would be better to use the expression 'any State organ or agent'. The same comment applies to articles 6, 7, 9, 10, 12 and 13".[185]

151. Mongolia also expresses:

> some doubts as to the coverage of acts of natural persons, who, at the time of committing a violation of international law, do not act as State representatives but nevertheless act under the authority and control of the State. In this connection mention should be made of the trend towards [a] broader understanding that under customary international law, as applied to environmental protection, a State is responsible for its own activities and for those of persons, whether they be individuals, private or public corporations, as long as their activities are under the State's jurisdiction or control.[186]

152. The United Kingdom calls on the Commission "to consider whether an effective criterion of 'governmental' functions can be devised and incorporated" in this chapter. It calls attention, in particular, to religious bodies which may exercise some degree of State authority (e.g. to punish persons for breaches of religious law) while not formally part of the governmental structure.[187]

153. As a matter of drafting, Switzerland and the United States doubt the wisdom of a technique which first specifies which acts are attributable (arts. 5–10), and then specified acts which are not (arts. 11–14): this leads in their view to excessive complexity.[188] In its 1981 comments, the Federal Republic of Germany likewise called for the consolidation of any useful elements of articles 11–14 into the other, positive, provisions of chapter II.[189]

(c) *Basic principles underlying the notion of attribution*

154. Before turning to the specific articles in chapter II, it is useful to call attention to the basic principles which underlie the notion of attribution:

(a) ***Limited responsibility of the State***. Under international law, the fact that something occurs on the territory of a State, or in some other area under its jurisdiction, is not a sufficient basis for attributing that event to the State, or for making it responsible for any injury caused.[190] A State is not an insurer in respect of injuries occurring on its territory; it is only responsible if the conduct in question (i) is attributable to it and (ii) involves a breach of an international obligation owed by the State to persons or entities injured thereby (see article 3);

(b) ***Distinction between State and non-State sectors***. Thus the rules of attribution play a key role in distinguishing the "State sector" from the "non-State sector" for the purposes of responsibility. However this immediately confronts the difficulty that international law does

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[178] See his second report, *Yearbook … 1970*, vol. II, document A/CN.4/233, pp. 187–190, paras. 31–38.

[179] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, for example, at p. 29; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 51, para. 86. Mr. Ago was a member of the majority on both occasions.

[180] See *Yearbook ... 1971*, vol. II (Part One), document A/CN.4/246 and Add.1–3, p. 214, para. 50.

[181] Brownlie, op. cit., p. 36.

[182] See the 1969 Vienna Convention, arts. 7–8, 46–47, 50–51. Similarly the identification of State organs or instrumentalities for the purposes of State responsibility is not necessarily the same as it is for the purposes of foreign State immunity. For the latter, see the Commission's draft articles on jurisdictional immunities of States and their property, art. 2, para. 1 (*b*) and the commentary (*Yearbook ... 1991*, vol. II (Part Two), pp. 14–19).

[183] *Yearbook … 1973*, vol. II, p. 189, para. (5) of the commentary to chapter II.

[184] A/CN.4/488 and Add.1–3 (reproduced in the present volume).

[185] Ibid.

[186] Ibid., comments by Mongolia on article 8.

[187] Ibid., comments by the United Kingdom on article 5.

[188] Ibid., comments by Switzerland on article 5, and by the United States on article 4.

[189] *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 74.

[190] As ICJ noted in the *Corfu Channel* case (footnote 134 above), p. 18 (see paragraph 250 below).

not determine the particular structures of government within States.[191] Many activities carried out by Governments could be entrusted to the private sector, and the line between public and private varies continually over time within and between different countries. Without a fixed prescription for State authority, international law has to accept, by and large, the actual systems adopted by States, and the notion of attribution thus consists primarily of a *renvoi* to the public institutions or organs in place in the different States;[192]

(c) ***The "unity of the State"***. On the other hand, international law makes no distinction between different components of the State for the purposes of the law of responsibility, even if the State does so, for example, by treating different organs as distinct legal persons under its own law. The relevant international principle is that of the "unity of the State".[193] In this respect, the process of attribution is an autonomous one under international law, as stipulated in article 4;[194]

(d) **Lex specialis**. The principles of attribution under international law are not, however, overriding. States can by agreement establish different principles to govern their mutual relations, and the principle of *lex specialis* accordingly applies to chapter II in its entirety;[195]

(e) ***Distinction between attribution and breach of obligation***. Under article 3, State responsibility requires both that the conduct be attributable to the State and that it involve a breach of an international obligation of the State. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the cumulative effect of the principles of attribution make it essential in each case to articulate the precise basis of any claim. For example, a State may not be responsible for the acts of private individuals in seizing an embassy, but it will certainly be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it. In that respect, there may be a close link between the basis of attribution and the particular primary rule which is said to have been breached, even though the two elements are analytically distinct.

155. In summary, attribution is a necessary condition for State responsibility. A State is not responsible for conduct unless that conduct is attributable to it under at least one of the "positive attribution" principles. These principles are cumulative, but they are also limitative. In the absence of a specific undertaking or guarantee (which would be *lex specialis*), a State is not responsible for the conduct of persons or entities in any circumstances not covered by articles 5, 7, 8, 9 or 15. In many cases, it will be obvious from the first that the State is involved, for example, where the injury flows directly from a law, a governmental decision or the determination of a court. But where there is doubt it will be for the claimant to establish attribution, in accordance with the applicable standard of proof, in the same way as the claimant will have to establish that there has been a breach of obligation.[196] This follows already from the provisions of article 3.

2. Review of specific articles

(a) *Article 5 (Attribution to the State of the conduct of its organs)*

156. Article 5 specifies what might be called the "primary" rule of attribution:

> For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

157. Article 5 needs to be read systematically, in the context of the articles of chapter II as a whole. Article 6 makes it clear that State organs may belong to the constituent, legislative, executive, judicial or any other branch of government, that they may exercise international functions or functions of a purely internal character, and that they may be located at any level of government, from the highest organs of State to the most subordinate. Article 10 indicates that an organ may act in its capacity as such, notwithstanding that it "exceeded its competence according to internal law or contravened instructions concerning its activity".

158. The commentary to article 5 makes no attempt to define an "organ", although it is clear that the term is used in its broadest sense to mean a person or entity constituting part of the Government and performing official functions of whatever kind and at whatever level. The breadth of the notion is further emphasized in article 6. The commentary does, however, distinguish between "organs" and "agents", on the basis that:

> [I]t was agreed that the article should employ only the term "organ" and not the two terms "organ" and "agent". The term "agent" would seem to denote, especially in English, a person acting on behalf of the State rather than a person having the actual status of an organ. Actions or omissions on the part of persons of this kind will be dealt with in another article of this chapter.[197]

Article 8 deals with "agents", although it does not use that term.

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[191] The main exception to this generalization is in the field of the administration of justice, especially criminal justice. Both international human rights law and the older institution of diplomatic protection require that there be independent tribunals established by law and operating in accordance with certain minimum standards.

[192] This does not, however, limit the scope of obligations States may undertake, including obligations relating to the "non-State sector". See, for example, the case of *X and Y* v. *The Netherlands*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 91, *Judgment of 26 March 1985* (Registry of the Court, Council of Europe, Strasbourg, 1985).

[193] As noted by Chile in its comments of 9 October 1979 (*Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 96).

[194] See *Yearbook…1973*, vol. II, p. 190, para. (10) of the commentary to chapter II ("The attribution of an act to a State in international law is wholly independent of the attribution of that act in national law").

[195] See paragraph 27 above, where it is suggested that article 37 (*Lex specialis*) be made applicable to the draft articles as a whole.

[196] This proposition has been repeatedly reaffirmed. See, for example, *Yeager* v. *Islamic Republic of Iran* (1987), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1988), vol. 17, pp. 101–102 ("in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State").

[197] *Yearbook … 1973*, vol. II, p. 193, para. (13) of the commentary to article 5.

Comments of Governments on article 5

159. As already noted, France suggests that the term "any State organ or agent" be substituted in article 5 and elsewhere.[198]

160. The United Kingdom queries whether this article does not give excessive weight to the State's municipal law:

> If that law itself designates the organ as an organ of the State, it may be appropriate for international law to adopt a similar position. If, however, the municipal law of a State does not treat an organ as part of the State, it does not necessarily follow that the organ's acts are not attributable to the State. The municipal law cannot have determinative effect in this context: attribution is a matter for international law.[199]

161. The United States is strongly of the same opinion. It draws attention to a perceived conflict between articles 4 and 5 in this respect, and suggests that:

> [T]he internal law loophole in article 5 effectively creates the possibility for a wrongdoing State to plead internal law as a defence to an unlawful act.
>
> Under this formulaic rule, it could be that according to some State law, the conduct of State organs will be attributable to the State, while the conduct of identical entities in other States will not be attributable to the State. The determination whether a particular entity is a State organ must be the result of a factual inquiry.[200]

It also notes that:

> [T]he proviso that the organ of the State "was acting *in that capacity** in the case in question" is not defined. The reference to "capacity" could be read as enabling a wrongdoing State to dispute its liability on the grounds that, while the State organ committed the wrongful act, it acted outside its scope of competence. Such a reading would undermine the principle that responsibility for the action of State organs is governed by international law.[201]

The meaning of the term "acting in that capacity" will be discussed in the context of article 10.[202]

The term "organ"

162. In the case of a "corporate" entity such as the State it is useful to distinguish between organs of the State (persons or entities which are part of the structure of the State and whose conduct as such is attributable to the State) and agents. As explained in the commentary, "agents" for this purpose are persons or entities in fact acting on behalf of the State by reason of some mandate or direction given by a State organ, or (possibly) who are to be regarded as acting on behalf of the State by reason of the control exercised over them by such an organ. The latter category is dealt with in article 8.[203] There are substantive differences between the two cases. For example, the unauthorized acts of organs are to be attributed to the State for the purposes of responsibility,[204] whereas different considerations may apply to the unauthorized acts of agents: this distinction is made by article 10. Thus while agreeing with France's observation that the draft articles should cover both the situation of "organs" and that of "agents", the Special Rapporteur believes that the distinction made between the two categories in articles 5 and 8 should be maintained.

The reference to "internal law"

163. As noted by several Governments, there is a problem with the *renvoi* in article 5 to the internal law of the State in determining whether a person or entity is to be classified as an organ. Article 5 refers to "any State organ having that status under the internal law of that State". No doubt internal law will be highly relevant to the question whether a person or body is an "organ", but there are several difficulties in treating internal law alone as decisive for that purpose. In the first place, the status of governmental entities in many systems is determined not only by law but by practice and convention; reference only to law can be seriously misleading.[205] Secondly, internal law may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Thirdly, even if it does so, this will be for its own purposes, and there is no security that the term "organ" used in internal law will have the very broad meaning that it has under article 5. For example, under some legal systems the term "government" has a specialized meaning, referring only to bodies at the highest level such as the Head of State and the Cabinet of Ministers. In other legal systems, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State.[206] The commentary to article 5 accepts this point, noting that the reference to internal law is "without prejudice to the different meanings which the term 'organ' may have, particularly in the internal public law of different legal systems".[207] But in most legal systems, the only classification of organs will be for the purposes of "internal public law".

The requirement that the organ act "in that capacity in the case in question"

164. Article 5 concludes with the phrase "provided that organ was acting in that capacity in the case in question". The term "acting in that capacity" will be discussed in the context of article 10.[208] Subject to that point, there is no difficulty with the notion that a person or entity may have various capacities, not all involving conduct as an "organ" of the State. To take an obvious case, the Head of

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[198] A/CN.4/488 and Add.1–4 (reproduced in the present volume), comments by France on article 5.

[199] Ibid., comments by the United Kingdom on article 5.

[200] Ibid., comments by the United States on article 4.

[201] Ibid.

[202] See paragraphs 235–240 below.

[203] See paragraphs 195–213 below.

[204] See paragraphs 235–240 below, for the question of *ultra vires* acts of persons under cover of their official functions.

[205] See Brownlie, op. cit., p. 136 (citing the case of the Metropolitan Police in the United Kingdom).

[206] See, for example, Case No. VI ZR 267/76 (*Church of Scientology Case*), *Neue Juristische Wochenschrift*, 1979, p. 1101; and *International Law Reports*, vol. 65 (1984), p. 193 (Germany, Federal Supreme Court); *Propend Finance Pty Limited and Others* v. *Sing and Others*, England, High Court, Queen's Bench Division, 14 March 1996 and Court of Appeal, 17 April 1997, *International Law Reports*, vol. 111 (1998), p. 611. These were State immunity cases, but the same principle must also apply in the field of State responsibility.

[207] *Yearbook …1973*, vol. II, p. 193, para. (13) of the commentary to article 5.

[208] See paragraphs 232–240 below.

State may act in a private capacity;[209] so may a diplomatic agent.[210] But the language of the proviso might tend to suggest that there is a special onus on a claimant to show, over and above the fact that the conduct was that of an organ, that it was acting in an official capacity. A more neutral phrase is to be preferred.

165. Before reaching conclusions on article 5, it is necessary to consider article 6, to which it is closely linked.

(b) *Article 6 (Irrelevance of the position of the organ in the organization of the State)*

166. Article 6 provides:

> The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.

167. This is not so much a rule of attribution as an explanation of the scope of article 5. As the commentary points out, in the nineteenth century there had been uncertainty on each of the issues addressed in article 6, but these uncertainties had been conclusively resolved through State practice and judicial opinions. Article 6 is in a sense a memento of these dead controversies, but as will be seen, a number of new issues have taken their place.[211]

Comments of Governments on article 6

168. The only comment so far is that of France, which fully accepts the principle underlying article 6 but notes that:

> the distinction it establishes between functions of an international character and those of an internal character is not without ambiguity. It would, furthermore, be preferable to replace the expression "constituent, legislative, executive, judicial or other power" ("pouvoir constituant, législatif, judiciaire ou autre") by "exercises constituent, legislative, executive, judicial or other functions" ("exerce des fonctions constituantes, législatives, exécutives, judiciaires ou autres").[212]

Substantive issues raised by article 6

169. Article 6 has three elements, which need to be considered in turn.

(i) "Whether that organ belongs to the constituent, legislative, executive, judicial or other power"

170. As suggested by France, it seems better to refer not to legislative, judicial, etc. branches of government but to those functions, which are very differently distributed under different national systems. However the comment raises a question of substance. Are these words intended as words of limitation, namely, so as to limit State responsibility to cases of the exercise of public power? At least one commentator has argued that the existing text and commentary at least leave the matter doubtful.[213] Clearly doubts on so fundamental a question should be resolved.

171. As to the interpretation of the existing text, the position seems to the Special Rapporteur to be clear. Provided that a State organ is acting in its capacity as such (and not in some extraneous, purely private capacity), all its conduct is attributable to the State. This is what article 5 says prima facie, and the reference to the different "powers" of government in article 6 is nowhere expressed to limit the scope of article 5.

172. As to the question of whether article 5 should be so limited, again the position seems clear. It is true that distinctions between different classifications of State conduct, by reference to terms such as *acta jure gestionis* and *acta jure imperii*, have developed in the last 20 years in the context of the immunity of States from the jurisdiction of national courts.[214] But that is an entirely different question from State responsibility, and there is no basis for the idea that a State could evade responsibility for one of its own acts by arguing, not that the act was committed by a private party, but that it could have been so committed, that is, that it was an act *jure gestionis*. Thus, for example, a State could not refuse to employ persons of a particular race or religion, or refuse to employ women, in defiance of its international obligations in relation to non-discrimination. Nor could it refuse to procure goods from nationals of a particular State, or refuse to pay debts owing to such nationals, in violation of a bilateral trade or investment treaty or a multilateral trade commitment. The fact that in each of these cases the conduct in question could be classified as *acta jure gestionis* is irrelevant.

173. This is the position taken in most modern doctrine,[215] and by those courts which have considered the question. For example the Mayor of Palermo requisitioned and attempted to run an industrial plant in order to maintain local employment; it was accepted without question that his conduct was attributable to the State of Italy, irrespective of the classification of that conduct.[216] The jurisprudence of the human rights bodies is equally clear, and is reflected in the following passage from the Swedish Engine-Drivers' Union case:

> The Convention nowhere makes an express distinction between the functions of a Contracting State as holder of public power and its responsibilities as employer. In this respect, Article II is no exception. What is more, paragraph 2 *in fine* of this provision clearly indicates that the State is bound to respect the freedom of assembly and association of its employees, subject to the possible imposition of "lawful restrictions" in the case of members of its armed forces, police or administration.
>
> Article II is accordingly binding upon the "State as employer", whether the latter's relations with its employees are governed by public or private law. Consequently, the Court does not feel constrained to take

[209] As is recognized in the Commission's draft articles on jurisdictional immunities of States and their property, art. 2, para. 1 (*b*) (v), and paras. (17)–(19) of the commentary (*Yearbook ... 1991*, vol. II (Part Two), pp. 18–19).

[210] See the Vienna Convention on Diplomatic Relations, art. 39, para. 2.

[211] See *Yearbook … 1973*, vol. II, pp. 197–198, para. (16) of the commentary to article 6.

[212] A/CN.4/488 and Add.1–4 (reproduced in the present volume), comments by France on article 6.

[213] Condorelli, "L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances", pp. 66–76.

[214] It has frequently been pointed out that different legal systems interpret and apply these distinctions differently, and that the extent of the international consensus is limited. See, for example, Cosnard, *La soumission des États aux tribunaux internes: face à la théorie des immunités des États*.

[215] See especially Condorelli, loc. cit. In addition, see Dipla, op. cit., pp. 40–45 and authorities cited.

[216] *I.C.J. Reports 1989* (see footnote 172 above).

into account the circumstance that in any event certain of the applicant's complaints appear to be directed against both the Office and the Swedish State as holder of public power. Neither does the Court consider that it has to rule on the applicability, whether direct or indirect, of Article II to relations between individuals *stricto sensu*.[217]

174. Several clarifications are however in point. First, the character of an act may be relevant, among other factors, in deciding whether a State organ or official has acted in its capacity as such, or as a private individual or entity.[218] Secondly, the distinction between attribution and breach needs always to be borne in mind. The reason a State is not, generally speaking, internationally responsible for the "private law" acts of its organs (e.g. the breach of a commercial contract entered into by the State) has nothing to do with attribution; it is simply that the breach of a contract is not a breach of international law but of the relevant national law. Thirdly, this discussion only relates to the conduct of organs of the State in the sense of article 5. The position of separate entities or of State-owned corporations is different and is discussed below.

(ii) "Whether its functions are of an international or an internal character"

175. This qualification is unnecessary. There cannot be the slightest doubt that State responsibility is attracted by acts whether "of an international or an internal character". In addition the formula tends to suggest a too categorical distinction between the "international" and "internal" domains. It will be sufficient to make the point in the commentary.

(iii) "Whether it holds a superior or a subordinate position in the organization of the State"

176. It is fundamental to the idea of State responsibility that the conduct of any organ within the governmental system, from the Head of State down, is attributable to the State, provided that the conduct is carried out by that organ in its capacity as such. As the commentary notes,

> After the Second World War the Italian/United States of America, Franco-Italian and Anglo-Italian Conciliation Commissions established under article 83 of the Treaty of Peace of 10 February 1947 often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officials, and always agreed to treat the acts of such persons as acts attributable to the State.[219]

The situation is thus beyond doubt, and is confirmed by more recent decisions. For example, in the *ELSI* case it was uncontested that the acts of a local government official, the Mayor of Palermo, were attributable to the Italian State.[220]

177. As to the formula, "whether it holds a superior or a subordinate position", this might appear to omit "intermediate" bodies and bodies which because of their independence it may be inappropriate to describe as subordinate (e.g. the criminal courts). The phrase "whatever position it holds in the organization of the State" is to be preferred.

Placement of article 6

178. Clearly the substance of article 6 should be retained. Since it is a clarification of the term "organ" in article 5, rather than a distinct rule of attribution, it could be included in the formulation of article 5 itself. This would have the advantage of allowing the three major rules of attribution in articles 5, 7 and 8 to be presented without interruption.

Conclusions on articles 5 and 6

179. For these reasons, articles 5 and 6 should be combined in a single article, with the various minor amendments indicated. In addition, and for greater consistency with article 4, the reference to internal law should be deleted. The commentary should explain the relevance of internal law in determining whether a person or body is an "organ" for the purposes of the draft articles, and the irrelevance of the classification of its functions once it is determined that the organ is acting as such.[221]

(c) *Article 7 (Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority)*

180. As its title suggests, article 7 deals with "other entities", namely, bodies which are not organs in the sense of article 5, but which nonetheless exercise governmental authority. It provides:

> 1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.
>
> 2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

181. The commentary to article 7 notes that the principle of attribution should apply to all entities which exercise governmental functions, both "when the basis of their separate existence is the local or territorial setting which they act (as in the case of municipalities, provinces, regions, cantons, component States of a federal State and so on) and when this basis is, instead, the special nature of the functions performed (as may be the case of a bank of issue, a transport company entitled to exercise police powers, and so forth)".[222] Article 7 is designed to deal with both categories.

182. As to paragraph 1, the commentary focuses on the component units of federal States. It asserts "the principle of the international responsibility of the federal State for the conduct of organs of component States amounting to a breach of an international obligation of the federal State, even in situations in which internal law does not provide

[217] European Commission of Human Rights, *Series A: Judgments and Decisions*, vol. 20, *Judgment of 6 February 1976* (Registry of the Court, Council of Europe, Strasbourg, 1976), p. 14. To similar effect, see *Schmidt and Dahlström*, ibid., vol. 21, p. 15.

[218] See paragraph 164 above.

[219] *Yearbook … 1973*, vol. II, p. 197, para. (14) of the commentary to article 6, and the decisions cited in footnote 206 above.

[220] *I.C.J. Reports* 1989 (see footnote 172 above), p. 52, para. 75.

[221] For the text of the proposed provision, see paragraph 284 below.

[222] *Yearbook … 1974*, vol. II (Part One), document A/9610/Rev.1, p. 277, para. (2) of the commentary to article 7.

the federal State with means of compelling the organs of component States to abide by the federal State's international obligations".[223] Only when the obligation in question is incumbent on the component unit, as distinct from the federal State, does the question of separate attribution to that unit arise.[224]

183. As to paragraph 2, the commentary notes its origin in the work of the 1930 Hague Conference for the Codification of International Law, where reference was made to such "'autonomous institutions' which exercise public functions of a legislative or administrative character".[225] It also notes the proliferation of these bodies and the difficulty of defining them other than by reference to the delegation of public power by law:

> The fact that an entity can be classified as public or private ..., the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, and the fact that it is not subject to State control, or that it is subject to such control to a greater or lesser extent ... do not emerge as decisive criteria for the purposes of attribution or non-attribution to the State of the conduct of its organs. ... [T]he most appropriate solution is to refer to the real common feature which these entities have: namely that they are empowered, if only exceptionally and to a limited extent, to exercise specified functions which are akin to those normally exercised by organs of the State ... Thus, for example, the conduct of an organ of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it falls within the exercise of those powers.[226]

The term "entity" was chosen on the basis that it was "wide enough in meaning to cover bodies as different as territorial governmental entities, public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies".[227]

Comments of Governments on article 7

184. France queries the notion of "territorial governmental entity", and suggests that the case of federal States be specifically mentioned.[228]

185. The United Kingdom asks for clearer guidance to be provided on the increasingly common phenomenon of parastatal entities (e.g. private security firms acting as railway police or as prison guards). Another example is former State corporations which have been privatized but which may retain certain public or regulatory functions.[229] It calls for clarification of the notion of "governmental authority". Along similar lines, Germany suggests that chapter II "might not sufficiently take into account the fact that States increasingly entrust persons outside the structure of State organs with activities normally attributable to a State".[230]

"Territorial governmental entities"

186. The first issue presented by article 7 is its separate identification of "territorial governmental entities", which includes a wide range of territorial administrative units. The essential difficulty here was analysed by Czechoslovakia in its comment of 24 July 1981:

> The internal organization of a State is not subject to international law, but is governed by its national law ... This principle has been duly reflected in articles 5 and 6. As far as the acts of organs of entities of territorial division of States are concerned, these organs should be taken as forming part of the structure of a State. Consequently, acts of organs of this kind should be already covered by the provisions of articles 5 and 6. In this light, the provision of article 7, paragraph 1, seems to be superfluous, at least as far as the entities of territorial division of a State without any international personality are concerned.[231]

187. The present Special Rapporteur agrees with this analysis. As the commentaries to articles 5 and 6 make clear, those articles were intended to cover organs of government, superior, autonomous or subordinate, whether located in the capital or elsewhere, and whatever the extent of their jurisdiction within the State. On that basis, it is clear that local and regional governmental units are already covered by those articles, whatever their designation or status might be under the constitutional law of the State concerned. To treat them as "entities separate from the State machinery proper"[232] is an error. The State as a whole is not to be equated with its central government. Moreover local or regional governmental units are like the organs of central government, and quite unlike the "entities" covered by article 7, paragraph 2, in that all their conduct as such is attributable to the State, and not only conduct involving the exercise of "governmental authority" in some narrower sense.[233] The commentary to article 7 expressly accepts the established principle that a State federal in structure is a State like any other, and that it cannot rely on the federal or decentralized character of its constitution to limit the scope of its international responsibilities.[234] The separate identification of "territorial governmental entities" cuts across that principle.

188. This conclusion is not affected by the fact that federal or other territorial units within a State have separate legal personality under the law of that State. This is true of many of the organs referred to in article 5: it is for example common for the central departments of government to have separate legal personality, but this does not affect the principle of "the unity of the State" for the purposes of international law, as Arbitrator Dupuy pointed out in his Preliminary Award in the *Texaco* case.[235] No doubt the position may be different in those exceptional cases where component units in a federal State exercise some limited international competencies, for example, for the purposes of concluding treaties on local issues. To the extent that

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[223] Ibid., p. 279, para. (5) of the commentary to article 7; see also the authorities cited on pages 279–280, paras. (5)–(9).

[224] Ibid., p. 280, para. (10) of the commentary to article 7.

[225] Ibid., p. 282, para. (15) of the commentary to article 7, and p. 280, footnote 578 ("Basis of Discussion No. 23 of the Preparatory Committee for the Hague Conference (*Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 2, p. 223)").

[226] Ibid., para. (18) of the commentary to article 7.

[227] Ibid., pp. 282–283, para. (19) of the commentary to article 7.

[228] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by France on article 7, para. 1.

[229] Ibid., comments by the United Kingdom on article 10.

[230] Ibid., comments by Germany on chapter II.

[231] *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 73, para. 5.

[232] *Yearbook … 1974*, vol. II (Part One), document A/9610/Rev.1, p. 282, para. (17) of the commentary to article 7.

[233] See paragraphs 164 and 170–174 above.

[234] See *Yearbook … 1974*, vol. II (Part One), document A/9610/Rev.1, p. 279, para. (5) of the commentary to article 7, and paragraph 182 above.

[235] *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic, International Law Reports*, vol. 53 (1979), p. 415, para. 23. See paragraph 154 above.

these treaties do not commit the federation as such but only the local units, no question of State responsibility in the sense of the draft articles can arise. To the extent that they do commit the federation, the ordinary rules of attribution stated in article 5 should apply. It is accordingly recommended that article 7, paragraph 1, and the reference to territorial governmental entities in article 7, paragraph 2, be deleted.[236] The commentary to article 5 should make it clear that the organs of the State include the organs of local and regional governmental units of the State, whatever their designation may be.

"Parastatals" exercising government functions

189. The position is different so far as paragraph 2 is concerned. The number of "parastatal" entities performing governmental functions is increasing and the question needs to be addressed in the draft articles. For the reasons stated in the commentary and affirmed in various government comments, this aspect of article 7 should be maintained. It is clear from the commentary that article 7 intends to catch such persons as private security guards acting as prison warders, to the extent that they exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations.[237] This addresses concerns of the United Kingdom referred to above,[238] although no doubt the commentary could provide more and more recent examples.[239]

190. It is another thing to identify precisely the scope of "governmental authority" for this purpose, and it is very doubtful whether article 7 itself should attempt to do so. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be, not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised, and the extent to which the entity is accountable to government for their exercise. The commentary can give guidance on these questions, but they are essentially questions of the application of a general standard to particular and very varied circumstances. It will be a matter for the claimant to demonstrate that the injury does relate to the exercise of such powers: the language of the proviso to that effect in paragraph 2 should be retained, in contrast to the formulation already proposed for article 5.[240]

[236] This is consistent with the position taken in the 1969 Vienna Convention, and with the literature on federal States in international law. See, for example, Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study*; Bernier, *International Legal Aspects of Federalism*; Michelmann and Soldatos, eds., *Federalism and International Relations: The Role of Subnational Units;* and Opeskin and Rothwell, *International Law and Australian Federalism*.

[237] Cf. also the *Barthold judgment of 25 March 1985*, European Commission of Human Rights, *Series A: Judgments and Decisions*, vol. 90 (Registry of the Court, Council of Europe, Strasbourg, 1985), p. 21 (rules of professional association given force of law).

[238] See paragraph 185 above.

[239] A more recent example of an entity within the category of "separate entities" under article 7, para. 2, is the Foundation for the Oppressed. See *Hyatt International Corporation* v. *Government of the Islamic Republic of Iran*, Case No. 134, *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1987), vol. 9, p. 72.

[240] See paragraph 164 above.

Conclusion as to article 7

191. For these reasons, it is recommended that the references to "territorial governmental entities" in article 7 and elsewhere be deleted, but that the substance of article 7, paragraph 2, be retained.[241]

(d) *Article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State)*

192. In contrast to articles 5 and 7, which deal with State organs or other entities exercising governmental authority, article 8 deals with other cases where persons or groups have in fact acted "on behalf of" the State. It provides:

> The conduct of a person or group of persons shall also be considered as an act of the State under international law if:
>
> (*a*) It is established that such person or group of persons was in fact acting on behalf of that State; or
>
> (*b*) Such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

Comments of Governments on article 8

193. Although few Governments commented on article 8 as such, a number of general comments were directed to the problem of State responsibility for acts of individuals or entities not formally part of the State structure. Germany, Mongolia and the United Kingdom all suggested that the draft articles should be more expansive in dealing with this category.[242] The United States, for its part, agreed with "the basic thrust of [article 8] that a relationship between a person and a State may exist de facto even where it is difficult to pinpoint a precise legal relationship".[243]

194. Like article 7, article 8 deals with two different cases. Article 8 (*a*) is concerned with persons or groups of persons acting in fact on behalf of the State. Article 8 (*b*) deals with the much rarer case of conduct in the exercise of this governmental authority by a person or persons not actually authorized to act by the State but "justifiably" acting in its absence. It is necessary to deal with the two separately.

(i) *Persons acting in fact on behalf of the State*

195. As the commentary points out, the attribution to the State or conduct in fact directed or authorized by it is "practically undisputed".[244] In such cases, it does not matter that the person or persons involved are private individuals; nor does it matter whether or not their conduct involves "governmental" activity. The commentary also

[241] A few minor amendments to the language of paragraph 2 are proposed. See paragraph 284 below for the proposed text and notes.

[242] See paragraphs 149, 151 and 152 above.

[243] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by the United States on article 8.

[244] *Yearbook … 1974*, vol. II (Part One), document A/9610/Rev.1, p. 284, para. (7) of the commentary to article 8, and para. (4), citing, *inter alia*, the *D. Earnshaw and Others (Zafiro)* and *Stephens* cases (UNRIAA, vol. VI (Sales No. 1955.V.3), p. 160; and ibid., vol. IV (Sales No. 1951.V.1), p. 267).

makes it clear that the term "person" includes an entity, whether or not it has separate legal personality.[245]

196. In its formulation of article 8 (*a*), the words "it is established that" were added. According to the commentary this was done because:

> [I]n each specific case in which international responsibility of the State has to be established, it must be genuinely proved that the person or group of persons were actually appointed by organs of the State to discharge a particular function or to carry out a particular duty, that they performed a given task at the instigation of those organs.[246]

But it is always the case that a claimant has to show that the conditions for State responsibility are satisfied.[247] Why should this burden be heavier in cases where actual authority or direction is relied on, as compared with other cases? It is suggested that the phrase be deleted.

The relevance of State control

197. In the passage just cited, the phrases "actually appointed" and "performed … at the instigation of" together imply that article 8 (*a*) is limited to cases of actual direction or instruction, that is, to cases of actual agency. Elsewhere the commentary is more equivocal. For example, in the commentary to article 11 it is said that:

> Where that Government is known to encourage and even promote the organization of [armed opposition] groups, to provide them with financial assistance, training and weapons, and to co-ordinate their activities with those of its own forces for the purpose of possible operations, and so on, the groups in question cease to be individuals from the standpoint of international law. They become formations which act in concert with, and at the instigation of, the State, and perform missions authorized by or even entrusted to them by that State. They then fall into the category of persons or groups which are linked, in fact if not formally, with the State machinery and are frequently called "*de facto* organs", and which were dealt with in article 8 (*a*) of this draft.[248]

The language of "promotion" and "coordination" is less emphatic than that of "appointment" or "instigation", and it raises the question whether the de facto control of a State over a person or group should be treated as a distinct basis for attribution. If not, then the language of article 8 (*a*) may need reconsideration. As a matter of ordinary language, a person may be said to act "on behalf of" another person without any actual instruction or mandate from that other person. The question is not simply one of drafting, it is one of substance. To what extent should de facto agency be limited to cases of express agency?

The Military and Paramilitary Activities in and against Nicaragua *case*

198. This was a key issue in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.[249] Was the conduct of the contras as such attributable to the United States, so as to hold the latter generally responsible for that conduct? ICJ analysed that issue almost exclusively in terms of the notion of "control". On the one hand, it held that individual attacks by Nicaraguan operatives (so-called "UCLAs") were attributable to the United States by reason of the "planning, direction, support and execution" of United States agents.[250] But it went on to consider, and reject, the broader claim of Nicaragua that all the conduct of the contras was attributable to the United States by reason of its control over them. It concluded that:

> [D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf. ... All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. *For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed*.*[251]

Thus, while the United States was held responsible for its own support for the contras, only in a few individual instances were the acts of the contras themselves held attributable to it.

199. It is relevant to note the comments of Judge Ago on these issues. Referring to article 11 of the draft articles, he stated in his concurring opinion that:

> It would ... be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name or on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does international law recognize, as a rare exception to the rule, that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptation of that term, may be held to be acts of that State.[252]

Judge Ago went on to criticize the Court for its use of the term "control". In his view,

> the situations which can be correctly termed cases of indirect responsibility are those in which one State that, in certain circumstances, exerts control over the actions of another can be held responsible for an internationally wrongful act *committed by and imputable to that second State*.[253]

According to this view, the criterion of control is relevant in inter-State relations (indeed, the term "direction or control" is used in article 28). But it is not a criterion for attributing the conduct of non-State entities to the State.

200. Although there was no disagreement between Judge Ago and the majority of the Court as to the result, there was a difference in approach. The Court was prepared to hold the United States responsible for conduct of the contras in the course of specific operations over which the United States was shown to have "effective control", whereas Judge Ago required nothing less than specific authorization of the wrongful conduct itself. On the other hand, they agreed that a *general* situation of dependence and support was insufficient to justify attribution.

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[245] Ibid., p. 283, para. (1) of the commentary to article 8.

[246] Ibid., pp. 284–285, para. (8) of the commentary to article 8.

[247] See paragraph 155 above.

[248] *Yearbook … 1975*, vol. II, p. 80, para. (32) of the commentary to article 11.

[249] *I.C.J. Reports 1986* (see footnote 32 above), p. 14.

[250] Ibid., p. 50, para. 86.

[251] Ibid., p. 62, para. 109, and pp. 64–65, para. 115.

[252] Ibid., pp. 188–189, para. 16.

[253] Ibid., p. 189, footnote 1.

The Tadić *case*

201. The International Tribunal for the Former Yugoslavia had to face a seemingly analogous problem in the *Tadić* case.[254] The question there was whether the applicable law on a war crimes charge was the law of international or internal armed conflict. That in turn depended on whether the victims of the alleged crimes were at the relevant time "in the hands of a Party to the conflict or Occupying Power of which they are not nationals" within the meaning of article 4 of the Geneva Convention relative to the Treatment of Civilian Persons in Time of War. If they were not, the accused's conduct was to be judged only by reference to common article 3 of the Geneva Conventions of 12 August 1949.

202. According to the majority of the Trial Chamber, the Court in *Military and Paramilitary Activities in and against Nicaragua* "set a particularly high threshold test for determining the requisite degree of control".[255] After noting the differences between the two cases, it formulated the question in the following terms:

> [W]hether, even if there had been a relationship of great dependency on the one side, there was such a relationship of control on the other that, on the facts of the instant case, the acts of the VRS [Republika Srpska Army] ... can be imputed to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro).[256]

It concluded that:

> There is, in short, no evidence on which this Trial Chamber may confidently conclude that the armed forces of the Republika Srpska, and the Republika Srpska as a whole, were anything more than mere allies, albeit highly dependent allies, of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) in its plan to achieve a Greater Serbia from out of the remains of the former Yugoslavia. The continued, indirect involvement of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the armed conflict in the Republic of Bosnia and Herzegovina, without the ability to impute the acts of the armed forces of the Republika Srpska to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), gives rise to issues of State responsibility beyond the scope and concern of this case.[257]

This finding had direct consequences for the innocence of the accused in relation to charges which were dependent on the finding of an international armed conflict.

203. Judge McDonald dissented on this point, essentially for three reasons. As a matter of law, the majority had read the *Nicaragua* test too strictly; as a matter of fact, she disagreed over the inferences to be drawn from the evidence (including the fact that all the members of the armed forces of Republika Srpska continued to be paid and armed by the Federal Republic of Yugoslavia (Serbia and Montenegro)). But in particular, in her view:

> By importing the standard of effective control which was designed to determine State imputability in *Nicaragua* to determine both whether a victim is a protected person and for the purpose of characterizing the nature of an armed conflict, the majority has expanded the reach of the holding of *Nicaragua* in a way that is incompatible with international humanitarian law.[258]

204. The decision is under appeal and it would be inappropriate to express any view about it. What can be said, however, is that both the majority and minority interpreted *Military and Paramilitary Activities in and against Nicaragua* as allowing attribution to be based on the exercise of command and control in relation to a particular operation, and that neither went as far as Judge Ago in requiring a "specific charge" or instruction.

The jurisprudence of the Iran-United States Claims Tribunal

205. The Iran-United States Claims Tribunal has also had to deal with this problem, although care is needed in analysing the cases since its jurisdiction is explicitly extended to claims in contract against any "entity controlled by" either contracting party. In such cases, the Tribunal has acted as a surrogate for the relevant national court and issues of State responsibility have not been relevant. In particular, the fact that the Islamic Republic of Iran guaranteed the payment of awards from the escrow fund did not necessarily mean it was liable on the awards themselves.[259]

206. The question of the responsibility of a State for its controlled corporations raises special issues and is discussed below. Turning to the question of "agency" dealt with in article 8 (*a*), the Tribunal has applied a broadly de facto analysis to such bodies as the Komitehs or Revolutionary Guards in the period prior to their incorporation as organs of the State. For example in *Yeager* v. *Islamic Republic of Iran*, the Tribunal said:

> While there is some doubt as to whether revolutionary "Komitehs" or "Guards" can be considered "organs" of the Government of Iran, since they were not formally recognized during the period relevant to this Case, attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law. It is generally accepted in international law that a State is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the State. *See* ILC-Draft Article 8(a).[260]

The Loizidou *case*

207. The relationship of a State's control over a situation to its responsibility for the situation was also an issue before the European Court of Human Rights in *Loizidou* v. *Turkey*. The question was whether Turkey could be held responsible for the denial of access to the applicant's property in northern Cyprus arising from the division of Cyprus and the consequent barriers to freedom of movement. The Court said:

> It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus ... that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in

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[254] *Prosecutor* v. *Duško Tadić*, International Tribunal for the Former Yugoslavia, case No. IT-94-1-A, judgement of 15 July 1999, *International Law Reports*, vol. 112 (1997), p. 1.

[255] Ibid., p. 190, para. 585 (Judges Stephen and Vohrah).

[256] Ibid., p. 191, para. 588.

[257] Ibid., p. 200, para. 606.

[258] Ibid., p. 270, para. 21 (dissenting opinion of Judge McDonald).

[259] The distinction was explained by the Tribunal in *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran*, Case No. 24, *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1985), vol. 4, p. 143; see also Caron, loc. cit., pp. 112–119.

[260] Case No. 10199, *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1988), vol. 17, p. 103, and see the whole passage at pp. 103–105. It should be noted that in that case there was evidence of encouragement from organs of the State but no evidence of any instructions or directives.

the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC" ... Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.[261]

The Court thus based Turkey's responsibility for the denial to the applicant of freedom of access to its property, contrary to article 1 of Protocol 1, on a global appreciation of Turkey's "control" over the island, an appreciation based both on the number of Turkish troops there and on the illegitimacy of the "TNRC". In effect, the Court held,

in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action whether lawful or unlawful it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[262]

208. This "global" approach was criticized in the dissenting opinion of Judge Bernhardt, who said that:

[T]he presence of Turkish troops in northern Cyprus is one element in an extremely complex development and situation. As has been explained and decided in the Loizidou judgment on the preliminary objections ... Turkey can be held responsible for concrete acts done in northern Cyprus by Turkish troops or officials. But in the present case, we are confronted with a special situation: it is the existence of the factual border, protected by forces under United Nations command, which makes it impossible for Greek Cypriots to visit and to stay in their homes and on their property in the northern part of the island. The presence of Turkish troops and Turkey's support of the "TRNC" are important factors in the existing situation; but I feel unable to base a judgement of the European Court of Human Rights exclusively on the assumption that the Turkish presence is illegal and that Turkey is therefore responsible for more or less everything that happens in northern Cyprus.[263]

The case lies in the shadowland between issues of attribution and causation; the latter will be dealt with in reviewing part two of the draft articles, especially article 44. But it should be observed, first, that the majority of the Court regarded itself as applying principles of "imputability"[264] and, secondly, that they did not base themselves exclusively on the unlawful character of Turkish control over northern Cyprus.[265]

Conduct by State-owned corporations

209. Related questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned, is their conduct attributable to it? In discussing this issue it is necessary to recall, in accordance with the statement of ICJ in the *Barcelona Traction* case, that international law acknowledges the general separateness of corporate entities at national level, except in special cases where the "corporate veil" is a mere device or a vehicle for fraud.[266]

210. Clearly, the fact that the State initially establishes a corporate entity (whether by a special law or pursuant to general legislation) is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.[267] Since corporate entities, although owned by (and in that sense subject to the control of) the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State, unless they are exercising aspects of governmental authority as referred to in article 7, paragraph 2. This was the position taken, for example, in relation to the seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.[268] On the other hand, where there was evidence that the corporation was exercising public powers,[269] or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[270] the conduct in question has been attributed to the State.

211. The distinction outlined in the previous paragraph seems to be a defensible one.[271] The consequence of attribution is to aggregate all the conduct concerned and to connect it to the State as an entity of international law, for the purposes of State responsibility. But this does not mean that differences, including differences in internal

[261] European Court of Human Rights, *Reports of Judgments and Decisions* 1996–VI, No. 26, *Judgment of 18 December 1996 (Merits)* (Registry of the Court, Council of Europe, Strasbourg), pp. 2235–2236, para. 56.

[262] Ibid., p. 2234–2235, para. 52, referring back to its decision on the preliminary objections (ibid., *Series A: Judgments and Decisions*, vol. 310 *(Preliminary Objections), Judgment of 23 March 1995*, p. 23, para. 62).

[263] Ibid. (see footnote 261 above), p. 2243, para. 3, dissenting opinion of Judge Bernhardt.

[264] Ibid., p. 2234, para. 52.

[265] The lack of separate international status of the "TRNC" was however relevant, since it deprived Turkey of the justification of basing its occupation on the consent of the latter. In effect the "TRNC" was treated as a subordinate organ of Turkey, and in this sense considerations of legality affected the decision on attribution.

[266] *I.C.J. Reports 1970* (see footnote 16 above), p. 3.

[267] For example. the workers' councils considered in *Schering Corporation* v. *Islamic Republic of Iran*, Case No. 38, *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1985), vol. 5, p. 361; *Otis Elevator Co.* v. *Islamic Republic of Iran*, Case No. 284, ibid., vol. 14, p. 283; *Eastman Kodak Company* v. *Islamic Republic of Iran*, Case No. 227, ibid., vol. 17, p. 153; discussed by Aldrich, op. cit., pp. 204–206; and Caron, loc. cit., pp. 134–135.

[268] *SEDCO, Inc.* v. *National Iranian Oil Company*, Case No. 129, ibid., vol. 15, p. 23. See also *International Technical Products Corp.* v. *Islamic Republic of Iran*, Case No. 302, ibid., vol. 9, p. 206 (acts of Bank Tejarat, a nationalized bank, not attributable to Iran); *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran,* Case No. 36, ibid., vol. 12, p. 349 (contractual liabilities of nationalized companies not attributable to the Islamic Republic of Iran in the absence of proof of "orders, directives, recommendations or instructions from the ... Government"). See the discussion by Caron, loc. cit., pp. 163–175.

[269] *Phillips Petroleum Co. Iran* v. *Islamic Republic of Iran*, Case No. 39, ibid., vol. 21, p. 79; *Petrolane Inc*. v. *Islamic Republic of Iran*, Case No. 131, ibid., vol. 27, p. 64.

[270] *Foremost Tehran, Inc.* v. *Islamic Republic of Iran*, Case No. 37, ibid., vol. 10, p. 228; and *American Bell International* v. *Islamic Republic of Iran*, Case No. 48, ibid., vol. 12, p. 170.

[271] See also Human Rights Committee, Communication No. R.14/61, *Hertzberg* v. *Finland* (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40*, A/37/40, annex XIV, p. 161), para. 9.1 (discretionary decision of Finnish Broadcasting Company executive not to broadcast a particular programme; conduct attributable to Finland on the grounds of its "dominant stake (90 per cent)" in the Company, but also on the basis that the Company was "under specific government control". See also Council of Europe, European Commission of Human Rights, *Yearbook of the European Convention on Human Rights 1971*, Application No. 4125/69, *X.* v. *Ireland*, vol. 14 (The Hague, Martinus Nijhoff, 1973), p. 198; and the case of *Young, James and Webster*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 44 (Registry of the Court, Council of Europe, 1981).

legal status, between the entities involved are irrelevant in deciding whether conduct should be attributable. It is here that the approach to corporate personality set out by ICJ in *Barcelona Traction* must be taken into account. That approach, though not itself part of the law of attribution is a factor to be applied in the process of attribution. Consequently, the extension of article 8 (*a*) to cover cases of conduct carried out under the direction and control of a State would not have the effect of making all the conduct of all State corporations attributable to the State for the purposes of international law.

The question for the Commission

212. The question is whether article 8 (*a*) should extend beyond cases of actual authorization or instruction to cover cases where specific operations or activities are, in fact, under the direction and control of the State. The present text ("in fact acting on behalf of that State") is less than clear on the point, but Judge Ago seems to have thought that it was limited to cases of express instructions.[272] The difficulty is that, in many operations, in particular those which would obviously be unlawful if attributable to the State, the existence of an express instruction will be very difficult to demonstrate.

213. It can be argued that the issue presented in *Military and Paramilitary Activities in and against Nicaragua* related specifically to the extent of the obligation of a State to control irregular forces or auxiliaries acting under its auspices, and that this is either a question of the content of the relevant primary rule, or alternatively a customary *lex specialis* in that specific context. However that may be, the issue of the direction and control of a State as a basis for attribution does arise in a general way, and in the above-mentioned case the Court appears to have been treating this issue as one of general principle. Moreover it is not clear why conduct of auxiliary armed forces in operations under the specific direction and control of a State should be attributable to the State, but not analogous conduct under State direction and control in other spheres. The position taken by the majority of the Court in *Military and Paramilitary Activities in and against Nicaragua* was not the subject of any specific dissent in that case, nor has it been criticized as overbroad in later decisions or in the literature.[273] For all of these reasons, the Special Rapporteur is provisionally of the view that article 8 (*a*) should be clarified, that it is desirable to attribute to the State specific conduct carried out under its direction and control, and that appropriate language to that effect should be added. The text and commentary should make it clear that it is only if the State directed and controlled the specific operation and the conduct complained of was a necessary, integral or intended part of that operation, that the conduct should be attributable to the State. The principle should not extend to conduct which was only incidentally or peripherally associated with an operation, or which escaped from the State's direction and control.[274]

(ii) *Agents of necessity: the exercise of State powers in the absence of the State*

214. Article 8 (*b*) makes attributable to the State the conduct of a person or group of persons "in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority". The commentary notes that the cases envisaged by subparagraph (*b*) only occur in exceptional cases, such as revolution, armed conflict or foreign occupation where the regular authorities dissolve, are suppressed or are for the time being inoperative. It stipulates that attribution to the State is:

> admissible only in genuinely exceptional cases ... [F]or this purpose, the following conditions must be met: in the first place, the conduct of the person or group of persons must effectively relate to the exercise of elements of the governmental authority. In the second place, the conduct must have been engaged in because of the absence of official authorities ... and, furthermore, in circumstances which justified the exercise of these elements of authority by private persons.[275]

Comments of Governments

215. In its comment of 11 January 1980, Canada reserved its position with respect to article 8 (*b*), on the ground that a more restrictive formulation might be desirable.[276] There have been no more recent comments.

The underlying principle

216. The principle underlying article 8 (*b*) owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces which is recognized as legitimate by article 2 of the Regulations respecting the Laws and Customs of War on Land, annexed to the 1907 Hague Convention IV, and by article 4 A, paragraph 6, of the Geneva Convention relative to the Treatment of Prisoners of War.[277] But there are occasional instances in the field of State responsibility proper. Thus the position of the Revolutionary Guards or Komitehs immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as potentially covered by article 8 (*b*). *Yeager* v. *Islamic Republic of Iran* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The Tribunal held their conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards

[272] See paragraph 199 above.

[273] See, for example, Eisemann, "L'arrêt de la C.I.J. du 27 juin 1986 (fond) dans l'affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci", pp. 179–180; Verhoeven, "Le droit, le juge et la violence: les arrêts Nicaragua c. États-Unis", pp. 1230–1232; and Lang, *L'affaire Nicaragua/États-Unis devant la Cour internationale de Justice*, pp. 216–222.

[274] See paragraph 284 below, for the proposed text of article 8 (*a*).

[275] *Yearbook … 1974*, vol. II (Part One), document A/9610/Rev.1, p. 285, para. (11) of the commentary to article 8. The commentary goes on to distinguish the de facto government of a State, the action of whose organs is covered by article 5, not article 8 (*b*) (ibid., para. (12), footnote 599, citing the award of 17 October 1923 in the *Aguilar-Amory and Royal Bank of Canada Claims (Tinoco Case)* (UNRIAA, vol. I (Sales No. 1948.V.2), pp. 381–382).

[276] *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 94, para. 3.

[277] Cited in *Yearbook … 1974*, vol. II (Part One), document A/9610/Rev.1, p. 285, para. (9) of the commentary to article 8, footnote 593.

at least exercised elements of governmental authority in the absence of the official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.[278]

The formulation of the principle

217. There is thus some authority in favour of the principle stated in article 8 (*b*), applicable in exceptional cases. Its formulation is however slightly paradoxical, in that it implies that conduct which may give rise to State responsibility is nonetheless "justified". It might be objected that if the conduct was wrongful it cannot have been "justified", so that the circumstances required for responsibility pursuant to paragraph (*b*) can never arise. This may have been why the Tribunal in *Yeager* v. *Islamic Republic of Iran* did not use the actual formulation of the paragraph in the dictum just quoted. The commentary to article 8 (*b*) captures rather better the idea that the circumstances must have justified the attempt to exercise police or other functions in the absence of any constituted authority, rather than justifying the actual events as they occurred. This idea could usefully be reinforced in the commentary by reference to cases such as *Yeager* v. *Islamic Republic of Iran*.

218. It is recommended that article 8 (*b*) be retained. For the reasons given the term "justified" should be replaced by the term "called for", thereby indicating that some exercise of governmental functions was called for, but not necessarily the conduct in question.

(e) *Article 9 (Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization)*

219. Article 9 provides that:

> The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

220. The commentary to article 9 stresses that it deals with the limited and precise situation of organs of a State (or international organization) which are in effect "loaned" to another State.[279] The notion of an organ "placed at the disposal" of the receiving State is a very specialized one, implying that the "foreign" organ is acting with the consent, under the authority of and for the purposes of the receiving State. It does not deal with experts from another State or an international organization advising a Government, or individual officials seconded to another State.[280] It also excludes the case of State organs sent to another State for the purposes of the former State, or even for shared purposes, but which retain their own autonomy and status: for example, foreign military liaison or cultural missions,[281] foreign relief or aid organizations. One concrete example of a "loaned" agency is the United Kingdom Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth.[282] Its role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.[283] The commentary cites the *Chevreau* case as an instance of the form of "transferred responsibility" envisaged by article 9: in that case, a British Consul in Persia, in his capacity as temporary chargé of the French Consulate, received but then lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that "the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power".[284] That was a case between the sending and the receiving States, and it is implicit in the Arbitrator's finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for his acts. The more significant question will be: against which of the two States would a third State be entitled or required to claim? In accordance with article 9, the answer is the receiving State, provided the conduct was carried out on behalf of that State.[285]

Comments of Governments on article 9

221. The United Kingdom asks, in the context of article 7, paragraph 2, for clarification on the position of acts of international organizations or their organs (such as the European Commission). It calls for

> a clear indication in the commentary that these draft articles are not intended to deal with the responsibility of member States for acts of international organizations (including military actions under the auspices of international or regional organizations). That is a complex issue; and it is not clear that it is desirable that the position of every international organization be the same. The topic of responsibility for acts of international organizations merits separate, detailed treatment.[286]

It also raises the question of compulsory reference to the courts of another State (e.g. under the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters) or to an international body (e.g. an ICSID tribunal). In such a case, is the referring State free of responsibility, no matter what happens after the case is

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[278] *Iran-United States Claims Tribunal Reports* (see footnote 260 above), p. 104.

[279] The commentary notes (*Yearbook … 1974*, vol. II (Part One), document A/9610/Rev.1, p. 287, para. (6)) that cases of dependent territories such as international protectorates are also not covered by article 9 and this is clearly correct. For example in *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176, it was understood that the responsibility of France acting both on its own behalf and on behalf of Morocco was engaged. The United States had lodged a preliminary objection in order to get clarification of this point; it was withdrawn once the clarification was obtained. See *I.C.J. Pleadings, Rights of Nationals of the United States of America in Morocco*, vols. I–II, p. 235; and *Order of 31 October 1951, I.C.J. Reports 1951*, p. 109.

[280] *Yearbook … 1974*, vol. II (Part One), document A/9610/Rev.1, pp. 286–287, para. (2) of the commentary to article 9.

[281] Ibid., p. 288, para. (7).

[282] Ibid., para. (10). This is a good example of convention and practice determining the status in which an organ acts (see paragraph 163 above).

[283] For example, the Agreement relating to appeals to the High Court of Australia from the Supreme Court of Nauru and Australia (Nauru, 6 September 1976), United Nations, *Treaty Series*, vol. 1216, p. 151.

[284] UNRIAA, vol. II (Sales No. 1949.V.1), p. 1141, cited in para. (13) of the commentary to article 9 (*Yearbook … 1974*, vol. II (Part One), document A/9610/Rev.1, p. 289).

[285] *Yearbook … 1974*, vol. II (Part One), document A/9610/Rev.1 p. 290, para. (17) of the commentary to article 9.

[286] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by the United Kingdom on article 7, paragraph 2.

referred? Again, in its view, the point should at least be addressed in the commentary.[287]

222. Uzbekistan also expresses the view that the responsibility of international organizations for their wrongful acts should be addressed, though in a separate instrument.[288]

When are State organs "placed at the disposal" of another State?

223. Article 9 deals with an extremely specialized issue: how specialized is clear from the definition given of the crucial phrase "placed at the disposal". According to the commentary, this

> does not mean only that the organ must be appointed to perform functions appertaining to the State at whose disposal it is placed. It also requires that, in performing the functions entrusted to it by the beneficiary State, the organ shall act in conjunction with the machinery of that State and under its exclusive direction and control, not on instructions from the sending State.[289]

By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, this must be an unusual situation, although it is not unknown.

224. The European Commission of Human Rights had to consider this question in two cases relating to the exercise by Swiss police in Liechtenstein of "delegated" powers.[290] At the relevant time Liechtenstein was not a party to the European Convention, so that if the conduct in question was attributable only to Liechtenstein, no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.

225. Analogous problems were faced by the European Commission and Court of Human Rights in a case concerning Andorra.[291] At a time when Andorra was not a party to the European Convention, two individuals were tried and sentenced to long terms of imprisonment by the Tribunal de Corts of Andorra. They elected to serve their sentence in France. They brought proceedings under the Convention against both France and Spain, alleging that they were responsible for deficiencies in the organization of the Andorran courts, and that France was responsible for their arbitrary detention, which no French law authorized.[292]

226. The Court drew a distinction between the original judicial process and the subsequent detention in France. The former was an Andorran process, which did not involve the exercise of governmental authority either of France or of Spain. French and Spanish judges served on the Andorran courts, but for that purpose they acquired Andorran nationality; they were formally seconded and in their Andorran capacity were neither responsible to nor controlled by the sending Governments.[293] As to their custody in France, on the other hand, France argued that "an adequate legal basis was provided by international custom and by the French and Andorran domestic law which implemented that custom". A narrow majority of the Court accepted that view and dismissed the complaint. To impose on France responsibility for ensuring that the original judgement complied with the Convention "would ... thwart the current trend towards strengthening international co-operation in the administration of justice"; thus the only obligation of France was not to participate in a "flagrant denial of justice", of which there was no sufficient evidence in that case. Thus the majority drew a distinction between the acts of French and Spanish officials (including the Co-Princes) in their capacity as Andorran organs, and the actions of France in giving effect to Andorran judgements: France's responsibility was attracted only by the latter.[294]

227. Another example of a "loaned" organ was the Auditor-General of New Zealand, who for a time acted as the auditor of the Cook Islands by agreement between the Cook Islands and New Zealand and pursuant to the Constitution of the Cook Islands.[295] The question arose whether the Auditor-General could be compelled to disclose Cook Islands documents acquired as a result of the exercise of this function, or whether the documents were entitled to sovereign immunity. The New Zealand Court of Appeal denied immunity, but nonetheless approached the case on the basis that the Auditor-General was performing an official function on behalf of the Cook Islands as a foreign State, and was not responsible to any New Zealand authority for the exercise of that function.[296]

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[287] Ibid., comments by the United Kingdom on article 9.

[288] Ibid., comments by Uzbekistan under "General remarks".

[289] *Yearbook … 1974*, vol. II (Part One), document A/9610/Rev.1, p. 287, para. (5) of the commentary to article 9.

[290] Council of Europe, European Commission of Human Rights, *Yearbook of the European Convention on Human Rights 1977*, Application Nos. 7289/75 and 7349/76, *X and Y* v. *Switzerland*, vol. 20 (The Hague, Martinus Nijhoff, 1978), pp. 402–406, discussed by Dipla, op. cit., pp. 52–53.

[291] The Co-Princes of Andorra are the President of France and the Bishop of Urgel in Spain. See Crawford, "The international legal status of the valleys of Andorra", p. 259; and Duursma, *Fragmentation and the International Relations of Micro-States: Self-determination and Statehood*, pp. 316–373.

[292] *Drozd and Janousek* v. *France and Spain*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 240 (Registry of the Court, Council of Europe, Strasbourg, 1992); and Duursma, op. cit., pp. 331–333.

[293] Ibid., p. 31, para. 96. The Court noted that "the secondment of judges or their placing at the disposal of foreign countries is ... practised between member States of the Council of Europe, as is demonstrated by the practice of Austrian and Swiss jurists in Liechtenstein".

[294] Ibid., p. 32, para. 106, and p. 35, para. 110. On this point the Court was narrowly divided (12–11). The minority refused to accept that "there is a watertight partition between the entity of Andorra and the States to which the two Co-Princes belong, when in so many respects (enforcement of sentences being a further example) those States participate in its administration", ibid., pp. 40–41 (Joint dissenting opinion of Judges Pettiti, Valticos, Lopes Rocha, approved by Judges Walsh and Spielmann).

[295] For a period, the audit function was further delegated by the Auditor-General to a private firm.

[296] *Controller and Auditor-General* v. *Davidson, International Law Reports*, vol. 104 (1996), pp. 536–537,, 569 and 574–576. An appeal to the Privy Council on other grounds was dismissed (*The Weekly Law Reports 1996*, vol. 3 (London), p. 859, and *International Law Reports*, vol. 108, p. 622).

Organs of international organizations as organs of States?

228. Thus examples can be found of State organs being "placed at the disposal" of another State in the sense of article 9. It is more difficult to find convincing examples of that practice in the case of international organizations. There is no doubt that an organ of an international organization may perform governmental functions for or in relation to States, pursuant to "delegated" powers or even on the authority of the organization itself.[297] But this does not necessarily mean that it is "loaned" to the States concerned, or that those States are responsible for its conduct. It seems clear, for example, that the various organs of the European Commission operating on the territory of the member States retain their Community character and are not covered by article 9. According to the Legal Office of the United Nations Secretariat, no United Nations operation, whether in the field of technical assistance, peacekeeping, election monitoring or in any other field, would involve "loaning" an organ to a State. In every case, the United Nations body would retain its separate identity and command structure. A possible example of an article 9 organ is the High Representative appointed pursuant to Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto of 14 December 1995.[298] Despite the rather reserved way in which the mandate of the High Representative is defined in article II of Annex 10, there is no doubt that the High Representative is exercising governmental authority in Bosnia and Herzegovina. Which entity is ultimately responsible for his activity is, however, unclear.[299]

229. As this example demonstrates, it may not be clear whether a person exercising governmental authority is doing so on behalf of an international organization or of a group of States, and in the latter case how the responsibility of the States concerned is to be related to their individual responsibility.[300] This latter problem will be discussed in more detail in the context of chapter IV of part one.

[297] For example, the international tribunals for the former Yugoslavia and for Rwanda carry out investigatory and other functions in various States, not limited to the territories over which they exercise substantive jurisdiction. The European Commission can impose sanctions and penalties for certain breaches of European Union law, including on foreign corporations.

[298] Collectively the Peace Agreement (S/1995/999, annex).

[299] The High Representative was "designated" by a Peace Implementation Council and endorsed by the Security Council pursuant to Annex 10 of the Peace Agreement (see ILM, vol. XXXV, No. 1 (January 1996), pp. 228–229). Under article V of Annex 10, the "High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement" (ibid., p. 148). See also Security Council resolution 1031 (1995), paras. 26–27. Whether article 9 of the draft articles would apply to the High Representative depends, *inter alia*, on whether the Peace Implementation Council qualifies as an "international organization". An earlier and less equivocal analogy was the High Commissioner for the Free City of Danzig, appointed by the League of Nations Council and responsible to it. See *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 4.

[300] A good example of the problem was presented by the question of State responsibility for quadripartite action in Germany, which was considered at different times by the European Commission of Human Rights, the German Federal Constitutional Court and the English Court of Appeal. All reached the same conclusion, viz., that the individual respondent State was not answerable in those proceedings. See Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application 6231/73, *Ilse Hess* v. *United Kingdom*, vol. 1 (Strasbourg, 1975), p. 74; the *Rudolf Hess Case, International Law Reports*, vol. 90 (1980), p. 386; and *Trawnik* v. *Gordon Lennox*, *All England Law Reports 1985*, vol. 2, p. 368.

Provisional conclusion

230. In considering article 9 it is useful to distinguish between organs of States and of international organizations. Although it may only be rarely that the organ of one State is "placed at the disposal" of another for the purposes of exercising the public power of the latter, such cases do occur, as the examples of cooperative arrangements for final courts of appeal show. Thus, decisions of the Privy Council on appeal from an independent Commonwealth State will engage the responsibility of that State and not of the United Kingdom. For these reasons, it is provisionally recommended that article 9 be retained, as it applies to State organs. This recommendation may, however, need to be revisited in the light of the examination of some of the broader issues of responsibility for joint State action which are raised, *inter alia*, by articles 27 and 28.

231. As far as international organizations are concerned, the position is more difficult. There are few (if any) convincing cases of an organ of an international organization being "placed at the disposal" of States in the sense of article 9. Any such cases are bound to raise broader questions of the possible responsibility of the member States, as well as the receiving State, for the conduct of the organ. These questions are also implicated by article 13 of the draft articles, to be discussed shortly.[301] In any event, however, the difficulties raised by article 9 in relation to international organizations outweigh the very limited clarification that article offers. It is recommended that the reference to international organizations in article 9 be deleted.

(f) *Article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity)*

232. Article 10 deals with the important question of unauthorized or *ultra vires* acts. It provides that:

> The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

233. The commentary to article 10 usefully records the development of the modern rule, and asserts categorically that "[t]here is no exception to this rule even in the case of manifest incompetence of the organ perpetrating the conduct complained of, and even if other organs of the State have disowned the conduct of the offending organ".[302] It goes on to discuss the central problem of distinguishing, on the one hand, cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, and, on the other hand, cases where their conduct is so removed from the scope of their official functions

[301] See paragraphs 253–259 below.

[302] *Yearbook … 1975*, vol. II, document A/10010/Rev.1, p. 61, para. (1) of the commentary to article 10.

that it should be assimilated to that of private individuals, not attributable to the State. This problem is dealt with below.

Comments of Governments on article 10

234. No Government comments have been made on article 10, and this appears to reflect very general if not universal agreement with the modern rule. Indeed it could hardly be otherwise, consistent with article 4.

Article 10 and the problem of distinguishing official from "private" conduct

235. The principle stated in article 10 is thus undoubted and clearly must be retained.[303] As noted, there is however a problem in distinguishing *ultra vires* conduct of officials from conduct which is wholly outside the scope of any official capacity, and is to be assimilated to private conduct. In the draft articles at present that problem is elided.[304] Both articles 5 and 7 require that the organ or entity has acted "in that capacity in the case in question", but no further definition is offered of the notion of "capacity". Article 10 again uses the phrase without further specification.

236. The matter has been extensively discussed in arbitral awards and in the literature.[305] In its commentary to article 10 the Commission cites with apparent approval the following article adopted at the 1930 Hague Conference for the Codification of International Law:

> International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed *under cover of their official character*,* if the acts contravene the international obligations of the State.[306]

This language derives from the decision of the French-Mexican Claims Commission in the *Caire* case, again cited in the commentary with approval as a "precise, detailed and virtually definitive formulation of the principles applicable".[307] The *Caire* case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held:

> that the two officers, even if they are deemed to have acted outside their competence ... and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.

Presiding Commissioner Verzijl likewise referred to the two officials as having "availed [themselves] of [their] official status".[308]

237. In the first phase of the Commission's work on this topic, the Special Rapporteur, F. V. García Amador, proposed the following language:

> an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity.[309]

238. The problem has continued to arise. For example, in *Yeager* v. *Islamic Republic of Iran*, the claimant complained of being unlawfully required to pay extra money to an Iran Air agent to get a prepaid air ticket issued, and of being robbed at the airport by Revolutionary Guards "performing the functions of customs, immigration and security officers". Iran Air was a wholly State-owned airline, whereas at the time, the Revolutionary Guards had not yet been formally incorporated as an organ of the State. Nonetheless, the Iran-United States Claims Tribunal distinguished between the two cases, holding that the Islamic Republic of Iran was not responsible for the apparently isolated act of the Iran Air agent, but that it was responsible for the later robbery.[310] In another case, the Tribunal posed the question in terms of whether it had been shown that the conduct had been "carried out by persons cloaked with governmental authority".[311]

239. The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if there is evidence that the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and taken steps to prevent it. However, the distinction between the two situations still needs to be made for individual cases of outrageous conduct on the part of persons who are officials, and the line drawn by the authorities cited above seems a reasonable one. In the words of the commentary:

> In international law, the State must recognize that it acts whenever persons or groups of persons whom it has instructed to act in its name in a given area of activity appear to be acting effectively in its name.[312]

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[303] It is confirmed, for example, in article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), which provides that: "A Party to the conflict ... shall be responsible for all acts committed by persons forming part of its armed forces." This would include acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and "correspond[s] to the general principles of law on international responsibility" (ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987)), pp. 1053–1054. See also the *Velásquez Rodríguez* v. *Honduras Case* (footnote 63 above), No. 4, para. 170; and *International Law Reports*, vol. 95 (1994), p. 296: "This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."

[304] As pointed out by Brownlie, op. cit., pp. 147–148.

[305] Ibid., pp. 145–150.

[306] League of Nations, *Acts of the Conference for the Codification of International Law*, held at The Hague from 13 March to 12 April 1930, vol. IV, *Minutes of the Third Committee* (document C.351(c)M.145(c).1930.V), p. 238, cited in *Yearbook … 1975*, vol. II, document A/10010/Rev.1, p. 64, para. (9) of the commentary to article 10.

[307] *Yearbook ... 1975* (see footnote 306 above), p. 65, para. (14) of the commentary to article 10.

[308] UNRIAA, vol. V (Sales No. 1952.V.3), pp. 529 et seq.

[309] *Yearbook ... 1961*, vol. II, document A/CN.4/134 and Add.1, p. 47, art. 12, para. 2.

[310] Case No. 10199 (see footnote 260 above), p. 110.

[311] *Petrolane, Inc.* v. *Islamic Republic of Iran* (see footnote 269 above), p. 92.

[312] *Yearbook … 1975*, vol. II, document A/10010/Rev.1, p. 67, para. (17) of the commentary to article 10.

240. The remaining question is whether the actual language of articles 5, 7 and 10 should be altered so as to reflect more clearly the principle of "apparent capacity" reflected in the commentary and in the cases. On the one hand, it may seem difficult to say that a customs official who acts outrageously, unlawfully and for private gain, but while on duty and using the instruments of office, is still acting in his "capacity" as an organ. This would suggest that a formulation such as "acting in or under cover of that official capacity" be adopted in article 10. On the other hand, article 10 already makes it clear that the notion of "official capacity" is a specialized one, and the commentary to article 10 can be reinforced to the same effect. The question is finely balanced, but the absence of any comments or proposals for change on the part of Governments perhaps tilts the balance in favour of the existing text. It is, however, proposed that the concluding phrase in article 10 be amended to read "even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise". This is clearer, as well as consistent with the proposal already made to delete the reference to internal law in article 5.[313]

(g) *Article 11 (Conduct of persons not acting on behalf of the State)*

241. Article 11 is the first of the "negative attribution" articles, to which reference has already been made.[314] It provides that:

> 1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.
>
> 2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

242. The commentary to article 11 notes that it "confirms the rules laid down in the preceding articles", and that it is a merely "negative statement".[315] Although "[t]he acts of private persons or of persons acting, in the case under consideration, in a private capacity are in no circumstances attributable to the State", this "strictly negative conclusion" does not mean that the State cannot be responsible for those acts, for example, if State organs breach an obligation to prevent private conduct in some respect. Indeed, States have "often" been held responsible for such acts.[316] There follows a useful analysis of the earlier practice, and in particular of the *Tellini* case of 1923, which definitively established the modern rule.[317] The commentary concludes that:

> (*a*) in accordance with the criteria which have gradually been affirmed in international legal relations, the act of a private person not acting on behalf of the State cannot be attributed to the State and cannot as such involve the responsibility of the State. This conclusion is valid irrespective of the circumstances in which the private person acts and of the interests affected by his conduct; (*b*) although the international responsibility of the State is sometimes held to exist in connexion with acts of private persons its sole basis is the internationally wrongful conduct of organs of the State in relation to the acts of the private person concerned. In the view of the Commission, the rule which emerges from the application of the criteria outlined above fully meets the needs of contemporary international life and does not require to be altered.[318]

Comments of Governments on article 11

243. The United States expresses the view that article 11 "adds nothing to the draft ... The duplication of rules provides a tribunal with an additional, if not troublesome, question of which rule to apply in a given situation and whether the rules differ in application. Article 11 should be deleted."[319] Similar misgivings were expressed by Chile in its comments of 9 October 1979: it described article 11 as "an almost pedantic clarification" and suggested that "its provisions might well have been combined with those of article 8(*a*)".[320]

The difficulty with article 11

244. As these comments suggest, article 11 presents a difficulty. At one level, it records the outcome of an important evolution in general international law away from notions of the "vicarious liability" of the State for the acts of its nationals, and towards a clear distinction in principle between the State and the non-State domains. It also provides apparent security to States that they will not be held responsible for the acts of private parties. On the other hand, as a matter of law, and in the context of the draft articles as a whole, that security is illusory, because article 11 lacks any independent content. On analysis, it says nothing more than that the conduct of private individuals or groups is not attributable to the State unless that conduct is attributable under other provisions of chapter II. This is both circular and potentially misleading, because in any given situation of injury caused by private individuals, it tends to focus on the wrong question. The issue in such cases is not whether the acts of private individuals as such are attributable to the State (they are not), but rather, what is the extent of the obligation of the State to prevent or respond to those acts. In short, not only is article 11 not a rule of attribution, it does not have the slightest impact, even in terms of the burden of proof, on the application of the other prvisions of chapter II which are rules of attribution. If, under any of those provisions, conduct is attributable to the State, then article 11 has no application. If the conduct is not so attributable, then article 11 has no effect. There is no third possibility.

Tentative conclusion

245. For these reasons, the Special Rapporteur tentatively proposes that article 11 be deleted. The problem is,

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[313] See paragraph 163 above.

[314] See paragraph 142 above.

[315] *Yearbook … 1975*, vol. II, document A/10010/Rev.1, p. 70, para. (1) of the commentary to article 11.

[316] Ibid., p. 71, paras. (3)–(5).

[317] Report of the Special Commission of Jurists, League of Nations, *Official Journal*, 5th year, No. 4 (April 1924), p. 524, as adopted unanimously by the Council of the League on 13 March 1924; and ibid., 4th year, No. 11 (November 1923), Twenty-sixth Session of the Council, p. 1305.

[318] *Yearbook … 1975*, vol. II, document A/10010/Rev.1, p. 82, para. (35) of the commentary to article 11.

[319] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by the United States on article 8.

[320] *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 97, para. 15.

however, that to delete it might imply, *a contrario*, a move back to discredited notions of "vicarious responsibility" for the acts of private persons, and may give rise to concern on the part of some States. To a considerable extent, this can be avoided by appropriate discussion in the commentary to other articles of part two (and the substance of the commentary to article 11 should be retained). In addition, however, it will be suggested that appropriate language can be inserted in a proposed new article which will address any residual concerns.[321]

(h) *Article 12 (Conduct of organs of another State)*

246. Article 12 provides that:

1. The conduct of an organ of a State acting in that capacity which takes place in the territory of another State or in any other territory under its jurisdiction shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

247. The commentary to article 12 recounts the many cases where organs of one State act as such on the territory of another State, and gives as examples of problems arising from such action a number of incidents from the 1950s, all involving the then Soviet Union in one capacity or another.[322] It notes however that in none of those incidents was the mere fact that they occurred on the territory of a State taken to be a sufficient basis for the responsibility of that State. Surprisingly, the commentary does not mention the *Corfu Channel* case.[323]

Comments of Governments on article 12

248. No comments were made on article 12 as such.[324]

The context of article 12

249. Article 12 has to be considered in the light of the provisions of chapter IV of part one, which deal with the implication of a State in the internationally wrongful act of another State. Article 27 deals with aid or assistance by one State in the commission of an internationally wrongful act of another State. Article 28 deals with situations where one State is subject to the "direction or control" of another in committing a wrongful act, and with situations of actual coercion. By comparison with article 12, these cases are much more likely to generate claims of responsibility; indeed it is difficult to see on what basis the mere fact that one State acts on the territory of another could, without more, give rise to the responsibility of the latter.[325] In other words, the problem with article 12 (as with article 11) is that it addresses a "non-problem", while at the same time there is a real problem which it does not address.

Territory and responsibility

250. In short, the occurrence of conduct of one State on the territory of another is not, as such and of itself, a sufficient basis for the attribution of the conduct to the latter State. The leading authority is the ICJ decision in the *Corfu Channel* case. In that case, mines had recently been laid in the Corfu Channel within Albanian territorial waters, but it was not shown that Albania was actually responsible for laying them.[326] The question was whether Albania was responsible for damage to British ships which had struck the mines. The Court said:

It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims. It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. *This fact, by itself and apart from other circumstances, neither involves* prima facie *responsibility nor shifts the burden of proof*.*[327]

The Court went on to hold Albania fully responsible for the damage, on the basis that Albania knew or should have known of the presence of the mines but failed to warn the United Kingdom: its obligation to warn was based, *inter alia*, on "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[328] In summary, the Court held that:

(*a*) The territorial State could be responsible for the conduct of another State on its territory, even if it was not shown to be complicit in that conduct;

(*b*) The mere occurrence of a wrongful act on the territory of a State did not, however, involve prima facie responsibility, nor even shift the burden of proof; but

(*c*) As a matter of substance, the occurrence of a wrongful act on the territory of a State was *relevant* to responsibility, because a State must not knowingly allow its territory to be used for acts contrary to the rights of other States; and

[321] See paragraph 283 below.

[322] These were Soviet complaints to the Federal Republic of Germany at meteorological balloons launched on its territory by the United States which strayed over the border; and a protest by the Federal Republic of Germany to Austria about the Austrian Foreign Minister's presence at a speech in Vienna by Mr. Khrushchev during which he insulted the Federal Republic of Germany (see *Yearbook … 1975*, vol. II, document A/10010/Rev.1, pp. 84–85, paras. (6)–(7) of the commentary to article 12).

[323] See footnote 134 above.

[324] For general comments on the issue of the "negative attribution" clauses, see paragraph 153 above.

[325] The special case of a State organ placed at the disposal of another State is dealt with in article 9, discussed above (paras. 219–231). The special provision in article 9 clearly implies that article 12 is unnecessary.

[326] In fact, they had been laid by Yugoslavia, as was suspected at the time.

[327] *I.C.J. Reports 1949* (see footnote 134 above), p. 18.

[328] Ibid., p. 22.

(*d*) As a matter of evidence, the location of the act was relevant in that, without shifting the burden of proof, it might provide a basis for an inference that the territorial State knew of the situation and allowed it to occur or to continue.

251. By comparison with these findings, the content of article 12 can be seen to raise difficulties. On the one hand, article 12 states a truism, that the location of wrongful conduct on the territory of a State is not a sufficient basis for responsibility.[329] If that is all article 12 says, its usefulness is extremely limited, since no one suggests the contrary. But the problem is that article 12 might be understood to imply that the location of a conduct of State B on the territory of State A is legally irrelevant so far as the responsibility of State A is concerned, and this is certainly not true. The Court in the *Corfu Channel* case treated location as highly relevant.

Recommendation

252. Article 12 touches on a much broader field of the combined action of States, which is dealt with to some extent in chapter IV and which may need further elaboration. But for essentially the same reasons as for article 11, article 12 adds little or nothing as a statement of the law of attribution,[330] and it has the further disadvantages analysed above. It is recommended that it be deleted. Elements of the commentary can be included in the commentary to article 9.

(i) *Article 13 (Conduct of organs of an international organization)*

253. Article 13 provides that:

> The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

254. The commentary points out that, unlike States, international organizations lack territory and always act on the territory of a State, usually though not invariably with the consent of that State.[331] It reviews the limited experience of claims by States against international organizations, noting the absence of any suggestion that the host State is liable for such acts.[332] It stresses that "the responsibility of international organizations is governed by rules which are not necessarily the same as those governing the responsibility of States" and disclaims any intention to deal with the former subject, or with the subject of the responsibility of member States for the acts of international organizations.[333] It explains that article 13 does not repeat the savings clause contained in the other three negative attribution articles, because of a reluctance "to include in the draft any provision which might suggest the idea that the action of an international organization is subject to the controlling authority of the State in whose territory the organization is called upon to function".[334] At the same time it notes that in certain circumstances a State might become responsible for the conduct of an international organization on its territory, for example, as a result of joint action with the organization.

Comments of Government on article 13

255. As noted, a number of Governments raised issues about attribution of acts of international organizations in the context of article 9. No comments related specifically to article 13.

Responsibility of States for the conduct of international organizations

256. Over and above the problem of the "negative attribution" clauses, already discussed, article 13 raises several difficulties:

a. *The irrelevance of location*

257. A similar comment applies here to the issue of the location of conduct as it does in relation to article 12, but the problem of the *a contrario* implication which might appear to flow from the language of article 13 is greater. As has been seen, the fact of a State acting on the territory of another State is legally relevant, although it is by no means sufficient of itself to attract the responsibility of the latter.[335] But international organizations always act, as it were, on the territory of a "foreign" State. Even in relation to the host State, with which it has a special relationship, an international organization is still legally an entirely distinct entity, and the host State cannot be expected to assume any special responsibility for its conduct or its debts. Moreover, as the commentary notes, there is a principle of the independence of international organizations, different and quite possibly stronger than the position that arises when one State acts on the territory of another.[336] For these reasons, the fact that an international organiza-

[329] Nor is it a *necessary* basis: a State can be responsible for its conduct in the de facto occupation or administration of territory not its own. As ICJ said in the *Namibia* case: "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States." *(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 54.) Earlier in the same paragraph the Court had been discussing issues of State responsibility; the reference to "liability" in the English version may have been a slip. The European Court of Human Rights has strongly affirmed the same principle in *Loizidou* v. *Turkey, judgment of 23 March 1995 (Preliminary Objections), Series A No. 310*, para. 62; and ibid., *judgment of 18 December 1996 (Merits), Reports of Judgments and Decisions* 1996–VI, para. 52. Thus, even since article 12 was proposed, the link between territoriality and responsibility has been further attenuated.

[330] It is significant that the two precedents for article 12 cited in the commentary (*Yearbook … 1975*, vol. II, document A/10010/Rev.1, p. 85, para. (8)), are both primary rules, not rules of attribution.

[331] Ibid., p. 87, para. (2) of the commentary to article 13.

[332] Ibid., pp. 87–88, paras. (3)–(4).

[333] Ibid., pp. 89–90, paras. (8)–(9).

[334] Ibid., p. 91, para. (13).

[335] See paragraph 250 above for the analysis of the *Corfu Channel* case.

[336] For example, the principle of the immunity of an international organization from the jurisdiction of the courts of a territorial State is more extensive than the immunity of a foreign State would be. In part, this may be a historical accident, but in part at least it reflects a functional difference between States and international organizations.

tion has acted on the territory of a State would appear to be entirely neutral, so far as concerns the responsibility of that State under international law for the acts of the organization. But if so, for article 13 to single out that neutral factor as a basis for non-attribution is extremely odd.

b. *The problem of substance*

258. There is a broader question of attribution to a State of the conduct of international organizations, which has acquired much greater significance since the adoption of article 13, given the controversies, *inter alia*, over the International Tin Council[337] and the Arab Organization for Industrialization.[338] The most detailed study of that problem which takes these developments into account is that of the Institute of International Law, which produced a carefully considered resolution in 1995.[339] That resolution does not mention the location of the organization or of its activities as a relevant factor in determining State responsibility for its acts. Indeed, article 6 of the resolution, which lists a number of factors which are not to be taken into account for that purpose, does not mention territorial location. Evidently it was thought completely irrelevant.

Recommendation

259. The responsibility of States for the acts of international organizations needs to be treated in its own right, in the context of the broader range of issues relating to responsibility for the acts of international organizations. As a statement of the law of attribution, article 13 raises awkward *a contrario* issues without resolving them in any way. It should be deleted. Instead, a savings clause should be inserted, reserving any question of the responsibility under international law of an international organization or of any State for the acts of an international organization.[340] Elements of the commentary to article 13 can be included in the commentary to that savings clause.

(j) *Article 14 (Conduct of organs of an insurrectional movement)/Article 15 (Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State)*

260. The position of "insurrectional movements" is dealt with in two articles, which reflects the substantial historical importance of the problem and the considerable bulk of earlier arbitral jurisprudence. Article 14 is the "negative" attribution clause, article 15 the affirmative one. It is convenient to deal with them together.

261. Article 14 provides that:

> 1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.
>
> 2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.
>
> 3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

262. Article 15 provides that:

> 1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.
>
> 2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

263. In its commentary to article 14, the Commission notes that, once an organized insurrectional movement comes into existence as a matter of fact, it will rarely if ever be possible to impute responsibility to the State, since the movement will by then be "entirely beyond its control".[341] After analysing the extensive arbitral jurisprudence,[342] diplomatic practice,[343] and the literature,[344] it affirms strongly that the State on whose territory the insurrectional movement is located is not responsible for the latter's conduct, unless in very special circumstances where the State should have acted to prevent the harm. That rule is stated in categorical terms; in particular it is denied that the State is responsible for or is bound to respect "routine administrative acts performed by the organs of the insurrectional movement in that part of the State territory which is under their control".[345] On the other hand, the insurrectional movement itself may be held responsible for its own acts.[346]

264. The commentary explains the two rules set out in article 15 on the basis of the organizational continuity of an insurrectional movement which succeeds in displacing the previous government of the State or even in forming

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[337] *J. H. Rayner Ltd.* v. *Dept. of Trade and Industry*, case 2 AC 418 (1990) (United Kingdom, House of Lords), and *International Law Reports*, vol. 81, p. 670; *Maclaine Watson & Company Limited* v. *Council and Commission of the European Communities*, Court of Justice of the European Communities, case C–241/87, *Reports of Cases before the Court of Justice and the Court of First Instance* 1990–5, p. I–1797.

[338] *Westland Helicopters Ltd* v. *Arab Organization for Industrialization, International Law Reports*, vol. 80 (1985), p. 595 (International Chamber of Commerce, Court of Arbitration); *Arab Organization for Industrialization and Others* v. *Westland Helicopters Ltd*, ibid. (1988), p. 622 (Switzerland, Federal Supreme Court); and *Westland Helicopters Ltd* v. *Arab Organization for Industrialization*, ibid., vol. 108 (1994), p. 564 (England, High Court).

[339] Institute of International Law, *Yearbook*, vol. 66, part II (Session of Lisbon, 1995), p. 445. For the *travaux préparatoires*, see part I (ibid.), p. 251.

[340] For the parallel recommendation to delete references to international organizations in article 9, see paragraph 231 above.

[341] *Yearbook … 1975*, vol. II, document A/10010/Rev.1, p. 92, para. (4) of the commentary to article 14.

[342] Ibid., pp. 93–95, paras. (12)–(18).

[343] Ibid., pp. 95–97, paras. (19)–(23).

[344] Ibid., pp. 97–98, paras. (24)–(27).

[345] Ibid., p. 98, para. (26).

[346] Ibid., pp. 98–99, para. (28), with reference to some older precedents.

a new State on part of its territory.[347] This has nothing to do with State succession; in the former case there is no succession of States, and in the latter the rule of continuity applies whether or not the predecessor State was responsible for the conduct itself (under article 14, it will almost always not be).[348] Thus it is not clear what the systematic or structural basis for responsibility is, but the earlier jurisprudence and doctrine, at least, firmly support the two rules set out in article 15.[349]

265. In formulating both the "negative attribution" rule in article 14 and the positive rule in article 15, the Commission made "no distinction ... between different categories of insurrectional movements on the basis of any international 'legitimacy' or any illegality in respect of their establishment as the government, despite the possible importance of such distinctions in other contexts".[350]

Comments of Governments on articles 14 and 15

266. Austria remarks that:

> The issue of the conduct of organs of an insurrectional movement contained in draft articles 14 and 15 leaves considerable doubt and requires further consideration. This pertains in particular to draft articles 14, paragraph 2, and 15, paragraph 1 … The relationship between the first and the second sentence of draft article 15, paragraph 1, should for instance be re-examined in the light of the experience gained in Eastern Europe following the breakdown of the Iron Curtain and other instances of civil unrest.[351]

In an earlier comment, Austria had noted that article 14 did not expressly deal with "the case of an insurrectional movement, *recognized by foreign States as a local* de facto *government*, which in the end does not establish itself in any of the modes covered by article 15 but is defeated by the central authorities", and had called for clarification.[352]

267. France proposes new wording for article 14, establishing a presumption of responsibility subject to exoneration in the event of *force majeure* etc., combined with the deletion of paragraphs 2 and 3 whose scope is "singularly unclear". It thus proposes an entirely new formulation in the following terms:

> The conduct of an organ or agent of an insurrectional movement in the territory of a State or in any other territory under its jurisdiction shall not be considered as an act of that State if:
>
> (*a*) The State in question establishes that the act is attributable to the insurrectional movement; and
>
> (*b*) The State in question establishes that it exercised the functions pertaining to its territorial jurisdiction over the territories concerned in a lawful manner.[353]

268. The United Kingdom notes that:

> It is desirable that a new Government should not be able to escape international responsibility for the acts that brought it to power, especially as there is a particular likelihood of injury to foreign States and nationals during an insurrection. On the other hand, to entitle ... successful insurrectionists to consent to departures from legal obligations owed to their national State might be thought to promote the non-observance of such obligations at a critical juncture for the State, and even to encourage intervention by third States in its internal affairs. It might therefore be thought preferable, in the interest of stability, to adopt the position that only the incumbent Government may consent to departures from legal obligations.[354]

This comment goes not so much to article 15 as to the question of whether or in what circumstances the consent given by an insurrectional movement may bind the State for the purpose of article 30. It will accordingly be considered when discussing that article.

The definition of "insurrectional movement"

269. The commentary declines to attempt any definition of an "insurrectional movement", on the ground that this is a matter for the international law of personality rather than of responsibility.[355] It does, however, note that insurrectional movements are intended to be covered whether they are based on the territory of the "target" State or on the territory of a third State.[356] This calls for several remarks.

270. First of all, the insurrectional movements considered in the earlier cases were by no means all at a level which might have entailed their having international personality as belligerents, and subsequent developments have done little to confirm the concept of the legal personality of belligerent forces in general. For example, recognition of belligerency in internal armed conflict is in virtual desuetude. Instead the threshold for the application of the laws of armed conflict contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) may be taken as a guide. Article 1, paragraph 1, refers to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and it contrasts such groups with "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (art. 1, para. 2). This definition of "dissident armed forces" would appear to reflect, in the context of the Protocols, the essential idea of an

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[347] Ibid., pp. 100–101, paras. (2)–(6) of the commentary to article 15. Although organizational continuity is given as the justification, it is also said that the rule extends "to the case of a coalition government formed following an agreement between the 'legitimate' authorities and the leaders of the revolutionary movement" (ibid., p. 104, para. (17)). It is doubtful how far this principle should be pressed in cases of governments of national reconciliation. A State should not be made responsible for the acts of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government. In this respect, the commentary needs some qualification.

[348] Ibid., p. 101, para. (8).

[349] Ibid., pp. 102–104, paras. (9)–(16). Only one case of practice is cited subsequent to 1930. For an analysis of doctrine and codification attempts, see pages 104–105, paras. (18)–(19).

[350] Ibid., p. 105, para. (20).

[351] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by Austria on articles 14 and 15.

[352] *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 92, para. 38.

[353] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by France on article 14, paras. 1–3.

[354] Ibid., comments by the United Kingdom on article 29, para. 1.

[355] *Yearbook … 1975*, vol. II, document A/10010/Rev.1, p. 92, para. (5) of the commentary to article 14.

[356] Ibid., p. 99, para. (29).

"insurrectional movement", but even a movement which clearly possessed all the characteristics listed in article 1, paragraph 2, would not necessarily be regarded as having international legal personality. Moreover, if the rationale for the rule of attribution in article 15 is one of institutional continuity and of the continuing responsibility of the entities concerned for their own acts while they were in armed opposition, there is no reason why it should be limited to situations where the insurrectional movement is recognized as having legal personality.

271. Secondly, these Protocols make a sharp distinction between "dissident" groups covered by Protocol II and national liberation movements covered by Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts). The latter are defined by article 1, paragraph 4, as engaged in a legitimate struggle for self-determination.[357] It has been objected that articles 14 and 15 fail to distinguish between the two cases, but for the purposes of the law of attribution it is not clear that such a distinction should be made.[358] Whether particular conduct is attributable to a State or other entity, and whether there has been a breach of an obligation are different questions, and the distinctions between Protocols I and II may be relevant to the latter.[359] But that provides no rationale for the differential treatment of different categories of insurrectional movement for the purposes of chapter II. For these reasons, it should be irrelevant to the application of the rules stated in articles 14 and 15 whether and to what extent the insurrectional movement has international legal personality.

The substantive rules reflected in articles 14 and 15

272. Turning to the substance of the rules stated in the two articles, the first point to note is that article 14, paragraph 3, deals with the international responsibility of liberation movements which are, *ex hypothesi*, not States. It therefore falls outside the scope of the draft articles and should be omitted. The responsibility of such movements, for example, for breaches of international humanitarian law, can certainly be envisaged, but this can be dealt with in the commentary.

273. The basic principle stated in article 14 is well established, as the authorities cited in the commentary show. It is true that the possibility of the State being held responsible independently for the acts of insurrectional movements remains, but this would of course be true in any event, since the "positive attribution" articles are cumulative in their effect; there is no need to state this specifically in article 14, paragraph 2.[360] That leaves article 14, paragraph 1, as an isolated "negative attribution" clause. For the reasons already given, such provisions are unnecessary and undesirable within the framework of article 3 and chapter II.[361]

274. The few judicial decisions on the issues presented by article 15 are inconsistent. In *Minister of Defence, Namibia* v. *Mwandinghi*, the High Court of Namibia had to interpret a provision of the new Constitution accepting responsibility for "anything done" by the predecessor administration of South Africa. The question was whether this made Namibia responsible for delicts committed by the South African armed forces. The Court held that it did, on the basis of a presumption that the acquired right of the claimant to damages in pending proceedings, a right which existed immediately prior to independence, should not be negated, especially having regard to the new State's policy of general continuity. In the course of a decision essentially founded on the interpretation of the Namibian Constitution, the Court nonetheless expressed the view that, under article 15, "the new government inherits responsibility for the acts committed by the previous organs of the State".[362] With all due respect, this confuses the situations covered by paragraphs 1 and 2. Namibia, as a new State created as the result, *inter alia*, of the actions of the South West Africa People's Organization, a recognized national liberation movement, was not responsible for the conduct of South Africa in respect of its territory. That it assumed such a responsibility attests to its concern for individual rights, but it was not required by the principles of article 15.

275. At the other extreme is a decision of the High Court of Uganda in *44123 Ontario Ltd* v. *Crispus Kiyonga and Others*. That case concerned a contract made by a Canadian company with the National Resistance Movement at a time when the latter was an "insurrectional movement"; it later became the Government, but denied its liability to perform the remainder of the contract, although a substantial performance bond was returned to the company. Without any reference to international law or to article 15, the Court rejected the claim. It said, *inter alia*, that "at the time of the contract the Republic of Uganda had a well established government and therefore there cannot have been two governments contending for power whose acts must be recognized as valid".[363]

Conclusion

276. Despite inconsistencies such as these, it should be noted that the two positive attribution rules in article 15 seem to be accepted, and to strike a fair balance *at the level of attribution* in terms of the conflicting interests involved. It is true that there are continuing difficulties of rationalization, but there has so far been no suggestion in government comments or in the literature that the substantive rules should be deleted: if anything the proposals are

[357] See generally Wilson, *International Law and the Use of Force by National Liberation Movements*.

[358] See Atlam, "National liberation movements and international responsibility", p. 35.

[359] Under article 1, paragraph 4, of Protocol I, national liberation movements are subject to higher standards of conduct and responsibility than are dissident armed forces covered by article 1, paragraph 1, of Protocol II.

[360] France's proposed version of article 14 (para. 267 above) fails to take account of the distinction between attribution and breach of obligation, and appears to specify a primary rule. As will be seen, however, the structure proposed by France is partly adopted in article 15 (see paragraph 277 below).

[361] See paragraphs 142 and 153 above.

[362] *The South African Law Reports* (1992 (2)), pp. 359–360; and *International Law Reports*, vol. 91 (1993), p. 361.

[363] *Kampala Law Reports* (1992), vol. 11, p. 20; and *International Law Reports*, vol. 103 (1966), p. 266. It should be noted that the Government had relied on a number of other legal defences potentially available under the proper law of the contract.

for reinforcement. It should be stressed, however, that the rules of attribution in the law of State responsibility have a limited function, and are without prejudice to questions of the validity and novation of contracts under their proper law, or to any question of State succession.[364]

277. It is suggested, therefore, that the essential principles stated in articles 14, paragraph 1, and 15, paragraphs 1–2, should be restated in a single article. Despite the difficulties with negative attribution clauses standing alone, it seems desirable to specify article 15 in the form of a negative rule subject to certain exceptions: this avoids the problem of circularity and will provide some assurance to Governments that they will not be held generally responsible for the acts of insurrectional groups.[365]

(k) *Subsequent adoption of conduct by a State*

278. All the bases for attribution covered in chapter II (with the exception of the conduct of insurrectional movements under article 15) assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the allegedly wrongful conduct. But that is not a necessary prerequisite to responsibility. A State might subsequently adopt or ratify conduct not otherwise attributable to it; if so, there is no reason why it should not be treated as responsible for the conduct. Adoption or ratification might be expressed or might be inferred from the conduct of the State in question. This additional possibility needs to be considered.

The Lighthouses *Arbitration*

279. There were, in fact, examples of this in judicial decisions and State practice before the adoption of chapter II. For example in the *Lighthouses* Arbitration, an arbitral tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when it was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction ... and eventually continued by her, even after the acquisition of territorial sovereignty over the island".[366] It is no accident that this was a case of State succession. There is a widely held view that a new State does not, in general, succeed to any State responsibility of the predecessor State with respect to its territory.[367] But if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for the wrongful act.

The United States Diplomatic and Consular Staff in Tehran *case*

280. This was also found to be the case, outside the context of State succession, in *United States Diplomatic and Consular Staff in Tehran*.[368] There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States Embassy and its personnel by the militants, and that created by a decree of the Islamic Republic of Iran which expressly approved and maintained the situation they had created. In the words of the Court:

> The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible. On 6 May 1980, the Minister for Foreign Affairs, Mr. Ghotbzadeh, is reported to have said in a television interview that the occupation of the United States Embassy had been "done by our nation".[369]

It is not clear from this passage whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the State of the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. In fact, it made little difference which position was taken, since the Islamic Republic of Iran was held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.[370] But circumstances can be envisaged in which no such prior responsibility could have existed, for example, where the State in question adopted the wrongful conduct as soon as it became aware of it, or as soon as it assumed control over the territory concerned. If the adoption is unequivocal and unqualified (as was the statement of the Minister for Foreign Affairs of the Islamic Republic of Iran, quoted by the Court in the passage above), there is good reason to give it retroactive effect, and this is what the Tribunal did in the *Lighthouses* Arbitration.[371] This has the desirable consequence of allowing the injured State to obtain reparation in respect of the whole transaction or event. It is also consistent with the position established by article 15 for insurrectional movements.

Recommendation

281. For these reasons, the draft articles should contain a provision stating that conduct not otherwise attributable to a State is so attributable if and to the extent that the conduct is subsequently adopted by that State. In formulating such a provision, it is necessary to draw a distinction between the mere approval of a situation and its actual

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[364] Questions of State succession may be raised by the ICJ reservation with respect to the routine administrative acts of South Africa in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (footnote 329 above), p. 56, para. 125.

[365] For the proposed formulation, see paragraph 284 below and the notes.

[366] UNRIAA, vol. XII (Sales No. 63.V.3), p. 198.

[367] See O'Connell, *State Succession in Municipal Law and International Law*, p. 482.

[368] *Judgment, I.C.J. Reports 1980*, p. 3.

[369] Ibid., p. 35, para. 74.

[370] Ibid., pp. 31–33.

[371] UNRIAA (footnote 366 above), pp. 197–198; and *International Law Reports, 1956*, vol. 23, pp. 91–92.

adoption. In international controversies, States may take positions on the desirability of certain conduct, positions which may amount to "approval" or "endorsement" in some general sense but which clearly do not involve any assumption of responsibility. In the *United States Diplomatic and Consular Staff in Tehran* case, the Court used such phrases as "approval", "endorsement", "the seal of official governmental approval", "the decision to perpetuate [the situation]", and in the context of that case these terms were sufficient for the purpose. As a general criterion, however, the notion of "approval" or "endorsement" is too wide. Thus, for the purposes of article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act), it is clear that mere approval or endorsement by one State of the unlawful conduct of another is not a sufficient basis for the responsibility of the former. It is suggested that the proposed provision use the language of "adoption", which already appears in the literature[372] and which carries the idea that the conduct is acknowledged by the State as, in effect, its own conduct.[373] The commentary should make it clear that adoption or acknowledgement must be unequivocal.[374]

282. It should be stressed that the proposed rule is one of attribution only. In respect of conduct which has been adopted, it will always be necessary to consider whether the conduct contravenes the international obligations of the adopting State at the relevant time. The question of the complicity of one State in the wrongful conduct of another is dealt with in chapter IV of part one. For the purposes of adoption of conduct, the international obligations of the adopting State should be the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct was not directly regulated by international law at all. By the same token, a State which adopts or acknowledges conduct which is lawful in terms of its own international obligations, would not thereby assume responsibility for the unlawful conduct of any other person or entity. In such cases, it would need to go further and clearly assume the responsibility to pay compensation.

283. As to the location of the proposed article, since it is a supplementary basis of responsibility, it is suggested that it be included as article 15 *bis*. The proposed article can make it clear that, except in the case of adoption or other cases covered by the preceding articles, conduct is not attributable to the State, and this can be suitably reinforced in the commentary. In this way the proposed article 15 *bis* can also perform the function of the former article 11.[375]

[372] See, for example, Brownlie, op. cit., pp. 157–158 and 161.

[373] Although the term "ratification" is sometimes used in this context, it should be avoided because of its formal connotations in the law of treaties and in the constitutional law of many States. In the context of State responsibility, adoption of conduct may be informal and inferred from conduct.

[374] Thus in the *Lighthouses* Arbitration, Greece was held not to be responsible for a completed violation of the claimant's rights, attributable to the autonomous Government of Crete, even though it had previously indicated that it was disposed to pay some compensation (UNRIAA (footnote 366 above), p. 196; and *International Law Reports, 1956*, p. 89).

[375] See paragraphs 241–245 above, where the deletion of article 11 is proposed.

3. Summary of recommendations in relation to chapter II

284. For the reasons given, the Special Rapporteur proposes the following articles in chapter II of part one. The notes appended to each article explain very briefly the changes that are proposed. They are merely for the purposes of explanation at this stage and are not intended to substitute for the formal commentary.

Chapter II

ATTRIBUTION OF CONDUCT TO THE STATE UNDER INTERNATIONAL LAW

Article 5. Attribution to the State of the conduct of its organs

For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises constituent, legislative, executive, judicial or any other functions, and whatever the position that it holds in the organization of the State.

Note

1. Article 5 combines into a single article the substance of former articles 5, 6 and 7, paragraph 1. The reference to a "State organ" includes an organ of any territorial governmental entity within the State, on the same basis as the central governmental organs of that State: this is made clear by the final phrase, "whatever the position that it holds in the organization of the State".

2. Chapter II deals with attribution for the purposes of the law of State responsibility, hence the phrase "For the purposes of the present articles" in article 5.

3. The requirement that an organ should have "that status under the internal law of that State" is deleted, for the reasons explained in paragraph 163 above. The status and powers that a body has under the law of the State in question are obviously relevant in determining whether that body is an "organ" of the State. But a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.

4. The requirement that the organ in question should have acted in its capacity as such is retained, but it is no longer formulated as a proviso, thereby avoiding any inference that the claimant has any special burden of showing that the act of a State organ was not carried out in a private capacity.

5. The words "whether the organ exercises constituent, legislative, executive, judicial or any other functions" are words of extension and not limitation. Any conduct of a State organ, in its capacity as such, is attributable to the State, irrespective of the classification of the function performed or power exercised. In particular, no distinction is drawn for the purposes of attribution in the law of State responsibility between *acta jure imperii* and *acta jure gestionis*. It is sufficient that the conduct is that of an organ of the State acting in that capacity.

6. The phrase "whether it holds a superior or a subordinate position" might imply that organs which are independent and which cannot be classified as either "superior" or "subordinate" are excluded, whereas the intention is to cover all organs whatever their position within the State. The language proposed in article 5 is intended to make that clear.

~~*Article 6. Irrelevance of the position of the organ in the organization of the State*~~

Note

Article 6 as adopted on first reading was not a rule of attribution but rather an explanation as to the content and effect of article 5. It is convenient and economical to include the qualification in article 5 itself, with minor drafting amendments. On that basis, article 6 can be deleted without any loss of content to chapter II as a whole.

Article 7. Attribution to the State of the conduct of separate entities empowered to exercise elements of the governmental authority

The conduct of an entity which is not part of the formal structure of the State but which is empowered by the law of that State to exercise elements of the governmental authority shall also be considered as an act of the State under international law, provided the entity was acting in that capacity in the case in question.

Note

1. Article 7, paragraph 1, as adopted on first reading, dealt with bodies which should be considered as part of the State in the general sense. As explained in paragraph 188 above, for the purposes of State responsibility, all governmental entities which constitute "organs" are treated as part of the State, and this was made clear by the general language of what was article 6 and is now proposed as part of article 5. Paragraph 1 is accordingly deleted.

2. The remaining paragraph (formerly paragraph 2) deals with the important problem of "parastatals" or "separate entities", which are not part of the formal structure of the State in the sense of article 5 but which exercise elements of the governmental authority of that State.

3. In contrast to State organs in the sense of article 5, the normal situation will be that these "separate entities" do not act on behalf of the State; but if they are empowered to exercise elements of governmental authority, their conduct may, nonetheless, be attributed to the State. It is appropriate to make the distinction between the two cases by retaining the proviso in article 7 ("provided the entity was acting in that capacity in the case in question").

4. The reference to internal law was deleted from article 5 for reasons explained above, and there is a case for doing the same in relation to article 7. On balance, however, the reference to internal law has been maintained. By definition, these entities are not part of the formal structure of the State, but they exercise governmental authority in some respect; the usual and obvious basis for that exercise will be a delegation or authorization by or under the law of the State. The position of separate entities acting in fact on behalf of the State is sufficiently covered by article 8.

5. The earlier reference to "an organ of an entity" has been deleted, on the ground that the entities are very diverse and may not have identifiable "organs". It is sufficient that the conduct is properly regarded as that of the entity in question, but it is impossible to identify in advance when this will be the case.

Article 8. Attribution to the State of conduct in fact carried out on its instructions or under its direction and control

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

(*a*) The person or group of persons was in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct; or

(*b*) The person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which called for the exercise of those elements of authority.

Note

1. Article 8 (*a*) deals with the case of conduct carried out for a State by someone in fact acting on its behalf, for example by virtue of a specific authorization or mandate. The reference to a "person or group of persons" is not limited to natural persons but includes other entities. It does not matter whether or not a group or entity has separate legal personality for this purpose.

2. In addition (and for the reasons given in paragraphs 212–213 above), article 8 (*a*) should cover the situation where a person, group or entity is acting under the direction and control of a State in carrying out particular conduct. In short, article 8 (*a*) should cover cases of agency and cases of direction and control; in both cases, the person who carries out the conduct is acting in fact on behalf of the State. On the other hand, the power or potential of a State to control certain activity (for example, the power inherent in territorial sovereignty, or in the ownership of a corporation) is not of itself sufficient. For the purposes of attribution, the control must actually be exercised so as to produce the desired conduct. This is intended to be conveyed by the requirement that the person should be acting "under the direction and control of the State in carrying out the particular conduct".

3. Subparagraph (*b*) deals with the special case of entities performing governmental functions on the territory of a State in circumstances of governmental collapse or vacuum. It is retained from the text as adopted on first reading, subject only to minor drafting amendments. The most significant of these is the substitution of the phrase "called for" instead of "justified"; as to which, see paragraphs 217-218 above.

Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

Note

1. Article 9 as adopted on first reading dealt both with organs of other States and of international organizations placed at the disposal of a State. For the reasons given in paragraph 231 above, the reference to international organizations has been deleted. Article 9 is, however, retained in its application to organs of States, subject to minor drafting amendments.

2. The situation covered by article 9 is to be distinguished from cases where another State acts on the territory of a State but for its own purposes, with or without the consent of the territorial State. In such cases, the organ in question is not "placed at the disposal" of the territorial State and, unless there is some other basis for attribution, the territorial State is not responsible for its conduct. This "rule of non-attribution" was previously covered by article 12, but for the reasons given in paragraphs 251–252, it is recommended that that article be deleted. The commentary to article 12 should be incorporated in the revised commentary to article 9.

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise.

Note

1. This important principle is retained with minor amendments from the text adopted on first reading. See paragraphs 235–240 above.

2. The minor amendments are as follows: first, the reference to "territorial governmental entities" is deleted, consequential upon the deletion of article 7, paragraph 1. Territorial governmental entities within a State are subsumed as organs of the State in article 5. Secondly, the term "authority" is preferred to the previous term "competence according to internal law" (see paragraph 240 above). In addition, the words "or entity" need to be inserted in the first sentence for the sake of completeness, and in the second sentence it is more elegant to refer to the "exercise" of authority than to an "activity".

~~*Article 11. Conduct of persons not acting on behalf of the State*~~

Note

For the reasons given in paragraphs 241–245 above, it is recommended that article 11 be deleted. However, the substantial point which it seeks to make is covered by the proposed new article 15 *bis*, to which the commentary to article 11 can be attached.

~~*Article 12. Conduct of organs of another State*~~

Note

For the reasons given in paragraphs 246-247 above, it is recommended that article 12 be deleted. Aspects of the commentary to article 12 can be included in the commentary to article 9.

~~*Article 13. Conduct of organs of an international organization*~~

Note

For the reasons given in paragraphs 253–259 above, it is recommended that article 13 be deleted. Instead, there should be a savings clause referring to international responsibility of or for international organizations.[376] Elements of the commentary to article 12 can be included in the commentary to that savings clause.

[376] Such a savings clause might read as follows:

> ***Article A. Responsibility of or for the conduct of an international organization***
>
> **These draft articles shall not prejudge any question that may arise in regard to the responsibility under international law of an international organization or of any State for the conduct of an international organization.**

~~*Article 14. Conduct of organs of an insurrectional movement*~~

Note

For the reasons given in paragraphs 272–273 above, it is recommended that article 14 be deleted. The substance of paragraph 1 and of the commentary to article 14 can be included in the commentary to article 15.

Article 15. Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement, established in opposition to a State or to its government, shall not be considered an act of that State under international law unless:

(*a*) The insurrectional movement succeeds in becoming the new Government of that State; or

(*b*) The conduct is otherwise considered to be an act of that State under articles 5, 7, 8, 9 or 15 *bis*.

2. The conduct of an organ of an insurrectional movement whose action results in the formation of a new State shall be considered an act of the new State under international law.

Note

1. For the reasons given in paragraphs 276–277 above, it is desirable to retain an article dealing with the conduct of insurrectional movements to the extent (but only to the extent) that such conduct may give rise to the responsibility of a State. Article 15 maintains the substance of article 15 as adopted on first reading.

2. Consistently with the scope of the draft articles as a whole, article 15 does not deal with any issue of the responsibility of entities which are not States, nor does it take any position on whether or to what extent "insurrectional movements" may be internationally responsible for their own conduct, or may in other respects have international legal personality.

3. Nor does article 15 define the point at which an opposition group within a State qualifies as an "insurrectional movement" for these purposes: this is a matter which can only be determined on the basis of the facts in each case, in the light of the authorities cited in the commentary. However, a distinction must be drawn between the more or less uncoordinated conduct of the supporters of such a movement and conduct which for whatever reason is attributable to an "organ" of that movement. Thus, the language of article 15 has been changed to refer to "the conduct of an organ of an insurrectional movement".

4. Paragraph 1 is proposed in negative form to meet concerns expressed about the attribution to the State of unsuccessful insurrectional movements. Unless otherwise attributable to the State under other provisions of chapter II, the acts of such unsuccessful movements are not attributable to the State.

Article 15 **bis.** *Conduct of persons not acting on behalf of the State which is subsequently adopted or acknowledged by that State*

Conduct which is not attributable to a State under articles 5, 7, 8, 9 or 15 shall be considered an act of that State if and to the extent that the State subsequently acknowledges or adopts that conduct as its own.

Note

1. This is a new provision, which is proposed for the reasons given in paragraphs 278–279.

2. The phrase "if and to the extent that" is intended to convey the idea: (*a*) that the conduct of, in particular, private persons, groups or entities is not attributable to the State unless it is under some other article of chapter II, or unless it has been adopted or acknowledged; (*b*) that a State might acknowledge responsibility for conduct only to a certain extent; and (*c*) that the act of adoption or acknowledgement, whether it takes the form of words or conduct, must be clear and unequivocal. The phrase "adopts or acknowledges that conduct as its own" is intended to distinguish cases of adoption from cases of mere support or endorsement by third parties. The question of aid or assistance by third States to internationally wrongful conduct is dealt with in chapter IV of part one.

Annex

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STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/488 and Add. 1–3

Comments and observations received by Governments

[*Original: English /French/Russian/Spanish*]
[*25 March, 30 April, 4 May, 20 July 1998*]

CONTENTS

* On behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden).

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Introduction

1. On 16 December 1996, the General Assembly adopted resolution 51/160, entitled "Report of the International Law Commission on the work of its forty-eighth session". In paragraph 5 of that resolution, the Assembly drew the attention of Governments to the importance, for the Commission, of having their views on the draft articles on State responsibility adopted on first reading by the Commission,[1] and urged them to submit their comments and observations in writing by 1 January 1998, as requested by the Commission.

2. By a note dated 12 February 1997, the Secretary-General invited Governments to submit their comments pursuant to paragraph 5 of General Assembly resolution 51/160.

3. As at 25 March 1998, replies had been received from the following 12 States (on the dates indicated): Austria (11 March 1998); Czech Republic (31 December 1997); Denmark (on behalf of the Nordic countries) (26 January 1998); France (12 December 1997); Germany (23 December 1997); Ireland (28 January 1998); Mexico (30 December 1997); Mongolia (29 December 1997); Switzerland (19 August 1997); United Kingdom of Great Britain and Northern Ireland (9 February 1998); United States of America (30 October 1997); and Uzbekistan (19 January 1998). These replies are reproduced below, article by article. Additional replies were received from the following States: Argentina (26 March 1998); Italy (4 May 1998); and Singapore (15 June 1998).

Comments and observations received from Governments

General remarks

Argentina

1. Argentina believes that the draft articles represent a very important step in the process of the codification and progressive development of international law. The prospective elaboration of an international convention codifying the legal regime of international State responsibility will complete the codification work that began with the 1969 Vienna Convention on the Law of Treaties.

2. A fair number of provisions in the draft contain and codify existing customary rules, reflecting State practice and doctrinal and judicial interpretation. In that respect, the articles constitute an extremely valuable guideline, which Argentina will take into account in cases where questions of international responsibility must be addressed.

3. The draft also contains other rules which could constitute a progressive development of international law, as they do not reflect the general practice of States up to this point.

4. With regard to the general economy of the draft, Argentina is also of the view that the Commission should, on second reading, strive to maintain close harmonization between the codification of this topic and that of the other two related topics that are currently also under consideration, namely, so-called international liability for injurious consequences arising out of acts not prohibited by international law, and diplomatic protection. Indeed, it seems advisable for the regime of international responsibility to be dealt with as a whole, and for all of its aspects to be worked out with the greatest possible coherence and conceptual clarity.

Austria

1. During the past sessions of the General Assembly, Austria has attached particular importance to promoting progress in the work of the Commission as well as of the Assembly in the field of codifying international law on State responsibility. This progress has, in recent years, been somewhat stalled by overloading work on the draft articles with over-ambitious proposals which had little chance of adequately winning broad international support for their inclusion in the final instrument to be adopted.

2. Recent progress made with regard to this important topic is therefore welcome. For the first time in its nearly half a century-long history of dealing with this topic, the Commission during its forty-eighth session presented a conclusive and fully comprehensive set of draft articles on State responsibility. Thus the Commission has provided the community of States with a solid basis for achieving the kind of decisive progress on this topic which Austria has been advocating at sessions of the General Assembly.

3. The establishment by the Commission of a Working Group on State responsibility and the decision, on the basis of its recommendations, to give appropriate priority to this topic during the next quinquennium is highly welcomed. Furthermore, the decision of the Commission to appoint Mr. James Crawford as Special Rapporteur for this topic is noted with particular satisfaction.

4. First of all, the objectives governing the upcoming work on State responsibility should be the following:

The rules on State responsibility should:

(*a*) Provide firm guidance for the conduct of States with a view to conflict prevention and resolution;

(*b*) Assist in determining State behaviour in order to prevent internationally wrongful acts;

(*c*) Take effect as soon as possible, in view of the fact that speedy completion of this codification project seems overdue.

5. In keeping with these objectives, the Commission and the community of States should, from the point of view of Austria, strive for an early conclusion of the work on this subject. The finalizing of the text of the draft articles with a view to early conclusive action should therefore have priority.

6. The aim of such action should be to prepare an international instrument on State responsibility based on broad

[1] The text of the draft articles provisionally adopted on first reading by the Commission may be found in *Yearbook … 1996*, vol. II (Part Two), pp. 58–65, document A/51/10, chap. III, sect. D.

support within the community of States. For such an instrument to have a regulatory effect in the near future, the format of an international convention is but one of the possibilities. Given the basic nature of such rules and taking into account the desirability of their widest possible acceptance by the State community, a more flexible format than a convention may prove to be more appropriate.

7. It must be emphasized that the legal authority of an international convention depends to a large degree on the number of ratifications. Since ratification cannot be imposed on States, the attainment of a sufficiently large number of ratifications if this aim is to be achieved at all usually tends to be a relatively slow process. The form of an international convention may thus, at least for a good number of years, create a double standard in State practice among, on the one hand, States that have already ratified the convention and, on the other, those that have not. Such a double standard would clearly run counter to the principal objectives mentioned above since it would jeopardize both the conflict preventive and the conflict containing effect of rules on State responsibility. Indeed, it may even lead to new conflicts.

8. Thus, in Austria's opinion, a declaration of principles representing to a large extent a restatement of existing international law and State practice and providing a guide for the conduct of States may, for instance, exercise a more sustained influence on the regulation of State practice in this field than an international convention. The latter may turn out to be too rigid an instrument to gain the necessary wide-ranging acceptance within a foreseeable timespan.

9. Austria, however, also recognizes that the format of a convention, if a large ratification rate can be assured within a realistic period of time, still provides the most desirable result of the codification exercise on State responsibility and should therefore not be dismissed a priori. It will be the task of the General Assembly or a diplomatic conference finalizing the draft to decide which format is the most appropriate one, not excluding the possibility of adopting both a declaration of principles based on wide acceptance, having a harmonizing effect on State behaviour and a convention containing more specific provisions and procedures.

10. Since a declaration of principles requires a different language from that of a convention, Austria strongly favours a revision of the present draft articles which should result in two texts:

(*a*) Draft declaration of principles;

(*b*) Draft convention.

11. Given the fact that the majority of the existing draft articles already embody principles and could be adopted with only minor changes in the light of the comments of States, the proposed organization of work, as unconventional as it may seem, would not necessarily create a greater burden for the work of the Commission than a revision aimed solely at providing a draft convention. Instead, this format may provide the State community with an earlier chance of adopting an instrument containing basic rules on State responsibility than the present structure of the Commission's work on the topic.

12. As far as the substance of the draft articles is concerned, the Commission in its report to the General Assembly on the work of its forty-ninth session[1] requested State comments particularly on the key questions of international crimes and delicts, countermeasures and settlement of disputes, the identification of any areas requiring more work in the light of recent developments and the identification of any lacunae in the draft articles, particularly in the light of State practice.

13. While more detailed comments are provided below on the above-mentioned key issues and on such provisions requiring revision, Austria tends towards the conclusion that the draft is already overcomprehensive and requires some facelifting rather than the identification of additional lacunae to be filled by further provisions.

14. From the point of view of Austria, certain controversial provisions which run the risk of endangering a high degree of acceptability should rather be removed from the draft articles even if this is done at the expense of completeness and comprehensiveness. This is particularly true regarding the issue of "international crimes and international delicts" and probably even for certain provisions of, or even the entire, part three of the draft articles.

15. Austria does not think that the revision of the draft articles should reopen a basic discussion of all issues, including those where general agreement is visibly emerging. Such a method of work would be likely to jeopardize the objective of a rapid conclusion of this important codification endeavour. The work of prominent international lawyers, which has been invested so far in the draft articles, should also be honoured and respected in order to avoid widening the range of unresolved issues. The existing draft articles, with only some exceptions, would already provide an excellent basis for the formulation of draft principles at the current stage. Some specific provisions, however, should either be revised or deleted for the reasons specified below.

16. Particular care should be given to avoiding certain legal terms the scope of which is not sufficiently determined by State practice, such as the notion of "fortuitous event". Given the fact that one of the major objectives of regulating State practice in the field of State responsibility is the avoidance of conflicts between States, unclear legal terms tend to create tensions and conflict rather than to avoid them.

17. Any progress on regulating State practice in the field of State responsibility will prove decisive in promoting peace and stability in international relations. Given the increasingly interdependent character of inter-State relations, issues of State responsibility may arise not only above, but even more so below the threshold of serious conflicts, while at the same time, carrying the danger of seriously deteriorating relations between States. To the extent to which the rules regulating State responsibility can have a stabilizing and pacifying effect on State behaviour within the foreseeable future, the codification endeavour on State responsibility may be qualified as successful.

[1] *Yearbook ... 1997*, vol. II (Part Two), p. 11, para. 30.

18. Whatever the result of ongoing efforts to codify the rules of international law on State responsibility, the following main objectives should govern the work of the Commission and the General Assembly in this area:

(*a*) The rules on State responsibility should provide a decisive element of conflict prevention and resolution in international relations. They should help to influence State behaviour by minimizing instances which could develop into more serious forms of conflict among States. At the same time the rules will have to preserve the legitimate right of States to respond to violations of international law through which their rights are infringed;

(*b*) Given the long history of the Commission's efforts to provide the international community with effective rules on State responsibility, high priority should be given to the early conclusion of the work on this topic. Efforts to revise the existing draft articles with a view to turning them into an efficient international instrument should therefore be based on an appreciation of the excellent work which has already been done by the Commission. The draft articles and the system adopted, with the exception of the elements mentioned above, provide an excellent basis for an early result of the codification efforts on State responsibility. Any revision should therefore refrain from introducing new and complicating elements into the draft articles. It should rather iron out those elements which still provide pockets of resistance against a wide acceptability of an instrument on State responsibility;

(*c*) Given the priority of an early conclusion and wide acceptability, a flexible approach should be adopted as far as the format of a future instrument on State responsibility is concerned. It should be kept in mind that rules on the responsibility of States touch upon the very basis of international law and may provide it with renewed authority and power;

(*d*) This conclusion warrants a "two-track approach":

(i) As a priority the Commission should, on the basis of the existing draft articles and comments received by States, identify such principles governing the law of State responsibility which are to be included in a universally acceptable declaration;

(ii) At the same time work should continue on the revision of the draft articles with a view to elaborating an international convention.

Czech Republic

1. Given the great importance of the subject which is of significance for international law in its entirety, since it involves secondary rules and will thus have a bearing on the settlement of a considerable proportion of future disputes between States the time has come to give priority to the rapid conclusion of work on the topic so as to provide the international community with effective and reliable basic rules on State responsibility.

2. The set of articles resulting from the first reading is a good starting point for achieving that goal. However, it is of crucial importance to ensure that the final text has every chance of being widely accepted; this will call for a good measure of pragmatism and realism, which the Commission has in fact already displayed in the past, particularly as regards the abandonment of the approaches proposed in the area of institutional machinery for the implementation of the regime of responsibility for State crimes. The form that the final outcome of the Commission's work in this area is to take will also not be immaterial; it might be advisable not to rule out, or begin to consider now, alternatives to the adoption of an international instrument requiring ratification, which could prove too inflexible to attract the active participation of a sufficient number of States within a short period of time. At the current stage of the Commission's work, it is neither necessary nor appropriate to make any drastic or entirely innovative changes in the approach to the subject as reflected in the draft or in the actual content of the text itself.

Denmark
(on behalf of the Nordic countries)

1. The draft articles on State responsibility as now presented in their entirety by the Commission are the result of a very long drafting process, indeed, representing at the same time an impressive piece of research. This being the case, the Nordic countries would caution against reopening a new drafting process through submitting too many detailed comments and drafting points, and prefer instead to concentrate on those features in the draft articles which are known to have caused considerable trouble in the process of codifying the present topic such as the chapters on countermeasures and international crimes, as well as part three on settlement of disputes.

2. As to the draft as a whole, the Nordic countries believe that in general terms it captures well present-day thinking and practice with respect to responsibility for internationally wrongful acts of States.

3. It is the hope of the Nordic countries that the Commission will devote sufficient time for the second reading of this monumental topic so as to complete the work before the end of the century.

France

1. Before presenting its observations on the draft articles, France wishes to commend the members of the Commission who worked on them, particularly the special rapporteurs. Their work, even if it did not always command unanimity, was consistently interesting and thought-provoking.

2. The Commission's decision to submit its draft articles to all States, through the Secretary-General of the United Nations, now enables France to explain in detail why it is critical of the articles in many respects.

3. The set of draft articles lacks consistency and is unrealistic. The articles make it clear that the Commission is focusing more on developing legal rules applicable to State responsibility than on codification.

4. Giving priority to the progressive development of law is obviously not, in itself, to be criticized; but the goals of

such an exercise must be achieved, and there are a number of conditions to be met. First, the exercise must respond to the wishes and concerns of States. Otherwise, the draft articles are likely to lead to a doctrinal instrument without any practical impact or to a convention that may never enter into force because it cannot attract enough ratifications. The exercise will thus have failed to achieve its goal: instead of contributing to the development of law, it will harm the Commission's prestige. During such an exercise, care must be taken not to violate substantive rules that form part of positive law, all the more so if the rules in question are in a higher category. It is essential to avoid any conflict with the Charter of the United Nations and to refrain from using any formulations that could impair its authority, in violation of Article 103 of the Charter. These two basic requirements are not met in the case under consideration.

5. Furthermore, a number of provisions do not belong in the draft (particularly those concerning international crimes, countermeasures and the settlement of disputes). Conversely, other issues that should have been considered in greater depth, since they are of central importance to the subject, are only touched on by the Commission (as in the case of reparation of damage). The draft is thus simultaneously overambitious and too modest in its aims. It covers issues that are extraneous to the subject, without fully covering the subject.

6. The Commission's strategic choices and ideological approaches are in fact quite perplexing. Torn between *lex lata* and *lex ferenda* and too often giving the latter precedence over the former, the Commission, which in the case under consideration too often gives in to the temptation to behave like a legislative body, ends up in an ambiguous position. The Commission's work, which has an all-pervading ideological dimension that aims to demonstrate the existence of an international public order and, what is more, to give that order a criminal connotation, cannot be regarded as expressing the *opinio juris* of States, and even less so their practice.

7. In sum, part one of the draft needs to be drastically amended in order to be acceptable; part two is frequently weak and not properly linked to part one; and part three is inappropriate and superfluous.

8. The draft articles suffer simultaneously from omissions (there is no reference to the concept of damage) and the introduction of unacceptable concepts (the concept of an international "crime", reference to *jus cogens*) and concepts that do not belong in a draft on State responsibility (countermeasures, settlement of disputes).

Germany

1. There can be no doubt that the subject of State responsibility is an extremely complex one that cuts across all of international law. It is certainly no coincidence that the topic of State responsibility has been on the agenda of the Commission for over 40 years. The tremendous efforts undertaken by four special rapporteurs—Messrs Francisco García Amador, Roberto Ago, Willem Riphagen and Gaetano Arangio-Ruiz—which have translated into no less than 29 reports to date, deserve our admiration and praise. Germany welcomes the appointment by the Commission, at its forty-ninth session, of Mr. James Crawford as the fifth Special Rapporteur on State responsibility.

2. Over all these years, Germany has very closely followed the work of the Commission on the subject. It has always been its firm belief that the codification of the law on State responsibility would serve to promote stability and peace in international relations. Germany is aware that some areas in the field of State responsibility are more developed than others. It is telling that the six successive reports presented by Mr. García Amador dealt exclusively with the question of responsibility for injuries to the persons or property of aliens.[1] Given the preponderance of arbitral decisions on the law governing the treatment of aliens, the Commission's present proposals also seem largely to follow the jurisprudence in this field and conform only to a lesser degree to actual State practice covering the entire field.

3. The Commission must be commended for taking into consideration the fact that inter-State relations are characterized by an increasingly high degree of interdependence and cooperation. The changing structure of international law from coexistence to cooperation[2] has certainly influenced, and continues to influence, the area of State responsibility.

4. The high degree of importance of the Commission's draft articles on State responsibility is demonstrated by the fact that they are already a source of inspiration and guidance for States and judicial organs, including ICJ.[3]

5. In view of the all-embracing importance of the subject, Germany would urge the Commission, in its efforts leading to the final adoption of the draft, to keep in mind that what is needed is an instrument which will command the widest possible support within the international community. It must be firmly based on customary law and State practice and not go too far beyond what is needed or indeed accepted as being the current state of the law.

6. As has been pointed out above, the draft articles adopted by the Commission represent a tremendous achievement. However, owing to the nature and complexity of the subject, the future of the project remains open.

7. Germany would urge the Commission to continue its work on a set of articles with commentaries. There undoubtedly exists a solid body of customary international law on State responsibility that lends itself to codification. The commentaries to the draft articles constitute a unique source of information for the practitioner. The draft articles themselves already give guidance to States and judicial organs[4] as well.

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[1] See his first report, *Yearbook ... 1956*, vol. II, pp. 173 et seq.; second report, *Yearbook ... 1957*, vol. II, pp. 104 et seq.; third report, *Yearbook ... 1958*, vol. II, pp. 47 et seq.; fourth report, *Yearbook ... 1959*, vol. II, pp. 1 et seq.; fifth report, *Yearbook ... 1960*, vol. II, pp. 41 et seq.; and sixth report, *Yearbook ... 1961*, vol. II, pp. 1 et seq.

[2] See Friedmann, *The Changing Structure of International Law*; Verdross and Simma, *Universelles Völkerrecht*, p. 41; and Pellet, "Vive le crime! Remarques sur les degrés de l'illicite en droit international", p. 301.

[3] See the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, paras. 50 et seq. and 83 et seq.

[4] Ibid.

8. The Commission will have to address in due course the question of whether it wants to present its final product in the format of a draft convention or rather in the format of a declaration or an expository code. The Commission will have to bear in mind that the format of the project will have an impact on part three on dispute settlement and, by extension, on part two on countermeasures as well. It will also have to consider that in the final stages of turning a Commission draft into treaty law during diplomatic negotiations, existing norms of customary international law could be put in question, bargained away or made subject to reservations. Both the Commission and States will have to ensure that in the further process of codification the existing customary rules on State responsibility will be reinforced and, perhaps, completed, but not damaged.

Ireland

1. Responsibility for the breach of an obligation is inherent in any system of law. Ireland recognizes the fundamental nature and importance of State responsibility in the international legal system and appreciates the extensive examination of this topic by the Commission. Accordingly, Ireland is most pleased to offer some comments and observations on the draft articles.

2. In its report on the work of its forty-ninth session, held from 12 May to 18 July 1997,[1] the Commission indicated a number of issues on which comments by Governments would be particularly helpful to it. They included the "key issues" of the distinction between international crimes and international delicts, countermeasures and the settlement of disputes. Ireland's comments and observations relate to these three key issues.

3. In conclusion, Ireland reiterates its appreciation of the work of the Commission on this topic of fundamental importance to the international legal system and offers these comments and observations on the draft articles on State responsibility as a contribution to the further deliberations of the Commission, without prejudice to the position which Ireland may subsequently adopt on any of the issues under consideration.

[1] *Yearbook … 1997*, vol. II (Part Two), p. 11, para. 30.

Italy

1. Italy wishes first of all to commend the members of the Commission, particularly those who have acted as special rapporteurs, for their excellent work on the draft articles on State responsibility. The draft articles adopted by the Commission on first reading would already appear to represent a very good basis for discussion at an international conference to adopt an international convention on the subject.

2. Italy's observations concern the following points:

(*a*) The scope of the draft;

(*b*) The issue of whether damage is an element of an internationally wrongful act;

(*c*) The issue of the distinction between international crimes and international delicts.

3. Italy reserves the right to submit specific comments on parts two and three of the draft at a later date.

4. In the view of Italy, the draft articles should cover determination of the conditions to be met for an internationally wrongful act committed by a State to exist, the legal consequences of such an act and the settlement of disputes concerning such acts.

Mexico

1. Mexico commends the Commission for its work on the draft articles on State responsibility. It invites the Commission to continue its endeavours and to make every effort to arrive at a text that will meet the requirements of the international community for the establishment of rules regulating international liability.

2. Nevertheless, Mexico wishes to make it clear that, in its view, it would have been preferable, for the completion of the work of regulating State responsibility and the international liability of States, to have considered, within the compass of a single instrument, both responsibility for fault and liability for risk.

3. Notwithstanding the foregoing, and since Mexico recognizes the innate difficulty of the drafting, negotiation and adoption process inherent in efforts to draft a single convention, it supports continuation of the work in the Commission as it is currently being undertaken, but expresses the wish that, in the current circumstances, the Commission should continue its work on the topic of liability for risk (acts not prohibited by international law).

Mongolia

1. Mongolia welcomes the years-long efforts of the Commission to elaborate feasible articles on State responsibility. It finds acceptable, in general, the approach to the concept of State responsibility and the thrust of the draft articles. Mongolia is of the view that the Commission has been careful in determining the principles which govern such responsibility. It believes that the articles, once adopted, will make an important contribution to the codification and progressive development of international law, in particular by establishing a general regime of State responsibility as compared to those already established by specific treaties.

2. Mongolia hopes that the Commission will give, when revising the draft articles, particular care and attention to clarifying legal terms the scope of which are not yet sufficiently determined by State practice, such as fortuitous event, material impossibility, interim measures of protection, etc., and to the links and connection to other basic documents such as the Code of Crimes against the Peace and Security of Mankind and the statute for an international criminal court to be finalized by July 1998, as well as to the principles reflected therein.

Singapore

1. As with previous documents presented by the Commission, these draft articles and commentaries, adopted on first reading at the forty-eighth session held from 6 May to 26 July 1996, join the list of many international instruments that have contributed to the development and codification of international law. This document is without a doubt consistent with the well-deserved reputation of the distinguished jurists that constitute the Commission. This set of draft articles and commentaries on the international responsibility of States is a laudable product of several decades of controversial, yet persistent, study and scrutinizing of principles *de lege ferenda* and *lex lata*. It is, perhaps, the identification through the commentary of articles that distinguish these two principles that highlights the excellence of the Commission's efforts. The commentary is most certainly an encouraging sign of the ongoing work of the Commission in this vital area of international law.

2. Singapore will herein make a few brief comments and notes to this extensive and far-reaching document. These observations would no doubt already have been considered by the Commission, but are nevertheless raised to underscore the potential controversial implications that such principles might have if they were to be accepted without further discussion.

3. There is no doubt that these draft articles and accompanying commentaries are important to the development of State responsibility. However, it is clearly necessary to reaffirm that any obligations, the violation of which is alleged, must be firmly established in international law. The rule must be shown to be accepted with certainty by the international community. Judicial acceptance of submissions that there could be obligations owed to the wider community in such a manner that other States may have an interest, was discussed in the *Namibia* case.[1] In that case, ICJ was of the view that a violation of international law had to precede the claiming of an interest.[2] Thus the process in which the status as an injured State is bestowed must be clarified, not only because it modifies the relationship between States, but also because it precedes the taking of unlawful acts that are legitimate countermeasures and circumstances precluding wrongfulness.

4. Singapore is not convinced that these draft articles should take the form of an international convention. As other States have noted, to adopt the form of a convention may create unnecessarily rigid rules. The principles formulated by the Commission should permit flexibility for international tribunals and States in its application to particular scenarios. The Government therefore reserves the right to make further observations and comments to these draft articles should the need arise.

[1] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

[2] ICJ, *Yearbook, 1970–1971*, No. 25 (The Hague, 1971), p. 107.

Switzerland

1. The Commission has just completed the first reading of its draft articles on State responsibility. This is the initial result of efforts initiated in the 1920s by the international community under the auspices of the League of Nations. One cannot underestimate the importance of this work which, although it mainly comes under the codification of the law of nations, also incorporates a number of elements that fall within the purview of the progressive development of international law. The draft articles therefore represent a legal monument in the true sense of the term, bearing as they do on a question central to inter-State relations, namely, violations of international law by States and the consequences of such violations.

2. Switzerland wishes to thank the Commission for having reached the end of its work. It wishes to pay tribute to the efforts of the special rapporteurs Messrs Ago, Riphagen and Arangio-Ruiz who have guided the Commission's work on this topic. Without them, the text would never have come into being. It can be affirmed here and now that the draft articles on State responsibility, whatever their ultimate fate, will serve as a vital reference point for any question arising in the field which they are intended to regulate. Some of the elements of the draft have, moreover, already become part of positive law, for example the concept embodied by the French term *fait illicite*, which has superseded the more traditional concept of the *acte illicite* (as per the first draft article); the distinction that is drawn between obligations of result and of conduct (arts. 20 and 21); and the fact that damage defined in the traditional sense is absent from the constituent elements of an international delict.

3. Clearly, a draft which is designed to regulate one of the most debated areas of the law of nations cannot entirely avoid close scrutiny or even criticism. In common with others, Switzerland wishes to share some of its far from complete thoughts on the topic. It offers these opinions in an entirely constructive spirit, i.e. with a view to contributing to the improvement, if improvement is needed, of what is in most respects an excellent piece of work.

4. The draft articles elaborated by the Commission are very thorough and therefore very detailed. This is both an advantage and a disadvantage, for the text sometimes seems repetitive and therefore unnecessarily complicated.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom commends the Commission for the completion of its draft articles on State responsibility, provisionally adopted on first reading at its forty-eighth session in 1996. It also welcomes the priority the Commission proposes to give to concluding this important project in its quinquennial plan. The work carried out over many years on this central topic of international law, as reflected in part in the draft articles themselves but to a large extent also in the commentaries, has introduced valuable clarity and precision into numerous areas. Attention needs now to be focused, both by Governments and by the Commis-

sion itself, on how best to bring this major work to fruition, in the form of a generally acceptable statement of the principles of State responsibility. In the United Kingdom's view, to achieve that aim will require the modification and refinement of aspects of the Commission's draft as well as the abandonment of certain elements; it will equally require an informed discussion of the shape and nature of the final product. The United Kingdom stands ready to cooperate actively in both tasks, and looks forward to the development of a fruitful dialogue between the Commission and Governments over their accomplishment.

2. The United Kingdom shares the Commission's view that there have been important developments in State practice and in international jurisprudence since work on the draft articles began. They endorse the suggestion that those developments should be taken into account by the Commission in preparing its final draft.

3. Given the fundamental place occupied by State responsibility in the system of international law, the United Kingdom considers it essential that the outcome of the project should encourage stability and certainty in international relations. To warrant approval, the principles must be sufficiently flexible to accommodate changes in the nature of international legal relations, such as those arising from the development of international environmental law. Flexibility for future development should however be clearly distinguished from innovation. Conscious innovation may indeed be required, for example in respect of new problems or areas of concern; but such innovation is most effectively achieved by the considered negotiation of specific instruments in particular contexts, and not by changing the underlying principles of international responsibility. To change the underlying principles may have unpredictable effects and may prove to be undesirable in particular contexts. Accordingly, the United Kingdom believes it to be of crucial importance that the Commission's draft, in its final form, reflect the established principles of customary international law grounded in the practice of States.

4. The United Kingdom does not consider it necessary or helpful to discuss in these comments the theoretical debates concerning the nature of State responsibility. States may come to an agreement on legal principles by a variety of routes; but the crucial question is whether the principles do in fact command the assent and respect of the international community. It is therefore necessary that the draft articles should not contain elements that render them unacceptable in principle to a significant part of the international community. It is also necessary that the draft articles be sufficiently practical and resilient to work effectively as the framework for day-to-day international relations. On both grounds the United Kingdom has concerns about parts of the current draft.

5. The United Kingdom considers that there is room for considerable improvement in the drafting of the articles. Some draft articles (such as draft articles 1, 2, 16 and 51) might usefully be combined with neighbouring draft articles or even omitted entirely. Other draft articles (such as draft articles 18 and 20–26) introduce a fineness of detail and distinction which, while valuable as an analytical tool, is unnecessarily complex, and unhelpful, in an instrument that is to lay down the principles of responsibility applicable in the daily dealings between States. In yet other cases (notably the provisions on international crimes and certain provisions on countermeasures and on settlement of disputes) it seems necessary to jettison elements of the draft in their entirety if there is to be any hope of a final product which reflects what States would find acceptable.

6. Careful attention is also required in this context to the form the final product should take. The Commission will naturally be devoting considerable thought to this question in the course of the second reading. The United Kingdom urges the Commission to give full consideration to the entire range of possibilities provided for under the Commission's statute and not to adopt as axiomatic a working assumption that the articles are destined to become an international convention. The United Kingdom would in fact be against any idea of proceeding towards the negotiation of a convention, for weighty reasons of substance which go beyond the sheer burden which dealing with such a subject at that level would lay on the international negotiating process. These reasons are as follows:

7. In the first place, to proceed by the convention route would invite the possibility that the resulting instrument would not be ratified by the overwhelming majority of the international community. Indeed, that outcome appears not only possible but even likely given the sheer difficulty of the subject matter and the consequent likelihood that a substantial number of Governments, or national parliaments, would not accept the need to grapple in abstract terms with the propositions in the text or would shy away from binding themselves to those propositions in solemn legal form. So a failure to achieve widespread ratification within a reasonably short time could only be seen as casting doubt on the soundness under general international law of the principles contained in it. The importance of the principles of State responsibility in the international legal system is such that it is highly undesirable to put their validity in question through what would appear, however unjustly, as an implicit vote of no confidence in the outcome of the Commission's work.

8. In the second place, the United Kingdom believes (as already indicated) that the overriding object of the exercise must be to introduce the greatest possible measure of clarity and stability into this area of the law. That would not necessarily be achieved by the adoption of an international convention which, in this very specific context, risks the creation of rigidities and inflexibilities where in fact subtlety and adaptability are required. The United Kingdom would therefore favour adoption of the final product in a form which would convey the approval of the international community and encourage reference to the principles as formulated by the Commission, but in a form which allowed for further refinement of the principles by international tribunals and in State practice by preserving a degree of flexibility in their application in concrete situations. The very difficulty the Commission has itself experienced in devising rules in terms apt for the most widely different situations (such as the unlawful use of force, environmental damage arising out of natural resource exploitation and economic wrongs) strongly suggests the advantage of allowing for the possibility of applying stable general principles in subtly different ways according to the context.

9. One particular area in which the need for flexible differentiation is evident is the relationship between the Commission's draft articles and other regimes of international law. The draft articles deal with many issues for example, the right of a State to take countermeasures in the event of a breach of an obligation owed to it, the attribution of conduct to a State, and the effect of *force majeure*, material impossibility and necessity upon the duty to fulfil international obligations that are also dealt with in the 1969 Vienna Convention. In the *Rainbow Warrior*[1] arbitration, and more recently in the *Gabčíkovo-Nagymaros Project* decision of ICJ,[2] the relationship between the basic rules of State responsibility and the specific rules applicable under the 1969 Vienna Convention has been examined. This question is not, however, addressed in the draft articles themselves. Draft article 37 states that part two of the draft articles does not oust the provisions of any *lex specialis*. But in the view of the United Kingdom that principle should be explicitly applied to the whole of the draft articles, and not to part two only.

10. Against that background there are four aspects of the draft articles that cause the United Kingdom particular concern, and which represent the major obstacles to the acceptability of the draft articles as a whole. They are the:

(*a*) Provisions on international crimes;

(*b*) Provisions on countermeasures;

(*c*) Proposals concerning dispute settlement;

(*d*) Approach adopted by the Commission to the exhaustion of the local remedies principle.

11. The United Kingdom reserves the right to offer further comments at a later stage.

[1] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the* Rainbow Warrior *Affair*, Decision of 30 April 1990 (UNRIAA, vol. XX (Sales No. E/F.93.V.3), pp. 215 et seq.).

[2] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

United States of America

1. The United States welcomes the opportunity to provide comments on the full draft articles on State responsibility prepared by the Commission.

2. The United States agrees with the Commission that a statement of the law of State responsibility must provide guidance to States with respect to the following questions: when does an act of a State entail international responsibility? What actions are attributable to the State? What consequences flow from a State's violation of its international responsibility? Customary international law provides answers to these questions, but the Commission has in many instances not codified such norms but rather proposed new substantive rules. In particular, the sections on countermeasures, crimes, dispute settlement and State injury contain provisions that are not supported by customary international law.

3. Therefore, these comments first address the following areas of the draft, which, in the view of the United States, contain the most serious difficulties:

(a) *Countermeasures*. While welcoming the recognition that countermeasures play an important role in the regime of State responsibility, the United States believes that the draft articles contain unsupported restrictions on their use;

(b) *International crimes*. The United States strongly opposes the inclusion of distinctions between delicts and so-called "State crimes", for which there is no support under customary international law and which undermine the effectiveness of the State responsibility regime as a whole;

(c) *Reparation*. While many of the points in the section on reparation reflect customary international law, other provisions contain qualifications that undermine the well-established principle of "full reparation";

(d) *Dispute settlement*. Because of certain flaws in the dispute settlement procedure, the United States urges that part three be made optional.

(e) *Standing and injury*. Important elements of the definition of an injured State in draft article 40 lack support under customary international law and would lead to undesirable consequences.

4. Because the articles would be used by States, tribunals and individuals, it is important that they be effective, practical and sound, which certain elements of the current draft are not. The Commission is urged to focus on developing a clear set of legal principles well anchored in customary international law and free from excessive detail and unsubstantiated concepts.

5. Several years ago two scholars commented, with respect to the Commission's efforts to codify the law of State responsibility, that "[n]o other codification project goes so deeply into the 'roots', the theoretical and ideological foundations of international law, or has created comparable problems".[1] Indeed, as the draft articles are reviewed, it becomes clear that the project of codification deserves exceedingly careful review and revision. As these comments have indicated, the United States believes that, while there is much to be commended in the draft articles, there are also several serious and substantial flaws. To a significant degree, the draft contains provisions that do not reflect customary international law. In those cases where progressive development might be warranted, the draft articles take steps in directions that unacceptably complicate the structure of enforcement of international norms.

6. If the major flaws of the draft are not addressed and corrected, it will be difficult for the project to obtain the wide support from the international community necessary for a movement towards a convention on State responsibility.

[1] Spinedi and Simma, "Introduction", *United Nations Codification of State Responsibility*, p. VII.

Uzbekistan

1. Uzbekistan believes that the document as a whole is acceptable.

2. The draft articles should be followed by an instrument on the responsibility of international organizations for internationally wrongful acts.

Part One

ORIGIN OF INTERNATIONAL RESPONSIBILITY

Argentina

Argentina considers that part one of the draft, concerning the origin of international responsibility (arts. 1–35), adequately codifies the basic rules of responsibility and outlines the subject in a satisfactory manner. The second reading will enable changes to be made to the drafting of the articles in order to eliminate excessive detail and simplify or clarify the formulation of some rules; nevertheless, the general thrust of the draft is correct, and it should not be subject to substantial changes.

Austria

Overall, Austria is satisfied with the general approach in particular of part one and the general structure adopted by the draft articles, with the exceptions specified below.

Denmark
(on behalf of the Nordic countries)

It has been observed and is accepted that the element of fault (*culpa*) is not established as a condition for engaging the responsibility of a State whereas it is envisaged as a general factor in part two determining the legal consequences of an internationally wrongful act. To accept fault as a general condition in establishing responsibility would considerably restrict the possibility of a State being held responsible for the breach of an international obligation. Moreover, proof of wrongful intent or negligence is always very difficult. In particular, when this subjective element has to be attributed to the individual or group of individuals who acted or failed to act on behalf of a State, its research becomes uncertain and elusive. If the element of fault is relevant in establishing responsibility, it already follows from the particular rule of international law governing that situation, and not from being a constituent element of international responsibility. This applies, for instance, with regard to certain cases of omission, where responsibility arises if there has been lack of due diligence on the part of the State concerned, thereby breaching a primary rule of international law.

Chapter I. General principles

Article 1 (Responsibility of a State for its internationally wrongful acts)

France

1. Draft article 1 is not acceptable because it reflects the intention to set up a kind of "international public order" and to defend objective legality, instead of safeguarding the subjective rights of the State, which France sees as the purpose of international responsibility.

2. Draft article 1, which states that "[e]very internationally wrongful act of a State entails the international responsibility of that State", is one of the articles most open to criticism.

3. In the Sixth Committee of the General Assembly, France has regularly pointed out that the existence of damage is an indispensable element of the very definition of State responsibility and that it is an integral part thereof. France has always criticized the idea that a breach of obligations, which are ill-defined in the draft articles, is sufficient to entail the responsibility of the State.

4. International responsibility presupposes that, in addition to an internationally wrongful act having been perpetrated by a State, the act in question has injured another State. Accordingly, if the wrongful act of State A has not injured State B, no international responsibility of State A with respect to State B will be entailed. Without damage, there is no international responsibility. This means that a State cannot file a claim without having an identifiable, specific legal interest. The interest in question cannot merely be the interest that any State may have in other States observing international law. International responsibility is limited to the protection of the rights of the State itself; it cannot be extended to the protection of international law as such.

5. One of the most questionable aspects of the Commission's work has been defining international responsibility without incorporating in the definition a requirement that damage must have been caused. Supposedly, for international responsibility to be entailed, a sufficient prerequisite is that the State has breached an international obligation. France cannot endorse this approach, which is not in conformity with positive law.

6. It is therefore essential to adopt from the outset an approach based on the concept of damage. Damage is a constituent element of responsibility in public international law. "Legal injury" alone cannot entail the international responsibility of a State. France is therefore proposing new wording for article 1.

7. A number of provisions of the draft give the impression that the State is "presumed to be at fault". The State should, on the contrary, be presumed to have observed the law, in accordance with the principle of good faith.

A whole series of procedural consequences flow from this presumption, particularly with respect to the burden of proof, which the draft too often ignores. Procedural guarantees are one of the most positive contributions of the codification process, without which codification has a tendency to become a purely doctrinal formulation of customary law. Regrettably, as a result of this omission, the Commission's draft is more like a doctrinal text than a draft international convention designed to govern the conduct of States.

8. France proposes amending this provision as follows:[1]

> [1.] Every internationally wrongful act of a State ~~entails the international responsibility of that State~~ [entails the responsibility of that State vis-à-vis the injured States].

[1] The drafting changes proposed by France are in square brackets. The provisions which France believes should be deleted are crossed out.

Germany

1. Germany agrees with the "General principles" on the origin of international responsibility as contained in draft articles 1 to 4.

2. Draft article 1 proceeds from the basic assumption that every internationally wrongful act of a State entails the international responsibility of that State. While Germany fully agrees with this well-accepted general principle,[1] it cannot fail to note that the circumstances under which responsibility arises and the remedies to be provided for violations cannot be divorced completely from the nature of the substantive or "primary" rules of conduct breached. Thus, for instance, the failure of a State to fulfil obligations of information, consultation, cooperation and negotiation would certainly incur a different degree of responsibility than the violation of the territorial sovereignty of another State. The procedures to be followed in seeking redress for the wrong may vary as well. Indeed, State practice shows that States in many cases refrain from invoking State responsibility and channel their grievances into a more conciliatory approach. Since "soft" obligations to consult and to cooperate are increasing in modern international law—a development that certainly is welcome—the Commission should also be concerned with the consequences of a lack of cooperation owed to other States or the international community. When States subscribe to such obligations, they do not intend and are not expected to run the risk of being subjected to a rigid regime of State responsibility.

3. The view that the determination of the content, form and degree of responsibility, that is, of the so-called secondary rules, is dependent on the nature of the primary rules concerned is not new to the Commission. In fact, it has been an accepted caveat, within the Commission, in its decision to restrict the topic of State responsibility to secondary rules. For instance, in presenting his preliminary report on the content, forms and degrees of international responsibility, Mr. Riphagen reminded the Commission that "in determining the new legal relationships established by a State's wrongful act, [one] cannot ignore the origin in particular the conventional origin of the international obligation breached".[2] The Commission itself, by introducing in draft article 19 the concepts of "international delicts" versus "international crimes", clearly admitted that primary and secondary rules are necessarily intertwined.[3] Indeed, in his third report, Mr. Riphagen went on to say that "the Commission may wish to consider the question whether even part 1 does sufficiently reflect the diversity of primary rules".[4] Germany invites the Commission to take up this suggestion. In this connection, the Commission might want to consider broadening the scope of draft article 37 to apply to part one of the draft articles as well.[5]

[1] See, for example, the case of the *S.S. "Wimbledon", Judgments, 1923, P.C.I.J.*, *Series A*, *No. 1*, p. 15; the case concerning the *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J.*, *Series A, No. 17*, p. 29; and the case of the *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 23.

[2] *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/330, p. 111, para. 12.

[3] See Rosenstock, "An international criminal responsibility of States?", p. 270: "[A]rticle 19 … is as clear a statement of a primary rule as one can imagine".

[4] *Yearbook ... 1982*, vol. II (Part One), document A/CN.4/354 and Add.1 and 2, p. 28, footnote 19.

[5] Article 37 on *lex specialis* reads: "The provisions of this part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act."

Switzerland

See "General remarks", above.

United Kingdom of Great Britain and Northern Ireland

The Commission might consider whether other elements of draft articles 1 to 4 could be combined or omitted.

Proposed new paragraph 2

France

1. France is of the view that a paragraph 2 could be included in draft article 1, making it clear that the articles do not prejudge questions which may arise with respect to injurious consequences arising out of acts not prohibited by international law.

2. France proposes adding a new paragraph 2 as follows:

> **"[2. The present articles do not prejudge questions which may arise with respect to injurious consequences arising out of acts not prohibited by international law.]"**

Article 2 (Possibility that every State may be held to have committed an internationally wrongful act)

Germany

Germany agrees with the "General principles" on the origin of international responsibility as contained in draft articles 1 to 4.

United Kingdom of Great Britain and Northern Ireland

Draft article 2 could well be omitted. The Commission might consider whether other elements of draft articles 1 to 4 could be combined or omitted.

Article 3 (Elements of an internationally wrongful act of a State)

Argentina

1. This characterization of an internationally wrongful act,[1] which relies on two elements (one subjective—the attribution of an act to the State—and one objective—the fact that the act constitutes a violation of international law), does not expressly include the element of *damage* caused as a result of the State's conduct to the detriment of the subject whose subjective right has been impaired.

2. While a large section of public-law doctrine holds that a reference to damage is obligatory,[2] the Commission did not regard the mention of damage as an essential condition for the existence of an internationally wrongful act.[3]

3. In this connection it is believed that the characterization formulated by the Commission deserves careful analysis. While it is indeed true that there are various international instruments which create obligations not between States, but between a State and its own subjects (namely, the international human rights protection treaties), it is also true that violations of those instruments have a special prevention and punishment regime (namely, the international human rights protection mechanisms) and do not necessarily give rise to a claim by one State against another.

4. Nevertheless, in the case of a wrongful act caused by one State to another, which would appear to be the *ratio legis* of the draft, the exercise of a claim makes sense only if it can be shown that there has been real financial or moral injury to the State concerned. Otherwise, the State would hardly be justified in initiating the claim.

5. In a similar vein, it has been stated that even in the human rights protection treaties, in which a legal relationship is established between a State and the individuals under its jurisdiction, the damage requirement cannot be denied. What is involved is actually a moral damage suffered by the other States parties.[4]

6. It has also been stated that the damage requirement is, in reality, an expression of the basic legal principle which stipulates that no one undertakes an action without an interest of a legal nature.[5]

7. The foregoing indicates that it would be advisable for the Commission to reconsider the non-inclusion of the damage requirement in draft article 3 from the standpoint of the object and purpose of the article.

[1] In 1972, at the prompting of the Special Rapporteur, Mr. Ago, there was a change in the Commission's concept of the international responsibility of the State. Up to the 1960s, State responsibility had been viewed essentially as relating to the protection of aliens. Mr. Ago's writings gave rise to a new concept, which is regarded as the fundamental basis of international responsibility: the violation by a State of its obligations towards other States and the international community as a whole.

[2] It has been stated in this connection that "the breach of an international obligation is a necessary but not sufficient element in the case of international delicts. For the purposes of establishing an automatic responsibility link between the acting State and the claimant State, there must be an additional requirement: the damage suffered by the claimant State" (Jiménez de Aréchaga, *Derecho Internacional Público*, p. 35).

[3] The Commission has stated that

> "International law today lays more and more obligations on the State with regard to the treatment of its own subjects. For examples we need only turn to the conventions on human rights or the majority of the international labour conventions. If one of these international obligations is violated, the breach thus committed does not normally cause any economic injury to the other States parties to the convention, or even any slight to their honour or dignity."

(*Yearbook ... 1973*, vol. II, document A/9010/Rev.1, p. 183, para. (12) of the commentary to article 3)

[4] "In the case of a violation of the human rights treaties, the damage sustained by each of the other States parties is a moral damage, which consists of the impairment of its interest in ensuring that the treatment of individuals in all States in the region adheres to the stipulated norms." (Jiménez de Aréchaga, op. cit.)

[5] In this connection, it has been stated that the damage suffered by a State is always the element "that entitle[s] one State to make a claim against another and demand redress" (*Yearbook ... 1973*, vol. I, 1205th meeting, statement by Mr. Sette Câmara, p. 22, para. 43).

France

1. The wording of draft article 3 should specify that the conduct of the State which may constitute an internationally wrongful act includes both legal acts and material conduct.

2. France proposes amending subparagraph (*a*) as follows:

> "(*a*) ~~Conduct consisting of an action or omission is attributable to the State under international law~~ [Conduct, be it a legal act or material conduct, consisting of an action or omission is attributable to the State under international law]; and"

Germany

Germany agrees with the "General principles" on the origin of international responsibility as contained in articles 1 to 4.

Italy

1. In Italy's view, damage should not be included among the elements of an internationally wrongful act.

2. Under international law, the breach of a legal obligation by a State necessarily involves the injury of a corresponding subjective right of another subject (or several other subjects) of international law. This other subject does not have to demonstrate that it has in addition suffered material or moral damage in order to be able to assert that an internationally wrongful act has been committed against it and that the wrongdoing State bears responsibility for that wrongful act. The injury of its subjective right suffices. Naturally, the content of the wrongdoing State's responsibility will be the same only where there has been material or moral damage.

3. Affirming that a wrongful act exists and that there is State responsibility only if the breach of the obligation attributable to the State has caused damage to another subject would be tantamount to saying, for example, that the violation by a State of another State's territory, or the adoption by a State of legislation that it had undertaken not to adopt, do not represent wrongful acts if they do not cause material or moral damage. What is more, in the case of obligations concerning the way in which States must treat their citizens, the State that breaches such obligations would not be committing an internationally wrongful act because there would be no State (or other subject of international law) that has suffered material or moral damage.

4. In fact, even those ever fewer in number who assert that damage is a condition for the existence of an internationally wrongful act do not draw such a conclusion. They affirm that damage has occurred in the cases in question, and they speak of legal damage in that connection. However, as the Commission indicated in its commentary to draft article 3, there is no point in referring to damage as being a subsequent element of a wrongful act, which would follow a breach of an obligation, since any breach of an international obligation involves legal damage and such damage is sufficient to establish the existence of a wrongful act and the responsibility of the wrongdoing State.

5. Those who now insist that damage should be included as an element of an internationally wrongful act are actually motivated by a different concern, i.e. the concern that failure to mention damage as an element of an internationally wrongful act would, where there is a breach of a given obligation, allow any member of the international community to invoke the existence of a wrongful act and the responsibility of the wrongdoing State. This concern is not well founded, however. The fact that damage is not regarded as an element of a wrongful act does not mean that all States may invoke the responsibility of the wrongdoing State. Only the State or States whose subjective right has been injured may do so, i.e. those in respect of which an obligation has been breached. What is at issue, therefore, is identifying the injured State, a subject that is dealt with in draft article 40. Unquestionably, in the case of the breach by a State of an obligation under a bilateral treaty, only the other State party to the treaty will have an injured subjective right and consequently only that State will be able to invoke the responsibility of the wrongdoing State. In the case of the breach of obligations under customary international law or under a multilateral treaty, identification of the injured subject is more complex, but it is clear that the breach of most obligations does not entail the injury of the subjective rights of all the States addressed by the norm containing the obligation (i.e. in the case of customary international law, all members of the international community and, in the case of a multilateral treaty, all States parties to the treaty). Only in instances where there are norms laying down *erga omnes* obligations (or *erga omnes* participants) will all States (or all States parties to the treaty) be able to claim that a subjective right has been injured and consequently invoke the responsibility of the wrongdoing State. It is therefore necessary to establish whether such norms exist—a matter dealt with in draft article 40—and, if so, what the norms in question are; the issue is not whether damage is a prerequisite for the existence of an internationally wrongful act. Furthermore, if the concept of damage is regarded as including legal damage, asserting that damage is an element of a wrongful act is insufficient to preclude the existence of obligations whose breach gives rise to responsibility with respect to all States. In fact, in the case of the breach of what are referred to as *erga omnes* obligations, all States addressed by the norm should be regarded as having had a subjective right injured and, consequently, as having suffered legal damage.

Mongolia

Draft article 3 establishes elements constituting an internationally wrongful act. Mongolia fully shares the view that a breach of international obligation should give rise to liability. It nevertheless is of the view that a broader approach to international obligations may be needed to accommodate the needs of situations which otherwise will not be covered. These would include, in the first place, State obligations relating to environmental protection. These are highly important obligations: obligations of States to each other and to future generations. In this connection mention should be made of principle 21 of the Declaration of the United Nations Conference (Stockholm Declaration) on the Human Environment[1] which declares that States have the responsibility to ensure that activities under their jurisdiction or control do not cause damage to the environment of other States or to areas beyond their national jurisdiction.

[1] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

Switzerland

See "General remarks", above.

United Kingdom of Great Britain and Northern Ireland

The Commission might consider whether other elements of draft articles 1 to 4 could be combined or omitted.

Article 4 (Characterization of an act of a State as internationally wrongful)

Germany

Germany agrees with the "General principles" on the origin of international responsibility as contained in draft articles 1 to 4.

United Kingdom of Great Britain and Northern Ireland

The Commission might consider whether other elements of draft articles 1 to 4 could be combined or omitted.

United States of America

1. Two areas in the draft articles on attribution require refinement or clarification (see comments on article 8, below):

The place of internal law[1]

Draft article 4 states the correct rule that the wrongfulness of State action "cannot be affected by the characterization of the same act as lawful by internal law". However, in the very next article, the draft provides that the definition of "State organ" depends on whether the particular entity has "that status under the internal law of that State". Although draft article 4 concerns the characterization of acts while draft article 5 concerns the characterization of organs, the internal law loophole in article 5 effectively creates the possibility for a wrongdoing State to plead internal law as a defence to an unlawful act.

2. Under this formulaic rule, it could be that according to some State law, the conduct of State organs will be attributable to the State, while the conduct of identical entities in other States will not be attributable to the State.[2] The determination whether a particular entity is a State organ must be the result of a factual inquiry.[3] The United States also notes that the proviso that the organ of the State "was acting in that capacity in the case in question" is not defined. The reference to "capacity" could be read as enabling a wrongdoing State to dispute its liability on the grounds that, while the State organ committed the wrongful act, it acted outside its scope of competence. Such a reading would undermine the principle that responsibility for the action of State organs is governed by international law.

[1] See also the comments of the United States on article 8, below.

[2] See *Yearbook … 1971*, vol. II (Part One), document A/CN.4/246 and Add.1–3, p. 253, para. 160.

[3] Compare *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 38–39, with *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983), pp. 626–627.

Chapter II. The "act of the State" under international law

Germany

Germany is in general agreement with the provisions contained in this chapter. Some doubts have been raised, however, as to whether the chapter in question sufficiently covers acts of natural persons and juridical persons, who, at the time of committing a violation of international law, do not act as State organs but nevertheless act under the authority and control of the State.[1] Germany tends to share these doubts. The concept lying at the basis of chapter II seems to be rooted more in the past than in present conditions. It might not sufficiently take into account the fact that States increasingly entrust persons outside the structure of State organs with activities normally attributable to a State.[2]

[1] See statement by Austria on 6 November 1992 (*Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 23rd meeting (A/C.6/52/SR.23), and corrigendum).

[2] It is acknowledged, however, that articles 7, paragraph 2, and 8 do introduce an element of flexibility.

Article 5 (Attribution to the State of the conduct of its organs)

France

1. The wording of draft article 5 is open to criticism. In the French version, the term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent". The same comment applies to articles 6, 7, 9, 10, 12 and 13.

2. France proposes amending this provision as follows:

> "[1.] For the purposes of the present articles, ~~conduct of any State organ having that status under the internal law of that State~~ [the conduct of any State organ or agent acting in exercise of its powers as defined by the internal law of that State] shall be considered as an act of the State concerned under international law, ~~provided that organ was acting in that capacity in the case in question~~."

Switzerland

Draft articles 5 to 10 of the draft defined wrongful acts attributable to the State. Draft article 11 and the following articles additionally list types of conduct that are not attributable to the State. Thus the draft initially focuses on the details of conduct that *are* attributable to the State, only to deal in the next instance, conversely, with conduct which is *not*. This technique could potentially detract

from a text which, among other virtues, should possess that of relative simplicity.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom does not consider the principles set out in draft articles 5 and 6 to be controversial in themselves, but notes that the application of the principles might in some circumstances give rise to difficulties. Both draft articles attribute to the State the conduct of "governmental" organs. However, a problem arises from the absence of any definition in the draft articles, and of any shared international understanding, of what acts are and what are not "governmental". In some situations, for example, religious bodies may exercise a degree of authority, perhaps including the power to punish persons for breaches of religious laws, but may not formally be a part of the governmental structure of the State. There is a need for the Commission to consider whether an effective criterion of "governmental" functions can be devised and incorporated in the draft. A similar point arises in relation to draft articles 7, paragraph 2, 8 (*b*), 9 and 10.

2. Draft article 5 establishes that acts of organs that are, under the municipal law of a State, organs of that State are acts of that State. If that law itself designates the organ as an organ of the State, it may be appropriate for international law to adopt a similar position. If, however, the municipal law of a State does not treat an organ as part of the State, it does not necessarily follow that the organ's acts are not attributable to the State. The municipal law cannot have determinative effect in this context: attribution is a matter for international law. The United Kingdom also observes that the principles developed in the context of State immunity are not necessarily applicable in the context of State responsibility. The Government hopes that the Commission will clarify these points in the commentary, and consider whether any change to the drafting of the draft articles is necessary.

3. See also comments on draft article 7, below.

United States of America

See comment on draft article 4, above.

Proposed new paragraph 2

France

France proposes adding a new paragraph 2 as follows:

> "2. The conduct of an organ or agent of the State shall be considered as an act of that State under international law, whether that organ or agent exercises constituent, legislative, executive, judicial or other functions, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State."

Article 6 (Irrelevance of the position of the organ in the organization of the State)

France

1. In the French version, the term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent".

2. Draft article 6 does not raise any particular difficulty. However, the distinction it establishes between functions of an international character and those of an internal character is not without ambiguity. It would, furthermore, be preferable to replace the expression "constituent, legislative, executive, judicial or other power" by "exercises constituent, legislative, executive, judicial or other functions".

3. France therefore proposes amending this provision as follows:

> "The conduct of an ~~organ~~ [an organ or agent] of the State shall be considered as an act of that State under international law, whether that ~~organ~~ [organ or agent] ~~belongs to the constituent, legislative, executive, judicial or other power~~ [exercises constituent, legislative, executive, judicial or other functions], whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State."

Switzerland

See comments on draft article 5, above.

United Kingdom of Great Britain and Northern Ireland

See comments on draft article 5, above.

Article 7 (Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority)

France

In the French version, the term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent".

Switzerland

See comments on draft article 5, above.

United Kingdom of Great Britain and Northern Ireland

See draft articles 5 and 10.

Paragraph 1

France

1. Exactly what is to be understood by "territorial governmental entity" within a State? Specific mention should be made of the case of a federate State.

2. France proposes renumbering this provision as draft article 6 and amending paragraph 1 as follows:

> "1. ~~The conduct of an organ of a territorial governmental entity within a State~~ [The conduct of an organ or agent of a federate State or of any territorial governmental entity acting in that capacity] shall also be considered as an act of that State under international law, ~~provided that organ was acting in that capacity in the case in question~~."

United Kingdom of Great Britain and Northern Ireland

The commentary indicates that draft article 7, paragraph 1, which attributes to the State the conduct of organs of territorial government entities within the State "acting in that capacity", was not intended to result in *ultra vires* acts of State organs being *ipso facto* unattributable to the State. Draft article 10 follows this approach. This point could usefully be made clear in the text of the draft article, and not merely in the commentary. A similar point arises in relation to draft article 5.

Paragraph 2

France

France proposes amending this paragraph as follows:

> "2. ~~The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority~~, [The conduct of an organ or agent of any entity empowered by the internal law of the State to exercise elements of the governmental authority and acting in that capacity] shall also be considered as an act of the State under international law, ~~provided that organ was acting in that capacity in the case in question~~."

United Kingdom of Great Britain and Northern Ireland

1. Draft article 7, paragraph 2, attributes to the State the conduct of entities that are not part of the formal structure of the State but are empowered by the State's law to exercise some governmental authority. The principle set out in article 7, paragraph 2, as currently drafted appears capable of attributing to member States the conduct of organs of regional or international organizations. As a matter of European Community law (which is a part of the law of European Community member States), for example, organs such as the European Commission have governmental powers that derive from a limitation of sovereignty and transfer of powers by member States. Those organs may be said not to be a part of the formal structure of the State, even if they have a role within the legal order of the State; and they may therefore be regarded as organs falling within draft article 7, paragraph 2. On the other hand, there are indications in the commentary[1] that the Commission might not have intended to deal with the question of responsibility for acts of international organizations.

2. It is desirable that this uncertainty be resolved. In the view of the United Kingdom, it is desirable that this be done by a clear indication in the commentary that these draft articles are not intended to deal with the responsibility of member States for acts of international organizations (including military actions under the auspices of international or regional organizations). That is a complex issue; and it is not clear that it is desirable that the position of every international organization be the same. The topic of responsibility for acts of international organizations merits separate, detailed treatment.

[1] See, for example, *Yearbook ... 1979*, vol. II (Part Two), p. 105, para. (32).

Article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State)

Mongolia

The draft articles in chapter II, part one, refer to the attribution of "acts of the State" under international law. Although they seem to be skilfully drafted, Mongolia has some doubts as to the coverage of acts of natural persons, who, at the time of committing a violation of international law, do not act as State representatives but nevertheless act under the authority and control of the State. In this connection mention should be made of the trend towards [a] broader understanding that under customary international law, as applied to environmental protection, a State is responsible for its own activities and for those of persons, whether they be individuals, private or public corporations, as long as their activities are under the State's jurisdiction or control.

Switzerland

See comments on draft article 5, above.

United Kingdom of Great Britain and Northern Ireland

1. The words "it is established" might usefully be moved to follow the words "under international law if", so as to make clear that they apply to both subparagraph (*a*) and (*b*).

2. See also comments on draft article 5, above.

United States of America

The other area in the draft articles on attribution that requires refinement or clarification:[1]

Persons acting on behalf of the State

Draft article 8 provides that the conduct of a person or group of persons may be attributed to the State if "[i]t is established that such person or group of persons was in fact acting on behalf of that State". The United States agrees with the basic thrust of this provision that a relationship between a person and a State may exist de facto even where it is difficult to pinpoint a precise legal relationship. It is to be noted, however, that draft article 11 applies the converse rule to article 8: "The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law." This provision adds nothing to the draft. As the commentary notes, it merely "confirms the rules laid down in the preceding articles".[2] The duplication of rules provides a tribunal with an additional, if not troublesome, question of which rule to apply in a given situation and whether the rules differ in application. Article 11 should be deleted.

[1] See also comment on draft article 4, above.

[2] *Yearbook … 1975*, vol. II, p. 70, para. (1).

Proposed new paragraph 2

France

France proposes adding a new paragraph 2 as follows:

"2. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law."

Article 9 (Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization)

France

In the French version, the term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent".

Switzerland

See comments on draft article 5, above.

United Kingdom of Great Britain and Northern Ireland

1. Draft article 9 attributes to the State the conduct of organs placed at the State's disposal by another State or an international organization, when the organ is acting for the "borrowing" State. The United Kingdom notes one particular difficulty, which bears also upon draft article 22, that arises from draft article 9. In circumstances where a State's laws direct litigants to go to tribunals in other States (for example, under the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) or established under international organizations (for example, ICSID), it is not clear whether it is intended that the State should have any responsibility for the conduct of the tribunal. Viewed from the perspective of attribution, the answer may appear to be no; but if the question is viewed from the perspective of the State's responsibility to "provide justice" (i.e. not to deny justice to litigants), or from the perspective of the exhaustion of local remedies rule, the answer may appear less clear. The answer may also differ according to whether the State requires, or merely permits, litigants to have recourse to "foreign" tribunals. This is a matter that requires careful consideration, and which could perhaps be clarified through the commentary, rather than by the amendment of the draft article itself.

2. See also comments on draft article 5, above.

Proposed new paragraph 2

France

France proposes adding a new paragraph 2 as follows:

"2. The conduct of an organ or agent of a State acting in that capacity which takes place in the territory of another State or in any other territory under its jurisdiction shall not be considered as an act of the latter State under international law."

Proposed new paragraph 3

France

France proposes adding a new paragraph 3 as follows:

"3. The conduct of an organ or agent of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction."

Article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity)

France

1. In the French version, the term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent".

2. France proposes renumbering this provision as article 7 and reformulating it as follows:

"The conduct of the State organs or agents referred to in article 5 and of the entities referred to in article 6 shall be considered as an act of that State under international law, whether or not they have acted within

their competence or complied with their instructions in accordance with the internal law of that State."

Switzerland

See comments on draft article 5, above.

United Kingdom of Great Britain and Northern Ireland

1. Draft article 10 attributes to the State the conduct of State organs, even if they are *ultra vires*. Draft article 11 stipulates that the conduct of persons not acting on behalf of the State is not attributable to the State.

2. According to the commentary,[1] draft article 11 covers the conduct of "legal persons which cannot be classified as private legal persons under the State's internal law (for example 'parastatal' or quasi-public legal persons and also other entities which are public but which have not been empowered to exercise elements of the governmental authority, or which have been so empowered only in a sector of activity other than that in which they have acted)".

3. This conduct is not attributable to the State. That statement implies that conduct outside the sector of activity in which a parastatal or quasi-public legal person has been empowered to exercise elements of the governmental authority is not attributable to the State. This creates a distinction between the treatment of State organs in draft article 10 and the treatment of parastatal persons in draft article 11 in relation to *ultra vires* acts, and compounds the problems arising from the use of references to exercises of "elements of the governmental authority" and to organs acting "in that [governmental] capacity", noted above in relation to draft articles 7 to 10.

4. For example, a State may empower a private security firm to act as railway police. A railway policeman in uniform may arrest a suspected criminal (whose crime has nothing to do with the railway) in a place near to, but not a part of a railway station. As a matter of the State's internal law, the powers of the railway police may not extend to that place. Is that an example of an article 7, paragraph 2, organ exceeding its competence (in which case the conduct is attributable to the State article 10)? Or is it an example of an article 7, paragraph 2, organ not acting in the capacity of a railway policeman, but rather in the capacity of an ordinary citizen (in which case the conduct is not attributable to the State: article 7, paragraph 2, article 11)? The United Kingdom requests that the Commission consider whether, given the wide range of governmental structures in different countries, clearer guidance can be given on such problems.

5. See also the comments on draft article 5, above.

[1] *Yearbook ... 1975*, vol. II, p. 70, para. (2).

Article 11 (Conduct of persons not acting on behalf of the State)

Switzerland

See comments on draft article 5, above.

United Kingdom of Great Britain and Northern Ireland

See comments on draft article 10, above.

United States of America

See comments on draft article 8, above.

Article 12 (Conduct of organs of another State)

France

1. In the French version, the term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent".

2. France proposes replacing the words "an organ" in the first line by the words "an organ or agent".

Article 13 (Conduct of organs of an international organization)

France

In the French version, the term "State organ" is too restrictive. It would be better to use the expression "any State organ or agent".

United Kingdom of Great Britain and Northern Ireland

There are many instances of bodies established by bilateral agreements between neighbouring States as vehicles for the exercise by one State of powers in, or in relation to, the territory of the other. In the view of the United Kingdom, further consideration needs to be given to the manner in which such bilateral bodies (such as boundary waters commissions) are treated in the draft articles.

Article 14 (Conduct of organs of an insurrectional movement)

Austria

The issue of the conduct of organs of an insurrectional movement contained in draft articles 14 and 15 leaves considerable doubt and requires further consideration. This pertains in particular to draft articles 14, paragraph 2, and 15, paragraph 1.

United Kingdom of Great Britain and Northern Ireland

See comments on draft article 29, below.

Paragraph 1

France

1. It would be preferable to state the principle of a presumption of State responsibility, while allowing for the possibility of exoneration in the event of *force majeure* (in the event, usurpation of government authority), the burden of proof falling on the State. France proposes new wording along these lines.

2. France proposes renumbering this provision as draft article 10 and reformulating it as follows:

> "The conduct of an organ or agent of an insurrectional movement in the territory of a State or in any other territory under its jurisdiction shall not be considered as an act of that State if:
>
> (*a*) The State in question establishes that the act is attributable to the insurrectional movement; and
>
> (*b*) The State in question establishes that it exercised the functions pertaining to its territorial jurisdiction over the territories concerned in a lawful manner."

Paragraph 2

France

The scope of paragraph 2 is singularly unclear. France proposes that it be deleted.

Paragraph 3

France

The scope of paragraph 3 is singularly unclear. France proposes that it be deleted.

Article 15 (Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State)

Austria

1. The relationship between the first and the second sentence of draft article 15, paragraph 1, should for instance be re-examined in the light of the experience gained in Eastern Europe following the breakdown of the Iron Curtain and other instances of civil unrest.

2. See also comments on draft article 14, above.

France

France proposes renumbering this provision as draft article 11.

United Kingdom of Great Britain and Northern Ireland

See comments on draft article 29, below.

Chapter III. Breach of an international obligation

Germany

Chapter III of part one on the breach of an international obligation contains, apart from draft article 19 on delicts and crimes, a number of provisions that should be revised or redrafted.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom is concerned that, throughout part one, chapter III, of the draft articles, the fineness of the distinctions drawn between different categories of breach may exceed that which is necessary, or even helpful, in a statement of the fundamental principles of State responsibility.

2. The United Kingdom is also concerned that it may be difficult to determine the category into which a particular conduct falls. This is a general point, applicable to the distinctions drawn by the Commission between obligations of conduct and obligations of result, between the various kinds of breach, and so on.

Article 16 (Existence of a breach of an international obligation)

France

1. It would be important to allow for the instance in which State responsibility cannot be entailed inasmuch as the obligation that was originally to be complied with by the State is set aside by an obligation considered to be superior. Here France is thinking in particular of the obligations arising from the Charter of the United Nations, whose primacy over other obligations is set forth in its Article 103.

2. France proposes adding the phrase "under international law" at the end of the sentence.

Switzerland

The desire to regulate all aspects of the question is also evident in the provisions regarding breach of an international obligation. Whereas draft article 16 sets forth the

principle, draft article 17 makes clear that the obligation in question may be customary, conventional or other. This clarification, although absolutely correct, adds nothing new to the principle articulated in draft article 16.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom suggests that the Commission might consider the possibility of combining draft article 21 with draft article 16.

Article 17 (Irrelevance of the origin of the international obligation breached)

Switzerland

See comments on draft article 16, above.

Article 18 (Requirement that the international obligation be in force for the State)

France

See comments on draft article 25, below.

Switzerland

The first paragraph of the draft article states that an international obligation cannot be breached unless it is in force at the time when the wrongful act is committed. That is self-evident and does not need to be explained.

United Kingdom of Great Britain and Northern Ireland

1. Draft article 18 lays the foundation for subsequent provisions in the draft articles by distinguishing between different kinds of acts. Paragraph 5 deals with complex acts, and paragraph 4 with composite acts. In essence, complex acts consist of actions taken by a variety of State organs in relation to a single matter, and composite acts are breaches made up of numerous individual instances, no one of which would suffice to establish the breach but which, taken together, clearly evidence the breach. The United Kingdom commends the Commission for the precision with which it has analysed the various instances of wrongful conduct. It is, however, concerned that the draft articles have moved too far in the direction of drawing fine distinctions between different categories of conduct. It hopes that the Commission will consider how far it is necessary, and how far it is helpful, to adopt articles defining with great analytical precision different categories of wrongful conduct. It may be preferable to have a simpler conception of wrongful conduct, and leave its application in concrete instances to be worked out in State practice.

2. The United Kingdom hopes that the Commission might reconsider the provisions of draft article 18 and the application of the exhaustion of the local remedies principle.

United States of America

1. Draft articles 18 and 24 to 26 provide for a complex series of abstract rules governing the characterization of an act of a State as a continuing, composite, or complex act. According to this finely wrought scheme, an act of a State may only result in international responsibility if the particular obligation was in force for that State at the time of the act. This principle, stated succinctly in draft article 18, paragraph 1, holds uncontroversially that breach arises "only if the act was performed at the time when the obligation was in force for that State". Read together, however, these draft articles inject far more complexity into the draft than necessary and provide possible legal hooks for wrongdoing States to evade their obligations.

2. The structure of these articles will provide ample room for wrongdoing States to seek to litigate issues or avoid obligations that otherwise should be plain. Where an act has a "continuing character", the breach "extends over the entire period during which the act continues and remains not in conformity with the international obligation" (art. 25, para. 1). There is little clue in the text or the commentaries as to how to distinguish a continuing act from one that does not extend in time. For instance, it may be exceedingly difficult in practice to distinguish between a continuing act and an act that is complete at the moment it is "performed" (art. 24), but that has "effects" or "consequences" extending in time.[1] Where an act is composite, or "composed of a series of actions or omissions in respect of separate cases", the breach "extends over the entire period from the first of the actions or omissions constituting the composite act ... and so long as such actions or omissions are repeated" (art. 25, para. 2). Where an act is complex, or "consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case", the breach "extends over the entire period between the action or omission which initiated the breach and that which completed it" (art. 25, para. 3). The question of whether an act concerns "separate cases" or "the same case" often may be difficult to determine in practice and simply may add confusion to straightforward determinations of responsibility.

3. These provisions may serve to complicate rather than clarify determinations of responsibility. As Brownlie has written, "the appearance of new, apparently defined, legal categories is of doubtful value. The difficult cases cannot be made less difficult by the invention of categories".[2] Consideration should be given by the Commission as to whether these provisions should be deleted because they add an unnecessary layer of complexity to the draft and risk fostering substantial abuse.

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[1] See *Yearbook … 1978*, vol. II (Part Two), pp. 86–89.

[2] Brownlie, *System of the Law of Nations: State Responsibility*, p. 197. See also Pauwelyn, "The concept of a 'continuing violation' of an international obligation: selected problems".

Paragraph 2

France

1. France proposes deleting this paragraph.

2. For the reasons of principle stated above, the reference to *jus cogens* in draft article 18, paragraph 2, should be deleted.

3. Paragraph 2 is problematic because, in taking up the wording of articles 53 and 64 of the 1969 Vienna Convention, it refers to the concept of a "peremptory norm of general international law", with respect to which France has a reservation in principle. Furthermore, there seems to be a rule of peremptory law which, far from prohibiting acts, establishes an obligation to carry them out. Such a provision has no place in an article of intertemporal law.

Paragraph 3

France

France proposes renumbering this provision as paragraph 2 and adding a new second sentence as follows:

> "The breach occurs at the moment when that act begins and extends over the entire period during which the act continues."

Paragraph 4

France

France proposes renumbering this provision as paragraph 3 and adding a new second and third sentence as follows:

> "The breach occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. The breach extends over the entire period from the first of the relevant actions or omissions and so long as such actions or omissions are repeated."

United Kingdom of Great Britain and Northern Ireland

Without prejudice to that point [that was pointed out in its general comments above on article 18], the United Kingdom considers that the drafting of paragraph 4 might be improved. As it is currently drafted, the rule in that provision is that there is a breach of the obligation by means of a composite act if the individual instances occurring during the period for which the obligation was in existence can be said to constitute the composite act—in other words, if the breach crystallizes out of the individual instances during that period. This is an instance where the precision of the Commission's analytical scheme may be unhelpful in practice. For example, a treaty binding upon State A might prohibit discrimination against nationals of State B. There may have been a pattern of such discrimination in the years prior to the making of the treaty. To insist that there be enough further instances of discrimination after the entry into force of the treaty to establish *de novo* the pattern of discrimination may not always be appropriate. In some cases, it is true, it may be quite proper to give State A the benefit of the doubt and to presume that it has abandoned its discriminatory practices. A single act of discrimination is not necessarily an indication that the pre-treaty practice is continuing; and it might be appropriate to place the burden of proving that an individual infraction is indeed a continuation of the pre-treaty practice upon the State asserting that it does have that character. However, it seems unnecessary to turn what might be helpful as a reasonable and rebuttable presumption into a rigid rule of law, as paragraph 4 as currently drafted does.

Paragraph 5

France

1. In the French version of the paragraph, the word "*complété*", which is an Anglicism, should be replaced by "*parachevé*".

2. France proposes renumbering this provision as paragraph 4 and adding a new second sentence as follows:

> "The breach occurs only at the moment when the last constituent element of that complex act is accomplished. The time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it."

United Kingdom of Great Britain and Northern Ireland

The draft of paragraph 5 states that there is a breach of an obligation by means of a complex act if the first element of the complex act occurred while the obligation was in force, even if the complex act continues after the obligation ceases to have effect. The principle stated in this paragraph is, in the view of the United Kingdom, correct, but not for the reason indicated by the Commission. According to the commentary, the paragraph treats a complex act as beginning with the initial wrongful conduct and continuing through the period in which that conduct is reviewed by organs of the State until the time when the initial wrongful act is finally and definitively confirmed by the highest authority in the State. It is the understanding of the United Kingdom that in such cases the wrong is committed and completed by the initial wrongful act attributable to the State (which may itself involve actions of more than one State organ), and that the subsequent submission of the matter to other, higher authorities in the State constitutes the exhaustion of local remedies. The approach in paragraph 5 is consistent with the Commission's approach to the exhaustion of local remedies, with which the United Kingdom disagrees. That point was raised above and is explained further in relation to draft article 22.

Article 19. International crimes and international delicts

[See also part two, chapter IV.]

Argentina

1. The distinction between international crimes and international delicts deserves to be analysed from two different standpoints: conceptual and nominal. One question is whether, from the substantive point of view, different regimes should be envisaged to regulate the consequences of various categories of violations of the law of nations, and another question is whether both categories can be called "crimes" and "delicts", respectively, using penal terminology.

2. With regard to the substantive issue, it seems clear that the distinction has a legal basis. Indeed, the consequences of an internationally wrongful act cannot be the same where that act impairs the general interests of the international community as where it affects only the particular interests of a State.

3. A strong current of opinion has emerged since the Second World War which holds that general international law envisages two entirely different kinds of responsibility regime. The first applies in the case of a violation by a State of rules whose observance is of fundamental importance to the international community as a whole (refraining from acts of aggression, the perpetration of genocide, the practice of apartheid, etc.). The second applies, on the other hand, in cases where the State has only failed to comply with a less important and less general obligation.

4. In the Commission's view, there are three circumstances which could constitute proof of the existence of such a dual regime: (*a*) the existence of a special category of rules characterized as "peremptory" or deriving from *jus cogens*; (*b*) the punishable nature of acts committed by individuals acting as State organs who by their conduct have violated international obligations; (*c*) the fact that the Charter of the United Nations attaches specially determined consequences to the violation of specific international rules (namely, Chapter VII).[1]

5. Argentina deems it fitting that the Commission recognized the existence of this distinction based on the gravity and scope of the violation by a State of its obligations. In this respect, it believes that a violation of international law that affects the international community as a whole should have effects commensurate with the seriousness of the wrongful act.

6. Accordingly, it is desirable that the Commission should, on second reading, analyse and elaborate as precisely as possible the different treatment and the different consequences attaching to different violations in accordance with this distinction.

7. With regard to the nominal question, however, Argentina cannot help but express doubts regarding the terminology used (referring to those violations which affect the international community as a whole as "crimes" and to others as "delicts").

8. In this respect, it should be noted that the adoption of a vocabulary which might be termed "penal law" or "criminal law" does not appear to reflect the nature of State responsibility. Indeed, the nature of international responsibility is such that, while it cannot be compared with civil liability, still less can it be compared with criminal responsibility.

9. The foregoing has even greater relevance at present, when a growing process of the progressive development of international criminal law is being witnessed, as demonstrated by the establishment of the international tribunals for the former Yugoslavia and for Rwanda, the elaboration by the Commission of the draft Code of Crimes against the Peace and Security of Mankind and, in particular, the work of the Preparatory Committee on the Establishment of an International Criminal Court.[2]

10. In this context, in which the international legal order tends to draw a clear distinction between the *international responsibility of the State* and the *international criminal responsibility of individuals*, it does not seem advisable to apply to the former a terminology appropriate to the latter, as that would lead to misunderstandings.[3]

[1] *Yearbook ... 1976*, vol. II (Part Two), p. 102, para. (16) of the commentary to article 19.

[2] Established pursuant to General Assembly resolution 50/46 of 11 December 1995.

[3] In this respect, it has been stated that:

> "Neither civil nor criminal, but partaking of both, international responsibility has its own features and cannot be compared with the categories of domestic law, since the society of States has little to do with the international community. From this standpoint, the terms 'crimes' and 'delicts' adopted by the Commission are particularly ill-chosen."

(Pellet, loc. cit., pp. 302–303)

Austria

1. Austria generally recognizes the importance of international norms against particularly grave violations of international law. However, it continues to hold the view that little can be gained from such a notion with a view to regulating State practice in the field of State responsibility. Austria therefore still prefers that draft article 19 be deleted, together with its legal consequences dealt with in draft articles 51 to 53. If the General Assembly adopted such articles, it would incur the danger of minimizing the acceptability of the entire set of provisions on State responsibility. The notion of international crimes would, in practice, provide tempting pretexts for defending countermeasures and sanctions of a disproportional character against minor violations of international law.

2. Given the fact that the notion of State crimes has thus far not been accepted in State practice and given also the need to formulate rules meeting the requirements of day-to-day practice, this notion of crimes should be abandoned. Besides, the notion of international delicts has no special importance as, technically speaking, any violation of international law entailing the responsibility of a State constitutes a delict.

3. The Commission should rather adopt a new approach and concentrate on the regulation of the legal consequences of violations of international law of a particularly grave nature.

4. In general Austria prefers the results-oriented or "objective" approach adopted in other areas of the draft articles and holds the opinion that elements of domestic criminal law including wilful acts do not correspond to the concept and system of the legal relations between States. In particular, inter-State relations lack the kind of central authority necessary to decide on subjective aspects of wrongful State behaviour. In this context the instruments provided by the Charter of the United Nations, in particular Chapter VII regarding such violations of international law which threaten international peace and security, should also be taken into account.

5. Furthermore, State practice, including the efforts to establish an international criminal court, which are directed towards prosecuting and deterring criminal acts committed by individuals including State organs may provide a more effective tool against grave violations of basic norms of international law such as human rights and humanitarian standards than the criminalization of State behaviour as such.

6. Austria is conscious that it is not the only State to reject the concept of State crimes in the context of State responsibility. On the other hand, Austria is known for its strong support for efforts by the international community aiming at developing legal instruments providing for the criminal responsibility of the individual under international law for committing acts which fall under the scope of article 19 of the draft articles. This is one of the reasons why Austria supports the creation of an international criminal court.

Czech Republic

1. With regard to draft article 19 and the distinction between international crimes and international delicts made in that article, the Czech Republic can only reaffirm its consistent position in favour of maintaining a dichotomy of different types of internationally wrongful acts and, consequently, differentiating between the two regimes of State responsibility that such a dichotomy implies. There are rules of international law so essential for the protection of the fundamental interests of the international community that their breach—the failure to fulfil the obligations involved—calls for the application of a specific responsibility regime; in view of the exceptional gravity of such failure and the harm it causes indirectly to the very framework of the international community, it would be neither appropriate nor sufficient to apply a common regime to it, merely adjusting the regime to take account of the scale of the breach and of the amount of damage caused. The idea of a specific regime for State responsibility for certain particularly serious acts is to be found in positive law and in State practice, although at the current stage no doubt in a relatively fragmentary, unsystematic or indirect form, or merely in outline. It will suffice, in that connection, to draw attention to the reference to obligations *erga omnes* in the ICJ judgment in the *Barcelona Traction* case,[1] or to the means specified in the Charter of the United Nations for the maintenance of international peace and security, including measures taken by the Security Council under Chapter VII.

2. It would be a retrograde step—conceptually, at least—if the Commission were now to reverse the decision it took over 20 years ago to include the concepts of "delicts" and "crimes" in the articles in order to distinguish between two separate categories of wrongful acts; such a step, which would not be in keeping with the unquestionably vigorous trends and developments in related fields of international law (for example, the emergence in positive law of the concept of *jus cogens* and, of course, the new and powerful momentum of the institutionalization internationally of the application of the concept of individual criminal responsibility with respect to some of the most serious international crimes), might well paralyse and freeze the law of State responsibility as a result of an excessively conservative, static approach. That notwithstanding, when the distinction between the two categories of internationally wrongful acts—delicts and crimes—is discussed, the issue of the use of the current terms ("delicts" and "crimes") must be separated from the substantive issue: whether there are two categories of wrongful acts, which —regardless of the terms used to designate them—fall under two qualitatively different regimes.

3. The inflexibility of the arguments put forward by those for and against distinguishing between two separate categories of wrongful acts by means of the terms in question is likely to stand in the way of any progress on the draft as a whole. The term "crime" is criticized because it evokes an "atmosphere", a criminal law context—even though, according to the Commission, use of the term "crime" is without prejudice to the characteristics of responsibility for international crimes. An exchange of views on possible connotations serves no purpose when the actual draft articles spell out the consequences of what the Commission refers to as "international crimes". There is nothing to indicate that the articles proposed by the Commission are based on criminal law concepts; on the contrary, the articles can be interpreted as fully supporting the view endorsed by the Czech Republic: that the law of international responsibility is neither civil nor criminal, and that it is purely and simply international and therefore "specific".

4. The terms currently used in the text, however, raise the issue of how appropriate they are. Debating terminological issues diverts attention from substantive issues and takes up a great deal of time that could be put to better use. In view of the constant disagreements caused by the use of the terms "crimes" and "delicts" (in some legal systems, the latter term has an exclusively penal connotation), during its second reading the Commission should consider either adopting more neutral terms (for example, an exceptionally serious "internationally wrongful act" instead of a "crime") or avoiding any specific terms when referring to two different types of wrongful acts and making the distinction by other means—for example, by more effectively breaking up the text into different sections dealing separately with the consequences of wrongful acts as such and wrongful acts that jeopardize the fundamental interests of the international community as a whole. The only expression used would thus be "internationally wrongful act", which would not appear to give rise to any

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

problems, and the distinction between the two types of acts would be made by means of the titles of the relevant sections of the draft. As a result, the terms used in the articles would be neutral but would leave the necessary room for widely acceptable terms to be developed subsequently in the sphere of State practice and doctrine.

Denmark
(on behalf of the Nordic countries)

1. The most spectacular feature of part one is no doubt the distinction contained in draft article 19 between international delicts and international crimes. Over the years the Nordic countries have supported this distinction, and still do. If, for instance, one looks at the crime of genocide or the crime of aggression, such crimes are, of course, perpetrated by individual human beings, but at the same time they may be imputable to the State insofar as they will normally be carried out by State organs implying a sort of "system criminality". The responsibility in such situations cannot in the view of the Nordic countries be limited to the individual human being acting on behalf of the State. The conduct of an individual may give rise to responsibility of the State he or she represents. In such cases the State itself as a legal entity must be brought to bear responsibility in one forum or another, be it through punitive damages or measures affecting the dignity of the State. This point of view is supported by the wording of article 4 of the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1996. That article provides—and correctly so the Nordic countries believe—that prosecution of an individual for a crime against the peace and security of mankind is without prejudice to any question of the responsibility of States. A similar provision is being considered in the context of individual criminal responsibility in the ongoing discussions of the Preparatory Committee on the Establishment of an International Criminal Court.[1]

2. If the term "crime" used in relation to a State is, however, regarded as too sensitive, consideration may be given to using other terminology such as "violations" and "serious violations" (of an international obligation). It must be essential, though, to establish particularly grave violations of international law by a State, such as aggression and genocide, as a specific category, where the consequences of the violations are more severe. It is the view of the Nordic countries that such a division into categories should be distinct and clear.

[1] Established pursuant to General Assembly resolution 50/46 of 11 December 1995.

France

1. France proposes that this article be deleted.

2. Moreover, the set of draft articles—particularly article 19, a subject which France deals with in greater detail below—gives the unquestionably false impression that the aim is to "criminalize" public international law. For the Commission, the punitive function appears to characterize international responsibility. However, such a function has hitherto been unknown in the law of international responsibility, which has emphasized making reparation and providing compensation. France does not believe that an internationally wrongful act should expose the wrongdoing State to punitive legal consequences.

3. France has on a number of occasions stressed in the Sixth Committee of the General Assembly that State responsibility is neither criminal nor civil, and that it is simply *sui generis*. Mechanically transposing concepts in the sphere of internal law, particularly criminal law, would be no more than an artificial, theoretical and ineffective exercise that would lead down the wrong track.

4. France has repeatedly criticized the concept of an "international crime" as defined in draft article 19, as well as the distinction between international crimes and international delicts. Although it can hardly be denied that some wrongful acts are more serious than others, the dichotomy established by the Commission between "crimes" and "delicts" proves to be vague and ineffective. Moreover, the Commission draws very few consequences from the distinction that it makes. Furthermore, as rightly stressed, such a distinction breaks with the tradition of the uniformity of the law of international responsibility.

5. Draft article 19 breaks new ground in creating a category of crimes which are specifically attributable to States and this poses a major problem linked to the responsibility of juridical persons. The new French Criminal Code does, admittedly, establish the criminal responsibility of juridical persons but it excludes the State. Indeed, the latter, which is the only entity entitled to impose punishment, could not punish itself. It is hard to see who, in a society of over 180 sovereign States, each entitled to impose punishment, could impose a criminal penalty on holders of sovereignty.

6. Chapter VII of the Charter of the United Nations does, admittedly, confer coercive powers on the Security Council in the matter of the maintenance or the restoration of peace, but there is no question in that chapter of a penal, or even a judicial, function with regard to States. The Council has already, rightly, considered that intolerable violations of the rights of a people by its own Government could constitute threats to international peace and security, and has decided to take action accordingly. Those responsible for internationally wrongful acts of exceptional gravity such as some of those envisaged in draft article 19 therefore risk being exposed to a prompt and appropriate reaction. It might be added that, for the purposes of maintaining peace, the Council has established a broad range of measures the purpose of which is simple—to prevent, dissuade and constrain—but these measures are not of a penal nature and, although they are described as "sanctions", their purpose is not in essence punitive. They are coercive measures which are a matter for the international police.

7. Another problem relates to the confusion in draft article 19 between the two concepts covered by the term "State". In its first sense, the State covers all organs which carry out functions of State authorities, whether of a government, of public offices or even, in certain cases, of a political party, the members or leaders of which may see their criminal responsibility implicated. In its second sense, the State constitutes a more abstract legal entity,

characterized by a territory, a population and institutions, an entity which is not, in essence, either good or bad, just or unjust, innocent or culpable. This confusion between the two senses distorts the whole exercise, as, moreover, several members of the Commission have pointed out. There is a great danger that, if an attempt is made to impose sanctions on a State, its population will be punished.

8. The term "crime" echoes the penal vocabulary. There is, however, some danger in postulating that there is a category of internationally wrongful acts which would be exactly comparable to crimes and delicts established by national criminal laws. Draft article 19 thus appears to be based on the idea that all wrongful acts under international law attributable to a State, which the draft articles categorize respectively as crimes and delicts, would fall under an international criminal law applicable to States. This disregards the fact that an offence—even a serious offence—is not necessarily a crime. Under all bodies of internal law, there are failures to meet an obligation which constitute civil offences but which do not fall under the specific branch of law which is criminal law.

9. Draft article 19 must necessarily be read in the light of draft article 52, concerning the "specific consequences of an international crime". It will be noted, in reading the latter article, that the Commission draws almost no consequence from the concept of "crime". The differences between the consequences deriving from an international crime and those resulting from another internationally wrongful act are insignificant. This underlines the artificial character of the dichotomy. The importance of a distinction between international crimes and delicts can indeed be justified only if it is reflected in regimes of responsibility which are themselves differentiated.

Germany

See part two, chapter IV.

Ireland

1. The Commission draws a distinction between international crimes and international delicts in draft article 19. An international delict is defined by reference to an international crime as any internationally wrongful act of a State which is not an international crime (para. 4); and an international crime is defined as an "internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole" (para. 2). The Commission has moreover given, in paragraph 3, an illustrative list of international obligations, a serious breach of which may result in an international crime.

2. In its commentary to draft article 19, the Commission states that, since the Second World War, there has been a growing tendency to distinguish between two different categories of internationally wrongful acts of the State: a limited category comprising particularly serious wrongs, generally called international "crimes", and a much broader category covering the whole range of less serious wrongs.[1] The Commission seems to regard the categorization of certain internationally wrongful acts as international crimes as increasingly gaining acceptance by States and to have thus acquired, or to be well advanced on the road to acquiring, the status of *lex lata*; that is, in terms of the Commission's own definition of an international crime, certain conduct on the part of a State is recognized as a crime by the international community as a whole. In the Commission's view, contemporary international law requires the application of different regimes of international responsibility to the two different categories of internationally wrongful acts.[2]

3. As evidence of the existence of a dual classification, the Commission cites a number of decisions of international judicial and arbitral bodies, State practice and the writings of several international jurists.

4. It is the opinion of Ireland that if such a classification exists, it must be grounded in State practice, and decisions of international judicial and arbitral bodies and the writings of international jurists may provide evidence of State practice. However, it appears to Ireland that the evidence cited by the Commission falls short of establishing the widespread acceptance by States of a dual categorization of internationally wrongful acts into international crimes and international delicts and is particularly flawed in two respects.

5. First, while much of the evidence does indeed relate to wrongful acts for which criminal responsibility exists under international law, this responsibility attaches to individuals, not to States. It is one thing for States to undertake to criminalize in their domestic law certain conduct on the part of individuals and to bring persons unsuspected of such conduct to justice. It is quite another thing for States to accept criminal responsibility themselves for such conduct. Even when the conduct of the individual may be attributed to the State, it does not necessarily follow that the responsibility of the State for the conduct is itself criminal in character.

6. From the evidence cited by the Commission, Ireland would mention as examples of the elision of individual responsibility and State responsibility, without being exhaustive, that relating to genocide, apartheid and the initiation of a war of aggression.

7. It is true that, under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which is now widely subscribed to, the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish. The acts which they undertake to prevent and punish are however those of individual human beings, whether they are constitutionally responsible rulers, public officials or private individuals, not those of a State. While States bear international responsibility for a breach of this obligation, there is no question of the responsibility being criminal in character.

[1] *Yearbook ... 1976*, vol. II (Part Two), p. 97, para. (6) of the commentary to article 19.

[2] Ibid.

8. Similarly, States parties to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, a convention also widely subscribed to, declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination are crimes violating the principles of international law. Under the Convention, international criminal responsibility for such conduct attaches not to States, but to individuals, members of organizations and institutions and representatives of the State. States parties undertake to suppress and punish the conduct; but, again, while a breach of the undertaking entails the responsibility of a State, this responsibility is not criminal in character.

9. Likewise, States have on many occasions attributed criminal responsibility under international law to individuals and organizations for the planning, preparation and initiation of a war of aggression, most notably in establishing the international war crimes tribunals at Nürnberg and Tokyo at the end of the Second World War. While acts of aggression by a State are also prohibited under international law, there is no clear evidence that the State responsibility flowing from a prohibited act of aggression has been recognized by the international community as pertaining to a particular category designated as criminal on the part of the State. To infer from texts, such as article 5, paragraph 2, of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX) of 14 December 1974, that States have accepted that an act of aggression on their part is criminal and gives rise to a regime of legal consequences distinct from those arising from acts not designated as criminal involves a quantum leap not justified by the text. Article 5, paragraph 2, states that a war of aggression is a crime against international peace and that aggression gives rise to international responsibility; it was adopted with an eye to the role of the United Nations, especially the Security Council, in the maintenance of international peace and security. Individuals bear responsibility under international law for crimes against peace, and nowhere in the Definition of Aggression is it said that a State bears criminal responsibility for an act of aggression. Rather it is the Security Council which determines the existence of an act of aggression and which may decide what measures shall be taken in accordance with the Charter of the United Nations to maintain or restore international peace and security.

10. Secondly, the reliance on evidence of *erga omnes* obligations to support the existence of a category of international criminal responsibility of States is misplaced. In particular, the Commission has relied on a famous passage from the judgment of ICJ in the *Barcelona Traction* case of 5 February 1970[3] in which the Court drew "an essential distinction" between the obligations of a State towards the international community as a whole and those arising vis-à-vis another State in the field of diplomatic protection. As examples of the former obligations the Court cited those deriving from the outlawing of acts of aggression and of genocide and from the principles and rules of international law concerning the basic rights of the human person, including protection from slavery and racial discrimination. In the Court's view, all States have a legal interest in the observance of such obligations. It follows that the responsibility engaged by the breach of these obligations is engaged not only in regard to the State that was the direct victim of the breach; it is also engaged in regard to all the other members of the international community, so that, in the event of a breach of these obligations, every State must be considered justified in invoking the responsibility of the State committing the internationally wrongful act. It should be noted that nowhere in its judgment does the Court draw a link between a breach of an *erga omnes* obligation and the attribution of criminal responsibility to a State. To do so involves another quantum leap not justified by the text of the judgment.

11. Instead the passage affords evidence of a distinction between international obligations according to whether the obligation is owed to the international community of States as a whole or to one or more other particular States. This is a distinction which goes to the scope of the obligation, not to its nature. The legal consequences of a breach of an *erga omnes* obligation may be different from those of a breach of an obligation owed to one or more particular States in that, in the former case, all States may be entitled to invoke the international responsibility of the wrongdoing State whereas, in the latter case, only the particular injured State or States may be so entitled. Such a difference in legal consequences does not however provide a sufficient basis for categorizing some internationally wrongful acts as international crimes and others as international delicts since the attribution of criminal responsibility is generally understood to relate to the nature and seriousness of the wrongful act, not merely to the scope of the obligation which has been breached.

12. Ireland appreciates that the role of the Commission encompasses not only the codification of international law but also its progressive development. It has therefore thought it appropriate also to consider whether the development of a dual classification of internationally wrongful acts into international crimes and international delicts is desirable *de lege ferenda* as opposed to *lex lata*. Having considered the matter, Ireland is of the view that it would not be desirable at the current stage for a number of reasons.

13. First, the concept of criminal responsibility is well developed in national legal systems, where it is generally associated with specific characteristics which distinguish it from that of civil responsibility. Not only is a crime usually understood as a wrong against society at large and as entailing a breach of the fundamental values of society, it carries penal connotations and the criminal law is typically enforced by institutions of State including organs of detection, investigation, compulsory adjudication and punishment. In contrast, international society does not possess comparable organs and the application of "penal" sanctions to a State is of an entirely different order than the application of such sanctions to an individual.

14. In rejecting the concept of an international crime to describe grave breaches of international law by States, it is not that Ireland does not recognize that there is a qualitative difference between, for example, genocide and the

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

failure of an embassy to pay service charges for which it is liable. Rather it is that the concept of a crime has been developed in national systems of law and now carries many connotations which cannot be transposed easily into the still essentially decentralized system of international law.

15. Secondly, even if it is accepted that penal sanctions may be applied to a State, to do so may in some instances be inherently unjust. In reality, it will be a Government, acting in the name of a State, which commits an internationally wrongful act. In the case of an undemocratic regime, the application of a sanction against a State may have an adverse impact upon the population of the State, not merely on the Government, and in so doing, may "penalize" persons who cannot in any moral sense be said to bear responsibility for the wrongful act. Indeed, to take the example of a grave breach of international law mentioned above, that of genocide, this will often be committed by a Government, or condoned by a Government, against a section or sections of the population of the State of which it is the Government.

16. Thirdly, the international community is currently engaged in negotiations for the establishment of an international criminal court before which individuals may be tried for some of the most serious offences. What these offences should be has been the subject of considerable controversy among States, showing that even on matters in respect of which the international criminal responsibility of individuals is widely accepted, there can be substantial disagreement on the content and scope of this responsibility. There is no such widespread acceptance of the international criminal responsibility of States, and even greater difficulties can be expected in the search for an agreed definition of specific offences. Moreover, given the current focus of the international community on the international criminal responsibility of individuals, which has come only after very many years of deliberation on the subject, consideration of the attribution of criminal responsibility to States runs the risk of diluting this focus and, at worst, undermining the momentum for the establishment of an international criminal court.

17. In the view of Ireland, criminal liability is essentially about individual moral responsibility; and the best way forward in international law is to try to get universal agreement that particularly heinous behaviour on the part of individuals should be criminalized and to establish the necessary procedures and institutions at the international level to ensure that human beings are called to account for such behaviour. It seems to Ireland that this is what the current proposals for the establishment of an international criminal court are all about, and that this is the best way of proceeding in the matter. As was said by the Nürnberg Tribunal, crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[4]

[4] *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946* (Nürnberg, 1948), vol. XXII, p. 466.

18. Fourthly, proposals for the progressive development of international law are unlikely to be successful if they are far removed from State practice. At the very least they need a basis in State practice and the general support of States. The Commission claims to have identified a trend in State practice since the Second World War towards the increasing acceptance by States of the notion of international crimes for which States bear responsibility under international law. However, Ireland has already expressed the opinion that the evidence cited by the Commission of this trend is not convincing. Moreover, it is clear that, currently, several powerful States, including members of the Security Council, are opposed to the concept of the international criminal responsibility of States. It is therefore the view of Ireland that any prospect of the progressive development of international law on this topic in the direction advocated by the Commission is slim.

19. Although Ireland rejects the distinction drawn in draft article 19 between international crimes and international delicts, it nonetheless considers that there is some merit in regarding international obligations *erga omnes* as a distinct category and the responsibility of States for a breach of these obligations as of a different order than the breach of an obligation owed to a particular State or States. Ireland therefore urges the Commission to give further consideration to State responsibility for a breach of an *erga omnes* obligation, especially to the legal consequences in respect of a State not directly affected by the breach as opposed to a State directly affected thereby.

Italy

1. Italy already indicated during the discussions in the Sixth Committee that it endorsed the choice made by the Commission to distinguish, within the category of internationally wrongful acts of States, a category of more serious wrongful acts which it terms "international crimes", entailing a different (or partially different) responsibility regime from the one attaching to all other wrongful acts (which it terms "international delicts"). Italy is aware that the distinction made by the Commission in article 19 of the draft articles has raised objections on the part of many States. Nevertheless, Italy is still of the opinion that this distinction should be made.

2. In Italy's view, existing international law affords to certain basic interests of the international community a protection different from that afforded to other interests. This different protection, which is apparent, for example, in the regime governing causes of invalidity or termination of treaties (conflict with a *jus cogens* rule) and the one on individual responsibility of persons acting in an official capacity (punishability of persons acting in an official capacity who have committed war crimes, crimes against peace or crimes against humanity), is also apparent in the State responsibility regime.

3. Existing customary law already provides that the violation of certain obligations which protect the fundamental interests of the international community simultaneously infringes the subjective rights of all States and authorizes all of them to invoke the responsibility of the State which violated the obligation: these are what ICJ

has termed "*erga omnes* obligations". The prohibition against armed aggression is the most important example of this category of obligations; it is not only the State which is the direct victim of the aggression that is injured: all States are injured, and can invoke the responsibility of the State committing the aggression. This is not true of the vast majority of obligations laid down by the rules of international law, including those laid down by customary rules.

4. The formula used by the Commission in article 19 of the draft articles to designate the wrongful acts included in the category of international crimes was criticized by many States. In Italy's view, however, even if the formula may appear somewhat complicated, it has a number of positive aspects.

5. The first positive aspect of this formula is that it does not give rise to a "crystallization" of international crimes. To this end, instead of drawing up a precise list of the wrongful acts that were to be regarded as international crimes at the time when the draft was prepared, the Commission preferred to indicate the criteria which should guide the interpreter in determining the wrongful acts to be characterized as international crimes at a given moment. Italy understands the reasons which led the Commission to use as its basic criterion the criterion adopted in the 1969 Vienna Convention for designating rules as belonging to *jus cogens*, namely, a "*renvoi*" to the international community as a whole. The Commission specified, in its commentary to article 19, that it had meant thereby to indicate that a given wrongful act must be regarded as a wrongful act entailing special legal consequences not only by one or another group of States (even a majority group), but by all the basic components of the international community. To envisage the same method for designating the two categories of rules (rules which cannot be derogated from by special agreement and rules establishing obligations whose violation represents an international crime) is an acceptable solution, but as what is involved is an even trickier matter than *jus cogens*, subsequent clarifications are needed to determine what international crimes are. The Commission has chosen the route of providing examples that can serve as a guide for the interpreter who would be responsible for determining whether, at a given moment, a wrongful act is considered to be an international crime by the international community as a whole. The list of categories of wrongful acts which could, in accordance with draft article 19, include international crimes is, in Italy's view, still valid nowadays, even though over 20 years have elapsed since the adoption of that article.

6. These are the positive aspects of the formula adopted. Nevertheless, the decision not to draw up a full list of international crimes makes it all the more necessary that the determination of whether an international crime has been committed in a specific case should be entrusted to an impartial third party, as the former Special Rapporteur had proposed.

Mexico

There is inadequate differentiation of the terms "crime" and "delict" in the draft articles.

Mongolia

Mongolia is fully aware of the practical and theoretical questions that are raised in connection with the notion of State crime and the distinction of international wrongdoing between crimes and delicts. It nevertheless stands for the retention in the draft articles of both the concept of international crimes and the distinction of international wrongdoing between crimes and delicts. It is obvious that international law cannot treat all cases of its breaches on an equal footing for the simple reason that some of these breaches may create much more serious consequences than others. The most important and appropriate requirement is that the determination of the commission of an international crime not be left to the decision of one State, but be attributed to the competence of international judicial bodies.

Switzerland

1. Switzerland's second comment bears on the distinction made by the Commission between delicts and "crimes". Criminalizing certain types of State conduct in pursuance of the peremptory norms of the law of nations is the corollary of the idea that certain violations of international law are more serious than others and merit a harsher punishment. This is certainly true, but one is inclined to think that this distinction, over which much ink has been spilt, might for several reasons create more problems than it would solve.

2. First of all, the distinction is meaningless unless the consequences entailed by the two categories of violations are substantially different. Draft article 52 governs the consequences of international "crimes" committed by States. It prescribes that the limitations imposed by draft article 43 (*c*) and (*d*), on the right to obtain restitution in kind which, it must be added, is impossible in a number of cases do not apply to these "crimes". In other words, the injured State could demand *restitutio in integrum* even if this imposed a disproportionate burden on the State which had committed a wrongful act (art. 43 (*c*)), or threatened the political independence or economic stability of that State (art. 43 (*d*)). These distinctions are either inadequate or dangerous; they are dangerous because, in the opinion of Switzerland, the abeyance of article 43 (*d*), in the context of "crimes", as prescribed by draft article 52 (*a*), raises the possibility of inflicting serious punishment on an entire people for the wrongdoing of its Government, thereby compromising international security and stability.

3. Another element of the distinction between delicts and "crimes" emerges from draft article 40, paragraph 3. If a "crime" is committed, all States other than the perpetrating State could claim to be "injured States" and are bound to attach to the crime the consequences set out in draft article 53. However, to the extent that the concept of "crime" overlaps with a violation of the peremptory norms of international law, all States could consider themselves injured within the meaning of draft article 40, paragraph 3, even without determining whether the conduct contrary to *jus cogens* is or is not considered a "crime". In order to attach especially severe consequences to certain

types of conduct, it is therefore not necessary to include draft article 40, paragraph 3, or to criminalize the types of conduct arising therefrom.

4. Another difficulty stems from the absence of a judicial mechanism that could be invoked unilaterally. Conduct that violates international law would therefore be characterized largely by the States concerned. The conflict over the existence of the violation itself would therefore be compounded by a further disagreement over its characterization, which would hardly contribute to fleshing out the distinction between delicts and "crimes".

5. Finally, it is legitimate to ask whether the trend towards criminalization at the international level (it seems the Commission intends to add the international "crimes" of States to those of individuals) is appropriate from the standpoint of legal policy. Switzerland believes that the exercise is an attempt by the international community to conceal the ineffectiveness of the conventional rules on State responsibility behind an ideological mask.

6. For all these reasons, Switzerland is not in favour of the distinction between delicts and crimes. It hopes that the Commission will carefully consider the merit of such a step during the second reading of the draft.

7. The first comment refers to draft article 19, if it is retained. It is to be wondered whether it might be useful to establish a connection here between the "crimes" of States and crimes committed by individuals, as defined in articles 16 to 20 of the draft Code of Crimes against the Peace and Security of Mankind. The current draft article 19 does not in fact specifically mention war crimes, crimes against humanity and crimes against United Nations and associated personnel. It may well be that these categories of crimes entail State responsibility in addition to the criminal responsibility of the individual perpetrators. It would be paradoxical if the criminal responsibility of these individuals came into play without the concomitant responsibility of the State.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom remains firmly persuaded that it would be damaging and undesirable to attempt to distinguish in the draft articles between international delicts in general and so-called "international crimes". This view has been expounded over many years in the debates in the Sixth Committee on the annual reports of the Commission. The United Kingdom has seen nothing to cause it to deviate from the views then expressed; quite the contrary. In essence, therefore, its position remains that the provisions concerning international crimes should be omitted from the draft articles. While reaffirming that position, the United Kingdom wishes merely to add the following:

2. There is no basis in customary international law for the concept of international crimes. Nor is there a clear need for it. Indeed, it is entirely possible that the concept would impede, rather than facilitate, the condemnation of egregious breaches of the law. The proposed draft articles are likely to make it more difficult for the international community to frame the terms of the condemnation so as to match precisely the particular circumstances of each case of wrongdoing. By establishing the category of international crimes, the danger of polarizing moral and political judgements into a crude choice between crimes and delicts is increased. There is a real possibility of dissipating international concern with the causes and consequences of wrongful acts by focusing debates on the question whether or not those acts should be classified as international crimes, rather than on the substance of the wrong. There is also a serious risk that the category will become devalued, as cases of greater and lesser wrongs are put together in the same category, or as some wrongs are criminalized while others of equal gravity are not.

3. Given the controversial nature of the concept, and the possibility that its adoption might lead to adverse consequences, the United Kingdom is opposed to the creation of a separate category on international crimes.

United States of America

1. Since the introduction of the distinction in draft article 19 between "international crimes" and "international delicts" in 1976, many States, members of the Commission, and prominent lawyers and scholars have voiced serious objections. On prior occasions, the United States identified to the Commission the serious difficulties inherent in the attempt to insert a regime of criminal responsibility into the law of State responsibility.[1] Still, the basic distinction pervades the draft, undermining the focus of the law of State responsibility.[2] The concept of international crimes of States bears no support under the customary international law of State responsibility, would not be a progressive development and would be unworkable in practice.

2. State responsibility, as Brownlie has pointed out, is "a form of *civil** responsibility".[3] Where a State imposes injuries on another, it bears responsibility to make reparation, the "essential principle" of which is that it must, "as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed".[4]

3. The notion that a State might additionally be subject to criminal responsibility for some delicts but not for others is foreign to the law of State responsibility. Indeed, the commentaries adduce no international precedent to support the concept. Whether such breaches are called "crimes" or "exceptionally serious wrongful act[s]", they

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[1] See, for example, *Official Records of the General Assembly*, *Thirtieth Session*, *Sixth Committee,* 40th meeting, agenda item 114, p. 2 (A/C.6/33/SR.40), and corrigendum.

[2] Draft article 19, paragraph 3, enumerates four categories of crimes, under the general headings of peace and security, self-determination, "safeguarding the human being" and "preservation of the human environment". Draft article 40, paragraph 3, defines "injured State" to include all States in the context of a State crime. Draft articles 51–53 treat the consequences of crimes, including modifications of the law of reparation and obligations on States in response to an international crime.

[3] Brownlie, *System of the Law of Nations* …, p. 23. See also Whiteman, *Digest of International Law*, p. 1215.

[4] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A*, *No. 17*, p. 47.

belong outside the framework of State responsibility. The United States continues to oppose the inclusion of a concept of State crimes in the draft articles and would highlight the following difficulties:

(a) *Institutional redundancy*

4. Existing international institutions and regimes already contain a system of law for responding to violations of international obligations which the Commission might term "crimes". Indeed, serious violations of humanitarian law, for instance, should be addressed through a coherent body of law applied by appropriate institutions. The Security Council has taken important steps in this direction through the creation of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda.[5] Intensive international efforts are now under way to establish a permanent international criminal court. Avenues such as these clarify and strengthen the rule of law. By contrast, the enunciation of a category of "State crimes" would not strengthen the rule of law but could add unnecessary confusion.

5. As a practical matter, the establishment of a separate category of State crimes in the draft articles risks diminishing the import of and the attention paid to other violations of State responsibility (i.e. "delicts"). An injured State may well argue that the particular act at issue amounts to a "crime" simply to increase its claim for reparation for the delict.

(b) *The principle of individual responsibility*

6. "Crimes against international law", the Nürnberg Tribunal stated, "are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[6] The Commission early on echoed Nürnberg, saying that "any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment".[7] The principle of individual responsibility has also been embodied in international conventions on the prevention of genocide, apartheid and slavery, three of the subjects that the draft articles include under the category of "safeguarding the human being". The principle has been codified in numerous international instruments and put into practice in such landmark institutions as the international war crime tribunals following the Second World War and the international tribunals for the former Yugoslavia and for Rwanda today.

7. To be sure, the existence of a category of crimes against humanity for which individuals are responsible attests to the "exceptional importance now attached by the international community to the fulfilment of obligations having a certain subject-matter".[8] Yet it is one thing to recognize the responsibility of individuals and quite another to establish a criminal regime punishing States for such violations. In practice, two regimes of responsibility one for individuals and one for States could help insulate the individual criminal from international sanction. Although some observers have found that State and individual criminal responsibility may coexist, an individual criminal may be emboldened to attempt to shift a degree of responsibility away from himself and to the State by resort to a provision for State crimes. To that extent, respect for the principles of war crime tribunals at Nürnberg and the international tribunals for the former Yugoslavia and for Rwanda will be undermined.

8. In sum, the draft articles concerned with international "State crimes" are unacceptable and risk undermining the entire project of codification of the law of State responsibility.

[5] Moreover, the Security Council has acted in areas defined as "crimes" by the draft articles. For instance, the act of aggression (draft art. 19, para. 3 (*a*)) by Iraq against Kuwait was countered by the Security Council's series of resolutions in 1990 and 1991 under Chapter VII of the Charter of the United Nations, for example, Security Council resolutions 660 (1990) of 2 August 1990, 678 (1990) of 29 November 1990, 686 (1991) of 2 March 1991 and 687 (1991) of 3 April 1991. The Council took a number of steps relative to genocide (draft art. 19, para. 3 (*c*)) with respect to the former Yugoslavia and Rwanda, for example, resolutions 771 (1992) of 13 August 1992, 808 (1993) of 22 February 1993, 827 (1993) of 25 May 1993 (former Yugoslavia); and resolutions 918 (1994) of 17 May 1994 and 955 (1994) of 8 November 1994 (Rwanda). Further, as notions of international security increasingly assimilate the idea of environmental protection against severe degradation, the Council may act against aggressive State actions bringing about "massive pollution", much as it did against Iraq's destruction of Kuwaiti oil fields in 1991; see Council resolution 687 (1991), para. 16, reaffirming Iraq's responsibility for "damage including environmental damage and the depletion of natural resources".

[6] *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946* (Nürnberg, 1948), vol. XXII, p. 466.

[7] *Yearbook ... 1950*, vol. II, document A/1316, Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, p. 374.

[8] *Yearbook … 1976*, vol. II (Part Two), p. 104, para (21).

Paragraph 2

Czech Republic

Under paragraph 2 (the wording of which appears to be tautological or "circular" but is not because the objective criterion used actually refers to a subjective element, namely, recognition, which must be verifiable), a breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the international community as a whole constitutes an international crime. Although this characterization offers the advantage of not prejudging the future development of the category of crimes, it does leave some doubt as to how it is to be determined which specific wrongful acts really constitute crimes.

France

1. Paragraph 2 states that "[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime". This wording

is imprecise. Who will establish the "essential nature" of the obligation in question? What is meant by the "international community"? It is possible to visualize the political reality that such a term is meant to represent. However, reference is being made to an entity that is legally indeterminate. Furthermore, who will determine that an interest is "fundamental" and that it is of concern to the "international community", an entity which both draft article 19 and texts dealing with positive law fail to define legally? Is reference being made to the interests of all States or only to the interests of a large number of States, and in the latter case, which States? These are instances of legal imprecision that are most regrettable in a draft of this type.

2. One can only wonder at the lack of concordance between paragraphs 2 and 3 of the draft article: why is the word "serious", which is to be found in paragraph 3, not used to describe the violation of an "essential" obligation, mentioned in paragraph 2, when it appears in each subparagraph of paragraph 3?

3. Draft article 19 draws on the same idea as *jus cogens*. If paragraph 2 is read in the light of articles 53 and 64 of the 1969 Vienna Convention, it will be noted that the concept of "an international obligation so essential for the protection of fundamental interests of the international community" is very close to that of "a peremptory norm of general international law". It is precisely because the 1969 Vienna Convention introduced a concept of the law of treaties which was previously unknown and, what is more, is dangerous for legal security, that the Government of France refused to sign that Convention. (For the reasons of principle stated above, the express references to *jus cogens* in draft articles 18, paragraph 2, 29, paragraph 2, and 50 (*e*) should be deleted.)

4. In any event, the scope of the concept of "crime" should not be confused with that of *jus cogens*; the introduction into the draft articles of two concepts which are of similar inspiration but divergent in scope adds further obscurity to the text.

United Kingdom of Great Britain and Northern Ireland

1. Draft article 19 introduces the controversial category of international crimes. It was indicated above that the United Kingdom does not support this provision. Without prejudice to that position, it wishes to make two more specific points concerning the approach adopted in the article.

2. First, the category of international crimes depends upon the identification of international obligations that are "so essential for the protection of fundamental interests of the international community" that their breach is recognized by that community as a crime. Yet there is no coherent account given of the manner in which the international "community as a whole" may recognize such rules. How, and by whom, is it to be determined what the international "community as a whole" is, and whether it has recognized a particular norm as "so essential for the protection of fundamental interests" as to render its breach an international crime?

United States of America

Abstract and vague language

Paragraph 2 applies to "international obligation[s] so essential for the protection of fundamental interests of the international community" that they are to be considered crimes.

Uzbekistan

Draft article 19, paragraph 2, should read as follows:

> "Internationally wrongful acts of exceptional gravity which pose a threat to international peace and security and also infringe upon other vital foundations of peace and of the free development of States and peoples constitute international crimes."

Paragraph 3

Czech Republic

The Commission cannot be expected to draw up a list of international crimes.

France

1. A draft on responsibility should lay down only secondary rules. However, paragraph 3 lays down primary rules by classifying international obligations in a basic fashion. France has indicated on a number of occasions that substantive rules do not belong in a text concerning secondary rules. Moreover, the list set out in paragraph 3 whose illustrative nature is surprising in a draft of this kind is largely obsolete and heterogeneous. It contains government policies rightly criticized today by the vast majority of States, which are the result of political approaches that reflect the ideological concepts of a bygone era rather than acts that are clearly identifiable and punishable by a criminal jurisdiction of any kind. Reference is also made to such phenomena as transboundary air and water pollution, which have as yet not been criminalized under all domestic legal systems and which the Commission itself is still discussing with a view to establishing into which category of responsibility they fall. This paragraph, which reveals the subjectivity of draft article 19, therefore does not belong in a codification text.

2. Criminal justice, as it exists in domestic law, presupposes a moral and social conscience, but it also presupposes a legislator empowered to define and punish offences, a judicial system to decide on the existence of an offence and the guilt of the accused, and a police force to carry out the penalties handed down by a court. Yet no legislator, judge or police exists at an international level to impute criminal responsibility to States or ensure compliance with any criminal legislation that might be applicable to them.

3. The international tribunals for the former Yugoslavia and for Rwanda and the future international criminal

court are, admittedly, indicative of the intention to be able to try individuals who have incurred responsibility for serious violations of international humanitarian law or other particularly heinous crimes, such as genocide, but the machinery set up (or to be set up) for that purpose does not permit the attribution of criminal responsibility to States, and is in fact not designed to do so. These initiatives, which emphasize the criminal responsibility of individuals, take away the rationale for prosecuting and punishing a State.

4. One can only wonder at the lack of concordance between paragraphs 2 and 3: why is the word "serious", which is to be found in paragraph 3, not used to describe the violation of an "essential" obligation, mentioned in paragraph 2, when it appears in each subparagraph of paragraph 3?

United Kingdom of Great Britain and Northern Ireland

There is a tension between paragraphs 2 and 3. Paragraph 2 defines a crime as "the breach by a State" of what might be called an "essential obligation". Paragraph 3 states that crimes may result from a "serious breach" of certain obligations. It should at least be made clear whether it is the importance of the rule, or the seriousness of the conduct violating the rule, which is decisive. It seems probable that the Commission intended the approach represented by paragraph 3 to be followed, since the commentary emphasizes that a breach of a rule of *jus cogens* does not necessarily constitute an international crime. If that be so, and the essential question is not the nature of the rule but rather the seriousness of the conduct constituting the violation, it may be asked again whether there is a need for a distinct category of "international crimes".

United States of America

Abstract and vague language

As noted, specific regimes of international law already govern particular violations referred to in paragraph 3, so it is not clear how their enumeration in the draft articles adds anything to the law. These topics are enumerated with references that cloud rather than clarify meaning. To what specific rules, for instance, do the phrases "massive pollution of the atmosphere or of the seas" or "safeguarding the human being" refer? Highly subjective terms are used to qualify the topics; specific categories of crimes are encumbered with subjective qualifications ("of essential importance", "serious", "on a widespread scale", "massive") susceptible to any number of interpretations. As a result, a decision-making body would lack objective rules that could be applied coherently in specific cases.

Paragraph 4

France

With regard to the concept of "delict", it will be noted that there is quite simply no definition. The formula in the paragraph whereby anything which is not a crime is necessarily a delict is hardly satisfactory. To make a distinction (between crimes and delicts) does not amount to giving a precise definition of what really constitutes a "delict".

Article 20 (Breach of an international obligation requiring the adoption of a particular course of conduct)

Denmark (on behalf of the Nordic countries)

The Nordic countries are doubtful as to the somewhat subtle academic distinction between obligations of "conduct" as opposed to obligations of "result" insofar as these distinctions, in contrast to that of "delicts" and "crimes", do not appear to have any bearing on the consequences of their breach as developed in part two of the draft articles.

France

The criticism of draft article 19, paragraph 3, made by France, also applies to the somewhat obscurely worded draft article 20. It relates to rules of substantive law, which classify primary obligations. It thus has no place in a draft of this kind and should be deleted.

Germany

1. The very elaborate draft provisions on the breach of an international obligation requiring the adoption of a particular course of conduct (art. 20), on the breach of an international obligation requiring the achievement of a specified result (art. 21) and on the breach of an international obligation to prevent a given event (art. 23) are intended to establish a complete set of rules devoid of any loopholes. Of course, every endeavour to avoid legal uncertainties wherever possible should be supported. However, there is a certain danger in establishing provisions that are too abstract in nature, since it is difficult to anticipate their scope and application. Such provisions, rather than establishing greater legal certainty, might be abused as escape clauses detrimental to customary international law. They may also seem impractical to States less rooted in the continental European legal tradition, because such abstract rules do not easily lend themselves to the pragmatic approach normally prevailing in international law.

2. Furthermore, it is doubtful whether an obligation under draft article 23 can always be separated from an obligation under draft article 20. For instance, article 22 of the Vienna Convention on Diplomatic Relations requires the receiving State to take all measures to ensure that the premises of a mission are not subject to any intrusion or damage and that there is no disturbance of the peace of the mission or impairment of its dignity. It appears doubtful whether this gives rise to a mere obligation to prevent the occurrence of an event, as seems to be the view of the Commission,[1] or whether it also implies a duty on the

[1] *Yearbook ... 1978*, vol. II (Part Two), pp. 82–86, paras. (4)–(15) of the commentary to article 23.

part of the State to adopt a particular course of conduct in order to ward off danger from a mission (for example, to provide police protection). The draft articles are also silent on the question as to whether an obligation under article 20 may conflict with an obligation under article 23. In sum, Germany is not quite sure whether the complicated differentiations set out in draft articles 20, 21 and 23 are really necessary, or even desirable.

Switzerland

See "General remarks", above.

Article 21 (Breach of an international obligation requiring the achievement of a specified result)

Denmark
(on behalf of the Nordic countries)

The Nordic countries are doubtful as to the somewhat subtle academic distinction between obligations of "conduct" as opposed to obligations of "result" insofar as these distinctions, in contrast to that of "delicts" and "crimes", do not appear to have any bearing on the consequences of their breach as developed in part two of the draft.

France

France's criticism of draft article 19, paragraph 3, also applies to the somewhat obscurely worded draft article 21. It relates to rules of substantive law, which classify primary obligations. It thus has no place in a draft of this kind and should be deleted.

Germany

See comments on draft article 20, above.

Switzerland

See "General remarks", above.

United Kingdom of Great Britain and Northern Ireland

See comments on draft article 16, above.

Paragraph 2

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom regards the propositions set out in draft article 21, paragraphs 1–2, as uncontroversial, but is concerned by the interpretation given to the proposition in paragraph 2 in the Commission's commentary. The commentary[1] suggests that where a State offers compensation to an injured foreigner having failed to exercise the vigilance required by international law to prevent an attack upon him, the payment or offering of compensation is the achievement of an "equivalent result" to the fulfilment of the initial obligation of vigilance. In the view of the United Kingdom this is not correct. No State has a free choice as to whether it safeguards foreigners and their property or pays them compensation. It is desirable that this be made clear in the commentary.

2. It is also suggested in the commentary[2] that paragraph 2 might apply where the initial conduct of the State constituting the violation of the obligation can be repaired by some further action by the State. The United Kingdom notes once again its concern that the Commission proceed on the basis of a correct interpretation of the exhaustion of local remedies principle, from which the situation contemplated by the draft paragraph should be clearly distinguished.

3. In general terms, the United Kingdom's view is that in a case where international law requires only that a certain result be achieved, the situation falls under draft article 21, paragraph 2. The duty to provide a fair and efficient system of justice is an example. Corruption in an inferior court would not violate that obligation if redress were speedily available in a higher court. In the case of such obligations, no breach occurs until the State has failed to take any of the opportunities available to it to produce the required result. If, on the other hand, international law requires that a certain course of conduct be followed, or that a certain result be achieved within a certain period of time, the violation of international law arises at the point where the State's conduct diverges from that required, or at the time when the period expires without the result having been achieved. Denial of a right of innocent passage, or a failure to provide compensation within a reasonable period of time after the expropriation of alien property, are instances of violations of such rules. Recourse to procedures in the State in order to seek "correction" of the failure to fulfil the duty would in such cases be instances of the exhaustion of local remedies.

[1] *Yearbook … 1977*, vol. II (Part Two), pp. 18–30.

[2] Ibid., p. 28, para. (30).

Article 22 (Exhaustion of local remedies)

France

It would be useful to specify that the exhaustion of local remedies is limited to diplomatic protection.

Germany

The Commission might also want to reconsider this draft article. It would appear that it has been placed into the draft in a somewhat haphazard manner, as it bears no relation either to draft article 21 or to draft article 23. While the rule on the exhaustion of local remedies certainly is a well accepted one, it has been developed for and applied in particular situations, above all the taking

of the property of aliens.[1] It should be made clear that the rule does not apply in cases of grave violations of the law on the treatment to be accorded to aliens that constitute, at the same time, violations of these human rights. It might be preferable not to treat the subject of local remedies at all in the current context since it does not represent an element necessary to the draft articles.

[1] See *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J.*, *Series A, No. 2*, p. 12.

United Kingdom of Great Britain and Northern Ireland

1. In the view of the United Kingdom, the draft articles are in one respect based upon an incorrect interpretation of the rules of customary international law. The commentary on certain draft articles, notably draft article 22, indicates that the effect of the rule concerning the exhaustion of local remedies is that no international wrong arises until the moment that the local remedies have definitively failed to redress the wrong. The United Kingdom is not persuaded that this is correct. It hopes that the Commission will give further consideration to the question whether as a matter of customary international law the exhaustion of local remedies is not merely a procedural precondition to the making of an international claim, rather than a precondition to substantive responsibility arising. This is a question of some practical importance, particularly in the context of time-limited compromissory clauses and of the determination of the quantum of compensation due for breaches of international obligations. It is desirable that the draft articles accurately reflect current customary law on this point.

2. The views of the United Kingdom concerning the exhaustion of local remedies principle have already been noted. Draft article 22 adopts the view that the duty to exhaust local remedies is not a "merely procedural" rule. In the United Kingdom's view, however, the duty to exhaust local remedies is indeed merely a procedural rule. There are rules of international law which are, in the Commission's terminology, "obligations of conduct". The rule forbidding the physical mistreatment of aliens by persons whose actions are imputable to the State is an example. In such cases, the breach plainly arises at the time that the State fails to act in conformity with the rule. Where the alien initially seeks a remedy in the local courts, the claim before the local courts is a step in the exhaustion of the local remedies. It takes place after the violation has occurred and before a claim in respect of the violation may be pursued on the international plane.

3. There may appear to be exceptional cases in which unsuccessful recourse to the local courts is indeed necessary in order to "complete" the violation of international law. Thus, some rules of international law permit what might at first appear to be "mistreatment" of aliens and their property, provided that the alien is compensated. The rules permitting the expropriation of alien property for a public purpose are an example. On a proper analysis of the precise nature of the obligation in these rules, however, it is clear that they do not constitute exceptions to the analysis applied above to "obligations of conduct". It is true that the breach does not arise until local procedures have definitively failed to deliver proper compensation (or, more accurately in the case of expropriation, have so failed within the time limits implied by the requirement of promptness). But this is not because the breach arises only when local remedies have been exhausted. It is because the duty is, strictly, not to refrain from expropriation for public purposes, but to compensate (by whatever procedure the State might choose) if property is expropriated or, to put it another way, to refrain from uncompensated expropriations.

4. The category of rules of this second kind, where the breach arises only after a definitive position is taken by the courts or other organs of the State, is approximately the same as the Commission's category of "obligations of result". The Commission has drafted article 22 so as to make it plain that it applies only to such obligations. The article states that there is a breach only if local remedies have been exhausted without redress. But this embodies, in the view of the United Kingdom, a fundamental conceptual confusion. The recourse to "local remedies" is in this context not at all of the same nature as recourse to local remedies as a procedural precondition for the taking over of the individual's claim and its pursuit on the international plane by his national State. The United Kingdom does not accept the approach adopted by the Commission in draft article 22. Indeed, it considers that draft article 21 states all that is necessary in this context in relation to obligations of result, and that draft article 22 could advantageously be omitted.

5. Without prejudice to the foregoing points, the United Kingdom wishes also to make two points concerning the drafting of draft article 22. First, the commentary states that " 'local remedies' means the remedies which are open to natural or juridical persons under the internal law of a State".[1] In practice, remedies open to an alien may not be "local" to the wrongdoing State. For instance, the State's laws might provide, by virtue of an agreement such as the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters or the European Union treaties, that the remedy must be sought in the courts of another State or in a tribunal within a regional or international organization. Similarly, either by virtue of the State's own laws, or by virtue of a contractual agreement (not necessarily governed by the State's own laws), the person might be bound to pursue a claim before an ICSID tribunal). Alternatively, the person may, under the law of the State, be permitted to choose to pursue a remedy in a court or tribunal of another State that has jurisdiction over the matter. It would be helpful if the Commission were to consider whether these possibilities necessitate any modification to the draft article or to the views expressed in the commentary.

6. Secondly, the commentary[2] makes plain that the draft article leaves open the question whether the local remedies rule is applicable in circumstances where the injury is suffered by an alien outside the territory of the State. If the purpose of the local remedies principle is (as the Commission asserts in the commentary[3] to enable the State to avoid responsibility for the breach of an international

[1] *Yearbook … 1977*, vol. II (Part Two), p. 50, para. (63).

[2] Ibid., p. 44, para. (40), and p. 50, para. (61).

[3] Ibid., p. 47, para. (48).

obligation by redressing the wrong, that logic applies regardless of the locus of the conduct and of the nature of the individual's link with the State. From the point of view of each State as potential wrongdoer, it would surely be preferable to bring all cases of wrong, whether intra- or extraterritorial, within draft article 22. From the point of view of each State as potential protector of injured citizens, such an inclusive approach would in principle create no more and no less disadvantage than the indisputable duty to exhaust local remedies in cases of wrongdoing by a State within its territory. Furthermore, the extension would be likely to arise in practice only in claims against States with a considerable extraterritorial capability to injure aliens. For those reasons, the balance of advantage might appear to lie with the inclusion of all cases within draft article 22, contrary to the position represented in the commentary.

7. On the other hand, there are egregious cases where the view might be very different. For instance, if agents of State A attack a private ship or citizen of State B outside the territory of State A, and perhaps beyond the territory of any State, a duty to exhaust the local remedies of State A might appear inappropriate, even if there were effective, impartial remedies available in State A. The United Kingdom suggests that the Commission examine this issue further, in an attempt to discover whether these conflicting policy arguments can be reconciled.

8. See also the comments on draft article 9.

United States of America

See the comments on draft article 29.

Article 23 (Breach of an international obligation to prevent a given event)

Denmark (on behalf of the Nordic countries)

The Nordic countries are doubtful as to the somewhat subtle academic distinction between obligations of "conduct" as opposed to obligations of "result" insofar as these distinctions, in contrast to that of "delicts" and "crimes", do not appear to have any bearing on the consequences of their breach as developed in part two of the draft articles.

France

France's criticism of draft article 19, paragraph 3, also applies to the somewhat obscurely worded draft article 23: it relates to rules of substantive law, which classify primary obligations. It thus has no place in a draft of this kind and should be deleted.

Germany

See the comments on draft article 20.

United Kingdom of Great Britain and Northern Ireland

1. The Commission considers that draft article 21 (Breach of an international obligation requiring the achievement of a particular result) does not adequately cover responsibility arising from obligations requiring a State to prevent a certain event in circumstances where the occurrence of the event is caused by factors in which the State plays no part. An obligation on State A to ensure that citizens of another State are not lynched by xenophobic mobs, for example, is, in the view of the Commission, distinct from an obligation to achieve a specific result.[1] The State is not obliged to do anything. In the absence of an attack by a mob no responsibility arises, even if it is evident that the State is utterly incapable of preventing a threatened attack. Responsibility arises only if the citizens are in fact lynched.

2. In the view of the United Kingdom, it is questionable whether there is a real distinction here. It might be said that the State's duty is to bring about the result that aliens are not attacked by xenophobic mobs. Every duty of prevention might be reformulated in this way. That being so, it is not clear that there is any real purpose to be served by drawing a distinction between the situations covered by draft article 21 (Failure to achieve a particular result) and by draft article 23 (Failure to prevent a given result). Draft article 23 is uncontroversial, but appears to be unnecessary. The United Kingdom hopes that the Commission will consider whether it is necessary to retain draft article 23 and, if it is, whether it might be combined with draft article 21.

[1] *Yearbook … 1978*, vol. II (Part Two), p. 82, para. (4), and p. 83, para. (8).

Article 24 (Moment and duration of the breach of an international obligation by an act of the State not extending in time)

France

In the view of France, draft article 24 should be retained since it establishes classification of breaches on the basis of how the breach is committed. It also allows for the establishment of the dates of breaches, which is very useful in the context of a procedure for the settlement of disputes.

Germany

Draft articles 24 to 26 provide for another complex series of abstract rules, this time governing the "[m]oment and duration of the breach of an international obligation". It is submitted that this scheme will tend to complicate rather than to clarify the determination of responsibility. From a practical point of view, the provisions do not assist in distinguishing between a continuing act (draft art. 25) and an act not extending in time (draft art. 24). The issue will always boil down to a thorough examination of the primary rule concerned and the circumstances

of its violation. Even then, a determination will always be subject to debate, as has been recently demonstrated in the *Gabčíkovo-Nagymaros Project* case.[1]

[1] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7. See, on the one hand, the majority opinion of the Court in paragraph 108 and, on the other hand, the separate opinion of Judge Fleischhauer as to the date of the unlawfulness of the recourse by Czechoslovakia to the so-called "Variant C".

United States of America

See the comments on draft article 18.

Article 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time)

France

In the view of France, draft article 25 should be retained since it establishes a classification of breaches on the basis of how the breach is committed. It also allows for the establishment of the dates of breaches, which is very useful in the context of a procedure for the settlement of disputes. Nevertheless, it might be useful to link draft article 25 to other articles referring to the same concepts:

(*a*) A breach by a continuing act: draft article 25, paragraph 1, should be linked to draft article 18, paragraph 3;

(*b*) A breach by a composite act: draft article 25, paragraph 2, should be linked to draft article 18, paragraph 4;

(*c*) A breach by a complex act: draft article 25, paragraph 3, should be linked to draft article 18, paragraph 5.

Germany

See the comments on draft article 24.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom is concerned that, throughout part one, chapter III, of the draft articles, the fineness of the distinctions drawn between different categories of breach may exceed that which is necessary, or even helpful, in a statement of the fundamental principles of State responsibility.

2. The United Kingdom is also concerned that it may be difficult to determine the category into which a particular conduct falls. This is a general point, applicable to the distinctions drawn by the Commission between obligations of conduct and obligations of result, between the various kinds of breach, and so on. It is raised here in relation to draft article 25.

United States of America

See the comments on draft article 18.

Paragraph 1

United Kingdom of Great Britain and Northern Ireland

Paragraph 1 is concerned with breaches having "a continuing character"; but there are no criteria for identifying such breaches. For example, in the scheme of these draft articles, does an expropriation of alien property by means of a decree, or the continued detention of and dealing in that property after the date of the decree, amount to a continuing act? Or are the subsequent holding and transactions independent breaches, or perhaps not breaches of international law at all? And how far may a claimant State adjust the position by the manner in which it formulates its claim? The United Kingdom hopes that, if this draft article is retained, the Commission will provide guidance on its interpretation. The view of the United Kingdom is that these questions are properly to be answered by considering the nature of the obligation rather than of the act. Indeed (to pursue the example used above), it does not think it even possible, by an examination of the act, to determine whether the continuing dispossession of the owner is a continuing wrong, or a consequence of the initial taking.

Paragraph 2

United Kingdom of Great Britain and Northern Ireland

Paragraph 2 is not controversial, but the United Kingdom suggests that the Commission might consider combining the category of composite acts with that of paragraph 1.

Paragraph 3

United Kingdom of Great Britain and Northern Ireland

The United Kingdom does not support the approach to the duration of complex acts adopted in paragraph 3. The draft article stipulates that the breach occurs at the time of the last constituent element of the complex act, but is then deemed to have begun at the time of the first constituent element. This retrospective generation of a breach of international law for which draft article 25, paragraph 3, provides is objectionable because the premise upon which it is based is, in the view of the United Kingdom, misconceived. If the "initial" State conduct breached the obligation, the "concluding" act simply completes the exhaustion of local remedies. If, on the other hand, no wrong arises until the concluding act occurs, that is because the obligation is simply to achieve a particular result by

means of the State's own choosing, which obligation may be fulfilled through the availability of appeals procedures and discretionary remedies.

Article 26 (Moment and duration of the breach of an international obligation to prevent a given event)

France

In the view of France, draft article 26 should be retained since it establishes a classification of breaches on the basis of how the breach is committed. It also allows for the establishment of the dates of breaches, which is very useful in the context of a procedure for the settlement of disputes.

Germany

See the comments on draft article 24.

United States of America

See the comments on draft article 18.

Chapter IV. Implication of a State in the internationally wrongful act of another State

Article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act)

France

See the comments on draft article 28, paragraph 3.

Germany

1. As far as draft article 27 on "aid and assistance" is concerned, Germany has some doubts as to whether this provision has a solid foundation in international law and practice.[1] It would appear that many of the situations envisaged by the Commission and quoted as examples of aid and assistance[2] actually refer to independent breaches of obligations under international law. For example, the action of a State allowing its territory to be used by another State for perpetrating an act of aggression as described in article 3 (*f*) of the Definition of Aggression[3] qualifies as an act of aggression and not as aiding aggression.

2. Should the Commission determine, however, that there is a solid foundation in international law and practice for the concept of "aid or assistance" in the field of State responsibility, it would certainly have to apply much more precision in clarifying the scope of the term "rendered for the commission" as a constitutive element. The requirement of intent in aiding and assisting the commission of an unlawful act also needs to be incorporated more clearly and unequivocally.

Switzerland

Draft article 27 introduces the concept of the implication of a State which has not necessarily acted in a wrongful manner. Switzerland is of the view that this provision, which has no basis in positive law and would embody a purely causal responsibility, has no place in the Commission's draft and should therefore be deleted.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom supports the basic principle adopted in draft article 27, but considers that the drafting leaves several important points unclear.

2. First, with regard to assistance that is not unlawful per se, it is clear that a State is responsible under the draft article only if it intends to give assistance to another State knowing that the assistance will be used for the purpose of committing an internationally wrongful act. But it is not clear whether the assisting State is responsible only in cases where it believes the conduct that it is assisting is unlawful, or whether the assisting State is responsible even if, while knowing what the assisted conduct will be, it believes that conduct to be lawful. In other words, it is not clear what effect a mistaken view of the law on the part of the assisting State would have in this context. This point would be important in cases where, for example, one State assists a forcible intervention by another in a third State, but regards the intervention as justified on humanitarian or other grounds. It may be thought that, to the extent that the State that is the perpetrator of the primary offence is at risk of being held responsible for its conduct whether or not it believed that its conduct was unlawful, so should "accessory" States that knowingly and intentionally assist its purpose. But no such conclusion is evident in the draft article or in the commentary. This point might usefully be considered by the Commission.

3. Secondly, it is not clear whether, in the case of acts of assistance that are wrongful per se, the draft article introduces a distinct wrong, so that the conduct is wrongful on two counts both under the rule which makes it wrongful per se, and under the draft article. This point may have practical importance. For instance, the "per se wrongfulness" may arise under a treaty, and that treaty may stipulate a particular procedure for dispute settlement. If draft article 27 creates a distinct wrong, dispute settlement procedures applicable to these draft articles would be applicable, which may permit or require a complainant State to circumvent the treaty-based dispute procedures. If, however, there are not to be two bases of wrongfulness in such cases, the question arises as to which is to be subsumed by the other.

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[1] See Brownlie, *Principles of Public International Law*, pp. 456 et seq.; Ipsen, *Völkerrecht*, pp. 521 et seq.; and Vitzthum, ed., *Völkerrecht*, p. 538.

[2] See *Yearbook ... 1978*, vol. II (Part Two), pp. 99 et seq., commentary to article 27.

[3] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

4. A third point is related to the second. The draft article does not itself explicitly assert that there is an obligation not to aid or assist the commission of an international wrong by another State. Two interpretations of the effect of the article are possible. The draft article may create (or assert the existence of) such an obligation by implication. Alternatively, the article may carry no such implication, and may do no more than attach responsibility to conduct constituting aid or assistance, regardless of the existence of any obligation not to give aid or assistance. If the latter interpretation is correct, there is no indication of the time at which the wrongful act arises. That time could be when the assistance is given, or when the assistance is "used". The distinction is clear in the case of, for example, the provision of transport facilities. It would be preferable to make clear that it is the first interpretation that is correct, and that there is an international obligation not to aid the commission of an unlawful act. The time of the breach would then vary according to whether or not the aid was unlawful per se. If it was, the breach would occur when the aid was given. If it was not unlawful per se, the breach would arise only when (and if) the aid was used for an unlawful purpose, although it would presumably (applying the approach adopted in draft article 25) then be retrospectively dated back to the time when it was given. This interpretation would also provide an answer to the point raised in the previous paragraph. There would clearly be an obligation distinct from any obligation that might render the aid per se unlawful; and in such cases the rendering of assistance would be unlawful on two distinct grounds. If these uncertainties can be resolved, draft article 27 would be a helpful provision. The United Kingdom hopes that the Commission will give further thought to the precise manner in which the draft article might be applied in practice, and to the possible need for redrafting the article in order to make its implications clearer.

United States of America

Draft article 27 provides that assistance to another State constitutes an unlawful act "if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter [State]". The United States agrees that circumstances may arise where two States act jointly in the commission of a wrongful act.[1] As a result, it is conceivable that an assisting State would be responsible for an action of the receiving State, but it is difficult, if not impossible, to imagine such responsibility of the assisting State in the absence of the actual commission of an unlawful act by the receiving State. To this extent, this is indeed a rule of joint responsibility where both States should be held responsible for unlawful action. At the same time, the rule as stated remains vague and would be difficult to apply in practice. For instance, what is the scope of the term "rendered for the commission"? It is assumed that the term means to cover the case where an assisting State intends to assist in the commission of an unlawful act. However, the phrase "rendered for" is rather obscure and may be interpreted as not requiring intent. That "rendered for" incorporates an intent requirement should be clarified in the text of the draft article.

[1] See Brownlie, *System of the Law of Nations* …, pp. 190–191.

Article 28 (Responsibility of a State for an internationally wrongful act of another State)

Switzerland

Draft article 28 concerns the responsibility of a State for exerting coercion to secure the commission of a wrongful act against a third country, as well as the responsibility of the State which was thus coerced to act. In the opinion of Switzerland, the second aspect of the problem the responsibility of the State victim of coercion comes within the province of the provisions on circumstances precluding wrongfulness and should be dealt with under that heading.

Paragraph 1

France

Paragraph 1 illustrates a historically dated situation. It would in any event be desirable to replace the term "*contrôle*" by "*maîtrise*", in the French version.

Paragraph 2

France

1. The term "coercion", without further qualification, is too loose. It would be better to speak of coercion "under conditions which are contrary to international law".

2. France proposes inserting the phrase "under conditions which are contrary to international law" after the phrase "An internationally wrongful act committed by a State as the result of coercion".

Paragraph 3

France

Paragraph 3 shows quite clearly that there can be no substitution of responsibility. There can, on the other hand, be two concomitant responsibilities. This comment also applies to draft article 27.

Chapter V. Circumstances precluding wrongfulness

France

In the view of France, the following article could replace all of chapter V:

"Article 18 *bis*

The wrongfulness of an act of a State is precluded:

(*a*) In relation to a State which consented to it in conformity with international law;

(*b*) If the act constitutes a countermeasure (within the meaning of article 47);

(*c*) Where the act constitutes a measure of self-defence in conformity with international law;

(*d*) If the act was due to an irresistible, external and unforeseen event which made it materially impossible for the State to act in conformity with that obligation;

(*e*) If the State establishes that the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care; distress may not be invoked if the State in question has contributed to the occurrence of the situation or if the conduct in question has created a comparable or greater peril;

(*f*) If the act corresponds to a state of necessity under the following conditions:

(i) The act respects the international rules which are applicable in situations of necessity;

(ii) The State which invokes the state of necessity did not contribute to its occurrence;

(iii) The act is the only means of safeguarding an essential interest of the State invoking the state of necessity against a grave and imminent peril;

(iv) The act does not seriously impair an essential interest of a State towards which an obligation is in force."

Article 29 (Consent)

France

It would be appropriate to group the draft articles concerning consent, countermeasures and self-defence (arts. 29, 30 and 34) and those dealing with other circumstances precluding wrongfulness (arts. 31–33).

United Kingdom of Great Britain and Northern Ireland

1. The Commission's decision that the exculpatory "defences" in draft articles 29 to 34 should preclude wrongfulness and not merely preclude responsibility entails the conclusion that a State that takes action which causes loss to another State or its nationals is, because its action is not unlawful, under no duty to pay compensation. The United Kingdom considers that this is entirely appropriate in circumstances where a State is acting with the consent of the State harmed (art. 29) or is exercising in accordance with international law its right to take countermeasures (art. 30) or its right of self-defence (art. 34). In the case of consent validly given, there is no violation of international law, and therefore no question of wrongfulness should arise. In the case of exercises of the right to take countermeasures or to act in self-defence, the conduct of the State is by definition a consequence, specifically permitted by international law, of a prior wrongful act by another State. It is appropriate that a State that exercises these rights given to it by international law to protect its interests against the wrongful acts of another State should not be regarded as acting wrongfully, any more than it would if it were to exercise any other right under international law.

2. The United Kingdom also accepts that it might be appropriate to regard as being in principle "not wrongful" conduct resulting from irresistible forces creating a situation in which performance of the international obligation in question is materially impossible (art. 31), because the "conduct" is by definition involuntary.

3. The United Kingdom thinks, however, that it would be useful to consider whether this approach to defences in international responsibility should operate in exactly the same manner in the context of the remaining circumstances precluding wrongfulness, i.e. distress (art. 32) and necessity (art. 33). In those cases, the State has a choice as to whether it complies with its international obligations or, in order to protect important interests, violates those obligations. In those circumstances, it may be preferable to adopt the view that the defences may excuse the wrongful conduct and in some circumstances release the State in question from the duty to make reparation for injury caused by it, but do not entirely preclude the wrongfulness of the conduct. On this basis the legal obligation would clearly survive, as would the obligation in principle to make reparation for any injury caused, and the State would be under a clear duty to return to compliance with the obligation. This possibility is one that the United Kingdom hopes the Commission will consider. The following comments (see draft articles 29, paragraphs 1–2, and 31–33) are made without prejudice to the general points made in the preceding paragraphs.

Paragraph 1

Austria

In paragraph 1, the expression "in relation to that State" should be further examined since there may exist some doubt concerning the logic of limiting the preclusion of wrongfulness to the consenting State.

France

1. It is not very clear what is to be understood by the expression "validly given". This seems to relate to defects of consent, taken from the law of treaties.

2. France proposes reformulating this provision as follows:

"1. The consent given by a State in conformity with international law to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes

the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent."

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom supports the principle in draft paragraph 1, that consent precludes the wrongfulness of (or at least, responsibility for) an act, but considers that it would be helpful for the Commission to give further consideration to two issues.

2. The first is the question of the person or organ by which the consent of the State must be given. The commentary[1] suggests that consent may validly be expressed by anyone whose acts are attributable to the State. The United Kingdom, however, considers that there is no necessary identity between the category of persons whose acts are attributable to the State and the category of persons competent to bind the State. Minor officials, for example, belong to the first but not the second category. It is hoped that the Commission might give further consideration to this question. In particular, the questions of the extent to which consent may be given on behalf of a State by (*a*) minor officials, and (*b*) insurrectionists who subsequently become the Government of the State, require clarification.

3. A further aspect of the question who may give the State's consent? arises in the context of revolutionary groups. Under draft article 15, the acts of insurrectional movements that become the new Government of a State are to be regarded as acts of the State. A desire for theoretical consistency might suggest that expressions of "consent" by insurrectional Governments be treated in the same way. Typically, that consent might relate to intervention by forces of a third State in support of the insurrection, or to the non-fulfilment of a treaty obligation owed by a third State to the insurrectionists' State. It is generally neater to have all aspects of international responsibility that concern the acts of insurrectionists determined on the basis of the same principles. The policy considerations are, however, different in the two cases.

4. It is desirable that a new Government should not be able to escape international responsibility for the acts that brought it to power, especially as there is a particular likelihood of injury to foreign States and nationals during an insurrection. On the other hand, to entitle, as it were, successful insurrectionists to consent to departures from legal obligations owed to their national State might be thought to promote the non-observance of such obligations at a critical juncture for the State, and even to encourage intervention by third States in its internal affairs. It might therefore be thought preferable, in the interest of stability, to adopt the position that only the incumbent Government may consent to departures from legal obligations. Certainly, the new insurrectional Government could have no cause for complaint if third States did adhere to their legal obligations to the insurrectional State.

5. The policy argument against counting acts of successful insurrectionists as consent on behalf of the State is supported by another practical consideration. The 1969 Vienna Convention makes no provision for the conclusion of international agreements by insurrectionists; and to the extent that the Convention is relevant to cases of insurrection, its provisions (notably articles 8 and 46) clearly suggest that insurrectionists cannot make treaties binding on the State. It is hard to see why insurrectionists should be entitled to achieve a modification of duties owed to their State by way of consent to departure from those obligations, when they could not do so by concluding a treaty modifying the same obligations. There are, then, arguments on both sides of this issue. There does not seem to be a decisive argument favouring either side. It is, however, desirable that the problem be addressed further by the Commission.

6. The second issue concerns the manner in which consent may be expressed. There are emergency situations in which it is appropriate to allow a State to take action to protect persons in another State from imminent and serious danger (for example, from risk of death from fire or flood), but where there may be insufficient time to obtain the consent of that other State. There may be a need to address, in the draft article itself or in the commentary, the possibility of implied or retrospective consent. The United Kingdom hopes that the Commission will consider whether it is possible, either in draft article 29 or elsewhere, to make express provision for a right to take such humanitarian action in emergency situations, with appropriate safeguards to protect the interests of the State in whose territory the action is taken.

Paragraph 2

Austria

Some States may have doubts regarding the practical relevance of excluding "consent" as a circumstance precluding the wrongfulness of an act of a State in the case of *jus cogens*.

France

1. For the reasons of principle stated above, the reference to *jus cogens* in article 29, paragraph 2, should be deleted.

2. Paragraph 2 poses a problem because it refers to the concept of a "peremptory norm of general international law", which France does not recognize.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom is unable to support paragraph 2, which precludes consent to a rule of *jus cogens*. The uncertainty which continues to surround the content

[1] *Yearbook … 1979*, vol. II (Part Two), p. 113, para. (15) of the commentary to article 29.

of the category of *jus cogens* and the lack of any practical mechanism for resolving that uncertainty make the provision impractical.

Article 30 (Countermeasures in respect of an internationally wrongful act)

(See also part two, chapter III.)

France

1. The formulation "wrongfulness of an act of a State not in conformity with an obligation of that State" is pleonastic. Further, the term "legitimate" is not legally apt. Lastly, the title of the draft article is ambiguous inasmuch as the operative provisions of the article concern not only countermeasures enacted by States on an individual basis, in the exercise of their own authority and acting "at their own risk", but also coercive measures authorized or decided on by the United Nations. It would in any event be preferable to limit this article to countermeasures *sensu stricto*.

2. It would be appropriate to group the draft articles concerning consent, countermeasures and self-defence (arts. 29, 30 and 34) and those dealing with other circumstances precluding wrongfulness (arts. 31–33).

3. France proposes reformulating this provision as follows:

> "An act of a State not in conformity with its obligation towards another State is not wrongful if the act constitutes a countermeasure (within the meaning of article 47) against that other State."

Mexico

The inclusion in the current formulation of the draft articles of an article on countermeasures in chapter V is inappropriate since, although Mexico is aware that countermeasures are an instrument used in practice by the community of States and that some of them have been incorporated in various kinds of international instruments, to state, as does draft article 30, that an originally wrongful act ceases to be wrongful under certain circumstances does not seem to accord with internationally recognized principles on the peaceful coexistence of States. Mexico would suggest, in any event, the inclusion in the draft articles of a paragraph strengthening precautionary measures, the aim of which would be to assist in the settlement of any dispute.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom welcomes the acknowledgement in draft article 30 that States are entitled to resort to countermeasures. Were the draft article to stand alone, it would constitute a clear statement of that right; and the exercise of that right would be subject to the limitations that have emerged in State practice and to rules specially agreed by States (such as the relevant rules of the 1969 Vienna Convention). In this respect draft article 30 would be comparable to draft article 34 on the right of self-defence. The United Kingdom commends this approach to the Commission.

2. It appears both unnecessary and undesirable to single out countermeasures as the one "circumstance precluding wrongfulness" whose content purports to be fixed by the draft articles. The United Kingdom would prefer that draft article 30 stand as the only provision on countermeasures, and that the context of the law on countermeasures be considered on another occasion. The United Kingdom does not consider that the elaboration of the content of the rules on countermeasures reflects the current state of customary international law, or that the draft articles represent a desirable development of it.

3. For all these reasons, the United Kingdom is strongly of the view that it is inappropriate to include any provision other than draft article 30 in these draft articles, and that the question of countermeasures needs careful and separate consideration.

4. See also draft articles 29, 48, 50 and 58.

United States of America

1. The United States supports the draft article's reflection of the settled view that "countermeasures ha[ve] a place in any legal regime of State responsibility".[1] The article acknowledges that an otherwise unlawful act loses its unlawful character when it "constitutes a measure legitimate under international law" in response to a prior unlawful act.[2] The United States agrees that draft article 30 concerns only acts of a State that are otherwise "not in conformity with an obligation of that State towards another State". Thus, the scope of the article does not extend to the entire range of responsive actions by States, such as measures of retortion, actions that might be termed "unfriendly" but that do not violate international obligations.[3]

2. Similarly, the United States does not understand draft article 30 to alter or otherwise affect the rights and obligations of States under the 1969 Vienna Convention and the customary international law of treaties. ICJ has recently drawn an even sharper distinction with respect to treaty law and State responsibility, stating that "these two branches of international law obviously have a scope

[1] See *Yearbook … 1993*, vol. II (Part One), document A/CN.4/453 and Add.1–3, p. 14, para. 38.

[2] The difference between measures that are not wrongful and measures that are legitimate is not entirely clear from the text of article 30. "Legitimate" seems to be intended to mean "within the limitations on countermeasures provided in part two" (see *Yearbook … 1979*, vol. II (Part Two), p. 116). If so, the Commission might consider incorporating this definition directly in article 30.

[3] See, for example, Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, p. 44; and Alland, "International responsibility and sanctions: self-defence and countermeasures in the ILC codification of rules governing international responsibility", pp. 143 and 150.

that is distinct".[4] A State may have a range of alternatives available under the law of treaties in response to a breach by another State of a provision of a treaty in force between the two States. The treaty may provide for specific responses, such as dispute settlement procedures or other measures. A State may also be entitled to reciprocal measures, which are outside the definition of countermeasures in article 30. The draft article should not be read as precluding States from taking measures designed to maintain "the condition of reciprocity in the law of treaties".[5]

3. In this connection, it bears noting that draft article 37 on *lex specialis* states that "[t]he provisions of this part [two] do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act".[6] The United States strongly supports the principle of draft article 37 and believes that it should also apply to part one of the draft articles. For instance, two States could devise an agreement where one of the circumstances precluding wrongfulness would not apply even where, in similar circumstances, the draft articles would indeed apply. Or parties could arrive at an agreement whereby each waives the rule of exhaustion of local remedies, even where that rule would normally apply under draft article 22.

[4] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 38, para. 47.

[5] Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, p. 17.

[6] *Yearbook … 1996*, vol. II (Part Two), p. 62.

*Article 31 (*Force majeure *and fortuitous event*)

Austria

1. Draft article 31 may require more elaboration. The way the article is drafted, objective and subjective elements seem to be mixed in a manner likely to blur rather than determine the scope of *force majeure* or other external events as elements precluding wrongfulness. Austria, therefore, wishes to request the Commission to inquire to what extent the concept of "material impossibility" could be further developed in relation to "fortuitous event" as an element precluding wrongfulness.

2. It is not to be ignored that the problems addressed by the draft article have far-reaching consequences which are likely to relate even to issues such as "due diligence" as a key element of the concept of prevention. There can be no doubt that the notion of due diligence needs further in-depth elaboration regarding its relevance in the context of State responsibility.

3. It should also be acknowledged that this notion has already frequently been referred to by States in their practice, as can be gleaned from the various digests. Austria, for example, applied it in cases concerning State responsibility with regard to foreign nationals killed during civil riots on its soil.

France

1. There is an element of redundancy in the use of the expressions "*force majeure*" and "fortuitous event", which in fact relate to the same regime.

2. It would be appropriate to group the draft articles concerning consent, countermeasures and self-defence (arts. 29, 30 and 34) and those dealing with other circumstances precluding wrongfulness (arts. 31–33). In the second group, in effect, the attitude of the victim is irrelevant, only objective facts (*force majeure*, distress, state of necessity) being taken into account.

United Kingdom of Great Britain and Northern Ireland

1. The principle of the defence of *force majeure* and fortuitous event in draft article 31 is not controversial, but the United Kingdom considers that it should be explicitly confined to circumstances in which: (*a*) there is a situation in which it is materially impossible for the State to comply with its international obligations, which situation *(b*) derives directly from factors or events that are both (*c*) exceptional and (*d*) beyond the control of the State. For instance, there is a clear distinction between circumstances where a State loses control of part of its territory, to insurgents for example, and circumstances where the State is unable to compel persons within the territory which is under its control to conduct themselves as they ought perhaps because key workers are on strike. The former is an exceptional circumstance, and if it causes a State not to comply with its obligations it is appropriate that the wrongfulness be precluded. The latter is a constant risk which affects all States, all of the time; and it should not form the basis of a circumstance precluding wrongfulness. It is not apparent from the commentary that the Commission has taken this view; indeed, it may be that the Commission has decided not to take this view.[1] The United Kingdom urges the Commission to consider the explicit adoption of this distinction, either in the commentary or in the draft article itself.

2. See also draft article 29.

[1] See *Yearbook … 1979*, vol. II (Part Two), p. 122.

Paragraph 1

France

1. The draft article seems to expand the impossibility of performance as compared with article 61 of the 1969 Vienna Convention and, in so doing, is likely to undermine the stability of established treaty regimes by covering new cases of wrongfulness. The expression "beyond its control" serves no purpose.

2. France proposes reformulating this provision as follows:

> "1. An act of a State not in conformity with its obligation towards another State is not wrongful if the act was due to an irresistible, external and unforeseen

event which made it materially impossible for the State to act in conformity with that obligation."

Paragraph 2

France

Paragraph 2 adds nothing to paragraph 1, and could thus be deleted.

Article 32 (Distress)

France

1. The wording of the draft article should be such as to guard against the likelihood of the situation of distress being used for injurious ends. France proposes new wording to that end.

2. It would be appropriate to group the draft articles concerning consent, countermeasures and self-defence (arts. 29, 30 and 34) and those dealing with other circumstances precluding wrongfulness (arts. 31–33). In the second group, in effect, the attitude of the victim is irrelevant, only objective facts (*force majeure*, distress, state of necessity) being taken into account.

Mongolia

Mongolia has doubts as to the appropriateness of including a provision on distress as a factor that could preclude wrongfulness. Therefore draft article 32 needs to be re-examined, especially in the light of increasing interdependence in the world as a result of the rapid progress in science and technology which also entails high-risk situations with far-reaching catastrophic consequences.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom supports the principle of the defence of distress, set out in this draft article, but recalls the comment made in relation to draft article 29, that it is desirable that an explicit provision be made somewhere in the draft articles for emergency humanitarian action to be taken without risk of international responsibility.

2. In draft article 32, the reference to the availability of a defence in circumstances where an international obligation is breached in order to save the lives of "persons entrusted to [the] care" of the actor limits the applicability of the draft article in humanitarian situations. There is no defence if the conduct is aimed at saving the lives of persons who have not been entrusted to the care of the actor, whether or not there was anyone else in the vicinity who could have saved those lives. The United Kingdom recognizes the danger that the extension of the principle of distress might lead to abuse. Nonetheless, it considers that the benefits of facilitating humanitarian action have to be balanced against the risk of abuse, and that it would be regrettable if no formula could be devised to enable cross-frontier actions to save life *in extremis*.

3. See also draft article 29.

Paragraph 1

France

France proposes inserting the phrase "the State establishes that" after the phrase "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if".

Paragraph 2

France

France proposes replacing the phrase "was likely to create" by the phrase "has created".

Article 33 (State of necessity)

Denmark
(on behalf of the Nordic countries)

The issues relating to draft article 33 on a state of necessity are important. ICJ, in its judgment of 25 September 1997 in the *Gabčíkovo-Nagymaros Project* case,[1] expressed the view that important elements of draft article 33 reflect customary international law. In view of the delicate aspects relating to such a provision, the Nordic countries would like to highlight the important contribution of the Commission in this context, while at the same time reserving their right to study the proposed provision in further detail.

[1] *I.C.J. Reports 1997*.

France

It would be appropriate to group the draft articles concerning consent, countermeasures and self-defence (arts. 29, 30 and 34) and those dealing with other circumstances precluding wrongfulness (arts. 31–33). In the second group, in effect, the attitude of the victim is irrelevant, only objective facts (*force majeure*, distress, state of necessity) being taken into account.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom views with extreme circumspection the introduction of a right to depart from international obligations in circumstances where the State has judged it necessary to do so in order to protect an interest that it deems "essential". A defence of necessity would be open to very serious abuse across the whole range of

international relations. There is a grave risk that the provision would weaken the rule of law.

2. The United Kingdom accepts all the same that further consideration is required as to whether there is a need for a provision concerning action taken by a State to cope with environmental emergencies which pose an immediate threat to its territory (as envisaged in the commentary[1]). If so, this would be akin to *force majeure* or distress, and might be considered in that context. It would not, however, in the British Government's view, provide in itself a sufficient basis for any wider provision concerning necessity.

3. See also draft article 29.

[1] *Yearbook … 1980*, vol. II (Part Two), pp. 39–40, para. (16) of the commentary to article 33.

Paragraph 1

France

France proposes reformulating this provision as follows:

"1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act unless the State establishes that:

(*a*) The act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(*b*) The act did not seriously impair an essential interest of the State towards which the obligation existed; and

(*c*) The act did not infringe an international rule applicable in situations of necessity.

Paragraph 2

France

France proposes reformulating this provision as follows:

"2. In any case, a state of necessity may not be invoked by a State if that State has itself contributed to that state of necessity."

United Kingdom of Great Britain and Northern Ireland

The United Kingdom wishes to raise the question of the role of paragraph 2 (*b*), which disapplies the defence of necessity in cases where the obligation arises under a treaty which explicitly or implicitly excludes the possibility of invoking the defence of necessity. There seems to be no reason in principle why treaties should not also exclude other defences, such as *force majeure* or distress, and impose absolute liability. It may therefore be necessary to consider extending the application of paragraph 2 (*b*) to the other defences. This is one aspect of the broader question of the relationship between these draft articles and the law of treaties, on which comment was made above (see "General remarks").

Article 34 (Self-defence)

France

1. The draft article illustrates a too restrictive approach to self-defence. Instead of "taken in conformity with the Charter of the United Nations", it would be preferable to say "in conformity with international law".

2. It would be appropriate to group the draft articles concerning consent, countermeasures and self-defence (arts. 29, 30 and 34) and those dealing with other circumstances precluding wrongfulness (arts. 31–33).

United Kingdom of Great Britain and Northern Ireland

See the comments on draft article 29.

Article 35 (Reservation as to compensation for damage)

Austria

1. Draft article 35 should be examined with regard to a possible reformulation. To the extent that the provision should pertain to liability for acts performed in conformity with international law, the provision would require a more specific formulation because it would otherwise lead to the danger of possibly undercutting the effect of circumstances precluding wrongfulness. A provision applying the exception under article 35 only to such acts for which international law provides a legal ground for compensation would suffice.

2. In this regard the Commission should, once again, spend some time on the organization of work regarding rules of international law governing liability and the duty to prevent damages and its systematic relationship with the rules on State responsibility.

France

The draft article envisages no-fault liability. France is of the view that it should be deleted, taking into account the comment made on draft article 1.

Germany

Germany agrees with the assumption underlying chapter V, that certain circumstances preclude wrongfulness. However, it would invite the Commission to re-examine draft article 35 stating a "reservation as to compensation for damage". This is the borderline between State respon-

sibility and liability for acts not contrary to international law. To what extent acts in conformity with international law give rise to a duty of compensation is currently unclear. Further, it would appear unsatisfactory if the Commission, while in draft article 33 precluding wrongfulness in a state of necessity, did not also deal with questions of redress for damage suffered by another State not responsible for that state of necessity.

United Kingdom of Great Britain and Northern Ireland

1. It was noted (see draft article 29) that the United Kingdom hopes that the Commission will consider whether it would be preferable to treat conduct covered by the "defences" of distress and necessity (arts. 32–33) as unlawful. The exculpatory provisions of draft articles 32 and 33 would then be regarded as indications of the circumstances in which the international community would ordinarily tolerate non-fulfilment of obligations, in the sense of refraining from condemnation of the action.

2. The United Kingdom considers that where a State has chosen to take action for its own benefit, there is no reason in principle why that State, rather than the State against which the action was taken, should not bear the cost of doing so. The principle of unjust enrichment might offer a conceptual framework for consideration of the liability of the State taking the action to compensate the State that has suffered the loss. The United Kingdom therefore welcomes the acceptance in draft article 35 of the possibility that States might sometimes be obliged to pay compensation where they have acted in a manner covered by draft articles 32 and 33 and caused loss to others.

3. In the current scheme of the draft articles it seems that, because of the exculpatory effect of the chapter V defences, any duty to compensate in these circumstances would have to be treated as a matter of international liability for injurious consequences arising out of acts not prohibited by international law. There is therefore a need to establish the relationship between draft article 35 and the work of the Commission on the question of injurious consequences arising out of acts not prohibited by international law.

Part Two

CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY

Argentina

Argentina considers that chapters I and II of part two, concerning the content, forms and degrees of international responsibility (arts. 36–46), adequately codify the basic rules of responsibility and outline the subject in a satisfactory manner. The second reading will enable changes to be made to the drafting of the articles in order to eliminate excessive detail and simplify or clarify the formulation of some rules; nevertheless, the general thrust of the draft is correct, and it should not be subject to substantial changes.

Denmark (on behalf of the Nordic countries)

The most difficult aspects of this part appear to be those related to "countermeasures" (chap. III) and "international crimes" (chap. IV).

Chapter I. General principles

Article 36 (Consequences of an internationally wrongful act)

France

France would suggest new wording for the draft article, taking into account the provisions of draft article 41. Article 41 could then be deleted.

Paragraph 1

France

France proposes reformulating this provision as follows:

> "A State which has committed an internationally wrongful act is bound, with respect to the injured State, to perform the obligation it has breached or to cease any wrongful conduct having a continuing character."

Paragraph 2

France

France proposes reformulating this provision as follows:

> "This obligation is without prejudice to the legal consequences of an internationally wrongful act as set out in this part."

United Kingdom of Great Britain and Northern Ireland

The United Kingdom considers that paragraph 2 should be amended so as to make plain that, even though conduct exculpated by a defence under draft articles 29 to 35 is not wrongful, the duty to perform the obligation that is breached by the conduct persists. It would be preferable if paragraph 2 referred to the continued duty of the State which has failed to comply with its obligation (rather than "committed the internationally wrongful act") to perform the obligation it has breached.

*Article 37 (*Lex specialis*)*

Czech Republic

It is precisely on the subject of the specific consequences of a "crime" that the draft might be reworked; revisions could be proposed during the second reading with a view to clarifying further certain specific aspects of the regime of "crimes" without unduly changing the format out of the text. It would probably be useful, then, to take another look at the wording of draft article 37 with a view to making it clearer that the provisions of part two, when they deal with the regime applicable to "crimes", are no longer simply residual in character. Indeed, since "crimes" consist of breaches of peremptory rules (and not of any peremptory rule but only of those rules of *jus cogens* that are of essential importance for safeguarding the fundamental interests of the international community), the secondary rules applicable to them must also be peremptory in nature, with no possibility of derogating from them by means of an agreement *inter partes.*

France

In the view of France, draft articles 37 to 39 could perfectly well be included in the final or introductory provisions of the draft. All three deal with the relationship between the draft articles and external rules, and emphasize the supplementary nature of this text.

Germany

See the comments on draft article 1.

Switzerland

Draft article 37 rightly provides that the rules of international law governing a particular situation should prevail over the general provisions contained in the draft articles. However, it might be appropriate to enter a reservation concerning article 60 of the 1969 and 1986 Vienna Conventions. These provisions enable a contracting party to terminate a treaty with respect to another party when the latter has violated the basic rules of the treaty. In view of the current wording of draft article 37, this specific reaction, which comes within the province of the law of treaties, could be considered as precluding all other consequences, namely, those deriving from the draft articles on State responsibility. This is not the case, and the situation should therefore be clarified.

United Kingdom of Great Britain and Northern Ireland

1. The European Community treaties are an example of a *lex specialis* modifying the incidence of many of the principles in the Commission's draft articles.

2. See also "General remarks", above.

United States of America

See the comments on draft article 30.

Article 38 (Customary international law)

France

In the view of France, draft articles 37 to 39 could perfectly well be included in the final or introductory provisions of the draft articles. All three deal with the relationship between the draft articles and external rules, and emphasize the supplementary nature of this text.

Article 39 (Relationship to the Charter of the United Nations)

Czech Republic

It must also be borne in mind and this is clearly a very important factor that in the field of the maintenance of international peace and security, which accounts for much of the action taken for the purpose of intervening in response to "international crimes" of States, there is in fact already a specific mechanism, which is appropriately covered by draft article 39.

France

1. In the view of France, draft articles 37 to 39 could perfectly well be included in the final or introductory provisions of the articles. All three deal with the relationship between the draft articles and external rules, and emphasize the supplementary nature of this text.

2. Draft article 39 appears to run counter to Article 103 of the Charter of the United Nations, which makes no distinction between the provisions of the Charter. Would not such a clause have the effect of restricting the prerogatives of the Security Council? It would in any event be preferable to state that the provisions of these draft articles do not impair the provisions and procedures of the Charter, in accordance with Article 103 thereof.

3. France proposes reformulating this provision as follows:

> "The provisions of the present articles are without prejudice to the provisions and procedures of the Charter of the United Nations, pursuant to Article 103 thereof."

Mongolia

Any text dealing with State responsibility should take into full account the current situation concerning the measures which the United Nations is taking under Chapter VII of the Charter.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom notes the request by the Commission for specific comments on the issues raised by draft article 39. However, it does not consider that the question of the relationship between the rights and obligations of States under the law of State responsibility and under the Charter of the United Nations should be addressed in these draft articles. That question raises complex issues, which concern not only the United Nations but also other international and regional organizations which may be acting in conjunction with the United Nations or in roles assigned to them under the Charter.

2. Without prejudice to the foregoing, the United Kingdom supports the principle of the pre-eminence of the Charter, which is reflected in its Article 103 and in draft article 39.

United States of America

1. The Commission has sought "quite specific comments by States"[1] with respect to the questions raised by draft article 39, which states that the "legal consequences of an internationally wrongful act" set out in the draft articles "are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security".

2. The United States agrees with the objective of the draft article in emphasizing that the Charter's allocation of responsibility for the maintenance of peace and security rests with the Security Council, and that an act of a State, properly undertaken pursuant to a Chapter VII decision of the Council, cannot be characterized as an internationally wrongful act. State responsibility principles may inform the Council's decision-making, but the draft articles would not govern its decisions.

3. The Charter states clearly that its obligations prevail over any other international agreements.[2] Article 103 not only establishes the pre-eminence of the Charter, but it makes clear that subsequent agreements may not impose contradictory obligations on States. Thus, the draft articles would not derogate from the responsibility of the Security Council to maintain or restore international peace and security.

4. The responsibility of the Security Council, and the coordinate responsibility of Member States to implement Council decisions, pervades the Charter. Article 2, paragraph 5, states, for instance, that "[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter". In Article 25, "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". Similarly, Article 48 commits Member States to take the "action required to carry out the decisions of the Security Council for the maintenance of international peace and security". In accordance with these Articles, therefore, Member States are obligated to "carry out" decisions of the Council under Chapter VII with respect to the maintenance of peace and security. The Charter does not provide an exception for existing obligations States might owe other States.

5. The discretion of the Security Council, moreover, is broad.[3] Thus, the Council has authority to take all necessary action, consistent with the purposes and principles of the Charter, to maintain or restore international peace and security. The Council, in connection with its Chapter VII responsibilities, may deny a State's plea of necessity or a State's right to take countermeasures.[4]

[1] *Yearbook … 1996*, vol. II (Part Two), p. 62, footnote 187.

[2] Article 103 of the Charter reads:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[3] See the Charter of the United Nations, Article 24, para. 2.

[4] See footnote 1 above.

Article 40 (Meaning of injured State)

Austria

As far as part two, chapter I, on the consequences of violations of international law is concerned, the concept of "injured State" developed in draft article 40 has merits to the extent to which States are directly affected in their rights by violations of international law. The competence to invoke reparation, restitution in kind or compensation should therefore be made entirely dependent on the condition that a State has been directly affected in its rights by a violation. However, doubts may be raised as to whether this concept is also workable in cases where a directly affected State cannot be singled out, such as in the case of human rights violations and the breach of obligations owed to the community of States parties as a whole.

France

1. The unfortunate ambiguity that results from the unwillingness to include the concept of damage among the requisites for bringing about a relationship that entails responsibility is altogether obvious in draft article 40. It is unclear what exactly is meant by a "right" whose infringement injures a State. The term is no doubt used in order to avoid referring to "damage" (which indeed constitutes an infringement of a right).

2. It is necessary to introduce into the draft article the idea that the injured State is the State that has a subjective right corresponding to obligations incumbent on clearly identified States. Draft article 40 should therefore make express reference to the material or moral damage suffered by a State as a result of an internationally wrongful act of another State.

3. France is not hostile to the idea that a State can suffer legal injury solely as a result of a breach of a commitment made to it. However, the injury must be of a special nature, which is automatically so in the case of a commitment under a bilateral or restricted multilateral treaty. By contrast, in the case of a commitment under a multi-

lateral treaty, the supposedly injured State must establish that it has suffered special material or moral damage other than that resulting from a simple violation of a legal rule. A State cannot have it established that there has been a violation and receive reparation in that connection if the breach does not directly affect it.

Germany

Draft article 40 is designed to determine which State or States are legally considered an "injured" State or States. As the Commission has rightly pointed out, this determination is obviously connected with the origin and content of the obligation breached by the internationally wrongful act in question, in the sense that the nature of the "primary" rules of international law and the circle of States participating in their formation are relevant to the indication of the State or States "injured" by the breach of an obligation under such "primary rules".[1]

[1] See *Yearbook ... 1985*, vol. II (Part Two), commentary to article 5, pp. 25–27.

Italy

See the comments on draft article 3.

Singapore

(a) *Identification of "an injured State" pursuant to draft article 40*

1. When and how a State becomes an injured State is vital in the allocation of certain privileges. The identification as an injured State gives that State a special status over a State that has committed an internationally wrongful act. This status, in turn, permits the injured State to claim remedies against the wrongdoing State and one of these remedies consists of acts that would otherwise be considered internationally wrongful acts, but are precluded from being wrongful as legitimate countermeasures. The process of identifying the injured State is consequently vital to legitimizing subsequent acts which would otherwise be wrongful. It is, perhaps, the most significant aspect of the Commission's work in the area of State responsibility.

2. From the commentaries to draft article 40, it is clear that the Commission is aware that controversy exists with this identification process that bestows the status of an "injured State". In order for a State to claim to be an injured State under draft article 40, the State would first have to show that the right alleged to be violated was a "primary" rule in international law and that they are parties bound by this primary rule. These are factors relevant in determining who is an injured State.[1]

3. Under draft article 3, two elements need to be established for an internationally wrongful act of a State; namely, an act or omission attributable to the State under international law; and secondly, that conduct has to constitute a breach of an international obligation owed by the offending State. The latter condition is considered by the Commission to be an objective element by reference to situations where the State "has failed, ... to fulfil an international obligation".[2] The Commission elaborated that the wrongfulness is constituted by a failure to observe conduct "which *juridically** it ought to have observed".[3] The term "juridically", refers presumably to the term "juridical", which is defined as "relating to, or connected with the administration of law or judicial proceedings".[4] It is therefore suggested that the conduct to be observed must be a requirement in law and has to be established to be owed in law by the offending State.[5] The identification of this primary rule may be different between treaty and customary international law.

4. Where a multilateral treaty is concerned, States are patently aware of the provisions they are committing to when they accede to the treaty. They may, in some cases, make reservations or declarations concerning those provisions, but are essentially taken to be bound by the treaty as a whole—*pacta sunt servanda*. Other States may be injured due to the violations of some provisions depending on the relationship created by the treaty. For example, where reservations are made and accepted, the relationship as between reserving State and accepting State is modified and is certainly different from reserving State and objecting State. Where customary international law is concerned, States may be bound by a rule, whether or not they specifically consent to it. They may be bound on the basis of acquiescence[6] or because it is a norm by "their very nature" and "[i]n view of the importance of the rights involved ..." they create obligations owed to the international community.[7] Two conditions thus exist before a State may rely on customary international law. First, it will be essential for that State to establish the requirements of acceptance as a norm of customary international law, that is, uniform State practice and *opinio juris sive necessitatis*,[8] and secondly, it must show a relationship or sufficient nexus between the violator and the State claiming status as an injured State sufficient to grant standing under draft article 40.

5. Draft article 40 is an important provision for clarification of when a State would have the *locus standi* to bring an action claiming the remedies set out in draft articles 41 to 46. It also provides the initial condition that must be satisfied before a State may take legitimate countermeasures against a wrongdoing State. This article

[1] See *Yearbook ... 1985*, vol. II (Part Two) , pp. 25–26, para. (4) of the commentary to article 5.

[2] *Yearbook … 1973*, vol. II, p. 179, para. (1) of the commentary to article 3.

[3] Ibid., p. 181, para. (7).

[4] *Oxford English Dictionary*, 2nd ed. (Clarendon Press, 1989), vol. VIII, p. 320.

[5] This proposition would seem to be confirmed by the Commission in their commentary (*Yearbook … 1985*, vol. II (Part Two), p. 27, para. (22).

[6] Where the requirements of being a persistent objector have not been met.

[7] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33; or a rule of *jus cogens*.

[8] *Asylum, Judgment*, *I.C.J. Reports 1950*, p. 266; and *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, para. 77.

should regulate the accord of standing with due respect to the two sources of international law.

(b) *Distinguishing convention mechanisms from customary international law measures*

6. A corollary issue to the granting of standing under draft article 40 is the difficulty of determining what mechanisms may be applied when particular provisions are violated. The choice between enforcement or dispute settlement procedures differs between treaty and customary international law. Treaty law may provide one means specific to the treaty, whilst customary international law may permit a variety of measures not provided in the treaty. For example, whilst countermeasures are provided for under the general framework of WTO,[9] the application of these measures is regulated by procedural requirements.[10] On the other hand, if articles 30, and 47 to 50 of these draft articles were to be accepted as customary international law,[11] the requirements necessary to the taking of legitimate countermeasures would be far less regulated. It is contentious whether WTO dispute settlement procedures would preclude the taking of unilateral countermeasures as envisaged by the draft articles.[12] The problem arises in determining in what situations customary international law measures would be more appropriate over treaty measures.

7. Under draft article 40, paragraph 2 (*e*), a State is an "injured State" where either a multilateral treaty or a norm of customary international law has been violated. What happens when an overlap occurs? In the *Military and Paramiliary Activities in and against Nicaragua* case, the Court in determining the provisions that allow human rights protection concluded that, "where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves".[13] This effectively places the governance of compliance of human rights provisions covered by conventions under the purview of convention organs, which in that case were the mechanisms under the American Convention on Human Rights and its contemporary application. The general principle seems to be that where a convention has mechanisms for reacting against violations, then those mechanisms take priority. Thus for example, any action concerning the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination may have to be overseen by the Committee on the Elimination of Racial Discrimination, as part two of the Convention delegates supervision and enforcement of the provisions to the Committee.

8. The situation with regard to customary international law would not be the same. Where the claim is purely based in customary international law, then the State will have to prove the existence of the norm in customary international law and establish that the violation of that norm has the consequences of obligations owed *erga omnes*, to the community of States. This requirement is recognized by the Commission. Clearly not all "rights", the violation of which would give rise to all States being an "injured State". In the *Barcelona Traction* case,[14] the Court found, *obiter*, that some obligations are owed to the international community because of "the importance of the rights involved".[15] The Court suggested that these rights were so important that all States had a "legal interest" in their protection.[16] The Court identified such norms as the outlawing of acts of aggression, genocide, and other basic rights of the human person which include protection from slavery and racial discrimination.[17] The Court went on to say that "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality".[18] Thus concluding that the means of protection where obligations owned *erga omnes* were alleged to be violated, was on the regional level based on the mechanisms under such conventions.[19] To a certain extent, both the *Military and Paramilitary Activities in and against Nicaragua* and the *Barcelona Traction* cases provide dicta that place treaty measures over customary international law (at least in the sphere of human rights).

9. The Commission could perhaps investigate these issues with regard to clarifying whether in fact convention mechanisms should take priority over customary international law. The Commission may wish, in the light of the above comments, further to consider the desirability of drafting separate provisions dealing with the two sources of international law within distinctly separate provisions rather than combining them as is the case now under draft article 40. It may be that the issue of which rights supersede, or which protection mechanism to apply, depends by and large on the circumstances and the discretion of the right-holder. Unless the convention specifically overrides customary international law provisions, the choice of mechanism may well remain within the discretion of the right-holder. Is this the situation *lex lata* or de *lege ferenda?*

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[9] Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994), annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes.

[10] For example, article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (ibid.) requires the lapsing of a reasonable time for compliance before concessions may be suspended.

[11] The provisions on countermeasures were at the very least accepted as conditions to be considered in evaluating justifiable countermeasures (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, para. 83).

[12] Sornarajah, "WTO dispute settlement mechanisms: an ASEAN perspective", pp. 122–124; particularly with regard to the application by the United States of the "super 301".

[13] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, para. 267.

[14] *I.C.J. Reports 1970* (see footnote 7 above), p. 3.

[15] Ibid., para. 33.

[16] Ibid.

[17] Ibid., para. 35.

[18] Ibid., para. 91.

[19] Ibid.

Switzerland

Draft article 40, which defines "injured State", also includes seemingly obvious elements, i.e. paragraph 1, which stipulates that the injured State must possess the infringed right.

Uzbekistan

Draft article 40 should be transferred to part two, chapter II, which contains provisions dealing with the rights of the injured State and obligations of the State which has committed an internationally wrongful act.

Paragraph 2

Austria

1. Systematically, the approach chosen by paragraph 2 (*e*) and (*f*) as well as paragraph 3, which concern acts violating international law with *erga omnes* effect, should be dealt with in a separate manner. The concept chosen in draft article 40 would lead to a competitive or cumulative competence of States to invoke legal consequences of a violation of international law. This could in concrete cases lead to absurd results, given the absence of any world authority deciding upon the competence of States to invoke *erga omnes* violations of international law.

2. The rights of States to invoke such violations should therefore be limited to specific legal consequences, namely the obligation to cease wrongful conduct and the reparation of the victims of violations of international law. This approach would adequately address the problem of the cumulation of the right of a multitude of States to invoke such violations and their legal consequences. Such limiting of the competence of States to invoke the consequences of *erga omnes* violations would not seriously hamper the capacity of the community of States under existing international legal procedures to react to violations of international law with *erga omnes* effect. In this context, reference can be made to the procedures under the Charter of the United Nations regarding the maintenance of international peace and security and the protection of human rights and fundamental freedoms.

3. Austria therefore expects the Commission to undertake a revision of draft article 40 as well as of chapter II of part two of the draft articles.

France

The drafting of paragraph 2 (*f*) allows any State party to a multilateral treaty to entail the responsibility of another State party where collective interests are involved. It is in fact completely inappropriate to allow States to intervene so in situations which are not of direct concern to them.

Germany

Germany would submit that the abstract concept formulated in paragraph 2 (*e*) and (*f*) does not in fact adequately take into account the wide variety of rules, both conventional and customary, that may or may not provide a basis to claim injury and reparation under well-developed legal regimes. As far as conventional rules are concerned, the Commission would need to clarify a possible overlap of paragraph 2 with article 60 of the 1969 Vienna Convention on termination or suspension of a treaty due to material breach, bearing in mind that the law of treaties and the law of State responsibility have a scope that is distinct.[1]

[1] See the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 38, para. 47.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom has no comment on the greater part of draft article 40. It does, however, wish to comment on paragraph 2 (*e*).

2. First, there is the question of the consistency of paragraph 2 (*e*) (ii) with article 60, paragraph 2 (*c*), of the 1969 Vienna Convention. Both paragraph 2 (*e*) as currently drafted and article 60 of the Convention are concerned with the concept of an "injured State" in circumstances where legal obligations have been violated. Both, indeed, are explicitly applicable to breaches of treaty obligations. The Convention treats a State as "injured" by a breach by another State party only if the breach (*a*) is material and (*b*) "radically changes the position of every party with respect to the further performance of its obligations under the treaty". That appears to be a narrower formulation than that adopted in the draft of paragraph 2 (*e)* (ii), which refers to situations where the infringement of a right under a multilateral treaty or under customary international law "necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law".

3. The main difference is the gap between a breach that "necessarily affects the enjoyment of ... rights" (para. 2 (*e*) (ii)) and a breach that "radically changes the position ... with respect to the further performance of ... obligations" (1969 Vienna Convention, art. 60, para. 2 (*c*)). The United Kingdom recorded above its view that it is desirable that the Commission consider and clarify the relationship between the draft articles as a whole and the Convention. Draft article 40 is one of the articles particularly affected by this problem.

4. The United Kingdom is also concerned that the criterion in paragraph 2 (*e*) (ii) is too vague. It might, for example, be said that an act of transboundary atmospheric pollution in breach of a treaty necessarily affects the enjoyment of the right of all States to be free from such pollution, even if the State raising this argument cannot prove any material detriment to its own territory. It has the

right not to have others pollute its atmosphere; it knows, as a matter of a priori reasoning, that pollution from State X is contributing to the build-up of atmospheric pollution; ergo, it is a State injured by the action of State X. The 1969 Vienna Convention approach has the effect of limiting the concept of the injured State to those States that are materially affected. That is an approach that the United Kingdom considers both practical and principled; and it would encourage the Commission to consider applying it in the context of draft article 40.

5. Such an approach might also be helpful in the context of multiparty disputes. As was noted above in relation to countermeasures (see draft article 30), situations may arise in which one State breaches an obligation owed to several States. The State principally affected may acquiesce in the breach. It would be helpful for the Commission to consider whether there are any circumstances in which the right of States to consider themselves "injured", and hence entitled to exercise the powers of "injured States", should be modified if the State principally injured has indicated that it has decided freely to waive its rights arising from the breach or if the State consents to the "breach".

6. The United Kingdom also notes that if compensation is to be recoverable under draft article 35, the definition of an injured State needs to be modified in order to include States injured by acts that are not internationally wrongful.

United States of America

1. As discussed above, the United States has identified serious flaws in the draft's definition of an injured State as including all States in the context of "State crimes". A similar problem may be found in draft paragraph 2 (*e*) (ii)–(iii) and (*f*). These provisions define injury on an abstract basis, without accounting for the wide variety of rules, both conventional and customary, that may provide standing to claim injury under well-developed regimes. Thus, while the draft recognizes the inherent difficulties in defining "injured States" in the context of multilateral treaties and customary international law, these provisions lead to unacceptable and overbroad conceptions of injury.

2. As currently drafted, paragraph 2 (*e*) (ii) provides that a State may claim injury where the right arises from a multilateral treaty or rule of customary international law and its infringement "necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law". To the extent that this draft article concerns multilateral treaty rules, the United States thinks that standing to claim injury would be governed by the specific treaty concerned and, as appropriate, the law of treaties.[1] Thus, paragraph 2 (*e*) (ii) should concern only customary international law. Further, the phrase "necessarily affects the enjoyment" is left undefined and could therefore be elastic and uncertain in application. The United States would propose the addition of an explicit limiting principle of interpretation, such as language providing that an infringement must "materially impair" the rights of the allegedly injured State.[2]

3. Paragraph 2 (*e*) (iii) states that an injury to any party may arise where the violation concerns a "right [that] has been created or is established for the protection of human rights and fundamental freedoms". A basic principle of human rights law is that because such violations often go unchallenged, means must be devised whereby other States may demand compliance with the law and international institutions may exercise their authority to ensure compliance. Human rights conventions often provide substantive bases upon which all States have a right to monitor and demand compliance with such rights. Such *erga omnes* rules are well established in State practice with respect to human rights treaties.

4. Yet the right to claim reparation as an injured State for a violation of human rights is ill-defined by the draft articles. To the extent that the draft articles attempt to assimilate into the requirement of reparation "human rights and fundamental freedoms", the regime of State responsibility becomes a statement of principles which few States, and still fewer tribunals and international organizations, will find useful. With respect to such "injuries" as defined here, there is no support in international practice for providing all States with the *locus standi* to seek reparation in cases where they have not been harmed in the sense provided by a particular rule of law. Indeed, it is unclear how a State might assert a claim in the absence of any substantive right provided to it under an established rule of law.

5. Finally, draft paragraph 2 (*f*) provides standing to a State where the allegedly infringed right, found in a multilateral treaty, "has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto". While the phrase "expressly stipulated" suggests a narrowing function, the draft and the commentaries do not define the term "collective interests". The draft may intend this phrase to cover specific kinds of interests found in specific categories of treaties. The Commission should clarify the meaning of "collective interests" in the text of the provision.

[1] Paragraph 2 as currently drafted does not adequately explain the extent to which its provisions overlap the customary international law of treaties and the 1969 Vienna Convention. In particular, article 60 of the Convention provides specific rules for the situation involving a "material breach of a multilateral treaty by one of the parties". Where the draft discusses rights infringed under treaties, it does not develop whether such infringements are akin to material breaches of a treaty or amount to something less. To the extent that the two concepts of infringed right and material breach overlap, the Commission should clarify that the Convention would govern interpretations of specific treaty regimes and injuries sustained therein.

[2] See *Yearbook … 1985*, vol. II (Part Two), pp. 26–27, para. (19), which refers to article 60, paragraph 2 (*c*), of the 1969 Vienna Convention.

Paragraph 3

Austria

See the comments on paragraph 2, above.

Czech Republic

The draft still contains by no means negligible specific elements relating to the regime of responsibility for crimes that justify the distinction made in draft article 19. For example, the provision set out in draft article 40, paragraph 3, is certainly not insignificant, and it has important consequences in terms of both reparation and countermeasures.

France

1. Paragraph 3, which deals with an "international crime", is not acceptable.

2. France proposes deleting this paragraph and reformulating the article as follows:

> "[1. For the purposes of the present articles, 'injured State' means a State which has sustained, or a State a national of which has sustained, material or moral damage arising from an internationally wrongful act of another State.
>
> "2. Infringement of a right and damage arise from the breach of an international obligation by another State, regardless of the origin, whether customary, conventional or other, of that obligation.
>
> "3. An 'injured State' is a State in respect of which it is established that:
>
> "(*a*) The damage it has sustained arose from the infringement of a right expressly created or established in its favour or in favour of a category of States to which it belongs; or
>
> "(*b*) The damage it has sustained arose from the infringement of rights expressly stipulated for the protection of a collective interest arising from an instrument by which it is itself bound; or
>
> "(*c*) The enjoyment of its rights or the performance of its obligations are necessarily affected by the internationally wrongful act of another State; or
>
> "(*d*) The obligation breached was established for the protection of human rights or fundamental freedoms.]"

Germany

Germany is of the opinion that the approach chosen by the Commission tends to broaden the circle of injured States beyond what appears to be legally accepted and workable in practice. While the concept of obligations *erga omnes* is an established and widely accepted one, violations of such obligations do not necessarily affect all States in the same manner. The Commission should study whether provision could be made for different categories of "injured States", leading to different "rights of injured States". For instance, while all injured States could well be seen as entitled to call for the cessation of an unlawful conduct or for the fulfilment of an obligation, the right to claim reparation might be limited to those States that have been "materially impaired" in the sense provided by the primary rule in question. This approach would leave unaffected the possibilities of the community of States as a whole under existing international legal procedures, such as the ones provided by the Charter of the United Nations, to react to a violation of international law with *erga omne*s effect.

Switzerland

Another element of the distinction between delicts and "crimes" emerges from paragraph 3. If a "crime" is committed, all States other than the perpetrating State could claim to be "injured States" and are bound to attach to the crime the consequences set out in draft article 53. However, to the extent that the concept of "crime" overlaps with a violation of the peremptory norms of international law, all States could consider themselves injured within the meaning of draft article 40, paragraph 3, even without determining whether the conduct contrary to *jus cogen*s is or is not considered a "crime". In order to attach especially severe consequences to certain types of conduct, it is therefore not necessary to include paragraph 3 or to criminalize the types of conduct arising therefrom.

United States of America

Crime and injury

1. Paragraph 3 provides that all States may be considered injured "if the internationally wrongful act constitutes an international crime". There is a wide variety of legal norms in which many or all States (or the international community "as a whole") have an interest. But specific regimes distinguish between "interest" and "standing", which the concept of criminal injury elides. State X may have a generalized interest in the adherence by other States to particular norms of international law, out of a concern for precedent or because the norm itself is an important matter of policy for the State. Given such an interest, State X may have the right to demand a cessation of unlawful conduct. Thus, draft article 41, by focusing on the obligation of a wrongdoing State to cease wrongful conduct rather than the remedies available to an injured State, suggests that injury is not a prerequisite to a demand for cessation. Nonetheless, State X may not have the *jus standi* in a particular case to pursue the remedies provided under draft articles 42 to 45. Standing depends upon the primary rules applicable in a particular case,

according to which a State might be able to assert that it has been "given a right of action".[1]

2. The definition of an injured State in paragraph 3 provides, however, that all States have standing to assert injury with respect to a crime, a situation that could lead to disruptive results.[2] While the concept of an injured community bears logical and jurisprudential weight, and is reflected in the responsibility of the Security Council to maintain international peace and security, it is unclear how a State may claim standing in the absence of a substantive rule of law granting it. Further, the motion in paragraph 3 that all States, individually rather than collectively, are injured by criminal violations raises particular concerns with respect to the responsibility of reparation. In particular, the draft's "construction might lead to a juridical 'overkill' by turning loose a sort of international vigilantism".[3] In fact, it would appear that an individual State would have available the panoply of rights to reparation even where it could not identify a substantive rule upon which it based its claim (see draft articles 51 and 52). Thus, multiple claims for reparation could result in inadequate compensation for those States that can indeed identify injury.

3. Under several substantive rules of law, particularly in the area of humanitarian law, all States parties have the ability to call for the cessation of unlawful conduct and for reparation to be provided to the injured State. At the same time, a wrongful act might principally affect one State, but widespread injuries might be suffered by a number of States (for example, the Iraqi invasion of Kuwait principally injured Kuwait, yet a number of other States and their nationals suffered injury in the course of the invasion). To the extent that a wrongful act inflicts widespread injuries upon a number of States, the determination of damages should take account of the consequences of the wrongful act, rather than its abstract gravity.[4] But the circle of States considered to have standing to claim reparation should be limited to those that identify a particular provision of law (outside the draft articles) granting them such a right.

[1] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 388 (dissenting opinion of Judge Jessup). As Judge Jessup noted, this may be true under certain "accepted and established situations" even where the State does not show "individual prejudice or individual substantive interest as distinguished from the general interest".

[2] See Simma, "International crimes: injury and countermeasures", pp. 283 and 285 (discussing concept of "community interest").

[3] Ibid., p. 299.

[4] Moreover, the draft articles already implicitly distinguish among the seriousness of violations. Under customary law, the consequences of violations depend on the nature of the violation. Draft article 44, paragraph 1, provides that an injured State is entitled to compensation "for the damage caused by that act", which is measured by the pecuniary value of returning the injured party to the status quo ante. As a result, it becomes unclear just what the concept of State crimes adds to the question of reparation for a violation of an international obligation.

Chapter II. Rights of the injured State and obligations of the State which has committed an internationally wrongful act

Argentina

Argentina considers that chapters I and II of part two, concerning the content, forms and degrees of international responsibility (arts. 36–46), adequately codify the basic rules of responsibility and outline the subject in a satisfactory manner. The second reading will enable changes to be made to the drafting of the articles in order to eliminate excessive detail and simplify or clarify the formulation of some rules; nevertheless, the general thrust of the draft is correct, and it should not be subject to substantial changes.

Mongolia

Mongolia finds acceptable the way the rights of the State that is wrongfully injured have been defined.

Article 41 (Cessation of wrongful conduct)

France

With regard to draft article 36, France would suggest new wording, taking into account the provisions of draft article 41. Article 41 could then be deleted.

United Kingdom of Great Britain and Northern Ireland

This draft article, as currently drafted, obliges only States that are acting wrongfully to cease their wrongful conduct. The United Kingdom considers that it would be helpful to record in the commentary that a State which acts in breach of an international obligation, but whose conduct is exculpated under draft articles 29 to 35, remains under a duty to act in accordance with its international obligations and is internationally responsible if it fails to do so immediately when the circumstances generating the defence cease to obtain.

Article 42 (Reparation)

Mongolia

Mongolia welcomes the principle of full reparation reflected in the draft article. In this connection it wishes to emphasize that compensation not only may but *should* include interest and, where appropriate, loss of profits.

Paragraph 1

France

France proposes replacing the phrase "restitution in kind" by the phrase "re-establishment of the pre-existing situation".

Germany

With the hesitations recorded above, Germany is in agreement with the basic rule, contained in paragraph 1, that the injured State is entitled to full reparation in the form mentioned. Some doubt exists, however, as to whether the injured State has, under customary international law, the right to "guarantees of non-repetition". The words "singly or in combination" seem to provide some flexibility as to what form reparation has to take in a specific case. To impose an obligation to guarantee non-repetition in all cases would certainly go beyond what State practice deems to be appropriate.

United States of America

1. While the draft articles restate the customary obligation to provide reparation, they also create several significant loopholes that might be exploited by wrongdoing States to avoid the requirement of "full reparation" identified in draft paragraph 1.

2. Paragraph 1 appears to state correctly that a wrongdoing State is under an obligation to provide "full reparation" to an injured State, in addition to ceasing unlawful conduct as required by customary law and set forth in draft article 41. Nonetheless, the Commission has provided two potentially significant exceptions from the general principle of full reparation.

Paragraph 2

France

1. The formulation in paragraph 2 (*b*) should specifically cover diplomatic protection.

2. France proposes replacing the phrase "[a] national of that State on whose behalf the claim is brought" by the phrase "a national of the State exercising diplomatic protection".

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom regards the draft article as largely uncontroversial, but has reservations concerning paragraphs 2 and 3. Both paragraphs give rise to the question whether the determination of reparation is a question of general international law or a question of the powers of the particular body making the determination. While the United Kingdom considers that it is permissible for States to establish an international tribunal and to give it specific directions concerning the approach that it must adopt towards reparation, it considers that there may be some advantage in spelling out general principles concerning reparation.

2. Paragraph 2 specifies that "the negligence or the wilful act or omission" of the injured State (or its injured national) are to be taken into account when reparation is determined. Those factors are not themselves controversial. It is, however, difficult to see why negligence and wilful wrongdoing are singled out for express mention. The nature of the rule that has been violated and of the interest that it is intended to protect, for example, are other factors that might be thought equally deserving of express mention, given that the provision is concerned with reparation as a whole and not merely with compensation. The United Kingdom is, moreover, concerned that this reference to what appears to be a doctrine of contributory fault or negligence is attempting to settle as a general principle of State responsibility a question that is properly an aspect of particular substantive rules of international law. The United Kingdom hopes that the Commission will reconsider this provision.

3. The prohibition in paragraph 3 on reparation which deprives the population of a State of its own means of subsistence is more problematic. The deprivation of means of subsistence had some meaning in the context of the affirmation of sovereignty over natural resources, but has no clear meaning here. Reparation is defined in paragraph 1 of the draft article. It includes restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition. Nothing in that provision would enable a tribunal to confiscate the means of production from a State. Restitution is the restoration of the status quo ante; compensation is a matter of money and not of the means of subsistence; and the other remedies are not material. Paragraph 3 can therefore only refer, and that imprecisely, to compensation. But it is not clear what level of financial hardship is contemplated, nor how it is to be determined if that level has been reached in any particular case. Is the level the same for all States, for example? And is it permissible to take into account assets held abroad by States? Moreover, if ability to pay is the real issue in paragraph 3, it is difficult to see why that should not be a factor in all cases, whether or not it is argued that there is a risk of the population losing its means of subsistence.

4. The United Kingdom considers that it would be helpful to have a statement of principle concerning the making of reparation and that the point should be made that an injured State cannot insist upon a particular kind or level of reparation. The United Kingdom believes that draft article 42 could usefully be modified. There might be a separate article stipulating that the right to reparation, in whatever form is to be implemented taking into account, *inter alia*, the importance of the rule and of the interest protected by it, the seriousness of the breach (and perhaps the degree of negligence or wilful misconduct involved) and the need to maintain international peace and security and to bring about the settlement of international disputes in conformity with principles of international law and justice. The article might then state that when a determination is made as to the precise form that reparation should take, account should be taken of the principle that the form of reparation imposed should not impose a burden on the State making reparation out of all proportion to

the benefit that the injured State would derive from some other form of reparation.

United States of America

1. Paragraph 2 provides vaguely for an "account[ing]" of "the negligence or the wilful act or omission" of the injured State or national "which contributed to the damage". It is unclear whether this subsection intends to impose a concept of contributory negligence, which under a common law approach might completely negate the responsibility of the wrongdoer,[1] or whether it foresees some partial deviation from the "full reparation" standard. Paragraph 2 could be read as incorporating a contributory fault standard, allowing a wrongdoing State to avoid its obligation to provide reparation simply by positing the negligence of the injured State. Such a standard, the United States suspects, would be unacceptable to most States, as it is to the United States.

2. The commentary to paragraph 2 suggests that the drafters may have intended to express a comparative fault principle.[2] The United States appreciates the difficulties posed by the circumstance where an injured State or national bears some responsibility for the *extent* of his damages.[3] However, the concept of comparative fault is neither established in the international law of State responsibility nor clearly explicated in paragraph 2.[4] What is more important, comparative fault introduces an imprecise concept susceptible to abuse by wrongdoing States which might argue that the principle of comparative fault should be applied to relieve them of the responsibility to provide reparation.

[1] See, for example, Dobbs, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury*, p. 256.

[2] See *Yearbook … 1993*, vol. II (Part Two), p. 59, para. (6) of the commentary to article 6 *bis* (present article 42): "[T]o hold the author State liable for reparation of all of the injury would be neither equitable nor in conformity with the proper application of the causal link theory."

[3] For instance, an injured State might in some circumstances be under a duty to mitigate its damages, analogous to the rules of contract law. See, for example, Whiteman, *Damages in International Law*, pp. 199–216; and Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, pp. 300–303.

[4] See *Yearbook … 1993*, vol. II (Part Two), p. 59, footnote 160.

Paragraph 3

France

Paragraph 3 should be deleted. There is no apparent justification for its inclusion in an article on reparation.

Germany

1. Germany would tend to agree that the rule contained in paragraph 3 has its validity in international law and in the context of the draft article. As has been stated in the report of the Commission on the work of its forty-eighth session, there are examples in history of the burden of full reparation being taken to such a point as to endanger the whole social system of the State concerned.[1] Germany would also agree with the finding that paragraph 3 has nothing to do with the obligation of cessation, or the obligation to return to the injured State, for example, territory wrongfully seized.

2. A thorough review of international practice might reveal that the principle of full reparation has been applied primarily in the context of arbitral awards that concerned individuals, not in the context of violations having such disastrous effects as war. It would appear that, in such circumstances, settlements, if they have been obtained, refrain from awarding full reparation for every single damage sustained.[2]

3. On the other hand, it should be mentioned that Security Council resolutions 662 (1990) and 687 (1991) declare that a State committing an act of aggression is liable to make full reparation. The Commission might want to draw some conclusions from the manner in which the resolutions are implemented.

[1] See *Yearbook …1996*, vol. II (Part Two), p. 66, para. 8 (*a*) and (*b*) of the commentary to article 42, para. 3.

[2] See Tomuschat, *Gegenwartsprobleme der Staatenverantwortlichkeit in der Arbeit der Völkerrechtskommission der Vereinten Nationen*, pp. 11 et seq.

United Kingdom of Great Britain and Northern Ireland

See the comments on paragraph 2.

United States of America

The second loophole is created by paragraph 3. It states, without support in customary international law, that reparation shall never "result in depriving the population of a State of its own means of subsistence". While there may arise extreme cases where a claim for prompt reparation could lead to serious social instability, the language of draft article 42, paragraph 3, could provide a legal and rhetorical basis for a wrongdoing State to seek to avoid any duty to provide reparation even where it has the means to do so. The draft article provides too subjective a formula, opening too many avenues for abuse. The commentary suggests that "[s]ome members disagreed with the inclusion of paragraph 3".[1] The United States agrees with the objectors; the inclusion of draft article 42, paragraph 3, in the draft articles is unacceptable.

[1] See *Yearbook … 1996*, vol. II (Part Two), p. 66, para. 8 (*b*) of the commentary to article 42, para. 3.

Article 43 (Restitution in kind)

France

1. France is of the view that it would be preferable to use the expression "re-establishment of the pre-existing

situation" rather than "restitution in kind", which might suggest simple restitution of an object or a person.

2. France proposes replacing the phrase "restitution in kind" by the phrase "re-establishment of the pre-existing situation" in the title, the *chapeau* and subparagraph (*c*).

3. France proposes deleting subparagraph (*b*). The subparagraph is not satisfactory since it refers to the concept of a "peremptory norm of general international law". It is also hard to understand how the restoration of lawfulness could be contrary to a "peremptory norm of general international law".

4. Subparagraph (*d*) should be deleted, as it adds nothing to the provisions of subparagraph (*c*).

United States of America

1. Restitution in kind has long been an important remedy in international law and plays a singular role in the cases where a wrongdoing State has illegally seized territory or historically or culturally valuable property.[1] Still, compensation appears to be the preferred and practical form of reparation in State practice and international case law[2] ("It is also clear that *in practice* specific restitution is exceptional") .

2. Draft article 43 nonetheless provides two exceptions which the Commission might usefully clarify. Subparagraph (*c*) provides that restitution in kind may "not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation". This exception may enable States to avoid the duty to provide restitution in kind in appropriate circumstances. To the extent that the phrase "a burden out of all proportion" is left undefined, this exception would undermine the useful principle that restitution is preferred in some circumstances.

3. Subparagraph (*d*) precludes restitution where it would "seriously jeopardize the political independence or economic stability" of the wrongdoing State. Such broad terms, left undefined and without an established basis in international practice, provide nothing to injured States but give hope to wrongdoing States seeking to avoid providing an appropriate remedy. In particular, the draft does not explain just what "serious" jeopardy might include. While subparagraph (*d*) may have relatively limited practical effect given the priority of compensation over restitution in practice, the inclusion of broad concepts providing for the avoidance of responsibility is likely to have effects beyond the narrow provision of draft article 43. The United States urges the Commission to delete the provision.

[1] See, for example, the case of the *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47; and the case concerning the *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 36–37.

[2] See, for example, Brownlie, *System of the Law of Nations …*, p. 211.

Uzbekistan

In the *chapeau* of draft article 43, a provision should be added to the effect that, if restitution of objects having individual characteristics is not possible, objects of the same kind or nearly identical objects may, by agreement, be substituted for them.

Article 44 (Compensation)

Denmark
(on behalf of the Nordic countries)

It may be pointed out, in particular with reference to draft article 44, that issues relating to the assessment of pecuniary damage are both highly complex and important. The Nordic countries feel that some guidance based on codification of customary law would have been useful in this respect.

France

In 1989, the Special Rapporteur envisaged[1] various forms of compensation, which have not been included in the current article, which has been abridged. It would be useful to revert to a more analytical version, adding elements of the earlier text. The current, overly concise, drafting stands in contrast to the degree of detail in draft articles 45 and 46.

[1] See *Yearbook … 1989*, vol. II (Part One), p. 1, document A/CN.4/425 and Add.1.

Germany

See the comments on draft article 45.

Mongolia

Mongolia welcomes the principle of full reparation reflected in the draft article. In this connection it wishes to emphasize that compensation not only may but should include interest and, where appropriate, loss of profits.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom considers that, to the extent that it represents the actual loss suffered by the claimant, the payment of interest is not an optional matter but an obligation. Draft article 44 should be amended accordingly.

United States of America

Draft article 44 states the long-established principle reflected in customary international law and innumerable bilateral and multilateral agreements that a wrongdoing State must provide compensation to the extent that restitu-

tion *in integrum* is not provided. The principle was stated clearly by PCIJ in the *Chorzów Factory* case, where it noted that the appropriate remedy is "[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear".[1] The principle has been applied to wrongful death cases as well.[2] The third element of moral damages is discussed below (see article 45).[3]

[1] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47. See also cases cited in *Yearbook … 1959*, vol. II, document A/CN.4/119, pp. 17–24; and Mann, *Studies in International Law*, pp. 475–476.

[2] See the Opinion in the *Lusitania* cases (United States/Germany), decision of 1 November 1923 (UNRIAA, vol. VII (Sales No. 1956.V.5), pp. 32 et seq.), at pp. 14, 19–20, holding that compensation would include, *inter alia*, "the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant ... [and] (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision".

[3] See also *Dispute concerning responsibility for the deaths of Letelier and Moffitt*, decision of 11 January 1992, UNRIAA, vol. XXV (Sales No. E/F.05.V.5, p. 1. The Security Council affirmed the principle that Iraq is responsible for damages arising out of the Gulf war (see Council resolution 687 (1991)). The United States has applied the "*Lusitania*" standard in a number of wrongful death cases which it has espoused and settled with other States. See, for example, "Damages for wrongful death: United States-Iraq: USS *Stark*", *in* M. Nash, ed., *1981–1988 Cumulative Digest of United States Practice in International Law*, pp. 2337–2340 (discussing the United States claim against Iraq arising out of its attack on United States missile frigate USS *Stark*).

Paragraph 1

France

France proposes replacing the phrase "restitution in kind" by the phrase "the re-establishment of the pre-existing situation".

Paragraph 2

France

France proposes reformulating this provision as follows:

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

United States of America

1. Paragraph 2 provides an unacceptable qualification to the requirement of "any economically assessable damage" by stating that interest "may" be covered. The Special Rapporteur recognized that both State practice and the literature "seem[ ] to be in support of awarding interest in addition to the principal amount of compensation".[1] The suggestion of the draft article itself, however, is that interest is not required. This suggestion goes counter not only to the overwhelming majority of case law on the subject but also undermines the "full reparation" principle. Numerous instances of international practice support the provision of interest.[2] The most significant and contemporary reflection of customary law concerning compensation may be found in the holdings of the Iran-United States Claims Tribunal, which has consistently awarded interest as "an integral part of the 'claim' which it has a duty to decide".[3] Similarly, UNCC, responsible for assessing damage and distributing awards for claims arising out of Iraq's invasion of Kuwait, decided that "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award".[4] The few contrary decisions do not undermine the near universal acceptance in international practice and arbitration of the necessity of the provision of interest in the award.

2. The Commission should close this loophole by stating that compensation "shall include interest", a proposition that expresses clearly and correctly the content of the law and practice of States. In the absence of this revision to draft article 44, paragraph 2, the United States believes that draft article 44 will not reflect the customary law on compensation but would, in fact, be a step backwards in the international law on reparation.

[1] *Yearbook … 1989*, vol. II (Part One), document A/CN.4/425 and Add.1, p. 23.

[2] See, for example, the case of the *S. S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, pp. 15 and 33, and that of the *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47; see also the case of the *Illinois Central Railroad Co. (U.S.A.* v. *United Mexican States*, decision of 6 December 1926 (UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 134 and 137).

[3] See, for example, *Iran* v. *United States*, case A19, decision No. DEC 65–A19–FT of 30 September 1987, *Iran-United States Claims Tribunal Reports*, vol. 16 (Cambridge, Grotius, 1988), p. 285, at pp. 289–290 (also noting that "[i]t is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*"); and *McCollough & Co., Inc.* v. *Ministry of Post*, case No. 89, award No. 225–89–3 of 22 April 1986, ibid., vol. 11, p. 34.

[4] Awards of interest: decision taken by the Governing Council of the United Nations Compensation Commission at its 31st meeting, held in Geneva on 18 December 1992 (S/AC.26/1992/16, para. 1).

Article 45 (Satisfaction)

Mongolia

Mongolia finds the provisions on satisfaction, assurances and guarantees of non-repetition to be highly important.

Paragraph 1

Germany

1. According to paragraph 1, an injured State is entitled to obtain satisfaction for the damage, in particular moral damage, caused by the internationally wrongful act. Germany agrees that a State can claim reparation for the moral damage suffered by its nationals. As such, moral dam-

age is equivalent to the harm of mental shock and anguish suffered and reparation will regularly consist of monetary compensation.[1] Since it is actually a form of compensation, not a form of satisfaction, the Commission should consider incorporating it into draft article 44.

2. As far as moral damages of States proper are concerned, the situation is less compelling.[2] Germany would tend to agree that monetary compensation as a form of satisfaction for infringements of the dignity of a State might be justified. However, it would resist any attempt to introduce the notion of "punitive damages" into the realm of State responsibility. Neither State practice nor international jurisprudence would support a punitive function of satisfaction.

[1] See *Yearbook ... 1993*, vol. II (Part Two), pp. 71 and 76.

[2] See the case of the *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 36: "The Court ... gives judgment that by reason of the acts of the British Navy in Albanian waters ... the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction." See also the case concerning the differences between New Zealand and France arising from the *Rainbow Warrior* affair, ruling of 6 July 1986 by the Secretary-General of the United Nations (UNRIAA, vol. XIX (Sales No. E/F.90.V.7), pp. 197 et seq). The ruling does not make clear whether the "compensation" of US$ 7 million awarded covers "moral damages" (which New Zealand had claimed, ibid. at pp. 202 et seq., but France had rejected for reasons of law, ibid., at pp. 209 et seq.).

United States of America

1. Moral damages, as draft article 45 implies, are part of the wrongdoing State's obligation to provide full reparation. The principle may be found in numerous aspects of State practice.[1] The commentary states that "international tribunals have always granted pecuniary compensation, whenever they deemed it necessary, for moral injury to private parties".[2]

2. Moral damages are equivalent to the harm of mental shock and anguish and consist of monetary payment precisely because they represent a form of compensation for actual harm suffered by a claimant.[3] Yet they are placed within the section on "satisfaction" and appear to be bound by the limitations therein. As stated, draft article 45 runs counter to customary international law. The United States recommends that the Commission resolve this problem by removing moral damages from the rubric of satisfaction and placing them under the provision for compensation in draft article 44. In addition, the draft should clarify that moral damages consist solely of damage for mental pain and anguish.[4] Otherwise, the provision for moral damages will not reflect customary international law and would therefore remain unacceptable.

[1] See, for example, Determination of ceilings for compensation for mental pain and anguish: decision taken by the Governing Council of the United Nations Compensation Commission during its fourth session, at the 22nd meeting, held on 24 January 1992 (S/AC.26/1992/8); and *Dispute concerning responsibility for the deaths of Letelier and Moffitt*, decision of 11 January 1992, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), pp. 8–9, paras. 23 and 31 (awarding moral damages to surviving family members of decedents).

[2] *Yearbook … 1993*, vol. II (Part Two), p. 71, para (19) of the commentary.

[3] See the *Lusitania* cases (UNRIAA, vol. VII (Sales No. 1956.V.5), p. 15 (holding that an element of wrongful death damages available to claimants is "reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties").

[4] See, for example, UNCC decision 8 (S/AC.26/1992/8) (footnote 1 above).

Paragraph 2

Austria

1. Although the concept of punitive damages as a legal consequence of violations of international law does not seem to be supported by international State practice, it is nevertheless known in some domestic legal systems. The Commission might therefore study the relevant State practice once again in order to provide a clear picture as to whether or not paragraph 2 (*c*) should be deleted.

2. From the point of view of Austria, however, the concept contained in paragraph 2 (*d*) merits further in-depth consideration. The duty of the State responsible for a wrongful act to prosecute individuals responsible for serious misconduct causing the wrongful act as a form of satisfaction should also be studied in order to better reflect recent State practice: there are a growing number of multilateral instruments emphasizing the duty of States to prosecute or extradite individuals for wrongful acts defined in those instruments.

Czech Republic

1. It would be useful for the Commission to reconsider the question of punitive damages in the case of "crimes", which should be studied in depth. The Commission has taken this question up on several occasions since the first Special Rapporteur, Mr. García Amador, devoted several valuable passages to it in his first report in 1956.[1] The notion of punitive damages is certainly unknown in some national legal systems, but this is not an insurmountable problem when analysing international responsibility, which is *sui generis* in nature as compared with the various regimes of responsibility that exist in domestic law. There are in fact examples in international case law where punitive damages have been claimed by parties and even granted, although it is true that they were relatively exceptional cases; furthermore, it is not as a rule easy to distinguish between real punitive damages, that is, those that go beyond simple reparation, and a "generous" award of compensation for mental suffering extensively evaluated. Determining the extent to which the underlying reasoning of certain arbitral awards dating fairly far back (for example, the *Carthage* (France/Italy)[2] and *Lusitania* cases[3]) which specifically excluded the notion of punitive damages remains a pertinent question today and, in the

[1] *Yearbook … 1956*, vol. II, document A/CN.4/96; see in particular pages 211–214, paras. 201–215.

[2] Decision of 6 May 1913 (UNRIAA, vol. XI (Sales No. E/F.61.V.4), p. 449).

[3] Decision of 1 November 1923 (ibid., vol. VII (Sales No. 1956.V.5), pp. 32 et seq).

light of the considerable development of international law, surely merits consideration.

2. Introducing the concept of punitive damages in the draft articles would make it possible to attribute to the regime for "crimes" a valuable a priori deterrent function, and the problems involved, which are certainly real (particularly in the case of crimes such as genocide, for example, which are directed against the population of the perpetrating State itself), do not appear insurmountable. The draft articles already contain a provision (art. 45, para. 2 (*c*)) which would seem to accept compensation that corresponds not strictly to the degree or extent of the injury, but to the "gravity" of the infringement of the rights of the injured State, although the commentary does not clearly state whether the Commission had intended to limit it to "crimes" or why it had not. The Czech Republic therefore believes that the Commission could reconsider the question of punitive damages in respect of crimes together with the provision currently set out in draft article 45, paragraph 2 (*c*).

France

1. In the view of France, a new paragraph 2 (*a*) could be included, referring to acknowledgement of the existence of an internationally wrongful act by a tribunal. Reference could also be made to "an expression of regret" as well as "an apology".

2. France proposes adding a new subparagraph (*a*) as follows:

> "(*a*) A declaration of the wrongfulness of the act by a competent international body which is independent of the parties;"

3. France proposes adding the phrase "an expression of regret and" before the phrase "an apology" in subparagraph (*a*).

4. Paragraph 2 (*d*) should refer to "disciplinary or penal action", the term "punishment" being inappropriate.

5. France proposes replacing the phrase "disciplinary action against" by the phrase "disciplinary or penal action against" in subparagraph (*d*).

6. France also proposes deleting the phrase ", or punishment of," in subparagraph (*d*).

Switzerland

Draft article 44 governs compensation, i.e. the arrangements for making reparations. Draft article 45, which deals with satisfaction, another type of reparation, provides in paragraph 2 (*c*) for the payment of damages hence compensation for "gross infringement of the rights of the injured State" . Switzerland is inclined to think that draft article 45, paragraph 2 (*c*), duplicates draft article 44 which already governs the issue of compensation. It therefore proposes that draft article 45, paragraph 2 (*c*), be deleted.

United States of America

The United States objects to paragraphs 2 (*c*) and 3. Paragraph 2 (*c*) provides that satisfaction, "[i]n cases of gross infringement of the rights of the injured State, [may take the form of] damages reflecting the gravity of the infringement". This provision suggests a punitive function for satisfaction that is neither supported by State practice nor international decisions.[1]

[1] While some scholars have found that penal sanctions are available in international law (see, for example, Jennings and Watts, *Oppenheim's International Law*, p. 533), punitive measures and damages that is, measures and damages unrelated to obtaining cessation of or reparation for a violation of a State's responsibility are not generally available to injured States (see, for example, Whiteman, *Digest of International Law*, p. 1215).

Uzbekistan

The following forms of satisfaction should be added in paragraph 2: "an expression of regret", "an expression of special honours to the injured State".

Paragraph 3

United States of America

A similar concern is the statement in paragraph 3 that satisfaction is limited to the extent that it "would impair the dignity" of the wrongdoing State. The commentary states that this provision is important to preclude a "[p]owerful State" from "impos[ing] on weaker offenders excuses or humiliating forms of satisfaction incompatible with the dignity of the wrongdoing State and with the principle of equality".[1] However, the term "dignity" is not defined (and may be extremely difficult to define as a legal principle) and therefore the provision would be susceptible to abuse by States seeking to avoid providing any form of satisfaction.[2] The United States urges that draft article 45, paragraph 3, be deleted.

[1] *Yearbook … 1993*, vol. II (Part Two), p. 81, para. (25).

[2] See article 29 of the Vienna Convention on Diplomatic Relations (providing for protection against an attack on the "dignity" of a diplomatic agent); and article 31, paragraph 3, of the Vienna Convention on Consular Relations (providing for protection of the consular post's "dignity").

Article 46 (Assurances and guarantees of non-repetition)

Czech Republic

The Commission might also wish to review the question of assurances and guarantees of non-repetition, which constitute a potentially critical element of reparation and whose regime should be strengthened in the case of "crimes". In this case, the obligation that has been breached is by definition of essential importance for safeguarding the fundamental interests of the international community; thus the possibility of obtaining appropriate assurances or

guarantees of non-repetition from the State committing the "crime" should be, systematically and unconditionally, *de jure*, whereas in the case of "delicts" the securing of such assurances or guarantees would remain subject to an assessment based on the circumstances of the case.

Mongolia

Mongolia finds the provisions on satisfaction, assurances and guarantees of non-repetition to be highly important.

Uzbekistan

Draft article 46 should stipulate what form of assurances the injured State is entitled to obtain.

Chapter III. Countermeasures

[See also part one, draft article 30.]

Argentina

1. The provisions dealing with countermeasures (arts. 47–50) contain certain innovative elements which merit the comments set forth below.

2. In its general commentary on chapter III, the Commission characterizes countermeasures as "unilateral measures of self-help". They "take the form of conduct, not involving the use or threat of force, which if not justified as a response to a breach of the rights of the injured State would be unlawful as against the State which is subjected to them".[1]

3. The Commission, while maintaining that countermeasures "should not be viewed as a wholly satisfactory legal remedy, ... because of the unequal ability of States to take or respond to them", adds, however, that:

> [r]ecognition in the draft articles of the possibility of taking countermeasures warranted as such recognition may be in the light of long-standing practice ought accordingly be subjected to conditions and restrictions, limiting countermeasures to those cases where they are necessary in response to an internationally wrongful act.[2]

4. In this connection, it is believed that, while countermeasures have been applied on various prior occasions, the taking of countermeasures has several aspects which may be regarded as questionable:

(*a*) Their lawfulness or unlawfulness is, in many cases, very difficult to determine;

(*b*) The countermeasure adopted is not always proportional to the nature of the wrongful act committed by a State;

(*c*) The affected State is generally incapable of making an objective judgement of the lawfulness or unlawfulness of an act committed by another State;

(*d*) As affirmed by the Commission itself, the capacity of States to take countermeasures or to respond to them is very unequal, depending on the resources at their disposal.

5. In a similar vein, draft article 48 (Conditions relating to resort to countermeasures) provides that the injured State, in fulfilling its obligation to negotiate, is entitled to take "interim measures of protection which are necessary to preserve its rights" (para. 1).

6. In its commentary, the Commission characterizes "interim measures of protection" as "inspired by procedures of international courts or tribunals which have or may have power to issue interim orders", and uses as an example the freezing of assets.[3]

7. The Commission considers that a feature of "interim measures of protection" is that "they are likely to prove reversible should the dispute be settled". In this connection, the Commission adds: "the comparison is between the temporary detention of property and its confiscation, or the suspension of a licence as against its revocation."[4]

8. Argentina is of the view that, while it is true that the practice of taking countermeasures or reprisals has been common in conflict relations between States, it is also true that, at the current stage in the evolution of the international community, countermeasures should be considered only as a last resort, once the various methods of peaceful settlement of disputes, and above all the obligation to negotiate, have been exhausted.

9. The taking of countermeasures should not be codified as a *right* normally protected by the international legal order, but as an act merely *tolerated* by the contemporary law of nations, and thus comparable to what is termed a "state of necessity" in domestic law.

10. In this connection, it is appreciated that the option of taking countermeasures is not only granted in a general way to States, but is, in addition, strengthened by the option of taking the aforesaid "interim measures of protection". The latter would appear to differ from countermeasures not in their nature but in their degree or duration.

11. In the light of the foregoing, it would be extremely useful for the Commission, in its second reading of the draft articles, to reconsider carefully the provisions dealing with countermeasures. It might be possible to reverse the presumption of the lawfulness of countermeasures by providing that, while States do not have a right to take

[1] *Yearbook …1996*, vol. II (Part Two), p. 66, para. (1) of the general commentary to chapter III.
[2] Ibid.
[3] Ibid., p. 69, para. (4) of the commentary to article 48.
[4] Ibid.

them, in certain cases, under circumstances of exceptional gravity, their use is not unlawful.[5]

[5] Moreover, the judicial precedents do not provide an unequivocal solution. In the arbitral award in the *Portuguese Colonies* case (Naulilaa incident) (UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011), it was stated that a reprisal is unlawful if it is not preceded by a fruitless claim exercised by the State which has suffered the violation. The arbitral award in the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978 (ibid., vol. XVIII (Sales No. E/F.80.V.7), p. 417) admitted the possibility of adopting certain countermeasures before an impartial dispute settlement mechanism exists.

Austria

Regarding chapter III of part two on countermeasures, more work is still required on further improving the procedures provided for in these draft articles.

Czech Republic

The notion of countermeasures covers various types of measures that an injured State can legitimately take against a State that has committed a wrongful act. As draft articles 47 to 50 show, the Commission tried to avoid any formalization of the current, largely unsatisfactory situation of the law relating to the taking of countermeasures in international relations, seeking instead to formulate clear and precise rules that would reinforce the guarantees against abuses. One indication of the move in this direction is the fact that countermeasures are not considered to constitute a "right" per se of an injured State. They are in fact to be viewed in the context of a situation which excludes the unlawfulness of an act by a State. Coherence has thus been achieved between the provisions of chapter III of part two and draft article 30 in part one of the draft articles.

Denmark
(on behalf of the Nordic countries)

1. The Nordic countries agree with the Commission in considering countermeasures as a reflection of the imperfect structure of present-day international society, which has not (yet) succeeded in establishing an effective centralized system of law enforcement. It is difficult, therefore, to avoid the use of countermeasures which are firmly founded in customary international law. In particular cases the risk of countermeasures may actually be the only effective deterrent to the commission of internationally wrongful acts. This is a reality that has to be faced, but in order to strengthen the safeguards against possible abuses of countermeasures the aim must be to monitor closely the exercise of that instrumental consequence of an internationally wrongful act.

2. When the concept of countermeasures is viewed within the perspective of peaceful settlement of disputes, two main conclusions can be drawn: first, there is no room for countermeasures where a mandatory system of dispute settlement exists as between the conflicting parties. Secondly, the use of force is not a legitimate means of enforcing one's own right. In singling out the use of force in the context of countermeasures a line is also drawn between the concept of countermeasures in time of peace as opposed to the applicability of that concept in time of war or, to use United Nations terminology, during armed conflicts. This distinction further supports the terminology adopted by the Commission which the Nordic countries consider to be a correct one, namely, use of the word "countermeasures" for enforcement acts taken unilaterally by a State in a time of peace while leaving the more value-loaded word "reprisals" for the laws of war, where it already appears in the relevant provisions of The Hague and Geneva Conventions.

3. In line with this reasoning, the Nordic countries wish to underline that countermeasures should not be resorted to as a punitive function, but should be seen as a remedy designed to induce the wrongdoing State to resume the path of lawfulness. Even within these parameters, they are of the opinion, however, that an extremely cautious approach must be taken in dealing with the question of countermeasures. It must always be kept in mind that this legal institution favours the powerful countries, which in most instances are the only ones having the means to avail themselves of the use of countermeasures to protect their interests.

France

1. The problem of countermeasures is raised in chapter III of part two of the draft articles. France has doubts about mentioning countermeasures in a set of draft articles dealing with the responsibility of States. The regime concerning responsibility should not be integrated with measures other than those aimed at repairing the damage sustained and should therefore not include provisions relating to punishment such as countermeasures, sanctions or collective reactions. In no internal system does responsibility, whether civil or criminal, include methods of enforcement. Such provisions are therefore out of place in a set of draft articles relating to responsibility. While it is true that countermeasures have a reparations dimension, they also have a protective dimension and a punitive dimension. There could, on the other hand, be some justification for a specific study of the regime of countermeasures by the Commission.

2. In this connection France notes that, in the draft articles, the taking of countermeasures is recognized as legitimate, provided that certain specific conditions are met. France subscribes to this approach.

Germany

The Commission is to be commended for including the topic of countermeasures in part two of its draft articles and generally striking a careful balance between the rights and interests of injured States and those States finding themselves at the receiving end of such countermeasures. In some respects, however, the draft provisions contained in chapter III of part two establishing substantive as well as procedural safeguards against unjustified or abusive

countermeasures would seem to tip the balance in favour of the State that has committed the wrongful act. The overall approach should be to proceed from the assumption that a State choosing to initiate countermeasures will normally do so in good faith, because it actually seeks redress for an injury which it has suffered or is still suffering.[1]

[1] See Simma, "Counter-measures and dispute settlement: a plea for a different balance", p. 102.

Ireland

1. The Commission addresses the subject of countermeasures (reprisals) in draft articles 30 and 47 to 50. Ireland considers it appropriate that this subject be addressed in the context of an examination of State responsibility. It is moreover of the view that this is an area in which it is both desirable and feasible for the Commission not only to clarify the existing rules of customary international law but also to develop the law.

2. It is a rule of general customary international law that a wronged State is entitled, in response to wrong it has suffered, to take certain measures which would be unlawful but for the prior violation of international law by another State or States. Given the paucity and limited scope of centralized institutions in the international community to deal with wrongdoing by States, Ireland realizes that individual States must be allowed to take certain action in such circumstances to protect their interests and accepts that this action may extend to the taking of measures which, but for the circumstances, would themselves constitute internationally wrongful acts.

3. However, in order to minimize the possible abuse of countermeasures, to prevent the escalation of disputes between States and to ensure respect for the rule of law, Ireland regards it as most important that there be limits to the circumstances in which States may resort to countermeasures and to the nature and scope of the measures which may be taken.

Italy

1. With respect to the *legal consequences of an internationally wrongful act committed by a State*, Italy considers it of the greatest importance that the draft should deal not only with what are referred to as "substantive" consequences, i.e. new obligations for a wrongdoing State, but also *countermeasures* that may be taken against such a State, and the conditions relating to resort to countermeasures.

2. Notwithstanding the theoretical reasons stated by the Commission in the commentary to draft article 1, which prompt Italy to opt for a broad concept of international responsibility rather than one confined to new obligations for the wrongdoing State, Italy believes that it is of the utmost importance that the countermeasures regime (for example, conditions relating to resort to countermeasures, and prohibited countermeasures) should be codified. It is particularly important to establish clearly the content of the rules of international law with respect to the consequences of a wrongful act, so as to prevent abuse on the part of States. In a specific case new obligations for a wrongdoing State are determined by agreement by the injured State and the wrongdoing State, or by a third party (an arbitrator, for example), whereas the decision to adopt countermeasures and as to their content is normally taken on the basis of a unilateral decision by the State taking the measures (which, of course, does not mean that the State taking the measures may judge its own case but, rather, that it "takes the risk" of taking countermeasures whose lawfulness could subsequently be challenged). It is therefore most important that the content of the rules of international law concerning countermeasures should be clearly established.

Mongolia

Provisions on countermeasures as provided for in chapter III are important for the regime of State responsibility. Conditions and restrictions relating to them seem to have taken into serious account general principles of international law. Mongolia hopes that all relevant questions pertaining to countermeasures will be re-examined in the light of final decisions to be taken on the distinction of international wrongdoing between crimes and delicts since the current system of countermeasures rests on that distinction.

Singapore

1. Singapore agrees with the general view that the right of States to take countermeasures in response to unlawful acts is permissible under customary international law. However, like some members of the Commission, Singapore questions the desirability of providing a legal regime for countermeasures within the framework of State responsibility because of the potentially negative implications. Without prejudice to this position, Singapore will nevertheless state certain observations on countermeasures.

2. Draft articles 48 and 50 prescribe some conditions limiting the type of measures that may be taken, but they do not address the key issue of whether the measures taken should be related or have some nexus to the right infringed. In fact, draft article 50 would, in general, seem not to reflect State practice or customary international law. These are complex issues, the substance of which may perhaps be more appropriately addressed in a specialist forum rather than as part of the ongoing work on these draft articles.

3. The application of countermeasures permits an injured State to depart from the obligations that would normally bind it and commit what would otherwise be an internationally wrongful act. Draft article 30 precludes this act from being wrongful where it is legitimately taken in response to an internationally wrongful act committed against it by another State. Although the commentaries elaborate by emphasizing that such measures must be legitimately taken "in accordance with the conditions

laid down in international law",[1] there are apparent contradictions in the commentaries concerning the conditions under international law. On the one hand, the Commission states that the object of countermeasures would be "by definition, to inflict punishment or to secure performance",[2] whilst also stating that to apply countermeasures in excess of its lawful function or aims would make the act unlawful, particularly if the purpose was to inflict punishment.[3]

4. The application and impact of economic sanctions as countermeasures are inevitably dependent on the economic and political status of the injured and wrongdoing State. This ability to impose and consequential impact are almost always unequal. An economically or politically more powerful State is bound to be in a better position to impose effective countermeasures than weaker States, especially developing and less developed States. Similarly, the impact of countermeasures against weaker States will generally be far more detrimental than for more powerful States. The use of countermeasures would thus favour more powerful States and would potentially undermine any system based on equality and justice.

5. There should be little contention that economic sanctions do adversely affect the economic situation within a State. It may be ironic that the violation of a State of its international obligations would have the consequence of causing suffering to its population, who may incidentally already be suffering from a repressive regime. Eventually, the impact of economic sanctions will be experienced by innocent citizens who are imputed with the wrong for which they may not themselves be responsible.

6. The application of countermeasures must not adversely affect the rights of third States. Although the rights of third States and the wrongfulness of action affecting third States is preserved by draft article 47, paragraph 3, it may not go far enough to impose the necessary deterrence to the application of disproportionate or unfair measures. Concern for this has been expressed by the Commission as "by no means a theoretical case" and it highlighted situations where countermeasures were aimed directly and deliberately at innocent third States.[4] The draft articles may need to address concerns on abuses against and contingencies for innocent third States.

[1] *Yearbook … 1979*, vol. II (Part Two), p. 116, para. (2) of the commentary to article 30.

[2] Ibid., para. (3) of the commentary to article 30.

[3] *Yearbook … 1996*, vol. II (Part Two), p. 67, para. (2) of the commentary to article 47.

[4] *Yearbook … 1979*, vol. II (Part Two), p. 120, para. (17) of the commentary to article 30.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom is concerned that the principles in the draft articles concerning countermeasures may be particularly ill-suited to situations where the dispute is not bilateral. Questions of proportionality, for instance, are much complicated if the initial obligation breached is an obligation *erga omnes*, or in some other way owed to several States. Several States may take countermeasures, but the State principally affected may decide to take none, or even to consent to the breach.

2. The United Kingdom has noted elsewhere (see draft articles 30, 48, 50 and 58) that it is not persuaded that it is necessary in these draft articles to say more on the question of countermeasures than is said in draft article 30. The question of countermeasures is complex and might usefully be reserved for separate study, either alone or in conjunction with the study of unilateral acts of States. The United Kingdom would much prefer draft articles 47 to 50 to be omitted, and makes the comments presented below in relation to those articles without prejudice to that view.

United States of America

1. International law generally permits countermeasures in order to bring about the compliance of a wrongdoing State with its international obligations. The limits on countermeasures are far from clear, though there is general consensus that principles of proportionality and necessity apply. In chapter III, the United States recommends that the Commission: (*a*) clarify the definition of countermeasures; (*b*) substantially revise the dispute settlement provisions pertaining to countermeasures; (*c*) recast the rule of proportionality; and (*d*) delete or substantially revise the prohibitions on countermeasures.

2. The United States agrees that under customary international law an injured State takes countermeasures "in order to induce [the wrongdoing State] to comply with its obligations".[1] In addition, the United States agrees that countermeasures under customary international law are governed by principles of necessity and proportionality. Chapter III as a whole, however, unacceptably limits the use and purposes of countermeasures by imposing restrictions not supported under customary international law.

[1] See draft article 47, para. 1. See also the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 417 and 443, stating that an injured State "is entitled ... to affirm its rights through 'counter-measures'").

Article 47 (Countermeasures by an injured State)

Czech Republic

The Czech Republic has taken note of the fact that draft articles 47 and 48 were revised following a debate marked by controversy and believes that during the second reading the Commission should review their content very carefully and cautiously.

Denmark (on behalf of the Nordic countries)

Draft article 47 states in effect that an injured State is entitled to take countermeasures provided demands for cessation/reparation have not been met and subject to the conditions set forth in the following articles. The Nordic

countries find that these articles are not easily comprehensible and moreover underline the entitlement of resorting to countermeasures. They believe it would be more logical and in line with a cautious approach to merge draft articles 47 to 49 into one article under the heading "Conditions of resort to countermeasures". The article could then start out by stating that States are not entitled to resort to countermeasures unless the following conditions are fulfilled, and then go on to indicate that lawful resort to countermeasures is conditional upon:

(*a*) The actual existence of an internationally wrongful act;

(*b*) The prior submission by the injured State of a protest combined with a demand of cessation/reparation;

(*c*) Refusal of an offer to settle the dispute through amicable settlement procedures, including binding third-party procedures;

(*d*) Appropriate and timely communication by the injured State of its intention to resort to countermeasures;

(*e*) Proportionality, i.e. the measures taken by the injured State shall not be out of proportion to the gravity of the internationally wrongful act and the effects thereof.

Paragraph 1

France

Draft article 47 is something of an amalgam. Paragraph 1 is presented as a definition and seems to have no link with the other two paragraphs, in particular paragraph 3, the substance of which is acceptable but which is hardly appropriate in this article (a State A can obviously not take vengeance on State C for what State B has done to it).

Ireland

Ireland agrees with the view, expressed by the Commission in its report on the work of its forty-eighth session,[1] that countermeasures may not be taken in order to inflict punishment on a wrongdoer State and that the purpose of such measures of self-help is to obtain, as appropriate, the cessation of an internationally wrongful act and/or reparation for the wrong. Ireland moreover believes that the purpose of countermeasures should be so limited and suggests that, for the avoidance of doubt, a sentence along the following lines should be added to paragraph 1, reading: "It does not include the taking of measures of a punitive nature."

[1] *Yearbook … 1996*, vol. II (Part Two), p. 67, paras. (2)–(4) of the commentary to article 47.

Paragraph 3

Denmark
(on behalf of the Nordic countries)

In a separate article it should be stressed that countermeasures are available only against the State that has committed a wrongful act and cannot be taken against third States.

France

See paragraph 1.

Ireland

Ireland is in general agreement with the provisions of draft article 47 regarding the conditions for the taking of lawful countermeasures and the relationship between the lawfulness of a countermeasure and obligations owed to third States. Ireland would nevertheless suggest a slight amendment to paragraph 3. The paragraph deals with the situation where a countermeasure involves a breach of an obligation towards a third State and makes it clear that the breach of an obligation towards a third State cannot be justified on the ground that the conduct concerned constituted a legitimate countermeasure against another State. Since other, international persons and bodies, such as intergovernmental organizations, may be injured by a countermeasure directed at a State, Ireland proposes that the term "third State" be replaced by the term "third party" in the paragraph.

Article 48 (Conditions relating to resort to countermeasures)

Czech Republic

The Czech Republic has taken note of the fact that draft articles 47 and 48 were revised following a debate marked by controversy and believes that during the second reading the Commission should review their content very carefully and cautiously.

Denmark
(on behalf of the Nordic countries)

See the comments on draft article 47.

France

The drafting of article 48 is not satisfactory. France suggests a new formulation as follows:

"1. An injured State which decides to take countermeasures shall, prior to their entry into force:

"(*a*) Submit a reasoned request calling upon the State which has committed the act alleged to be internationally wrongful to fulfil its obligations;

"(*b*) Notify that State of the nature of the countermeasures it intends to take;

"(*c*) Agree to negotiate in good faith with that State.

"2. However, the injured State may, as from the date of such notification, implement provisionally such countermeasures as may be necessary to preserve its rights.

"3. When the internationally wrongful act has ceased, the injured State shall suspend countermeasures, provided that the parties have initiated a binding dispute settlement procedure under which orders binding on the parties may be issued.

"4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour an order emanating from the dispute settlement procedure."

Ireland

1. Ireland recognizes that the provisions of this article were the subject of much debate and controversy in the Commission and believes that they will likewise prove to be controversial among States. In particular, many States are unlikely to accept any obligation to resort to the dispute settlement provisions of part three of the draft articles, and Ireland doubts the wisdom of linking the conditions relating to countermeasures to these provisions. It of course accepts that the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered is a basic principle of international law, and that this principle should be reflected in the conditions relating to resort to countermeasures. This means that, before taking countermeasures, a State believing itself to have been injured by an internationally wrongful act on the part of another State should normally negotiate with the wrongdoing State in order to obtain the cessation of the wrongful act and/or appropriate reparation therefore; and only if the wrongful act then continues or appropriate reparation is not forthcoming, could countermeasures be regarded as necessary, thereby entitling the injured State to have resort thereto. Ireland thinks it unlikely that, in the current decentralized system of international law, States would be willing to undertake any more wide-ranging obligation prior to taking countermeasures.

2. Also, there are circumstances in which an injured State will want to retain the freedom to resort to countermeasures without prior negotiation, namely, when it regards such action as necessary to preserve its interests. The Commission has dealt with such situations by allowing that an injured State may take interim measures of protection which are necessary to preserve its rights. In the absence of third-party determination of the need for such measures in a particular case, the distinction between interim measures and countermeasures will be difficult to maintain and may indeed merely fuel further disagreement between States.

Switzerland

Switzerland is satisfied with the provisions on the settlement of disputes with respect to countermeasures.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom believes that it is correct in principle, and desirable as a matter of policy, that a State should not resort to countermeasures after a lapse of time which clearly implies that the State has waived its right to do so. It suggests that, if this chapter of the draft articles is to be retained, the Commission should consider the addition of a provision corresponding to article 45 of the 1969 Vienna Convention, barring recourse to countermeasures by a State after it has acquiesced in a breach of its rights. Once more, the United Kingdom notes that the question of countermeasures in the context of multilateral disputes needs particular attention.

United States of America

1. Under customary international law, a demand for cessation or reparation should precede the imposition of countermeasures.[1]

2. Draft article 48 as a whole should, at the least, be placed in an optional dispute settlement protocol. As a mandatory system of conditions, it is without foundation under customary international law and undermines the ability of States to affirm their rights by countermeasures.

[1] See, for example, the case of the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, para. 84 ("the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it"); and the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 420). Draft article 48, however, goes beyond customary international law in two significant respects.

Paragraph 1

Argentina

[See part two, chapter III, and draft article 58.]

Austria

1. Austria welcomes the fact that the point of view stated in the past by the Austrian delegation to the General Assembly concerning the obligation of the injured State to seek dispute settlement measures prior to taking countermeasures has been reflected in the reformulated draft article 48, paragraph 1.

2. See also part three.

Czech Republic

Resort to countermeasures is not a direct and automatic consequence of an internationally wrongful act. It is subject to the identification by the injured State of the behaviour it considers to be wrongful and to the submission of a request for cessation and reparation. Resort to countermeasures is an option only when there has been no satisfactory response to the request addressed to the State committing the violation. The purpose of these preconditions is to reduce the likelihood of premature, and thus improper, resort to countermeasures. It is in this sense that the Czech Republic interprets paragraph 1, which requires the injured State to fulfil its obligation to negotiate prior to taking countermeasures, except in the case of "interim measures of protection", the suspension of which would render the countermeasures meaningless.

Denmark
(on behalf of the Nordic countries)

The concept of interim measures of protection may also be singled out for special mention.

France

France believes that the taking of countermeasures should, as far as possible, be associated with a process for the peaceful settlement of disputes. On this point, the introduction, in paragraph 1, of an obligation to negotiate (provided for in draft article 54) is appropriate.

Germany

1. Paragraph 1 stipulates that, prior to taking countermeasures, an injured State must fulfil its "obligation to negotiate" with the State that has committed the wrongful act. Germany has some doubts as to whether the obligation to negotiate prior to the taking of countermeasures is an accepted principle under international law. It would rather seem that under customary international law only a demand for cessation or reparation must precede the imposition of countermeasures. ICJ has recently confirmed this principle by stating that "the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make a reparation for it".[1] It would also be quite unreasonable to expect the injured State to refrain from taking (peaceful) countermeasures until it has exhausted all means to settle the dispute amicably.

2. Germany notes at the same time that paragraph 1 does not prejudice the taking, by the injured State, of "interim measures of protection" necessary to preserve its rights. However, in practice it will be difficult to distinguish interim measures from countermeasures proper. The injured State might resort to what it regards as mere "interim measures of protection" while the target State might consider these responses to constitute full-blown countermeasures, necessitating prior negotiations. Concern has already been voiced that the new category of "interim measures" may open the way to attempts to circumvent the limitations traditionally attached to the taking of reprisals.

[1] *Case concerning* the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 56, para. 84.

United Kingdom of Great Britain and Northern Ireland

As explained below, the United Kingdom has reached the conclusion that the whole of part three, concerning dispute settlement, should be omitted. This has nothing to do with the United Kingdom's general attitude towards the compulsory third-party settlement of legal disputes, to which it remains as firmly attached as ever. It has to do instead with the effect part three is likely to have in inhibiting widespread acceptance of the draft articles among States. Nowhere is this clearer than in the manner in which the draft links the provisions on dispute settlement to those on countermeasures. Customary international law does not require that States negotiate prior to taking countermeasures, or even that States abandon countermeasures while negotiations are in process. Paragraph 1 proposes a novel and unjustified restraint upon States which is impractical and utopian in the fast-moving modern world. The United Kingdom also considers that the reference to "interim measures of protection" is an unfortunate use of language which may suggest a conceptual link, which it considers entirely misconceived, with interim measures in ICJ.

United States of America

1. Draft article 48, in conjunction with draft article 54, requires an injured State to seek negotiations before taking countermeasures. However, customary international law does not require an injured State to seek negotiations prior to taking countermeasures, nor does it prohibit the taking of countermeasures during negotiations. The *Air Service Agreement* tribunal, for instance, noted that it "does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of countermeasures during negotiations ..."[1] The requirement for prior negotiations may prejudice an injured State's position by enabling a wrongdoing State to compel negotiations that delay the imposition of countermeasures and permit it to avoid its international responsibility.

2. The draft, in article 48, paragraph 1, treats this problem by providing an exception from the prior-negotiation requirement for "interim measures of protection which are necessary to preserve [the injured State's] rights". This exception is vague and may lead to contradictory conclusions by States seeking to apply it. In particular, the draft does not indicate whether interim measures of protection would, like countermeasures, be unlawful without the precipitating wrongful act. If not, then it would be unnecessary to enunciate a principle of interim measures. How-

[1] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 445.

ever, if interim measures fall within the definition of draft article 30 but short of "full-scale countermeasures",[2] it is unclear how in concrete circumstances the term might be applied.[3]

3. Rather than opening the section on countermeasures to disputes over the meaning of interim measures, the draft articles should reflect the fundamental customary rule that countermeasures are permissible prior to and during negotiations. The United States would therefore urge the Commission to clarify draft article 48 by stating that countermeasures are permissible as a means to induce such compliance prior to and during negotiations.[4]

[2] *Yearbook … 1996*, vol. II (Part Two), p. 69, para. (3) of the commentary to article 48.

[3] Ibid. The commentary cites measures such as freezing assets to preclude capital flight and measures that "have to be taken immediately or they are likely to be impossible to take at all" (para. (4)). Such examples are useful illustrations but provide limited guidance.

[4] The commentary might note that an injured State should, where possible, seek to obtain a wrongdoing State's compliance with its international obligations by negotiations.

Paragraph 2

Czech Republic

The fulfilment by the injured State, when it takes countermeasures, of its obligations in relation to dispute settlement in accordance with part three of the draft articles or any other binding dispute settlement procedure in force between the States concerned introduces a relatively rigid organic link between parts two and three of the draft articles. While the Czech Republic is not unsympathetic to the idea of monitoring, at least a posteriori, the lawfulness of countermeasures, the obligation set out in draft article 48, paragraph 2, would seem to prejudge the question of the binding nature of part three concerning the system for the settlement of disputes. Thus any problems which States may have with the dispute settlement regime proposed in part three have direct consequences for the substantive rules concerning countermeasures.

United States of America

1. Paragraph 2 contains two flaws with respect to the draft's system of arbitration. First, it states that "[a]n injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under part three". This refers to draft article 58, paragraph 2, which states that where the dispute involves the taking of countermeasures by the injured State, "the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal" constituted under the articles. Compulsory arbitration of this sort is not supported by customary international law, would be unworkable in practice and would establish a novel system whereby an injured State may be compelled to arbitrate a dispute. There is no basis in international law or policy for subjecting the injured State to such a requirement when it pursues countermeasures in response to a wrongful act of another State. Indeed, this compulsory system is in contrast to draft article 58, paragraph 1, which states that the parties may submit other disputes under the articles to arbitration "by agreement". The United States thinks that this creates a serious imbalance in the treatment of injured and wrongdoing States. In addition to extending the period during which a wrongdoing State may remain in breach of its obligations, this system imposes on the injured State the high cost of arbitrating the dispute. Draft article 60 exacerbates the problem of delay by providing for ICJ review. The United States believes that this system of compulsory arbitration would impose an unacceptable cost on injured States that must resort to countermeasures.

2. In addition, draft article 48, paragraph 2, states that "[a]n injured State taking countermeasures shall fulfil" the obligations under draft article 58, paragraph 2, "or any other binding dispute settlement procedure in force" for the parties. The United States understands that draft article 48, paragraph 2, merely seeks to preserve other existing mechanisms in force between the parties.[1] However, to the extent that it may be read as imposing additional requirements, the paragraph lacks support under customary international law. For instance, it should not be misinterpreted as constituting consent to resort to dispute settlement procedures where the existing procedure requires mutual consent. Such an outcome would be unacceptable.

[1] See *Yearbook … 1996*, vol. II (Part Two), pp. 69–70.

Paragraph 3

United States of America

The requirement in paragraph 3 that countermeasures be suspended while dispute settlement mechanisms are "being implemented in good faith" is vague and may lead to further delay and abuse by the wrongdoing State.

Article 49 (Proportionality)

Austria

1. Based on the rather "realistic" approach advocated by Austria in the context of codification, the element of proportionality seems to be of crucial importance. Austria recognizes, of course, that the principle of proportionality remains undetermined in its scope as long as no international judicial authority exists which could further develop and refine the concept of proportionality. On the other hand, it cannot be denied that the mere fact that the element of proportionality may be invoked by a State against which countermeasures are taken already provides a regulating effect. Furthermore, the jurisdiction of ICJ, particularly its advisory opinion on the legality of nuclear weapons and the reference to the principle of proportionality therein, reveals the importance of this principle as a regulatory element in already existing State practice.

2. Some of the work of the Commission should therefore be devoted to refining the provision on proportional-

ity possibly further, at least for the commentary to be provided by the Commission for the conclusive set of draft articles.

Czech Republic

The proportionality of countermeasures, provided for in draft article 49, is one of the fundamental conditions to be met if the resort to countermeasures is to be legitimate. The function of the principle of proportionality becomes even more important in the case of countermeasures taken in response to a crime. The effects of a crime may be felt by the community of States to varying degrees, and the principle of proportionality should therefore be applied by each injured State individually; this is in fact what draft article 49 in its current form does.

Denmark
(on behalf of the Nordic countries)

See the comments on draft article 47, above.

France

France proposes replacing the phrase "out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State" by the phrase "out of proportion to the effects of the internationally wrongful act on the injured State and the degree of gravity thereof".

Germany

As far as the issue of proportionality is concerned, Germany agrees that it constitutes a principle widely recognized in both doctrine and jurisprudence. It has recently been affirmed by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons.*[1] Germany would also agree that an assessment of proportionality has to involve consideration of all elements deemed to be relevant in the specific circumstances. This evaluation will also have to include the gravity of the alleged breach involved.

[1] *I.C.J. Reports 1996*, p. 226, paras. 41 et seq. See also "Advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons: note by the Secrtary-General" (A/51/218, annex).

Ireland

1. Ireland agrees with the Commission that proportionality is accepted in general customary international law as a prerequisite of the legitimacy of a countermeasure and also agrees with the negative formulation of this condition in draft article 49. Ireland wonders whether further thought might not however fruitfully be given by the Commission to the phrasing of the condition. There has in recent years been an in-depth examination and application of this criterion to specific situations by international bodies, for example, by international human rights institutions such as the European Court of Human Rights, and it may be that, in the light of this practice, a more refined description of the text would be possible. The current phrasing of draft article 49 might suggest that the only considerations of relevance in applying the criterion of proportionality to countermeasures are the degree of gravity of the internationally wrongful act and the effects thereof on the injured State. Ireland notes in this connection that, in its report on the work of its forty-seventh session, the Commission states that the purpose of countermeasures, namely, to induce the wrongdoing State to comply with its obligations, is of relevance in deciding whether and to what extent a countermeasure is lawful, and perceives "[t]his issue" as being different from that of proportionality.[1] The Commission appears thereby to imply that the purpose of countermeasures is not relevant in considering the proportionality of a countermeasure. Yet, as international case law in the field of human rights demonstrates, the purpose of a measure may be a relevant consideration in deciding the proportionality of the measure. Countermeasures may legitimately be taken in order to secure the cessation of an internationally wrongful act and/or to obtain reparation therefor, and reparation itself may take a number of forms. Ireland is of the view that both the particular aim of the countermeasure and the particular form of reparation sought, if any, may indeed be relevant to the question of the proportionality of a countermeasure.

2. Ireland further notes that, at the same point in its report on the work of its forty-seventh session, the Commission indicates that the concluding phrase "on the injured State" (in relation to the effects of the internationally wrongful act) is not intended to narrow the scope of draft article 49 and unduly restrict a State's ability to take effective countermeasures in respect of certain wrongful acts involving obligations *erga omnes*, for example, violations of human rights. The Commission however then goes on to distinguish between a material injury and a legal injury, and states that a legally injured State, in contrast to a materially injured State, would be more limited in its choice of the type and the intensity of measures that would be proportional to the legal injury it has suffered.[2] Since in many instances of human rights violations the material injury will be to nationals of the State committing the internationally wrongful act, it may be that limitation of consideration of the effects of an internationally wrongful act to the legal injury suffered by an injured State would be too restrictive. Indeed it may be that, in such cases of human rights violations, the classic understanding of proportionality in the context of countermeasures as a relationship between a wrongdoing and a wronged State may be inappropriate.

[1] *Yearbook … 1995*, vol. II (Part Two), p. 66, para. (10) of the commentary to article 13.

[2] Ibid., para. (9) of the commentary to article 13.

United States of America

1. The United States agrees with the Commission that under customary international law a rule of proportion-

ality applies to the exercise of countermeasures.[1] International law does not, however, provide clear guidance with respect to how States and tribunals should measure proportionality. One school of thought states that the countermeasure must be related to the degree of inducement necessary to satisfy the original debt,[2] or "the amount of compulsion necessary to get reparation".[3] Elsewhere, it is stated that the countermeasure must be compared "to the act motivating them".[4] The United States agrees that, in some circumstances, the countermeasure must be related to the principle implicated by the international wrong.[5] Similarly, the wrongful act may illustrate what kind of measure might be effective to bring the wrongdoing State into compliance with its obligations.

2. Draft article 49 evaluates the proportionality of a countermeasure by accounting for "the degree of gravity of the internationally wrongful act and the effects thereof on the injured State".[6] The United States believes that this formulation gives undue emphasis to the "gravity" of the antecedent violation as the measure of proportionality. In the view of the United States, draft article 49 should reflect both trends identified above with respect to proportionality. Proportionality means principally that countermeasures should be tailored to induce the wrongdoer to meet its obligations under international law, and that steps taken towards that end should not escalate but rather serve to resolve the dispute. A conception of proportionality that focuses on a vague concept of "gravity" of the wrongful act reflects only one aspect of customary international law. As Zoller has written, proportionality is not confined to relating the breach to the countermeasure but rather to "put into relationship the purpose aimed at, return of the status quo ante, and the devices resorted to in order to bring about that return".[7] Because countermeasures are principally exercised to bring a return to the status quo ante, a rule of proportionality should weigh the aims served by the countermeasure in addition to the importance of the principle implicated by the antecedent wrongful act.

3. In addition, the commentary explains draft article 49's formulation, "shall not be out of proportion", by stating that "[a] countermeasure which is *disproportionate, no matter what the extent*,* should be prohibited to avoid giving the injured State a degree of leeway that might lead to abuse"[8] The United States believes that this interpretation does not accord with customary practice.[9] Proportionality is a matter of approximation, not precision, and requires neither identity nor exact equivalency in judging the lawfulness of a countermeasure. Customary law recognizes that, in some circumstances, a degree of response greater than the precipitating wrong may be appropriate to bring the wrongdoing State into compliance with its obligations.[10] The United States believes this interpretation should be reflected in the text of draft article 49.

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[1] See, for example, Memorial and reply of the United States in the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7)), excerpted in *1978 Digest of United States Practice in International Law*, M. Nash, ed., pp. 768 and 776.

[2] Phillimore, *Commentaries upon International Law*, p. 16.

[3] Oppenheim, *International Law: A Treatise*, p. 141. See *Yearbook … 1995*, vol. II (Part Two), p. 64, footnotes 174 and 176.

[4] *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), pp. 1011 and 1028. See also the *Air Service Agreement* case (footnote 1 above), p. 443 (the countermeasure requires "some degree of equivalence with the alleged breach").

[5] *Air Service Agreement* case (see footnote 1 above), pp. 443–444. The *Air Service Agreement* tribunal stated:

> "The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the countermeasures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France."

Such an examination of the State responsibility violation differs from that suggested by the use of the term "gravity" in draft article 49.

[6] The draft article's concept of effects on an injured State is not entirely clear and thus requires elucidation. It does not, for example, appear to match the recent ICJ enunciation of an effects measurement, which related the effects of the countermeasure to the injury. See the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 56, para. 85 ("an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question"). Draft article 49, by contrast, relates the countermeasure to the effects of the wrongful act on the injured State. See *Yearbook … 1995*, vol. II (Part Two), pp. 65–66. The Court did not elucidate this "effects" consideration, and its analysis does not clearly indicate which trend in the law it intended to follow.

[7] Zoller, op. cit., p. 135. See also Elagab, op. cit., p. 45; and *Yearbook … 1995*, vol. II (Part Two), pp. 65–66. Relating the countermeasure to the aims to be achieved, whether cessation or reparation, differs from the requirement of draft article 47, para. 1, that the countermeasure be necessary. The requirement of necessity aims at the initial decision to resort to countermeasures; it asks, is the resort to countermeasures necessary? (*Yearbook … 1996*, vol. II (Part Two), p. 67). By contrast, the rule of proportionality asks whether the precise measure chosen by the injured State is necessary to induce the wrongdoing State to meet its obligations.

[8] *Yearbook … 1995*, vol. II (Part Two), p. 65, para. (4) of the commentary to article 13.

[9] See, for example, the *Portuguese Colonies* case (Naulilaa incident) (UNRIAA, vol. II (Sales No. 1949.V.1), p. 1028 (countermeasures are "excessive" where they "are out of all proportion to the act motivating them"); and the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (ibid., vol. XVIII (Sales No. E/F.80.V.7), p. 444) (measures taken by the United States "d[id] not appear to be *clearly disproportionate*").

[10] As one writer has put it, the cases and practice of States suggest that the appropriate measure is, roughly speaking, whether the countermeasure is "too severe" (Alland, loc. cit., p. 184).

Article 50 (Prohibited countermeasures)

Czech Republic

Article 50 concerns prohibited countermeasures. The Czech Republic is in agreement with the prohibitions listed in subparagraphs (*a*) to (*e*), most of which relate to *jus cogens*.

Denmark
(on behalf of the Nordic countries)

In a second article one could then deal with prohibited measures along the lines of draft article 50 as proposed by the Commission.

Ireland

Ireland strongly endorses the itemization in draft article 50 of substantive limits to the measures which may lawfully be taken by way of countermeasures. In the last few decades there has been increasing recognition that there is conduct on the part of a State which should be prohibited under all circumstances and which logically therefore should not be permitted even in response to a prior unlawful act of another State. Ireland welcomes the attempt by the Commission to set forth the recognized limits to legitimate countermeasures and to build thereon, and in general supports the list of prohibited conduct. However it does not agree fully with all aspects of the list, and addresses each of the categories of prohibited conduct in turn, below.

United Kingdom of Great Britain and Northern Ireland

The limitations which draft article 50 sets upon lawful countermeasures are not satisfactory.

United States of America

The United States believes that the prohibitions on the resort to countermeasures in draft article 50 do not in all cases reflect customary international law and may serve to magnify rather than resolve disputes. First, the draft article would prohibit categories of countermeasures without regard to the precipitating wrongful act. However, the rule of proportionality in draft article 49 would generally limit the range of permissible countermeasures and would, in most circumstances, preclude resort to the measures enumerated in draft article 50. To that extent, draft article 50 is unnecessary. Secondly, the draft article may add layers of substantive rules to existing regimes without clarifying either the specific rules or the law of State responsibility. Thus, the duplication of rules in areas such as diplomatic and consular relations and human rights may complicate disputes rather than facilitate their resolution.[1]

[1] For instance, the rules of diplomatic and consular relations set forth in the two following Conventions—Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations—establish a system of reciprocity, under which a State that violates its provisions legitimately may be subject to a proportionate denial of reciprocal rights. While the United States strongly supports the principle of inviolability, draft article 50 (*c*) should not be misinterpreted to preclude actions taken on the basis of reciprocity. See article 47, para. 2, of the Vienna Convention on Diplomatic Relations; and article 72, para. 2, of the Vienna Convention on Consular Relations.

Subparagraph (a)

France

The drafting of subparagraph (*a*) is strange. It would be better to draw on the drafting of article 52 of the 1969 Vienna Convention. The new wording could then read as follows: “The threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

Ireland

The inclusion in subparagraph (*a*) of the threat or use of force as prohibited by the Charter of the United Nations reflects the concern of States that disputes should be settled peacefully, without resort to force, and implicitly recognizes the role of the United Nations and its organs in this area. Ireland believes that, other than in self-defence or collective enforcement action under the Charter, force should not be used or threatened by one State against another and fully agrees with the limitation on countermeasures specified in this subparagraph. Ireland also notes in this connection that it is stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annexed to General Assembly resolution 2625 (XXV), adopted by consensus on 24 October 1970, that States have a duty to refrain from acts of reprisal involving the use of force.

Subparagraph (b)

France

Subparagraph (*b*) also poses a problem. This is a new provision which has no basis in customary law, and should thus be deleted.

Ireland

The Commission argues that the proposed limitation set forth in subparagraph (*b*), namely, extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act, is also currently prohibited under international law in *all circumstances*, and indeed there is some evidence in State practice for this.[1] Ireland nevertheless doubts whether there would be universal agreement that such conduct is prohibited in all circumstances and therefore approaches the matter as a proposal *de lege ferenda*. It notes that two essential State interests would be protected by the prohibition, those of the territorial integrity and political independence of the wrongdoing State. Ireland also notes that the prohibition would not extend to all economic or politi-

[1] See *Yearbook …1995*, vol. II (Part Two), p. 69, paras. (8)–(11) of the commentary to article 14.

cal pressure which threatened those interests but only to extreme economic or political coercion. The formulation seems intended to draw a balance between the legitimate interests of a State entitled to take countermeasures and the vital interests of a wrongdoing State. While the epithet "extreme" is not precise and may give rise to disagreement in a specific instance of economic or political coercion used by way of a countermeasure, Ireland is of the view that some such limitation on the taking of countermeasures is desirable and that the formulation has merit. Indeed consideration might fruitfully be given by the Commission to the extension of this prohibition to cover the vital interests of the population of a wrongdoing State as opposed to the vital interests of the State itself. Ireland has in mind countermeasures which would, for example, have the effect of depriving the people of a State of their means of subsistence.

Switzerland

The provisions on countermeasures are on the whole a balanced and particularly well-drafted section of the Commission's draft. Nevertheless, Switzerland has a reservation with regard to subparagraph (*b*), which prohibits as a countermeasure "[e]xtreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act". It is to be wondered why this prohibition is restricted to economic and political coercion. Surely there are other types of coercion, for example environmental countermeasures, which could also endanger the territorial integrity and political independence of a State. For that reason, Switzerland would like to see the words "economic or political" deleted from subparagraph (*b*).

United Kingdom of Great Britain and Northern Ireland

The notion of countermeasures involving "[e]xtreme economic or political coercion", which subparagraph (*b*) seeks to prohibit, is vague and altogether too subjective. The wording lacks precision, but there is in any case no obvious way in which a definition of "extreme" measures might be approached. Furthermore, if the original wrong were the application of "[e]xtreme economic or political coercion" to the injured State, it is hard to see why that State should not respond in kind against the wrongdoing State.

United States of America

Thirdly, the article relies on vague language that would amplify the areas of dispute. For instance, subparagraph (*b*) disallows the use of "[e]xtreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act". What is "extreme"? What measures fall under the rubric of "economic or political coercion"? What kinds of economic or political measures would "endanger the territorial integrity or political independence" of a State?[1] These are subjectively adduced criteria for which no supporting State practice is cited.[2]

[1] See Elagab, op. cit., pp. 191–196.

[2] Indeed, of the cases that are cited, the economic measures would seem to be lawful even in the absence of the precipitating wrongful act. See *Yearbook … 1995*, vol. II (Part Two), pp. 69–70.

Subparagraph (c)

Ireland

Ireland likewise approaches subparagraph (*c*) as a proposal de *lege ferenda*. There is universal acceptance of the inviolability of diplomatic and consular agents, premises, archives and documents but some doubt as to the existence of this inviolability in respect of each of the categories of the protected persons and property *in all circumstances*. Ireland regards the inviolability of these persons and property as fundamental to the operation of the international legal system and supports this limitation on recourse to countermeasures. There are other measures which may lawfully be taken as a response to an internationally wrongful act in relation to diplomatic and consular personnel and property and which would not be as deleterious to the functioning of the international legal system, for example, a rupture of the diplomatic relations between the wronged and the wrongdoing State.

Subparagraph (d)

Ireland

1. Ireland also agrees with the general thrust of the limitation specified in subparagraph (*d*), that is, any conduct which derogates from basic human rights, but regards the phrase "basic human rights" as too general and imprecise for this purpose. It is possible to identify certain such rights from which no derogation is permissible, and Ireland considers it desirable that these be specified in draft article 50.

2. It is now usual to provide in international agreements guaranteeing civil and political rights that there may be no derogation from a number of these rights even in time of war or other public emergency threatening the life of the nation. While there is some variation in the list of non-derogable rights in the various treaties, there is a large degree of concordance among them. Ireland would suggest that the list enumerated in the International Covenant on Civil and Political Rights[1] is appropriate for inclusion in draft article 50 since the Covenant is intended to constitute part of a worldwide bill of rights and is in fact now widely subscribed to by States.

3. Article 4, paragraph 2, of of the Covenant provides as follows: "No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."

[1] See General Assembly resolution 2200 (XXI), annex.

4. Article 6 guarantees the right to life; article 7 the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; article 8, paragraph 1, the right not to be held in slavery; article 8, paragraph 2, the right not to be held in servitude; article 11 the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation; article 15 the right not to be subjected to retroactive criminal offences or penalties; article 16 the right to recognition everywhere as a person before the law; and article 18 the right to freedom of thought, conscience and religion.

5. Article 4, paragraph 1, permits derogation from the other rights guaranteed by the Covenant in time of public emergency, but only to a certain extent and subject to certain conditions. It states:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

6. Clearly, therefore, not only may there be no derogation from the rights specified in paragraph 2, but derogation of a discriminatory kind from any of the protected rights is also prohibited. Ireland would accordingly recommend that countermeasures involving a derogation from any of the rights specified in article 4, paragraph 2, of the International Covenant on Civil and Political Rights as well as countermeasures which are discriminatory on any of the grounds mentioned in article 4, paragraph 1, should be expressly prohibited.

United Kingdom of Great Britain and Northern Ireland

1. Again, the prohibition subparagraph (*d*) seeks to set on countermeasures that would derogate "from basic human rights" strikes a sympathetic chord but is, all the same, difficult to grasp and unacceptably wide. Principles such as the sanctity of human life and freedom from slavery or torture are of course fundamental, and their preservation has the United Kingdom's firm support. The fact remains, however, that most countermeasures are not directed at individuals, but are measures taken by one State against another State. It is therefore far from clear how any recognizable countermeasure in the understood sense of the term could amount to "conduct which derogates from" fundamental rights of this kind. Whether the same would be true of other generally recognized human rights, such as freedom of association, is not immediately apparent; nor is it apparent whether they would or would not be within the proposition in the draft article. The United Kingdom notes, moreover, that the commentary on subparagraph (*d*) cites as an illustration of the proposition the exclusion from asset freezes and trade embargoes of items necessary for basic subsistence and humanitarian purposes. This is however a subject of some current controversy which is under discussion in the Security Council and General Assembly within the framework of Article 50 of the Charter of the United Nations.

2. The questions raised above with respect to subparagraphs (*b*) and (*d*) are thus issues of substantive law. They reinforce the United Kingdom's belief that the draft articles should confine themselves to the generally applicable principles of State responsibility and should not attempt detailed regulation of the rules governing countermeasures.

United States of America

Similarly, subparagraph (*d*) refers to "[a]ny conduct which derogates from basic human rights", without defining derogation or "basic" human rights. The language of subparagraph (*d*) provides only limited guidance, for there are very few areas of consensus, if any, as to what constitutes "basic human rights".

Subparagraph (e)

France

1. For the reasons of principle stated above, the references to *jus cogens* in draft article 50 (*e*), should be deleted.

2. France cannot agree to subparagraph (*e*), which refers to the concept of a "peremptory norm of general international law".

3. See also draft article 19, paragraph 2.

Ireland

With reference to subparagraph (*e*), which prohibits by way of countermeasures any other conduct in contravention of a peremptory norm of general international law, Ireland favours the deletion of this provision. While there is widespread acceptance of the concept of a peremptory norm of general international law, there is not the same degree of consensus with respect to the identification and formulation of specific norms. Moreover, as indicated in relation to the other subparagraphs of the draft article, Ireland prefers as much specification as is reasonably possible with respect to State conduct which is prohibited by way of countermeasures.

United States of America

Subparagraph (*e*) similarly does not provide useful guidance in determining whether a countermeasure would be permissible. Just as there is little agreement with respect to "basic" human rights and political and economic "coercion", the content of peremptory norms is difficult to determine outside the areas of genocide, slavery and torture.

Proposal for new article 50 bis

France

1. Should chapter III on countermeasures be retained, France proposes an article 50 *bis* on the cessation of countermeasures. It is important to emphasize the essentially conditional and provisional nature of countermeasures.

2. France proposes adding a new provision on the cessation of countermeasures as follows:

> "Countermeasures shall cease as soon as the obligations breached have been performed and full reparation has been obtained by the injured State."

Chapter IV. International crimes

[See also part one, draft article 19]

Czech Republic

1. The use of terms is not a key issue, however. The real issue before the Commission is whether there are in fact two different types of wrongful acts and, if so, what are the specific consequences of an internationally wrongful act that harms the fundamental interests of the international community as a whole. The purpose of the draft articles on State responsibility is to lay down secondary rules called for by breaches of primary rules. However, the difficulties that arise from a consideration of the consequences of international crimes are in large part directly linked to the ambiguities surrounding primary rules, whose clarification is not within the Commission's mandate.

2. The characterization of crimes set out in draft article 19 would appear to suggest that it is first of all the nature of the primary rule that determines which breaches constitute crimes. Consequently, that article further strengthens the impression that the definition of crimes falls within the domain of the codification of primary rules. However, there is a widely held view that whether a breach of a rule of international law falls under a specific responsibility regime—in other words, whether such a breach has aggravated consequences—depends not so much on the nature of the primary rule as on the scale of the breach and on the extent of its negative consequences. Accordingly, this latter approach unlike the Commission's approach, which the Czech Republic endorses, and which is based on a quite rigorous distinction between delicts and crimes treats the transition between the two categories as a sort of "continuum", with all the drawbacks to which that would give rise when secondary rules are laid down and implemented.

3. To acknowledge, where responsibility is concerned, that wrongful acts that jeopardize the fundamental interests of the international community whatever terms may be used to refer to such acts do not have specific consequences when compared with other wrongful acts, or to acknowledge that it is not possible to determine objectively and on the basis of a legal rule what such consequences are, would be tantamount to acknowledging that "fundamental interests of the international community" is not a legal but a political concept, whose interpretation is open to the influence of such factors as expediency and arbitrariness.

4. The distinction between the two categories of internationally wrongful acts whatever terms may be used in order to refer to them is based on the assumption that there is a difference between the responsibility regimes for the two categories of wrongful acts (such a distinction would otherwise serve no practical purpose and be superfluous). One might well at first believe that the differences between the two responsibility regimes have gradually disappeared among other things, as a result of the abandonment of former draft article 19 in part two, which dealt with a specific institutional mechanism for applying the principle of responsibility for a "crime". The Czech Republic does not endorse such a view, however, First, it is sensible not to adopt approaches that are rather impractical and overambitious, among which the institutional mechanism just mentioned and other such initiatives should no doubt now be included. In the longer term, a viable regime of responsibility for crimes cannot no doubt ideally be conceived of without developing an appropriate implementation mechanism. Given the aggravated character of the substantive consequences of crimes, a collective response transmitted through an ad hoc or permanent mechanism at the disposal of the international community should be given preference over the use of countermeasures by individual States. However, in the current circumstances it is unrealistic to entrust international organizations with taking all the necessary decisions and action in order to put into effect the legal consequences of crimes. The process of setting up the appropriate mechanisms will probably be slow, and ways of institutionalizing international action can vary widely. It is therefore too early to make specific proposals in that respect during the current exercise.

Denmark
(on behalf of the Nordic countries)

As to the chapter dealing with the consequences of an international crime, the approach was not very ambitious; it may, however, be more realistic. As stated in the commentary, the formulation of draft articles 41 to 45 dealing with reparation as well as article 46 is for the most part adequate to respond to the most serious as well as lesser breaches of international law. The Nordic countries agree with that assessment in particular if it is generally accepted that the phrase contained in draft article 45, on satisfaction, "[i]n cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement", also covers punitive or exemplary damages.

France

The whole of chapter IV, on international crimes, is the object of a reservation in principle by France taking into account its position on draft article 19.

Germany

1. The position of Germany on the issue of international crimes has been consistent over the past 20 years. This position has been, and still is, one of considerable scepticism regarding the usefulness of the concept. Germany would, once again, urge the Commission to reconsider the concept with due consideration of State practice.

2. The idea that States themselves are to be held criminally responsible is not sustained by international practice. Since Nürnberg, considerable developments have taken place in the field of individual criminal responsibility. The principle of individual criminal responsibility, including that of State officials, has been embodied in a number of international conventions and forms the basis for the international tribunals for the former Yugoslavia and for Rwanda, the draft Code of Crimes against the Peace and Security of Mankind prepared by the Commission and the current negotiations on a statute for an international criminal court. It has been submitted that upholding the notion of "crime" in the context of the conduct of States as abstract entities will adversely affect the developments in the field of criminal responsibility of individuals.[1] Indeed, it has always been a line of defence by individual criminals to negate their own responsibility and to blame the criminal system which they served.

3. It is difficult to reconcile the principle of equality of States with the possibility of one State punishing another State for acts or omissions it considers to be of a criminal nature. However, existing international institutions and legal regimes already provide rules and mechanisms for a collective response to violations of international obligations that would fall under the ambit of draft article 19, paragraph 2. For cases of aggression there exists the system of the Charter of the United Nations for the maintenance of international peace and security, particularly Chapter VII, and the law on collective self-defence (to which, in any case, the draft articles are subordinated). Flagrant violations of the right of self-determination will again constitute issues falling under Chapter VII and will, additionally, be governed by relevant rules and principles within international organizations at both the universal and the regional levels. Serious breaches, on a widespread scale, of international obligations that are of essential importance for safeguarding the human being might well be, and indeed have been, taken up by the Security Council as "threats to international peace and security".[2] The same applies to intentional acts of severe environmental degradation.[3] Perhaps in contrast to the situation existing at the time when the concept of "State crimes" was first introduced,[4] universally condemned acts can now be expected to find their adequate legal and political response by the community of States.

4. Germany readily accepts that there exists a category of "wrongful acts of an exceptional gravity", to take up a term proposed by members of the Commission,[5] that is breaches of obligations which protect values or goods of concern to all States. There is ample evidence that the concepts of obligations *erga omnes* and, even stronger, *jus cogens* have a solid basis in international law. Reference needs only to be made to the *Barcelona Traction* case[6] and to the 1969 Vienna Convention.[7] In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ pointed out that "because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' ... *they constitute intransgressible principles of international customary law*"*.[8] With the Court, it can safely be said that it is generally accepted that rules and principles protecting the basic interests of the international community should enjoy a legal strength enabling them to override any attempt, in fact or in law, to harm those interests.

5. Germany would encourage the Commission to re-evaluate the importance of the concepts of obligations *erga omnes* and of *jus cogens* in the field of State responsibility. If the Commission uses as a starting point the idea that violations of peremptory norms of international law (*jus cogens*) lead to *erga omnes* obligations, it could very well succeed in drafting provisions that are acceptable to the international community as a whole. In carrying out such a review, the emphasis should be less on introducing remedies of punitive character than on how States should react to grave breaches either *ut singuli* or acting collectively.

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[1] See Rosenstock, loc. cit., p. 267.

[2] See Security Council resolutions 770 (1992), 808 (1993) and 827 (1993) (situation in the former Yugoslavia); 918 (1994) and 955 (1994) (situation in Rwanda); and 1080 (1996) (situation in the Great Lakes region).

[3] See Security Council resolution 687 (1991), para. 16 (holding Iraq responsible for "damage including environmental damage and the depletion of natural resources").

[4] See Rosenstock, loc. cit., p. 275: "Article 19 is a reflection of the political climate and mood of the 1960s and 1970s and little more."

[5] See *Yearbook ... 1994,* vol. I, pp. 69 et seq. and 81 et seq. In a footnote to the word "crime" the first time it appears in part two of the draft articles, the Commission at its forty-eighth session in 1996 stated the following:

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

(*Yearbook … 1996*, vol. II (Part Two), p. 63, unnumbered footnote). Germany would certainly support such a move.

[6] *Barcelona Traction, Light and Power Company Limited*, *Judgment, I.C.J. Reports 1970*, p. 32.

[7] Article 53 reads as follows:

> "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."

ICJ mentioned the concept of *jus cogens* in its judgment in the *North Sea Continental Shelf* case (*Judgment, I.C.J. Reports 1969*, p. 42) and, in its judgment in the case of *Military and Paramilitary Activities in and against Nicaragua* quoted with approval the following statement by the Commission: "[T]he law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens.*" (*I.C.J. Reports 1986*, p. 100, para. 190)

[8] *I.C.J. Reports 1996*, para. 79. See also "Advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons: note by the Secretary-General" (A/51/218, annex).

Italy

1. Italy believes that the draft should deal with *the responsibility of States for particularly serious wrongful acts* (referred to as "international crimes" in the draft), and not only responsibility for "ordinary" wrongful acts (referred to as "international delicts" in the draft). For the reasons indicated below, in relation to part three, Italy believes that certain particularly serious wrongful acts already entail legal consequences other than those of wrongful acts in general. Such special consequences should not be determined on the basis of customary law alone. Moreover, it might be advisable to include in the draft provisions to complement and enhance the regime that currently exists under customary law. Italy therefore does not share the view that the legal consequences of the most serious wrongful acts should be excluded from the draft articles on State responsibility.

2. Existing customary law provides for certain differences in the content of the legal consequences which injured States can invoke. Thus, for example, in the case of armed aggression, unlike in the case of any other wrongful act, injured States can adopt measures of self-defence entailing the use of force. Other differences begin to emerge in the framework of the reparation owed by the State committing the wrongful act, particularly with regard to the content of satisfaction and guarantees of non-repetition of the wrongful act.

3. In Italy's view, the differences envisaged in international law in the responsibility regime for wrongful acts which adversely affect the fundamental interests of the international community should appear in the draft. At the same time, these differences should be developed and integrated in the light of the need to make the responses to such acts more effective and to prevent abuse. The trickiest questions concern: (*a*) the need to find a criterion for ensuring coordination between the individual reactions of injured States; and (*b*) the need to envisage a system for deciding that such an act has been committed in a specific case. An interesting proposal on that subject had been put forward by the former Special Rapporteur, but it was not adopted by the Commission. Nevertheless, the Commission should continue its work on these questions and submit to States other proposals in this regard, with a view to a possible codification conference in the future.

4. A failure to deal in the draft articles on State responsibility with the legal consequences arising out of internationally wrongful acts which adversely affect the fundamental interests of the international community can have only two aims: (*a*) to assert that such acts entail the same responsibility regime as any other wrongful act; or (*b*) to leave it to customary international law to determine the existence of such acts and the special regime attaching thereto. In Italy's view, neither of these aims is acceptable. Italy believes, as stated above, that customary international law already provides for differences in the regime of State responsibility, particularly as regards the subjects entitled to invoke it. To deny the specificity of the responsibility regime for the acts in question would be a step backwards in terms of existing law and not a codification effort. Not to deny the existence of a special responsibility regime for certain particularly serious wrongful acts, but to leave it to customary law to decide that they have been committed, seems to Italy to be equally unacceptable, because it is precisely in this area that an effort to clarify and, where necessary, integrate existing rules is needed.

5. It follows from the foregoing that the special responsibility regime for wrongful acts adversely affecting the fundamental interests of the international community to which Italy is referring is not a regime of the criminal type like the one provided for in the domestic law of States. The Commission, moreover, was always careful to state that in using the expression "international crimes" to designate wrongful acts of States entailing a special responsibility regime it never had any intention of attaching to the acts in question the types of responsibility peculiar to domestic law. The consequences currently attached to international crimes in draft articles 52 and 53 do not resemble the criminal penalties known to domestic law. Therefore, the use of the expression "international crimes", which has aroused so many concerns and objections on the part of a number of States, does not raise any problems for Italy, which views it solely as a concise way of referring to the most serious internationally wrongful acts (the same applies to the term "international delict", which is used to designate less serious internationally wrongful acts). Nevertheless, should the Commission deem it appropriate, in order to overcome certain objections, to use another term to designate the most serious internationally wrongful acts, Italy would have no objections.

United Kingdom of Great Britain and Northern Ireland

1. The legal consequences of the designation of an international wrongful act as an international crime appear to the United Kingdom to be of little practical significance and, to the extent that they do have significance, to be unworkable. Those consequences are established by draft articles 51 to 53.

2. The opposition of the United Kingdom to the concept of international crimes was explained above.

Article 51 (Consequences of an international crime)

Austria

1. Austria still prefers that draft article 19 be deleted together with its legal consequences which are dealt with in draft articles 51 to 53.

2. See also draft article 19.

Czech Republic

1. The Czech Republic is disappointed with the Commission's extremely terse commentary on the articles contained in part two, chapter IV, and the absence of any reference to specific features of the application to international crimes of the articles contained in part two, chapters II and III. This absence is particularly striking given that draft article 51 specifically states that "[a]n inter-

national crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in articles 52 and 53". The commentary to the draft articles contained in chapters II and III gives the impression that there may be nothing special about the way they are to be applied in the case of international crimes, whereas the magnitude of the injury done by an international crime and the fact that there are many injured States mean that the application of a single provision from chapters II and III to both a delict and a crime would occur under very different circumstances and could result in significantly different outcomes.

2. Lastly, and this is moving in the direction of the second question on which the Commission is especially keen to have the views of Governments, namely the issue of countermeasures, the Czech Republic does not believe that the regime of countermeasures in the cases of State "crimes" should be individualized, i.e. liberalized. The notion of countermeasures has come to take the place of the traditional notion of "reprisals", which has undergone a fundamental change since the appearance in international law of the prohibition of the use of force, which has been set up as a peremptory rule (*jus cogens*) and incorporated in the Charter of the United Nations. The Czech Republic considers that, given the rudimentary nature of the centralized machinery for the application of international law, individual means of constraint or coercion continue to be an indispensable element of that law, and the provisions governing them can also be appropriately included in a text on State responsibility. The question is, of course, a highly complex and delicate one. The taking of countermeasures can give rise to abuses and would probably be even more likely to do so if one yielded to the temptation to establish a less strict regime for resort to countermeasures in response to a State crime.

France

France proposes that this draft article be deleted.

United Kingdom of Great Britain and Northern Ireland

Draft article 51 says nothing of substance.

Article 52 (Specific consequences)

Austria

1. Austria still prefers that draft article 19 be deleted together with its legal consequences which are dealt with in articles 51 to 53.

2. See also draft article 19.

Czech Republic

1. The draft still contains by no means negligible specific elements relating to the regime of responsibility for crimes that justify the distinction made in draft article 19. Then there is draft article 52, which contains provisions dealing specifically with "crimes" and concerns restitution in kind and satisfaction. Moreover, one form that satisfaction can take is the initiation of criminal proceedings against individuals who have taken part in the preparation or commission of a wrongful act by a State. In the case of a "delict", the State that is the source of the internationally wrongful act is itself supposed to bring the criminal proceedings. In the case of at least some State crimes, that is the prerogative of the international community and of any State that has at its disposal an appropriate mechanism for the purpose. Satisfaction also represents an important point of convergence between State responsibility and individual criminal responsibility under international law.

2. Another suggestion would be to consider the problem of an injured State's option to choose between restitution in kind and compensation. This option exists in respect of "delicts", but the Czech Republic questions whether it should be retained as such in the case of "crimes". Surely it must be asked whether it is even possible, in the case of a "crime", for an injured State somehow to consolidate the consequences of a breach of a peremptory norm of essential importance for safeguarding the fundamental interests of the international community by agreeing to compensation instead of insisting on restitution in kind. Might it not be preferable to stipulate that compensation would be permissible in the case of a "crime" only when it was accompanied (where appropriate) by restitution in kind, for which it could be substituted only in cases where it was materially impossible to revert to the status quo ante (or even, where appropriate, in cases where it was not possible for the reasons set out in draft article 43 (*b*) to (*d*)?

Denmark (on behalf of the Nordic countries)

The concept of proportionality pervades the whole field of remedies as stated in the commentary to draft article 52 (*a*), but may nevertheless be restated in connection with this particular provision.

France

France proposes that this article be deleted.

Switzerland

The distinction [between international crimes and international delicts] is meaningless unless the consequences entailed by the two categories of violations are substantially different. Draft article 52 governs the consequences of international "crimes" committed by States. It prescribes that the limitations imposed by draft article 43 (*c*) and (*d*), on the right to obtain restitution in kind which, it must be added, is impossible in a number of cases do not apply to these "crimes". In other words, the injured State could demand *restitutio in integrum* even if this imposed a disproportionate burden on the State which had committed a wrongful act (draft art. 43 (*c*)) or threatened the political independence or economic stability of that State (draft

art. 43 (*d*)). These distinctions are either inadequate or dangerous: dangerous because, in the opinion of Switzerland, the abeyance of draft article 43 (*d*), in the context of "crimes", as prescribed by draft article 52 (*a*), raises the possibility of inflicting serious punishment on an entire people for the wrongdoing of its Government, thereby compromising international security and stability.

United Kingdom of Great Britain and Northern Ireland

1. Draft article 52 sets out the particular consequences of designating conduct as an international crime. The injured State could demand restitution even if it imposed a disproportionate burden on the wrongdoing State compared with the burden of a demand for compensation, and even if it would seriously jeopardize the political independence or economic stability of the wrongdoing State (draft art. 43 (*c*) and (*d*)); and it could demand satisfaction that would impair the dignity of the wrongdoing State (draft art. 45, para. 3).

2. In the view of the United Kingdom, the interests of international peace and security demand that restitution which would be disproportionately burdensome or would seriously jeopardize the independence and stability of the wrongdoing State, or satisfaction that would impair its dignity, should not be an entitlement of the injured State. Nor is it desirable that tribunals be empowered to order such measures. Those consequences must be appraised in a political context.

3. It is likely that the perception of the dangers that would flow from unrestrained demands for restitution or satisfaction would influence the characterization of a wrong as a crime or delict. If the imposition of demands for unrestrained reparation on the wrongdoer carries a clear risk of serious disruption in international affairs, there is likely to be considerable reluctance to characterize wrongs as crimes.

4. Moreover, the scheme could scarcely work. If the wrong were designated as a crime, the injured State might be entitled to demand unrestricted restitution or satisfaction. The wrongdoer is unlikely to agree to this in bilateral negotiations; and a tribunal judging the matter will ordinarily decide in accordance with its own rules and in exercise of its own discretion what the proper form and measure of reparation should be. The "right" to reparation is unlikely to lead to negotiated settlements or to judicial awards significantly different from those which would arise under the present law, where there is no distinct category of international crimes and where each delict is judged on its own terms. The only foreseeable difference would be that certain wrongs would be labelled as "international crimes". Whether that be a unilateral decision by each State, or the culmination of consideration of the matter by various international organs, labelling the wrong as a crime seems too small a reward (likely in any event to be lost in the rhetoric which surrounds serious breaches of international law) to warrant the establishment of this new and controversial category of international wrongs.

Article 53 (Obligations for all States)

Austria

1. Austria still prefers that draft article 19 be deleted together with its legal consequences which are dealt with in draft articles 51 to 53.

2. See also draft article 19.

Czech Republic

As for the rest, the draft still contains by no means negligible specific elements relating to the regime of responsibility for crimes that justify the distinction made in draft article 19. Lastly and most importantly, there is draft article 53, which reflects the specific nature of the regime of responsibility for "crimes" very clearly.

France

1. France proposes that this draft article be deleted.

2. Draft article 53 relates to the obligations incumbent on all States when a State commits an international crime. It establishes a kind of "collective legal security" on the legislative level without drawing any consequences of an institutional nature and, in so doing, poses the delicate question of the institutionalization of the response to the "crime" outside the United Nations.

3. Such an article gives rise to numerous difficulties:

(*a*) By risking encouraging States to have recourse (at times wrongly) to countermeasures in defence of what the draft articles call the "fundamental interests of the international community";

(*b*) By affording the whole "international community", by virtue of the introduction of the concept of "crime", the possibility of engaging in an *actio popularis* and reacting collectively to the wrongdoing; this is not without danger. One of the functions of public international law is, in fact, to avoid tension. It is not certain, however, that an *actio popularis* is the most appropriate mechanism to prevent tension. On the contrary, it may be feared that such a mechanism might lead to a continuing public debate as to who complies with, or fails to comply with, public international law. Such a mechanism is, however, not part of positive law and would in any case be difficult to bring into operation.

United Kingdom of Great Britain and Northern Ireland

Draft article 53, which sets out the duty not to recognize as lawful or assist in the maintenance of the situations created by crimes etc., appears to add little or nothing to the consequences of other draft articles.

PART THREE

SETTLEMENT OF DISPUTES

Argentina

The provisions dealing with settlement of disputes (arts. 54–60) contain certain innovative elements which merit the comments set forth under article 58 below.

Austria

1. Given the general reluctance of States to undergo obligatory dispute settlement procedures, Austria still has some doubts regarding the efficiency of the system provided for in the draft articles.

2. Austria in international codification conferences is known for consistently advocating systems promoting the settlement of disputes among States. In the particular case of State responsibility, however, the danger exists that dispute settlement procedures, in particular those of an obligatory nature, may not work in practice. From the point of view of Austria, the Commission should, therefore, refrain from including part three in the draft articles altogether. The procedure in draft article 48 could instead retain the obligation to negotiate and contain a reference to existing dispute settlement procedures under international law applicable between the injured and the injuring State. As radical as such an approach may seem from a dogmatic point of view, State practice seems to support it as a more realistic one.

Czech Republic

With regard to the provisions of part three, concerning the settlement of disputes, it would be preferable if the procedures set out were optional in nature and could be simplified, given that the scope of the draft articles covers the whole area of State responsibility and thus a large share of potential disputes between States. In this connection the Czech Republic feels it necessary to reiterate its position that the Commission has not yet found a way to prevent a potential conflict between the procedures set out in part three and those that may be applicable under other instruments in force between the States concerned and which might provide for different means of settling disputes, including different sequences or conditions for their activation. It would be desirable for the Commission to devote due attention to this problem during the second reading of the draft articles. In any event, the contents of part three should, in the Czech Republic's view, be structured taking into account the form the draft may ultimately take. Accordingly, it would probably be premature at the current stage to take any decisions on a whole series of possible options in this area ranging from a modification of the contents of part three to their inclusion in a separate optional protocol or their outright deletion.

Denmark
(on behalf of the Nordic countries)

1. The Nordic countries can accept the general outline of this part of the draft articles including the two annexes on the establishment of a Conciliation Commission and an Arbitral Tribunal, respectively. They note, however, that the Commission itself had recognized the need to consider the problem of the coexistence of dispute settlement obligations under part three of the draft on State responsibility with any dispute settlement obligations originating in any other instruments and the Nordic countries encourage the Commission to do so.

2. In national law, in Community law governing the relations between the States members of the European Community and even in certain branches of international law, none of the parties to a dispute can take the law into their own hands. A compulsory third-party settlement procedure has been introduced into those legal systems to make sure that disputes are solved in a peaceful and civilized manner. In the view of the Nordic countries, a serious attempt should be made to develop further and bolster the international legal order with effective settlement procedures.

France

1. Part three of the draft articles has the effect (no doubt intentional) of instituting a mandatory jurisdictional settlement of all disputes. There is, however, no reason to single out disputes giving rise to questions of responsibility by applying an ad hoc settlement mechanism to them. Moreover, in most cases there is no isolated dispute relating to responsibility. There are, on the other hand, disputes on matters of substance which have consequences relating to responsibility. That is, indeed, the case with the majority of such disputes.

2. France does not see why there should be a specific settlement mechanism for disputes related to responsibility. It would be preferable to leave them to general international law. Failing the deletion of part three, one possible solution would be to transform it into an optional protocol.

3. In the opinion of France, part three relates more to the work of a diplomatic conference than to one of codification. It will be recalled that the procedure for the settlement of disputes which appears in the annex to the 1969 Vienna Convention was introduced during the diplomatic conference which specified the purpose of the Convention, and not by the Commission. The machinery provided for in the Convention is, moreover, clearly more respectful of the will of States than that envisaged here. Lastly, it is at the very least premature to include a part three concerning the settlement of disputes when it is not yet certain that the draft articles will become a convention.

4. France considers that part three of the draft should be deleted. Therefore, it is not proposing any changes in the wording of the provisions of articles 54 to 60 or of annexes I and II.

Germany

It is the view of Germany that, given the multitude of global, regional, multilateral and bilateral mechanisms for conciliation, arbitration and judicial review that are already in place but are unfortunately only rarely used by States, existing mechanisms should be used first, in particular if there already exists a special dispute settlement regime applying to the substantive primary law whose breach is alleged. Part three on dispute settlement should thus be expressly designated a residual, subsidiary role vis-à-vis existing mechanisms and procedures.

Ireland

1. Ireland is of the view that part three should be optional rather than an integral part of the text. There are a number of reasons for this view.

2. First, as mentioned above, Ireland believes that many States will be unwilling to subscribe to such dispute settlement provisions, and if the provisions were to be an integral part of the text, or if, in the event that the draft articles were to be adopted in the form of a treaty, no reservations were to be permitted in respect thereof, this would jeopardize the acceptance by those States of other draft articles which they would be willing to accept. Given the centrality of the topic of State responsibility to the system of international law, Ireland favours the maximum possible acceptance by States of the draft articles and is of the opinion that there should be the possibility for States to opt out of provisions such as these which are controversial in order to maximize the acceptance of the other provisions.

3. Secondly, as Ireland understands it, the focus of the Commission's work on this topic has been on the codification and development of the rules relating to State responsibility. The settlement of disputes relating to the interpretation and application of these rules is an ancillary matter which should not be allowed to detract from the Commission's focus.

4. Thirdly, internationally wrongful acts giving rise to State responsibility may occur in any area of the law, and the attempt to devise a dispute settlement regime of a general character at the current time in this context could be seen as misplaced. While Ireland appreciates that the Commission's proposals in this regard would not take priority over other dispute settlement provisions whether of a general or a specific character agreed by States, it may be wise to examine in greater depth and separately the question of dispute settlement, including the relationship between various regimes.

Italy

Italy believes that the draft should include a part dealing with the *settlement of disputes.* A convention on the international responsibility of States must be accompanied by dispute settlement provisions concerning the interpretation and implementation of the convention. The basic link between rules on internationally wrongful acts and their legal consequences, on the one hand, and the regime for the settlement of disputes concerning such acts, on the other hand, means that it is preferable, if not necessary, for the dispute settlement rules not to be drawn up directly by the future conference itself, which may be called upon to adopt a convention on State responsibility. It would be particularly difficult to discuss rules on countermeasures and on international crimes and their consequences without knowing at that point what the dispute settlement regime was to be. Italy therefore shares the view that the Commission's draft should contain a part dealing with the settlement of disputes.

Mexico

1. Mexico greatly appreciates and commends the Commission on its work on the settlement of disputes developed in part three of the draft articles. In view of the importance attached by Mexico to this topic, and with a view to strengthening the chapter, which is regarded as fundamental to the promotion of peaceful coexistence among peoples, Mexico would suggest that the Commission attach greater importance to this area.

2. Mexico suggests, for the Commission's consideration, the inclusion of an optional protocol, intended, should other means of settling disputes not succeed, to allow election for a compulsory arbitration mechanism or appeal to ICJ.

Mongolia

Mongolia finds the provisions on the settlement of disputes to be acceptable. It does not share the view that they constitute somewhat overly detailed provisions that lack flexibility. Mongolia believes that they reflect in general the principle that parties to a dispute should be allowed to choose freely the means of settlement. More thought, however, needs to be devoted to the link between the settlement of disputes and countermeasures.

Switzerland

With regard to the peaceful settlement of disputes in respect of the interpretation or application of the provisions of the convention which could result from the Commission's draft, Switzerland wishes first of all to congratulate the Commission and its Special Rapporteur, Mr. Arangio-Ruiz, for the thoroughness with which they have studied this particular problem. Switzerland is satisfied with the provisions on the settlement of disputes with respect to countermeasures. Unfortunately this satisfaction does not extend to the *general* arrangements for settling disputes for which the draft provides. No doubt the introduction of a conciliation procedure that may be invoked unilaterally in the event of negotiations breaking down is to be welcomed. But in a field as quintessentially legal as international responsibility, that is not enough. If a future convention in this field is to be as effective as one would wish, each State concerned must be able to launch a judicial process culminating in a binding verdict when

conciliation fails. Unless that happens, the work currently under consideration will remain half unfinished.

United Kingdom of Great Britain and Northern Ireland

1. It has already been indicated that the United Kingdom does not support the retention of part three of the draft articles, dealing with the settlement of disputes, and that this has nothing to do with the desirability of compulsory procedures for the settlement of disputes as such. The fact remains, however, that dispute settlement procedures are not a necessary part of a set of legal provisions on State responsibility: the second can be complete without the first. The United Kingdom observes moreover that a settlement of disputes regime, however desirable in itself, takes on an entirely different aspect if allied with a set of legal rules as fundamental to the whole system of international law as the rules governing State responsibility. The resulting situation would be very different from the inclusion of dispute settlement provisions in a bilateral or multilateral treaty creating substantive legal obligations. There the scope and nature of the area of relations falling under the dispute settlement clauses is foreseeable in advance. In the present case, practically every international dispute could be cast in terms of a dispute concerning the nature and extent of the international responsibility of a respondent State for the actions of which complaint is made. The draft articles set out principles of State responsibility of general application. Those principles, and the dispute settlement obligations that are appended to them in part three of the current draft, would be applicable in every international dispute, unless their application were specifically excluded. The United Kingdom feels bound to note that that would be a utopian outcome, but hardly one to be realistically envisaged in the current state of international relations. The inclusion of a general and open-ended commitment to international dispute jurisdiction can only reduce by a significant margin the likelihood that the draft articles will secure the necessary widespread acceptance by States.

2. Finally, what part three in its present form would bring about would be compulsory conciliation for practically all international disputes and compulsory arbitration for all disputes arising out of a resort to countermeasures. The United Kingdom must question whether that would represent a satisfactory choice of method or forum for so wide-ranging a potential class of disputes. The only tribunal which (in the United Kingdom's view) would be capable in principle of meeting the challenge of so wide a range of international disputes would be ICJ. But the truth remains that the class of disputes to which part three would apply is simply too wide to lay down, prescriptively, a unique mode of settlement.

3. It remains only to note that if (as the United Kingdom has urged above) the final outcome of the exercise is not an international convention, the idea of an additional section on the settlement of disputes automatically falls away, since compulsory dispute settlement procedures would require a legal instrument by which States formally consent to be bound. That would not however preclude the adoption, simultaneously with the final version of the Commission's draft, of a strong recommendation to States to settle disputes that may in future arise by one or another of the binding mechanisms that are available to them. The United Kingdom would in fact urge that such a course be considered.

4. As was indicated above, the United Kingdom is unequivocally opposed to the inclusion in these draft articles of the provisions of part three on the settlement of disputes.

5. There may be some point in a simple restatement of the obligation of States to settle disputes peacefully by means of their own choosing. It may also be possible for the Commission to identify very specific areas arising under the draft articles in which States might undertake obligations to pursue particular dispute settlement processes. For example, if (contrary to the view favoured by the United Kingdom) the detailed provisions on countermeasures were retained, and the link between the substantive provisions on countermeasures and dispute settlement procedures retained with them, it might be necessary for the Commission to attempt to find a workable dispute settlement process to replace that in the current part three. The United Kingdom does not, however, consider that there is a useful role in the draft articles for any scheme as ambitious and wide-ranging as that in the present part three.

United States of America

1. Part three of the draft articles recognizes that negotiation (art. 54), good offices and mediation (art. 55) and conciliation (art. 56) all play an important role in international dispute settlement. However, the articles go further by making the resort to such tools binding at the request of any State party to a dispute (though the recommendations of the Conciliation Commission may not be binding, participation by both parties seems to be required).

2. While the attempt to advance the cause of peaceful settlement of disputes is laudable, the United States sees several serious problems in the framework set forth in the draft articles. What is most important, to the extent that the draft articles compel resort to such modes of dispute settlement, this framework does not reflect customary international law. Indeed, such a system is unlikely to find widespread acceptance among States. Further, a mechanism designed to meet all possible disputes would not meet the very real differences that arise under the law of State responsibility. Thus, this system will likely be ineffective in resolving many disputes. Finally, such procedures, especially those relating to the conciliation process, are slow and expensive, imposing possibly long delays and high costs. Rather than requiring such a procedure, the draft should allow States, upon mutual agreement, to resort to such mechanisms.

3. The United States believes that the long-term credibility of a code of State responsibility would be undermined by linking it to a mandatory system of dispute settlement that imposes potentially high costs on States, is ignored by States or, even worse, is seen as unbalanced in its treatment of wrongdoing and injured States. The dispute settlement provisions should be deleted in favour of

a single non-binding provision that encourages States to negotiate a resolution of their disputes, if necessary by resort to mutually agreeable conciliation or mediation, or to submit to procedures under existing agreements, or to submit by mutual agreement their disputes to binding arbitration or judicial decision.

Article 54 (Negotiation)

France

1. Should part three of the draft articles be retained, which does not seem advisable, France would wish to make the following comments:

2. The usefulness of draft article 54 is open to question. The term "amicably" is either unnecessary (to negotiate "amicably" is a tautology) or dangerous (in that it might allow the law to be set aside, contrary to what is stated elsewhere in the draft articles). It would, in any event, be necessary to integrate consultations into the negotiating machinery. More fundamentally, there is no clear distinction between the disputes of concern here: do they relate only to countermeasures or to the interpretation and application of the text as a whole? It will be recalled that chapter III, in part two, relating to countermeasures, already establishes an obligation to negotiate as well as a procedure for the settlement of disputes (art. 48).

Article 55 (Good offices and mediation)

France

As with draft article 54, the utility of draft article 55 is open to question.

Mexico

There should be clarification that the procedure established under draft article 55 is parallel to the compulsory formal negotiation procedure.

Article 56 (Conciliation)

France

The period of three months provided for in draft article 56 is too short.

Mexico

Mexico welcomes in particular the establishment of conciliation as a compulsory measure should other means of achieving a diplomatic solution fail.

Article 57 (Task of the Conciliation Commission)

France

The Conciliation Commission resembles a commission of inquiry rather than a genuine conciliation commission. The principle whereby the Commission could undertake an independent inquiry within the territory of any party to the dispute is unacceptable since the aim is to establish a mandatory inquiry mechanism which is not in keeping with the optional character of conciliation.

Mexico

Mexico reiterates the appropriateness of taking up the topic of precautionary measures, which could be proposed by the Conciliation Commission, and, where necessary, handed down by the Arbitral Tribunal.

Paragraph 2

Mexico

The obligation of parties to assist the Conciliation Commission in determining the facts which are the cause of the dispute should be specified.

Paragraph 4

France

The period provided for in paragraph 4 is also too rigid. It would have been preferable to have provided for a "reasonable period". The drafting of the annex to the 1969 Vienna Convention might serve as a useful reference.

Article 58 (Arbitration)

France

France considers the draft article unacceptable in that, in reality, its aim is to establish a mandatory arbitration mechanism. States cannot be obliged to submit disputes between them to an arbitral tribunal. That is contrary to the very principle of arbitration, which is based solely on the will of States.

Paragraph 1

United States of America

1. The provision of an arbitral tribunal under paragraph 1, to which parties may "by agreement" submit their disputes, is unexceptional but unnecessary for the draft articles to function effectively. If, for instance, States are willing to agree to submit their dispute to an international tribunal, they may establish such a tribunal on their

own accord or with the assistance of a third party (a disinterested State or international organization, for instance). The United States would support an optional set of dispute settlement procedures for States to follow if it would help them to resolve disputes.

2. See also draft article 48.

Paragraph 2

Argentina

1. The part of the draft articles which refers to the settlement of disputes is closely related to the taking of countermeasures, and it is in that connection that Argentina wishes to make comments on it.

2. Draft article 58, paragraph 2, provides that:

> … where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, *the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal** to be constituted in conformity with annex II to the present articles.

3. In this connection, it is believed that, in the Commission's scheme, the main limitation of countermeasures arises precisely from the compulsory arbitration scheme provided for in the draft articles. Such a solution requires careful consideration.

4. Compulsory arbitration would be extended to virtually all areas of international law, since the draft seeks to establish a general and comprehensive solution to the legal problems deriving from the international responsibility of the State.[1]

5. In this connection, it is necessary to consider the degree of universal acceptance which the compulsory arbitration scheme proposed by the Commission would have. Indeed, if that solution failed, the option of resorting to countermeasures would lose its main check and balance. Countermeasures and compulsory arbitration should be regarded as two sides of the same coin.

6. For that reason, it would be advisable for the Commission to reconsider these aspects, bearing in mind that the regime of countermeasures could be reformulated and that the compulsory arbitration scheme provided for in the draft articles could be made more flexible.

[1] In this connection it should be noted that, in its commentary, the Commission stated that "[t]his dispute, in its turn, may include not only issues relating to the *secondary** rules contained in the draft articles on State responsibility, but also the *primary** rules that are alleged to have been violated" (*Yearbook … 1995*, vol. II (Part Two), p. 79, para. (5) of the commentary to article 5).

Denmark
(on behalf of the Nordic countries)

It is further noted that the only binding element of the whole third-party settlement scheme relates exclusively to disputes relating to the legitimacy of countermeasures already adopted by the allegedly injured State as well as the underlying dispute which led the injured State to take countermeasures. That creates a certain imbalance between the right of the wrongdoing State to take the case to arbitration, whereas the injured State does not have this right when the original dispute as to the responsibility of the wrongdoing State arises. Moving the mandatory element to the stage at which countermeasures have been resorted to may amount to encouraging the use of such measures whereas the goal is to limit as far as possible the use of countermeasures, an instrument which favours strong States. Given the likelihood of disputes relating to State responsibility as well as the possible escalation of such disputes as a consequence of either party resorting to the use of countermeasures, it should be a condition for resorting to countermeasures that the wrongdoing State has not responded positively to a binding settlement of the dispute.

France

Draft article 58, paragraph 2, could incite a State to take countermeasures to force another State to accept recourse to arbitration. Countermeasures would thus be encouraged, rather than channelled, and disputes would thereby become more complicated. Furthermore, such a provision is not in keeping with draft article 48.

Germany

Germany welcomes the Commission's proposal to include some measure of compulsory third-party involvement in the settlement of disputes. The Commission should consider whether the mandatory scheme it has introduced in part three would find the necessary support by States. Draft article 58, paragraph 2, is of particular importance since it tries to avoid a mutual escalation of measures and countermeasures by introducing third-party determination of the legality of countermeasures in cases where, as usual, their legality is disputed. Germany would be interested in being further informed as to whether other countries take a definite stand to support this proposal.

Mexico

The Commission is invited to undertake an in-depth analysis of paragraph 2 in view of the potential difficulty of determining which is the allegedly wrongdoing State, as well as that of a situation in which internationally wrongful acts are committed by two or more States among themselves. For its part, Mexico would propose the elimination of the paragraph.

United Kingdom of Great Britain and Northern Ireland

The proposal in paragraph 2 for compulsory arbitration at the option of a State that is the target of countermeasures is unacceptable. It has no basis in customary international law and is inequitable and undesirable in principle. It is inequitable that the wrongdoer should be given a right to demand compulsory arbitration when the victim of the

original wrong is given no such right. It is also predictable that, were the draft paragraph to be adopted, it would lead to an increase in the use of countermeasures as States sought to provoke the wrongdoing State into referring to arbitration the dispute arising out of the original wrong.

Article 59 (Terms of reference of the Arbitral Tribunal)

France

The question arises of how the Arbitral Tribunal could take, even implicitly, interim measures of protection "with binding effect". ICJ itself has no means of doing so.

Mexico

Mexico reiterates the appropriateness of taking up the topic of precautionary measures, which could be proposed by the Conciliation Commission, and, where necessary, handed down by the Arbitral Tribunal.

Article 60 (Validity of an arbitral award)

France

Draft article 60, which establishes a kind of extrinsic control of the validity of an arbitral award, provides for the mandatory jurisdiction of ICJ in cases where the validity of an award is challenged. This is the first time that a legal instrument in the form of a convention provides for such a mechanism. It is not acceptable in that it imposes the mandatory jurisdiction of ICJ.

Mexico

1. Mexico is of the view that the effectiveness of arbitral awards depends, *inter alia*, on the willingness of the State to comply with its international legal obligations, and not on adding the recourse of appeal to ICJ. If the parties are certain that the arbitral award will be *res judicata*, without the right of appeal, they will devote themselves fully to the composition of the tribunal and the conduct of its proceedings. If the Commission takes the view that ICJ is not to function as an appeals body on the substance of the case, it should consider the possible legal impact of any determination that the award was void owing to the invalidity of any act of the arbitral tribunal.

2. Mexico has striven for the development of peaceful means of settling international differences and has acquired positive experience which it is willing to place at the disposal of the Commission. Mexico has always complied with arbitral awards against it, even where it has disagreed with the outcome. Where awards have been in its favour, it has affirmed the validity of the law and principles involved, while leaving the door open to a diplomatic solution, thereby ensuring implementation.

United States of America

The provision in draft article 60 of an appellate function to ICJ couched as a challenge to the "validity of an arbitral award" would likely discourage States from signing on to the compulsory system of the draft articles. Together with the strict limitations on countermeasures, a challenge to an arbitral body's decision would extend the period during which a State must await reparation for a wrongdoing State's violation. As it relates to countermeasures, part three suggests that a wrongdoing State might remain in breach of its obligations and yet require a variety of steps, culminating perhaps years after the original wrongdoing in a challenged arbitration and a proceeding before ICJ. Aside from being a highly complex aspect of law enforcement, this sets up an inefficient system which will impose excessive costs on injured States.

ANNEX I. THE CONCILIATION COMMISSION

No comments or observations have been received to date.

ANNEX II. THE ARBITRAL TRIBUNAL

France

The arbitration regulations contained in annex II are far from complete. What law would be applicable by the Arbitral Tribunal? On what basis would its power of inquiry rest? Further, it would be necessary to align the mandates of the Conciliation Commission and of the Tribunal since it would be paradoxical to lay greater emphasis on the less binding technique for the settlement of disputes.

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)

[Agenda item 3]

DOCUMENT A/CN.4/487 and Add.1

First report on prevention of transboundary damage from hazardous activities, by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur

[*Original: English*]
[*18 March 1998*]

CONTENTS

Multilateral instruments cited in the present report

	Source
Treaty establishing the European Economic Community (Treaty of Rome) (Rome, 25 March 1957)	United Nations, *Treaty Series*, vol. 298, p. 3.
Convention for the Protection of World Cultural and Natural Heritage (Paris, 16 November 1972)	Ibid., vol. 1037, p. 151.
Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, D.C., 3 March 1973)	Ibid., vol. 993, p. 243.
Convention for the Prevention of Marine Pollution from Land-based Sources (Paris, 4 June 1974)	Ibid., vol. 1546, p. 103.
Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 February 1976)	Ibid., vol. 1102, p. 27.
Convention on the Conservation of Nature in the South Pacific (Apia, 12 June 1976)	UNEP, *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, 1991), vol. 2, p. 463.
Convention on the prohibition of military or any other hostile use of environmental modification techniques (New York, 10 December 1976)	United Nations, *Treaty Series*, vol. 1108, p. 151.

	Source
Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution (Kuwait, 24 April 1978)	Ibid., vol. 1140, p. 133.
Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 19 September 1979)	Ibid., vol. 1284, p. 209.
Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979)	Ibid., vol. 1302, p. 217.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	Ibid., vol. 1833, p. 3.
Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena de Indias, 24 March 1983)	Ibid., vol. 1506, p. 157.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)	Ibid., vol. 1513, p. 293.
ASEAN Agreement on the Conservation of Nature and Natural Resources (Kuala Lumpur, 9 July 1985)	UNEP, *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, 1991), vol. 2, p. 343.
Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System (Harare, 28 May 1987)	*International Legal Materials* (Washington, D.C.), vol. XXVII, No. 5 (September 1988), p. 1109.
Single European Act (Luxembourg, 17 February 1986 and The Hague, 28 February 1986)	United Nations, *Treaty Series*, vol. 1754, p. 3.
Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987)	Ibid., vol. 1522, p. 3.
Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988)	*International Legal Materials* (Washington, D.C.), vol. XXVII, No. 4 (July 1988), p. 859.
Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel, 22 March 1989)	United Nations, *Treaty Series*, vol. 1673, p. 57.
International Convention on Oil Pollution Preparedness, Response and Cooperation (London, 30 November 1990)	Ibid., vol. 1891, p. 51.
Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, 30 January 1991)	Ibid., vol. 2101, p. 177.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	Ibid., vol. 1989, p. 309.
Protocol to the Antarctic Treaty on Environmental Protection (Madrid, 4 October 1991)	*International Legal Materials* (Washington, D.C.), vol. XXX, No. 6 (November 1991), p. 1461.
Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992)	United Nations, *Treaty Series*, vol. 1757, p. 3.
Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992)	Ibid., vol. 1936, p. 269.
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	Ibid., vol. 2105, p. 457.
Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 9 April 1992)	Ibid, vol. 2099, p. 195.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	Ibid., vol. 1771, p. 107.

	Source
Convention on biological diversity (Rio de Janeiro, 5 June 1992)	Ibid., vol. 1760, p. 79.
Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)	Council of Europe, *European Treaty Series*, No. 150.
Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	*Official Records of the General Assembly, Fifty-first Session, Supplement No. 49*, resolution 51/229, annex.

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Introduction

1. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was placed on the agenda of the International Law Commission at its thirtieth session in 1978.[1] That same year, Mr. Robert Q. Quentin-Baxter was appointed Special Rapporteur for the topic. By 1984, he had submitted five reports[2] to the Commission, which sought to develop a conceptual basis for the topic. An effort was made to identify the boundaries of the new topic and distinguish it from the topic of State responsibility, which had been under consideration by the Commission for some time. A distinct contribution by Mr. Quentin-Baxter was to propose a schematic outline in his third report in 1982.[3] Before his untimely death in 1985, he submitted his fifth report containing five draft articles[4] which, however, were not referred to the Drafting Committee.

2. At its thirty-seventh session, in 1985, the Commission appointed Mr. Julio Barboza Special Rapporteur for the topic. Between 1985 and 1996, Mr. Barboza submitted 12 reports.[5] During this process he carried further the

[1] Pursuant to General Assembly resolution 32/151 of 19 December 1977, the Commission, at its thirtieth session in 1978, established a Working Group to consider the scope and nature of the topic (see *Yearbook ... 1978*, vol. II (Part Two), pp. 150–152).

[2] (*a*) Preliminary report: *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2;

(*b*) Second report: *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2;

(*c*) Third report: *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360;

(*d*) Fourth report: *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373; and

(*e*) Fifth report: *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

[3] The third report (see footnote 2 above) consisted of two chapters: one set out a schematic outline of the topic and the other analysed the relationship between the schematic outline and the underlying principles discussed both in the Commission and in the Sixth Committee.

[4] Fifth report (see footnote 2 above), pp. 155–156, para. 1.

[5] (*a*) Preliminary report: *Yearbook ... 1985*, vol. II (Part One), p. 97, document A/CN.4/394;

(*b*) Second report: *Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402;

(*c*) Third report: *Yearbook ... 1987*, vol. II (Part One), p. 47, document A/CN.4/405;

(*d*) Fourth report: *Yearbook ... 1988*, vol. II (Part One), p. 251, document A/CN.4/413;

(*e*) Fifth report: *Yearbook ... 1989*, vol. II (Part One), p. 131, document A/CN.4/423;

(*f*) Sixth report: *Yearbook ... 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1;

basic approach and outline developed by Mr. Quentin-Baxter. From 1988 onwards, specific articles were placed before the Drafting Committee for consideration. While several draft articles were developed,[6] in 1992 at its forty-fourth session the Commission established a working group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic.[7] On the basis of the recommendations of the Working Group, the Commission took a number of decisions.[8] As regards the scope of the topic:

(*a*) The Commission noted that, in the last several years of its work on the topic, it had identified the broad area and the outer limits of the topic but had not yet made a final decision on its precise scope. In the view of the Commission, such a decision might be premature. The Commission, however, agreed that, in order to facilitate progress on the subject, it would be prudent to approach its consideration within that broad area in stages and to establish priorities for issues to be covered;

(*b*) Within the understanding set forth in subparagraph (*a*) above, the Commission decided that the topic should be understood as comprising issues of both prevention and remedial measures. However, prevention should be considered first; only after having completed its work on that first part of the topic would the Commission proceed to the question of remedial measures. Remedial measures in that context might include those designed for mitigation of harm, restoration of what had been harmed and compensation for harm caused;

(*c*) Attention should be focused at first on drafting articles in respect of activities having a risk of causing transboundary harm and the Commission should not deal, at that stage, with other activities which in fact caused harm. In view of the recommendation contained in subparagraph (*b*) above, the articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission had completed consideration of the proposed articles on those two aspects of activities having a risk of causing transboundary harm, it would then decide on the next stage of the work.

3. In 1994 and 1995, at its forty-sixth and forty-seventh sessions, the Commission provisionally adopted several articles on first reading.[9]

4. At its forty-eighth session, in 1996, the Commission established a working group to review the topic in all its aspects in the light of the various reports submitted by the Special Rapporteur and the discussions it had held over the years.[10] In addition to those reports, the Commission had before it a survey prepared by the Secretariat on liability regimes relevant to the topic.[11] The Secretariat had also prepared a survey in 1985 for the thirty-seventh session on State practice relevant to the topic.[12]

5. The report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law contained a complete picture of the topic relating to the principles of prevention and of liability for compensation or other relief along with draft articles and commentaries thereto. The Commission was not able to examine the draft articles thus presented, but they were annexed to the report of the Commission to the General Assembly on the work of its forty-eighth session in 1996.[13]

6. Pursuant to General Assembly resolution 51/160 of 15 December 1996, the Commission at its forty-ninth session in 1997 established a working group to consider the manner in which the topic could be further studied and to make recommendations thereon.[14] The Working Group reviewed the work of the Commission on the topic since 1978. It noted that the scope and content of the topic remained unclear owing to such factors as conceptual and theoretical difficulties, the question of the appropriateness of the title and the relation of the subject to the topic of State responsibility.[15]

(*g*) Seventh report: *Yearbook ... 1991*, vol. II (Part One), p. 71, document A/CN.4/437;

(*h*) Eighth report: *Yearbook ... 1992*, vol. II (Part One), p. 59, document A/CN.4/443;

(*i*) Ninth report: *Yearbook … 1993*, vol. II (Part One), p. 187, document A/CN.4/450;

(*j*) Tenth report: *Yearbook … 1994*, vol. II (Part One), p. 129, document A/CN.4/459;

(*k*) Eleventh report: *Yearbook … 1995*, vol. II (Part One), p. 51, document A/CN.4/468; and

(*l*) Twelfth report: *Yearbook … 1996*, vol. II (Part One), p. 29, document A/CN.4/475 and Add.1.

[6] *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/443, pp. 61–62, paras. 3–8.

[7] Ibid., vol. II (Part Two), p. 51, paras. 341–343.

[8] Ibid., paras. 344–349.

[9] Articles 1 and 2 and 11 to 20 were adopted in 1994 (see *Yearbook ... 1994*, vol. II (Part Two), p. 154, para. 360, and pp. 158–178, para. 380). Articles A to D were adopted in 1995 (*Yearbook…1995*, vol. II (Part Two), pp. 91–99).

[10] *Yearbook … 1996*, vol. II (Part Two), p. 78, para. 97.

[11] *Yearbook … 1995*, vol. II (Part One), p. 61, document A/CN.4/471, Survey of liability regimes relevant to the topic "International liability for injurios consequences arising out of acts not prohibited by international law".

[12] *Yearbook … 1985*, vol. II (Part One) (Addendum), p. 1, document A/CN.4/384, Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law.

[13] *Yearbook …1996*, vol. II (Part Two), annex I, pp. 100–132.

[14] *Yearbook … 1997*, vol. II (Part Two), p. 59, para. 162.

[15] Ibid., para. 165. It has also been observed that, while international practice shows that States now accept a general principle of responsibility for environmental harm, "there still remain many uncertainties as to the exact content and the limits of such a principle", including the legal basis and the form of international responsibility for environmental harm. At least three different forms or regimes of responsibility for a wrongful act and one regime of liability for acts which are not wrongful or prohibited have been identified: fault responsibility, responsibility without fault or objective responsibility, objective and relative responsibility or objective and absolute responsibility, and finally liability for acts which are not wrongful or prohibited. See, for an examination of these and other issues, Pisillo-Mazzeschi, "Forms of international responsibility for environmental harm", pp. 15–17. See also Kiss and Shelton, *International Environmental Law*, pp. 350–360. The authors note that, "[a]mong the various elements required to establish liability—causality, identifying the wrongdoer, proof and measurement

(*Continued on next page.*)

7. As to the two aspects of the topic, "prevention" and "international liability", the Working Group felt that they were distinct from one another, though related. Accordingly, it proposed that issues of prevention and liability should be dealt with separately. Noting further that several draft articles on prevention had been provisionally adopted by the Commission, the Working Group recommended the completion of the first reading of the draft articles on prevention in the following few years. It was also the view of the Working Group that any decision on the form and nature of the draft articles on prevention should be decided at a later stage.[16]

8. It may also be noted that a view was expressed in the Working Group that the Commission should retain the subject of international liability. However, it was agreed that the Commission would need to await further comments from Governments before it could take any decision on the issue. It was further noted that the title of the topic might need adjustment depending on the scope and content of the draft articles. Accordingly, the Commission decided in 1997 to proceed with its work on the topic, concentrating first on matters concerning prevention under the subtitle "Prevention of transboundary damage from hazardous activities".[17]

(*Footnote 15 continued.*)

of harm—an issue common to domestic and international environmental law is determining the *legal basis or degree of fault necessary to impose liability*" (ibid., p. 350). During the last two decades, there has been a proliferation of scholarly literature on the subject of international liability. Reviewing this literature, the editors of the *Harvard Law Review* noted that, nevertheless, no operational system for adjudicating liability had emerged. Further, in their view, the scant international environmental case law that did exist possessed little precedential value because the cases had been decided not on environmental liability grounds but rather on narrow mootness or treaty grounds. Thus, neither scholars nor international judges could legitimately rely upon these cases to generate more specific liability rules. Accordingly, no legitimate expectations about the consequences of action or inaction to prospective environmentally injurious States could be communicated. Thus, the principle *sic utere tuo ut alienum non laedas* "remains an abstraction, an empty concept that commentators hope to fill with substantive content, preferably content bearing the imprimatur of the United Nations or some other international organization". According to the editors, "[t]he challenge for the publicists, then, lies in the promulgation of an international liability regime that so advances the interests of states that nations will surrender some of their sovereign rights to participate in the system" (Guruswamy, Palmer and Weston, *International Environment Law and World Order: A Problem-Oriented Coursebook*, pp. 330–332). See also, on the essential modesty of customary law, Brownlie, "A survey of international customary rules of environmental protection".

[16] *Yearbook … 1997*, vol. II (Part Two), p. 59, para. 166.

[17] Ibid., para. 168.

PART ONE. THE CONCEPT OF PREVENTION AND SCOPE OF THE DRAFT ARTICLES

CHAPTER I

Consideration of the topic of international liability during the fifty-second session of the General Assembly

A. General observations

9. The Commission's decision to continue work on the topic was welcomed. It was stated that there was a growing need for clear rules limiting the nature of the discretion with which States interpreted and complied with certain obligations, especially those aimed at ensuring that activities carried out in areas under their jurisdiction or control did not cause damage to other States or to areas beyond the limits of their national jurisdiction. It was regrettable that only modest advances had been made, owing to the reluctance of States to contribute to the definition of the scope of a regime of liability for such activities. Reference was made to principle 22 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)[18] reflected in many later international instruments which imposed on States the obligation to cooperate in developing that area of law. It was stated that steps should be taken to put that obligation into effect. It was further stated that international law dealing with the subject was constantly evolving and had major significance at the dawn of the twenty-first century.[19] In the modern world, the failure to prevent damage to the environment could have serious consequences. The current understanding was that the world did not have an inexhaustible supply of natural resources and that sustainable development must be promoted. Those who contributed to the codification and progressive development of international law in that field could not neglect the issue.

B. The Commission's decision regarding prevention and liability

10. With regard to the decision by the Commission to address the question of prevention separately from liability, two different views were expressed. Many delegations, while agreeing with that approach, stressed the need to deal also with the question of liability. The remark was made that the Commission, in deciding to separate its study of prevention from that of liability in the true

[18] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

[19] For these views, see *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 17th meeting (A/C.6/52/SR.17, para. 27), statement by Mexico, and 23rd meeting (A/C.6/52/SR.23, para. 28), statement by New Zealand.

sense, had opted for an approach which on the one hand seemed fully justified and, on the other, had various far-reaching consequences.[20] It could not be denied that the two matters, international liability and prevention, were connected only indirectly, and it was justifiable to separate them for a number of reasons. Irrespective of whether liability constituted a primary or a secondary norm, it defined the consequences resulting from damage caused by activities which were lawful under international law. In that respect, reference could be made to draft article 35 on State responsibility, a link which was also reflected in the commentary on that provision. However, the draft on liability also included rules that were purely primary in scope, for example those concerning prevention, the violation of which would not entail liability but did fall within the sphere of State responsibility. It was therefore incorrect to combine prevention with a liability regime in the same draft unless a clear conceptual distinction was made therein. A separation of the two issues was also warranted on the grounds that they often dealt with different spheres of activity: prevention addressed almost all dangerous activities. Thus, principle 21 of the Stockholm Declaration,[21] which the Commission had already recognized as constituting existing law, did not distinguish different categories of activities. In contrast, it seemed appropriate to provide a liability regime only for those activities which were considered indispensable despite their dangerous nature. Such a regime would stipulate that damage which occurred despite precautionary measures need not be defrayed by society but should be compensated by the author of the damage. It was only in that way that the prevention and liability regimes were connected.

11. It was noted that the Working Group of the Commission had made significant progress on that topic in 1996, which had resulted in a set of draft articles on prevention. States had the obligation to prevent transboundary harm and to minimize risk, in particular through environmental impact assessments. Future work on the topic, however, should not be confined to prevention. If there was harm, there must be compensation. Prevention was merely an introduction to the crux of the topic, namely, the consequences of the acts in question. By studying each aspect of the topic with the same degree of care, the Commission would demonstrate that it was a modern organization prepared to take up the challenges of the twenty-first century.[22]

12. The remark was also made that article 1 defined the scope of the draft articles, namely, activities not prohibited by international law which involved a risk of causing significant transboundary harm.[23] State responsibility would arise from the occurrence of harm if the State failed to implement the obligations set out by the draft articles on prevention while engaging in activities of that nature. On the other hand, if the State fulfilled its obligations under the draft articles and harm still occurred, that would give rise to "international liability", which was the core issue. As soon as the Commission completed its first reading of the draft articles on "prevention", it should proceed to the issue of "liability". The decision on whether there was a need to adjust the title of the topic should be made in the light of the content of the draft articles.

13. The comment was made that the Commission's confusion on the relationship between the two aspects of the topic was understandable:[24] the "liability" aspect was definitely a key component of the topic in question and was of considerable practical import as well. However, the topic, which was relatively poorly defined in judicial practice and doctrine, was controversial and invited conflicts which sprang, *inter alia*, from differing interpretations of the matter under different systems of national law and entailed clashing theories with respect to risk, liability, abuse of rights and breaches of good-neighbourliness, to cite only a few; such clashes significantly clouded the question as to what regime was applicable at the international level. Even if the crux of the problem was defined in terms of primary rules, the fact remained that the meaning of *sic utere tuo ut alienum non laedas* was very difficult to interpret in positive international law. Accordingly, the Commission's decision to separate the two aspects of the topic, at least temporarily, was appropriate and would at least allow progress on the "prevention" aspect, which should be limited to hazardous activities.

14. Yet another view expressed the undesirability of considering the liability aspect of the topic. It was stated that while "international liability" had been the core issue of the topic as originally conceived, that did not mean that it should be retained for further work 25 years later, in the light of the meagre understanding reached in that time. Further work on the topic should be confined to the prevention aspect alone. The comment was also made that the Commission had failed over the past 20 years to define the scope and content of the topic, so it would be better to start with what was possible and practicable. Within that framework, the Commission should confine its work to transboundary damage and to activities having a risk of causing harm. The broader issues of creeping pollution and global commons should be excluded, at least initially.[25]

C. Prevention

15. With regard to the issue of prevention, it was stated that in view of the multifarious activities carried out by States within their borders it might be difficult to draw up an exhaustive list of activities involving a transboundary risk and that an illustrative list might be preferable. It was also noted that it might be difficult to accept the

[20] Ibid., 23rd meeting (A/C.6/52/SR.23, para. 41), for example, the views expressed by Austria.

[21] See footnote 18 above.

[22] See *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 17th meeting, statement by Mexico (A/C.6/52/SR.17, para. 27); 23rd meeting, statements by Italy (A/C.6/52/SR.23, para. 12) and New Zealand (ibid., para. 28); 24th meeting, statement by Portugal (A/C.6/52/SR.24, paras. 62–63); 25th meeting, statements by Brazil (A/C.6/52/SR.25, para. 16), the Republic of Korea (ibid., para. 38) and Argentina (ibid., para. 43).

[23] Ibid., 23rd meeting, statement by China (A/C.6/52/SR.23, para. 6).

[24] Ibid. statement by the Czech Republic (A/C.6/52/SR.23, para. 66).

[25] Ibid., 19th meeting, statement by the United Kingdom of Great Britain and Northern Ireland (A/C.6/52/SR.19, para. 48); and 24th meeting, statement by Japan (A/C.6/52/SR.24, para. 3).

qualification of "transboundary harm" as "significant", a term which could be controversial, particularly as there was no provision for a binding dispute settlement mechanism. In the absence of such a mechanism, the adjective should be deleted.[26] In the event of harm, the aggrieved State should be entitled to compensation by the State from which the harm emanated. It was also stated that the work on prevention should include a procedure under which the parameters and ramifications of prevention in international law would first of all be clarified and then assessed against the relevant draft articles already elaborated by the Commission. In that regard, it was impossible to ignore the difficulties of defining "hazardous acts" which would determine the scope of the provisions. At the same time, however, it was important not to lose sight of the original task, namely the elaboration of a regime of liability *sensu stricto*. The comment was further made that the Commission should take account of contemporary practice in the field, which placed more emphasis on providing incentives, including capacity-building, to promote the observance of rules of due diligence. Implementation of the due diligence obligation should be made directly proportional to the scientific, technical and economic capacities of States. Failure to meet that obligation should entail enforceable legal consequences not involving economic or other sanctions.[27]

16. It was also observed that some activities might become hazardous only in conjunction with other activities, a fact that might necessitate an expanded exchange of information, a more liberal consultation regime and a broader assessment of risk that encompassed both the environment of other States and activities in those States. Similarly, the effects of transboundary activities in two States might combine to be felt in a third State, thus creating more than one State of origin.[28]

D. Comments on specific articles recommended by the Working Group

17. The remark was made that the proposed draft articles elaborated by the Working Group in 1996 were based on the principle of customary international law, which established the obligation to prevent or mitigate transboundary damage arising out of activities that were under the control of a State.[29] It was noted that the existence of harm was a prerequisite for the establishment of liability. However, the question of whether liability should flow from the mere existence of harm or from conduct reflecting a lack of diligence might be better determined by the nature of the activity and the risk it posed. It was also noted that reparation was preferable to compensation in the case of environmental damage. It was observed that the remaining draft articles were consistent with what national and international environmental assessment should be. Regarding the future development of the draft articles, it would be desirable to permit States to override them where they dealt with specific issues of liability with respect to which a treaty was being negotiated. It was also noted that the general issue of the relationship with existing treaty law in the field of international liability must be addressed as well.

18. The view was expressed that article 4 as currently drafted was broader than its predecessor, article B.[30] Under a rubric of prevention that went beyond the prevention of risk, it now encapsulated three obligations: risk prevention *ex ante*, risk minimization *ex ante* and harm minimization *ex post*, the last of which, being related to transboundary harm that had actually occurred, might in some circumstances amount to prevention. Article 4 distinguished the occurrence of harm, which must be significant, from its effects, which might be minor. Thus, if article 4 was taken in conjunction with article 1 (*b*), the draft articles would apply to activities that did not involve risk of significant transboundary harm but did in fact cause it. It would be useful to clarify whether the last part of article 4 intended to impose an obligation to remove harmful effects; as drafted, some choice on the part of States could be implied, especially in conjunction with article 3, on freedom of action. In addition, the broad concept of prevention under article 4 was not commensurate with that under articles 9 to 19, on prevention or minimization of risk, being more closely related to that under articles 20 to 22, on compensation. With respect to article 4 the comment was also made that the article was important because it emphasized the importance of preventive action, and in particular draft article 1 (*b*), which dealt with activities that did not normally entail risk but that nonetheless caused harm.

19. It was noted that article 6, like article 4, drew a distinction between harm and effects, but referred to effects in both affected States and the State of origin.[31] Clarification was needed as to whether both types of effects were also covered by the obligations in article 4, or only effects in affected States.

20. With respect to articles 9 and 11, it was stated that they were both concerned with the question of authorization and should be placed together.[32] The emphasis in article 11 could be strengthened by introducing the concept of good faith. Also, the introduction of a temporal element, requiring reasonably prompt action on the part of a State in directing those responsible for pre-existing activities to obtain authorization, would reinforce the need for due diligence.

21. It was stated that under article 10 (risk assessment) the questions of who should conduct the assessment, what it should contain and the form of authorization were left to the State of origin to decide; it was in fact appropriate to avoid being overly prescriptive.[33]

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[26] Ibid., statement by Pakistan, 18th meeting (A/C.6/52/SR.18, para. 64).

[27] Ibid., statement by India (A/C.6/52/SR.18, para. 30). Emphasis on providing incentives, including capacity-building, was highlighted by India.

[28] Ibid., statement by Australia, 24th meeting (A/C.6/52/SR.24, para. 27).

[29] Ibid., statement by Canada, 25th meeting (A/C.6/52/SR.25, para. 30).

[30] Ibid., statement by Australia, 24th meeting (A/C.6/52/SR.24, para. 22). See also the statement by Portugal (ibid., para. 62).

[31] Ibid., statement by Australia (A/C.6/52/SR.24, para. 23).

[32] Ibid., para. 24.

[33] Ibid., para. 25.

22. It was further observed that articles 13 to 18 had to be considered in the light of international regimes governing more specific areas of activity.[34] The purpose of article 13 was to require notification and transmission of information. As currently drafted, it also required a response, but that requirement might be more appropriately placed under article 14 (exchange of information) or article 17 (consultations on preventive measures). If, on the other hand, article 13 was to involve the exchange of information and not simply transmission and notification, then articles 13 and 14 could be combined under the title "Notification and exchange of information".

23. On the general issue of international liability, it was noted that the Commission should elaborate on joint liability arising from joint activities, and on associated issues including indemnities, rights of action and of inspection, dispute settlement principles and bodies, access, investigation and clean-up. The comment was also made that the relationship between this topic and State responsibility should be clearly defined.[35]

24. Given the comments made by States in the Sixth Committee at the fifty-second session of the General Assembly in 1997, there is a clear mandate to proceed with the work on prevention. Several comments on general issues and observations made on specific articles recommended by the Working Group in 1996 are dealt with below.

25. It is proposed to clarify the concept of prevention and the scope of the proposed draft articles, keeping in mind the work done by the Commission so far. Thereafter, the various elements or principles comprising the regime of prevention will be dealt with. The following two chapters on the concept of prevention and on the scope of the draft articles rely mostly on material drawn from the records of the Commission on the subject, particularly the reports of the two previous Special Rapporteurs as well as the decisions taken by the Commission. While the focus is on the principle of prevention, some reference to reparation and liability is inevitable since the subjects of prevention, reparation and liability had been dealt with as closely related concepts in the work of the Commission in the past. However, even while such reference is made to reparation or liability, care has been taken not to digress from the topic of prevention, and thus consideration of matters like strict or absolute liability or any legal principles concerning the post-harm phase has been strictly avoided. A review of the work accomplished by the Commission so far during the last 20 years is considered necessary for the following reasons:

(*a*) As this is a newly constituted Commission, such a review would provide a necessary background to the members of the Commission;

(*b*) Any regime to be developed on prevention should usefully incorporate the various elements of the concept of prevention so far developed by the Commission with the large support of both members of the Commission and delegations in the Sixth Committee; the review will attempt to identify these elements as far as possible;

(*c*) Such a review would also highlight the various arguments or points of view expressed on the difficult issues involved, like the relationship between liability and responsibility, the equation between the principle of prevention and liability on the one hand and responsibility on the other, the need to define legal thresholds of harm as well as other components of the scope of the topic. These issues engaged the attention of the Commission as well as of the Sixth Committee in the past and they will also do so in the future. Accordingly, the analysis of the trends in decisions on these issues would help us to conclude the work of the Commission on the topic as expeditiously as possible.

[34] Ibid., para. 26.

[35] Ibid., statements made by Australia, 17th meeting (A/C.6/52/SR.17, para. 28) and Thailand (ibid., para. 39).

Chapter II

The concept of prevention

A. Prevention within the context of sustainable development

26. Prevention as a concept has assumed great importance in any scheme of avoiding or not causing harm to one's neighbour, howsoever widely or narrowly neighbourhood is defined. In the modern context, not only do various activities project damage or harm beyond their immediate confines, but the magnitude of such damage, whenever and wherever it occurs, has also become a matter of grave concern. Accordingly, growth of population, the need for economic development, ever growing consumerism and materialism have resulted in cities becoming congested, rivers and oceans becoming polluted, forests becoming depleted, land becoming scarred, toxic and hazardous wastes abounding, with the health, well-being and even the survival of humankind at stake. Global warming, ozone depletion, deforestation, desertification, deteriorating biodiversity, the unmanageable and unsustainable plundering of natural resources and other factors account for the deterioration of the global environment, threatening to put the planet in peril.[36]

27. Meeting the challenges posed by these problems has become an urgent and enduring concern of humankind. The United Nations Conference on Human Environment held in Stockholm in June 1972 and the United Nations Conference on Environment and Development held at Rio de Janeiro in June 1992 are two of the most notable efforts

[36] For a treatment of many of these themes, see "Our precious planet", *Time*, special issue (November 1997).

of the international community to identify policies, programmes and strategies for avoiding transnational harm to the environment and to conclude treaties to implement them. Both of those conferences and other follow-up meetings and declarations gave high priority to the concept of prevention in achieving desired goals. Principle 2 of the Rio Declaration,[37] which basically reaffirmed principle 21 of the Stockholm Declaration,[38] reads:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[39]

28. ICJ, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996, confirmed that principle 2 restated a rule of customary law, observing that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment".[40]

29. As has been observed, however, "[t]he exact scope and implications of principle 2 are not clearly determined yet. Certainly not all instances of transboundary damage resulting from activities within a State's territory can be prevented or are unlawful".[41]

30. According to the Rio Declaration,[42] the obligation to avoid causing significant transboundary harm requires an approach which promotes prevention as a duty and as a concept integral to the process of development aimed at eradicating poverty (principles 4 and 5). As has been rightly stressed in principle 25: "Peace, development and environmental protection are interdependent and indivisible." This interdependent approach has been reiterated in the final documents of recent United Nations conferences such as the International Conference on Population and Development in Cairo, the World Summit for Social Development in Copenhagen, the Fourth World Conference on Women in Beijing, the second United Nations Conference on Human Settlements (Habitat II) at Istanbul and the nineteenth special session of the General Assembly for the purpose of an overall review and appraisal of the implementation of Agenda 21.

31. The special situation and needs of developing countries, in particular, the least developed and those most environmentally vulnerable, require special priority in this connection (principle 6).[43]

B. Prevention as a preferred policy

32. The obligation not to cause damage to the environment of other States or of areas beyond the limits of national jurisdiction is a clear directive to States to employ their best possible efforts to prevent such transboundary damage. Prevention is preferable because compensation in case of harm can often not restore the situation prevailing prior to the event or accident, i.e. the status quo ante.[44] Discharge of the duty of prevention or due diligence is all the more required as knowledge regarding the operation of hazardous activities, materials used and the process of managing them and the risk involved is steadily growing. From a legal perspective, the enhanced ability to trace the chain of causation, i.e. the physical link between the cause (the activity) and the effect (harm) in spite of several intervening factors in the chain of causation, makes it also imperative to take all steps necessary to prevent harm to avoid liability. Prevention as a policy in any way is better than cure. It is a time-honoured policy and one that is widely used by many developed and industrialized societies to manage and even reduce or eliminate the ill effects of their economic growth.

33. The issue of prevention, therefore, has rightly been stressed by the Experts Group on Environmental Law of the World Commission on Environment and Development. Article 10 recommended by the Group in respect of transboundary natural resources and environmental interferences thus reads: "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—

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[37] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

[38] See footnote 18 above.

[39] For the text of the Rio Declaration, the Stockholm Declaration and many other relevant instruments, see Birnie and Boyle, *Basic Documents on International Law and The Environment.*

[40] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 242, para. 29.

[41] "Rio Declaration on Environment and Development application and implementation: report of the Secretary-General" (E/CN.17/1997/8), para. 23. It has also been pointed out that "[i]n general international practice has not been particularly favorable to remedying environmental damage through use of traditional rules of state responsibility. Characteristically states proclaim the principle of responsibility but demonstrate hesitancy in adding detailed norms. They are even more reluctant to invoke it against other states when actual cases arise" (Kiss and Shelton, op. cit., p. 360).

[42] See footnote 37 above.

[43] The Rio Declaration further states that, "[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities" (principle 7). In this connection, the point has been made that:

> "Differentiated responsibilities may result in different legal obligations. In practical terms, the principle of common but differentiated responsibilities is translated into the explicit recognition that different standards, delayed compliance timetables or less stringent commitments may be appropriate for different groups of countries, to encourage universal participation. The developed countries acknowledge their responsibility because of the pressure on the global environment, and because of the technologies and financial resources they command. A number of international agreements recognize a duty on the part of industrialized countries to contribute to the efforts of developing countries to pursue sustainable development and to assist developing countries in protecting the global environment. Such assistance may entail, apart from consultation and negotiation, financial aid, transfer of environmentally sound technology and cooperation through international organizations."

(E/CN.17/1997/8, para. 46)

[44] The principle of prevention is referred to as a starting point for the elaboration of an international regime concerning prevention of transboundary harm. The basic assumption is that environmental protection is best achieved by preventing environmental harm rather than attempting to compensate for environmental damage once it has occurred. See UNEP, Final report of the Expert Group Workshop on International Environmental Law Aiming at Sustainable Development (UNEP/IEL/WS/3/2) (1996), p. 12.

i.e. harm which is not minor or insignificant."[45] It must be further noted that the well-established principle of prevention was highlighted in the arbitral award in the *Trail Smelter* case[46] and was reiterated not only in principle 21 of the Stockholm Declaration,[47] but also in General Assembly resolution 2995 (XXVII) of 15 December 1972 on cooperation between States in the field of the environment. This principle is also reflected in principle 3 of the Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, adopted by the UNEP Governing Council in 1978, which provided that States must

> avoid to the maximum extent possible and ... reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the utilization of a shared natural resource so as to protect the environment, in particular when such utilization might:
>
> (*a*) cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State;
>
> (*b*) threaten the conservation of a shared renewable resource;
>
> (*c*) endanger the health of the population of another State.[48]

34. Prevention of transboundary harm to the environment, persons and property has been accepted as an important principle in many multilateral treaties concerning protection of the environment, nuclear accidents, space objects, international watercourses, management of hazardous wastes and prevention of marine pollution. It has also been accepted in several conventions concluded by the Economic Commission for Europe such as the 1979 Convention on Long-Range Transboundary Air Pollution; the 1991 Convention on Environmental Impact Assessment in a Transboundary Context; the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes; and the 1992 Convention on the Transboundary Effects of Industrial Accidents. Through these and other measures, Europe is effectively attempting to integrate environmental protection into economic development. Moreover, "a growing economy is actually seen as a necessary precondition for sustainability, in that it creates the resources needed for ecological development, the restoration of earlier environmental damage and the prevention of future harm".[49]

C. Prevention as an obligation of conduct

35. A study of State responsibility for industrial and technological damage which may be involved inherently as a risk in beneficial or developmental activities concluded that any such responsibility for transboundary harm was limited only to obligations of conduct and did not extend to obligations of result.[50] Dupuy observed in this connection:

> The various limits usually placed on the legal exercise of [States'] powers in these respects have the effect not of protecting third parties against any infringements of their subjective rights resulting from the conduct of these activities, but rather of making it an obligation for the States engaging in them to take the greatest care to *prevent* any possible damage.[51]

36. He further stated that prevention was better than cure, so that a regime which articulated required standards of behaviour might be worth more than one that set a tariff for loss or injury.[52]

37. Another commentator also foresaw the need for the development of new rules in respect of lawful acts of States which carried a risk of causing serious damage. Observing that it was doubtful whether we could stretch the limits of responsibility for wrongful acts indefinitely without attacking its very foundation, Reuter noted:

> We have only to consider that certain risks, which are normal enough for no prohibition to be placed on the enterprises that create them, entail an obligation to make reparation for damage if the risk materializes. In such a case, responsibility exists without any breach of a rule of international law. The act is lawful, but it entails an obligation of reparation. Responsibility is bound up with mere causality. No one can say at present that such a rule exists in international law; but since mankind has never shrunk from highly dangerous undertakings, the rule might be adopted at least in part.[53]

38. Justifying the development of the duty of prevention as a duty of care, Mr. Quentin-Baxter observed that "conventions dealing with liability seldom stand in isolation: much more usually they are a link in a chain of obligations, which in turn form part of a larger international effort designed to prevent or minimize loss or damage arising from the particular activity". He added that

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[45] *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 (Brundtland Commission) (London, Graham & Trotman, 1987), p. 75. It was also noted that the duty not to cause substantial harm could be deduced from the non-treaty-based practice of States, and from the statements made by States individually and/or collectively. See Lammers, *Pollution of International Watercourses*, pp. 346–347 and 374–376.

[46] UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.

[47] See footnote 18 above.

[48] UNEP, *Environmental Law: Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978), p. 2. For a mention of other sources where the principle of prevention is reflected, see *Environmental Protection and Sustainable Development …* (footnote 45 above), pp. 75–80.

[49] European Commission, *Caring for Our Future: Action for Europe's Environment*, 1st ed. (Luxembourg, 1997), p. 10.

[50] As to obligations of conduct and result, see articles 20 and 21 of the draft articles on State responsibility (Part I) adopted by the Commission on first reading, *Yearbook ... 1980*, vol. II (Part Two), p. 32.

[51] Dupuy, *La responsabilité internationale des États pour les dommages d'origine technologique et industrielle*, cited in the second report of Mr. Quentin-Baxter (see footnote 2 above), p. 113, footnote 77. The Experts Group on Environmental Law of the World Commission on Environment and Development noted: "While activities creating a significant risk of causing substantial harm must in principle be prevented or abated, it may well be that, in the case of certain dangerous activities, the unlawfulness will be taken away when all possible precautionary measures have been taken to preclude the materialization of the risk *and the benefits created by the activity must be deemed to far outweigh the benefits to be obtained by eliminating the risk* which would require putting an end to the activity itself" (*Environmental Protection and Sustainable Development …* (footnote 45 above), p. 79). See also article 11 on liability for transboundary environmental interferences resulting from lawful activities proposed by the Experts Group (ibid., p. 80).

[52] Dupuy, op. cit., cited in the second report of Mr. Quentin-Baxter (see footnote 2 above), p. 114, para. 46.

[53] Reuter, "Principes de droit international public", p. 593, cited in the second report of Mr. Quentin-Baxter (see footnote 2 above), p. 116, footnote 95.

"[o]bligations of reparation, therefore, are not allowed to take the place of obligations of prevention."[54]

39. A study of the various conventions involved also led Mr. Quentin-Baxter to the conclusion that, in respect of activities which bore a risk of damage, Governments retained ultimate supervisory functions, even when they passed on to private operators the duty to provide compensation and to guarantee its payment.[55] He noted further that the strictness of the standard of care tended to increase with the degree of danger inherent in the enterprise, which standard, of course, related primarily to obligations of prevention. The duty of care, operating as a function of such obligations, required the State within whose territory or jurisdiction the danger arose to work in good faith for a just solution, taking due account of all the interests involved.[56]

D. Prevention and reparation: a continuum and a compound obligation

40. Mr. Quentin-Baxter's essential approach was to deal with the subject of prevention along with reparation, treating them as part of a continuum rather than as two mutually exclusive options.[57] In short, in his conception, this topic allowed a soft approach to the problem of reconciling one State's freedom of action with another State's freedom from transboundary harm.[58] More generally, this system of "different shades of prohibition"[59] was projected as an appeal to "self-regulation" by the source State; if it could not reach agreement with the affected State, it was at least duty-bound to take objective account of the legimate interests of the affected State, whether by providing a protective regime or by providing reparation for a transboundary loss or injury not governed by an adequate or agreed regime.[60]

E. State responsibility versus obligations of prevention and liability

41. Distinguishing obligations that arise respectively from wrongful acts and from acts which international law does not prohibit, Mr. Quentin-Baxter noted that the primary aim of the draft articles he intended to develop was "to promote the construction of regimes to regulate without recourse to prohibition, the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature and to have transnational effects".[61] He further explained that the term liability was used in the sense of "a negative asset, an obligation, in contra-distinction to a right". Accordingly, it referred not only to the consequences of an obligation but rather to the obligation itself which like responsibility included its consequences.[62]

42. Thus, it was submitted that an obligation in respect of an act not prohibited would arise only when a primary rule of international law so provided. In other words, the various principles expected to be dealt with under this topic would be in the nature of an elaboration of a primary rule rather than as legal consequences of violations of a primary obligation.

43. As a further variation from the topic of State responsibility, the phrase "acts not prohibited" in the title was used, as explained, to indicate that an injured State did not have to prove the lawfulness of the activities of which it complained, as the phrase carried implicitly the enlarged meaning "acts, whether or not prohibited".[63] Persuaded by Mr. Quentin-Baxter, the Commission took an initial decision which it repeatedly reaffirmed to the effect that "the topic lay within the field of 'primary' rules, i.e. rules that are governed by and do not compete with the established system of State responsibility for wrongful acts or omissions".[64] The development of the topic of international liability, hence, the duty of prevention, would involve admitting the existence and reconciliation of "legitimate interests and multiple factors".[65] It may be recalled that principle 23 of the Stockholm Declaration[66] also referred to the criterion of certain categories of legitimate interests. As a basis for the development of the theme of "legitimate interests and multiple factors", Mr. Quentin-Baxter referred to a number of cases. He noted the following principle affirmed in the "*Lotus*" case:[67] "limitations upon the sovereignty of States depend upon the existence of primary rules of obligation, and these are to be proved, not presumed".[68] He further pointed out that

[54] Second report of Mr. Quentin-Baxter (see footnote 2 above), p. 120, para. 70; see also various conventions cited in footnote 115 of the same report. The Institute of International Law, in its resolution on environment of 4 September 1997, observed that the duty to take all necessary care to prevent damage to the environment imposed upon States, regional and local Governments and juridical or natural persons existed independently of any obligation to make reparation (*Yearbook of the Institute of International Law*, vol. 67, part II, session of Strasbourg, 1997, art. 9, p. 483). See also the preambular paragraph of its resolution of the same date entitled "Responsibility and liability under international law for environmental damage", which noted that "both responsibility and liability have in addition to the traditional role of ensuring restoration and compensation that of enhancing prevention of environmental damage" (ibid., p. 487).

[55] See the provisions cited in his second report (footnote 2 above), p. 120, footnote 116.

[56] Ibid., pp. 120–121, paras. 71–72.

[57] Mr. Yankov felt that the purpose of the topic was to deal with a "twilight zone", *Yearbook ... 1981*, vol. I, p. 226, 1687th meeting, para. 1. Others believed that the topic was concerned with the regulation of activities that were in principle useful and legitimate and should, therefore, not be prohibited but only regulated with conditions attached to the conduct. See, in this respect, the view of Mr. Riphagen (*Yearbook ... 1980*, vol. I, 1630th meeting, p. 245, paras. 29–30) and Sir Francis Vallat (ibid., 1631st meeting, p. 250, para. 36). Mr. Quentin-Baxter stated that, "[f]rom a formal standpoint, the subject-matter of the present topic must be expressed as a compound 'primary' obligation that covers the whole field of preventing, minimizing and providing reparation for the occurrence of physical transboundary harm" (fourth report (see footnote 2 above), p. 213, para. 40).

[58] Fourth report (see footnote 2 above), p. 213, para. 43.

[59] As the activities coming within the scope of this topic "are near the moving frontier between lawfulness and unlawfulness" and hence represent "different shades of prohibition", many members within the Commission and in the Sixth Committee were unwilling to describe such activities as licit or illicit (ibid., pp. 206–207, para. 20). For a mention of various views expressed in this regard, see paragraphs 20–22 (ibid.).

[60] Ibid., p. 214, para. 44.

[61] Preliminary report (see footnote 2 above), p. 250, para. 9.

[62] Ibid., para. 12.

[63] Ibid., p. 251, para. 14.

[64] Fourth report (see footnote 2 above), p. 203, para. 7.

[65] Preliminary report (see footnote 2 above), p. 258, para. 38.

[66] See footnote 18 above.

[67] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A*, *No. 10.*

[68] Preliminary report (see footnote 2 above), p. 257, para. 35.

ICJ held in the *Corfu Channel* case that every State had an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States".[69] The Court was referring to a breach of an undisputed rule of international law that is the right of innocent passage, i.e. to acts contrary to the rights of other States. This was a ruling similar to that of the arbitral tribunal in the *Trail Smelter* case.[70]

44. Further, the duty to have regard to all the interests involved could be seen to be arising from the duty to take reasonable care as well as from the application of an equitable principle. Accordingly, it was suggested that a discharge of the duty of reasonable care would involve not only taking necessary precautions to prevent damage, but also providing for an adequate and accepted regime of compensation.[71] The regulation of mutual obligations in relation to shared interests could involve "boundless choices" for States. For example, agreed safety and supervisory measures could be supplemented by conventional regimes regulating liability for damage.[72] Or a regime of care for shared environment providing equal care for individual, as well as differing, needs of States and peoples concerned could be agreed upon by taking into consideration all relevant factors.[73] The regime of reasonable care required of a State that permitted an activity the harmful effects of which might be felt outside its own borders might, for example, include obligations to collect and furnish information to seek agreement upon methods of construction or procedures or tolerable levels of contamination and to provide guarantees of reparation in case of precautions which failed to prevent injurious consequences.

F. Schematic outline proposed by Mr. Quentin-Baxter[74]

45. The above provided the conceptual backdrop for the schematic outline proposed by Mr. Quentin-Baxter, the main objective of which was "to reflect and encourage the growing practice of States to regulate these matters in advance, so that precise rules of prohibition, tailored to the needs of particular situations—including, if appropriate, precise rules of strict liability—will take the place of the general obligations treated in this topic".[75]

46. With respect to the obligation of prevention, section 2, paragraph 1, of the schematic outline provided for the duty to inform and section 2, paragraph 5, for the duty to cooperate in good faith to reach agreement, if necessary, upon the establishment of a non-binding fact-finding procedure. Further, section 6 dealt with various factors States could take into consideration with a view to achieving mutual accommodation and balancing of interests.

47. Reaction to the general analysis and approach adopted by Mr. Quentin-Baxter in his five reports and in particular to the schematic outline which he proposed was generally favourable and supportive.

48. During the discussion in the Sixth Committee of the General Assembly at its thirty-seventh session, there was preponderant support both for the general tenor of the schematic outline and, more specifically, for implementing the duty to avoid, minimize and provide reparation for transboundary losses or injuries. Some thought that the schematic outline should be reinforced to give better guarantees that that duty would be discharged. A few, on the other hand, were sceptical about the value of the topic or its viability. A few others thought that a conceptual distinction must be made between the question of prevention and that of reparation and several saw advantage in concentrating upon the latter duty. Most, however, were firmly in favour of maintaining the linkage between prevention and reparation indicated in the schematic outline.[76]

G. Prevention and liability: treatment of the topic by Mr. Barboza

49. After taking over the subject, while accepting the general orientation of Mr. Quentin-Baxter, Mr. Barboza developed the theme of international liability further. He also revisited many of the issues that had been raised during the time of Mr. Quentin-Baxter. He recommended that the question of the relationship of the topic of liability to the topic of responsibility should not be reopened. Noting that the previous Special Rapporteur had used two main guidelines to draw a conceptual distinction between his topic and that of State responsibility, one relating to the distinction between primary and secondary rules and the second emphasizing duties of prevention and "due care", and that the schematic outline had found general acceptance within the Commission and in the Sixth Committee, in spite of some reservations, he said that:

> There seemed to be a clear indication that higher approval had been given to the approach of considering transboundary loss or injury as a topic of discussion, to including prevention as an integral part of that topic, as well as to the other procedures and concepts referred to in the outline. The topic, for which a sound basis thus exists, is of concern to

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[69] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 22.

[70] See footnote 46 above.

[71] Preliminary report (see footnote 2 above), p. 260, para. 46. Mr. Quentin-Baxter further stated that "[i]f, however, the same injurious consequences occur in circumstances the possibility of which not even a vigilant State could have been expected to envisage, equity may still suggest that the State which took or allowed the action should provide compensation for the innocent victim; but other equities may outweigh that consideration" (ibid.). Moreover, he pointed out that the "criterion of actual knowledge of a source of danger may sometimes be replaced, as the test of responsibility for wrongfulness, by an assessment as to whether a lack of knowledge is compatible with the required standard of due diligence" (ibid., p. 263, para. 55).

[72] Ibid., p. 261, para. 48.

[73] As for example, in the case of the sharing of watercourses for non-navigational uses among co-riparians. Article V of the Helsinki Rules on the Uses of the Waters of International Rivers (ILA, *Report of the Fifty-second Conference, Helsinki, 1996* (London, 1967), pp. 484 et seq.; and reproduced in part in *Yearbook … 1974*, vol. II (Part Two), document A/CN.4/274, p. 357, para. 405); and article 6 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses suggested various such factors. It is also relevant to note the following observation made in the *Lake Lanoux* case: conflicting interests must be reconciled by mutual concessions and agreements involving broad comparison of interests and reciprocal goodwill (UNRIAA, vol. XII (Sales No. 63.V.3), p. 308).

[74] Fourth report, annex, p. 223 (see footnote 2 above).

[75] Fourth report (footnote 2 above), p. 216, para. 50.

[76] Ibid., p. 204, para. 10.

a large number of countries and will apparently have an interesting role to play in contemporary international law.[77]

50. Mr. Barboza noted that the main aim of the topic was to promote a regime of liability by way of dealing with the consequences of the damage that might arise out of the transboundary harm caused by activities not prohibited by international law. Within an overall scheme of such a regime of liability he envisaged a proper role for prevention:

> [I]n the absence of an agreed régime for assigning direct responsibility to individuals in certain cases, the State not only would be liable when there were injurious consequences of certain activities carried out in its territory or under its control, but also would be responsible for obligations of prevention, i.e. all the duties involved in avoiding or minimizing such consequences.[78]

51. Section 2, paragraph 1, of the schematic outline envisaged a duty for the acting State to provide the State likely to be affected by loss or injury to persons or things within the territory or control of that State because of an activity within its territory or control "with all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable, and the remedial measures it proposes". Similarly, section 2, paragraph 5, provided for the acting State's obligation to cooperate in good faith to reach agreement with the affected State, in case of a dispute arising between the affected State and the acting State as to whether the measures proposed were sufficient to safeguard the interests of the former. For this purpose, it was further suggested that a non-binding fact-finding and conciliation procedure might be followed. The schematic outline, however, provided in the first sentence of sections 2, paragraph 8, and 3, paragraph 4, that failure to comply with these two obligations did not give rise to any right of action, while specifying that the acting State

> has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.[79]

52. Reviewing the above propositions of the schematic outline, in particular the first sentence of sections 2, paragraph 8, and 3, paragraph 4, and in view of the doubts expressed by some members of the Commission about the value of procedures which could be neglected without engaging the responsibility of the State for wrongfulness, Mr. Barboza recommended that the first sentence in sections 2, paragraph 8, and 3, paragraph 4, should be deleted. In his view, failure to fulfil the obligations contained in sections 2 and 3 would entail drawing certain adverse procedural consequences against the acting State, which the outline itself had noted in section 5, paragraph 4, according to which "the affected State shall be allowed a liberal recourse to inferences of fact and circumstantial evidence in order to establish whether the activity does or may give rise to loss or injury".[80] Pointing out the relevance of the *Trail Smelter* case[81] in this respect, Mr. Barboza noted that, under the latter parts of sections 2, paragraph 8, and 3, paragraph 4, of the outline, the acting State had an obligation of due diligence to monitor the activity continuously and to take whatever remedial measures it considered necessary and feasible to safeguard the interests of the affected State. Moreover, where injury actually resulted, there was a provision to make reparation as provided in section 4, paragraph 2, of the schematic outline.[82]

53. Subject to the above considerations, and noting that the obligation of prevention in a regime of liability for risk was only an obligation of due diligence, Mr. Barboza came to the conclusion that the obligation laid down at the end of sections 2, paragraph 8, and 3, paragraph 4, formed part of a regime of prevention whose primary effects, which came into play only after injury had occurred, were to aggravate the legal and material position of the source State.[83]

54. With respect to activities involving a risk of transboundary harm, Mr. Barboza concluded that a State engaging in such activities should notify, consult and negotiate a mutually accepted regime governing such an activity and, in the process, if the States so desired, they could even prohibit the activity.[84] He noted, however, that there was no requirement of prior consent from the States likely to be affected to be complied with by the State initiating such activities in its territory.[85]

55. Elaborating on the various requirements of prevention, Mr. Barboza identified at least six elements:[86]

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[77] Preliminary report (see footnote 5 above), p. 99, para. 9.

[78] Second report (see footnote 5 above), p. 146, para. 5.

[79] Fourth report (see footnote 2 above), p. 224.

[80] Ibid., pp. 224–225.

[81] See footnote 46 above.

[82] Second report, p. 149, para. 20; p. 150, paras. 24–25; p. 154, para. 41(*c*); and p. 159, para. 63. See also the preliminary report, p. 100, para. 16 (*c*) (footnote 5 above).

[83] Second report, p. 160, para. 66. See also draft article 18 proposed by Mr. Barboza in his sixth report, annex, p. 108 (footnote 5 above).

[84] Second report, pp. 152–154, paras. 34–40. See also Barboza, "International liability for the injurious consequences of acts not prohibited by international law and protection of the environment", p. 332.

[85] The arbitral tribunal in the *Lake Lanoux* case, after assigning the duty to the acting State to consider any negotiation in good faith with the affected State(s), asserted:

> "International practice reflects the conviction that States ought to strive to conclude such agreements [regarding the industrial use of international rivers] … But international practice does not so far permit more than the following conclusion: the rule that States may utilize the hydraulic power of international watercourses only on condition of a *prior* agreement between the interested States cannot be established as a custom, even less a general principle of law."

(*International Law Reports, 1957* (London), vol. 24 (1961), p. 130)

[86] See Barboza, loc. cit., pp. 334–336. Other commentators also examined various components of the principle of prevention. One of them referred to the various obligations involved in the duty of prevention in a slightly different and more elaborate manner. According to him, the duty of prevention would involve the principle of cooperation in scientific research, systematic observations and assistance, the principle of exchange of information, the principles of prior notice, environmental impact assessment and consultation, the principle of risk assessment, warning and emergency assistance (Iwama, "Emerging principles and rules for the prevention and mitigation of environmental harm", *Environmental Change and International Law: New Challenges and Dimensions*). See also other contributions in that volume, particularly those of Brown Weiss and Orrego Vicuña.

In its 1997 resolution on responsibility and liability under international law for environmental damage (see footnote 54 above), the Institute of International Law noted that the principles of responsibility and liability were designed to encourage prevention and provide for restoration and compensation (art. 2). The principle of prevention, it was suggested, included mechanisms concerning notification and consultation, regular exchange of information and the increased utilization of environmental impact assessments. It was further noted that the implications of

(*a*) Prior authorization of an activity where it involves risk of transboundary harm. Such authorization, once provided by the State of origin, could also constitute, in his view, evidence of "knowledge" on the part of the State within the requirements of the *Corfu Channel* case (i.e. evidence of "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[87]);

(*b*) Risk assessment: this principle would require every State to undertake an assessment to determine the extent and nature of the risk of the activity, including an evaluation of the possible impact of that activity on persons or property as well as on the environment of other States. Such a requirement, Mr. Barboza noted, was supported by the *Trail Smelter* case,[88] principle 17 of the Rio Declaration[89] and, more notably, by the provisions of the 1991 Convention on Environmental Impact Assessment in a Transboundary Context. By way of further clarification of this principle, he observed that such an assessment could consider the type or source of energy used in a manufacturing activity, substances manipulated in production, the location of the activity and its proximity to the border area, the vulnerability of zones of affected States situated within the reach of an activity, etc. He also noted that by way of risk assessment States could also agree upon a list of substances that are considered to be dangerous or hazardous or list the activities that are presumed to be harmful in respect of which the requirement of authorization of assessment could be made mandatory;[90]

(*c*) The principle of information and notification, which is a logical consequence of any conclusion reached on the risk involved upon assessment. This principle is well recognized in the context of the use of international watercourses;[91]

(*d*) The principle of consultations is essentially a principle of cooperation with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm. Like Mr. Quentin-Baxter, Mr. Barboza also noted that any effort involved in such consultations should aim at a balance of interests of all the States concerned; and that in the absence or upon failure of consultations or negotiations held in good faith, the State of origin was free to proceed with the risk activity on its own, taking unilaterally such measures of prevention as it deemed appropriate under the circumstances, and further making necessary arrangements for reparation for any significant transboundary harm that arises in case of an accident;[92]

(*e*) The principle of unilateral preventive measures, which obligates the State of origin to take legislative, administrative and other actions to ensure that all appropriate measures are adopted to prevent or minimize the role of transboundary harm of the activity;[93]

(*f*) Finally, Mr. Barboza, like Mr. Quentin-Baxter, noted that the standard of due diligence that should be deemed applicable with regard to the principle of prevention was generally considered to be proportional to the degree of risk of transboundary harm in a particular case. Mr. Quentin-Baxter, however, while putting forward a similar proposition, stated that the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability. He further stated that standards of protection should take into account the means at the disposal of the acting State and the standards applied in the affected State and in regional and international practice.[94]

H. Draft articles provisionally adopted by the Commission in 1994 and draft articles recommended by its Working Group in 1996

56. Articles adopted provisionally by the Commission in 1994 dealt with prevention in terms of duties of prior authorization (art. 11), risk assessment (art. 12), adoption of legislative, administrative and other actions by States (art. 14), as well as duties to notify and inform (art. 15), to exchange information (art. 16), to provide information to the public (art. 16 *bis*) and to consult (art. 18), the rights of States likely to be affected (art. 19) and factors relevant for achieving an equitable balance of interest (art. 20).

57. The question arose whether measures aimed at preventing further harm, including any measures to be taken by way of restoration or rehabilitation of the situation prior to the incidence of harm caused by an accident, should be regarded as a legitimate part of the concept and duty of prevention.

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the precautionary principle, the "polluter pays" principle and the principle of common but differentiated responsibility in the context of responsibility and liability should also be considered under preventive regimes (art. 13).

[87] See footnote 69 above. For an elaboration of the concept of prevention and in particular the requirement of prior authorization, see article 16 proposed by Mr. Barboza in the annex to his sixth report (footnote 5 above), p. 107; see also article I of the annex to his eighth report (ibid.), p. 67; and his ninth report (ibid.), p. 193, para. 25.

[88] See footnote 46 above.

[89] See footnote 37 above.

[90] See article 11 proposed by Mr. Barboza in the annex to his sixth report (footnote 5 above), p. 107. See also article 10 approved by the Working Group of the Commission in 1996 (footnote 13 above), p. 101. Mr. Barboza noted further: "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." He suggested though that Governments "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" (eighth report (footnote 5 above), p. 64, para. 17).

[91] See his sixth report, annex, art. 11 (footnote 5 above), p. 107; see also article 15 proposed in the ninth report (ibid.) and comments thereto, pp. 193–195, paras. 26–38.

[92] Eighth report (footnote 5 above), pp. 65–67, paras. 18–28. Mr. Barboza also suggested in 1992 that obligations of prevention be attached to States and that "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" (ibid., p. 63, para. 11). However, this suggestion was not found acceptable, and as a result these were reincorporated into the main text of the draft articles. See ninth report (footnote 5 above), p. 190, para. 9.

[93] Barboza, loc. cit., p. 336. See also his comments regarding article 8 on prevention, in his seventh report (footnote 5 above), p. 77, para. 20, and article 16 (ibid., p. 84, para. 45). See also *Yearbook … 1996*, vol. II (Part Two), annex I, commentary to articles 4 and 7 recommended by the Working Group, p. 110, paras. (3) and (4), and p. 117, para. (1).

[94] Fourth report (see footnote 2 above), schematic outline, sect. 5, p. 224.

58. Mr. Barboza had proposed in his ninth report an article 14 which incorporated the concept of prevention *ex post*, placing a duty on the source State to ensure through legislative, administrative or other measures that the operator of a risk-bearing activity took all necessary measures, including the use of best available technology to contain and minimize harm or, in the event of an accident, to cushion the unleashed effect before it reached the border or to adopt other measures to help contain such effects.[95]

59. He elaborated further on the concept of prevention *ex post* and also dealt with the concept of "response" measures in his tenth report. He referred to a number of conventions which dealt with those concepts. With respect to response measures, taking the example of the Convention on the Regulation of Antarctic Mineral Resource Activities, it was suggested that these would include measures of prevention *ex post* as well as some types of measures known as response action, as in the case of clean-up and removal, whose purpose was not to limit or minimize transboundary harm.

60. In order to meet the objection raised by some members of the Commission to the concept of prevention *ex post*,[96] Mr. Barboza proposed to replace it by the concept of response measures and to define the latter only to mean prevention *ex post*: "'Response measures' means any reasonable measures taken by any person in relation to a particular incident to prevent or minimize transboundary harm."[97]

61. The Drafting Committee, which considered the proposal made by Mr. Barboza in article 14 to include measures of prevention *ex post* in the concept of prevention, rejected his view and opted for the approach taken by those members who opposed its inclusion.

62. Accordingly, article 14 provisionally adopted by the Commission in 1994 did not include measures of prevention *ex post* in the concept of prevention. As noted in the commentary, "[t]he expression 'prevention' in this article, pending a further decision by the Commission, is intended to cover only those measures taken before the occurrence of an accident in order to prevent or minimize the risk of the occurrence of the accident".[98]

63. The Commission, however, reversed its position in 1995. It noted that the Special Rapporteur's original proposal of including prevention *ex post* under prevention and not reparation was "prudent and reasonable".[99] The Commission further noted that the same approach had been adopted in several agreements.

64. The Working Group of the Commission reviewed the draft articles on the topic in 1996 and recommended them for adoption by the Commission.[100] In addition, the Working Group adopted article 4 on prevention (a revised version of article 14 provisionally adopted by the Commission in 1994) as a statement of general principle:

> States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm and, if such harm has occurred, to minimize its effects.[101]

65. It can be seen that the concept of prevention, as adopted, includes measures to be taken to contain and minimize the effects of harm resulting from an accident, in addition to measures required to be taken by way of management of risk prior to any such accident. Thus, the Working Group endorsed the Commission's view that the concept of prevention should include measures of prevention *ex ante* and measures *ex post*.[102]

66. The above-mentioned recent resolution of the Institute of International Law on responsibility and liability under international law for environmental damage referred to the need for the adoption of additional mechanisms like preparation of necessary contingency plans and appropriate restoration (safety) measures directed to prevent further damage and to control, reduce and eliminate damage once it is caused as part of the concept of prevention (art. 14). It further suggested that failure to comply with the obligations on response action and restoration should engage civil liability of operators. Compliance with the obligations, however, would not preclude responsibility for harm actually caused (art. 15). States and other entities undertaking response action or restoration are entitled to be reimbursed by the entity liable for the cost incurred (art. 16).

67. Together with article 6 on cooperation, article 4 recommended by the Working Group provides the basic foundation for the remaining articles on prevention. The obligation for prevention extends to taking appropriate measures to identify activities creating a risk of causing significant transboundary harm. This is an obligation which is of a continuing character.

68. The obligation involved in article 4 is an obligation of conduct and not of result. Accordingly, the State is obliged to take the necessary legislative, administrative and other actions for enforcing its laws, decisions and policies. This also involves an obligation of due diligence, which is defined by a standard broader than the "national standard".[103] As noted in the

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[95] Ninth report (footnote 5 above), p. 192, para. 19.

[96] Tenth report (footnote 5 above), p. 132, para. 7.

[97] Ibid., p. 133, para. 22.

[98] *Yearbook ... 1994*, vol. II (Part Two), p. 170, para. (10) of the commentary to draft article 14.

[99] *Yearbook ... 1995*, vol. II (Part Two), p. 87, para. 389.

[100] See articles 9–19 and commentaries thereto, *Yearbook ... 1996*, vol. II (Part Two), annex I, pp. 118–129.

[101] Ibid., p. 101.

[102] Mr. Barboza noted in his tenth report (footnote 5 above), p. 132, para. 11:

> "It is thus clear that the concept of prevention is strictly applicable both to activities to avoid incidents that can lead to transboundary harm and to activities to prevent the effects of the incident from reaching their full potential. Prevention of incidents, or prevention *ex ante*, is just one aspect of prevention in general, which would include prevention *ex post*, because the fewer incidents there are, the less harm there will be. It is thus not possible, methodologically, to include in the chapter on reparation actions *ex post* to prevent harm".

[103] The Institute of International Law stated in this respect that the obligation of due diligence must be objectively measured not only in accordance with generally accepted international rules and standards but also in accordance with objective standards relating to the conduct to be expected from a good Government (art. 3 of the resolution on responsibility and liability under international law for environmental

Donoghue v. *Stevenson* case,[104] one "must take reasonable care to avoid acts or omissions which [one] can reasonably foresee would be likely to injure [one's] neighbour". A "neighbour" is one who is closely and directly affected by the act whom one ought reasonably to have in contemplation as being so affected when one is concerned with acts and omissions in question. As observed by the Commission, the due diligence standard must further be directly proportional to the degree of risk of harm. Issues such as the size of the operation, its location, special climatic conditions, materials used in the activity and whether conclusions drawn from the application of these factors in a specific case are reasonable are among the factors to be considered. What is a reasonable standard of care or due diligence may change with time. Accordingly, discharge of the due diligence obligation requires States to keep abreast of technological changes and scientific developments.[105]

69. As stated in the Rio Declaration, standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular, developing countries.[106]

70. The obligation of prevention further obliges a State to undertake unilateral measures to prevent or minimize the risk of significant transboundary harm. Such an obligation requires States to take measures to ensure reduction of harm to the lowest point, consistent with available scientific knowledge and technology as well as economic capacity.

A. Activities coming within

damage) (see footnote 54 above). Failure to enact appropriate rules may not amount to a breach of an obligation but may result in its responsibility if harm ensues as a consequence, including damage caused by operators within the State's jurisdiction and control (art. 4).

[104] United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council* (London, 1932).

[105] See the commentary to article 4, *Yearbook …1996*, vol. II (Part Two), annex I, pp. 110–111.

[106] Principle 11 (footnote 37 above). See also principle 23 of the Stockholm Declaration (footnote 18 above). It is the view of the Commission, therefore, "that the level of economic development of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence" (para. (12) of the commentary to article 4) (see footnote 105 above).

CHAPTER III

Scope of the draft articles

The scope of the topic

71. Identifying activities coming within the scope of the present topic is a task in which the Commission has engaged from the very beginning of its work. Mr. Quentin-Baxter considered that the topic should deal with a wide variety of activities.[107] A majority within the Commission later endorsed the view that the "draft could be limited to transboundary problems pertaining to the physical environment and that questions involving the most delicate problems that might arise in the economic sector could be set aside".[108]

72. Mr. Quentin-Baxter's reference to "the physical environment"[109] had given rise to debate within the Commission and the General Assembly both in 1980 and 1982. In response, the Special Rapporteur stated:

> It should therefore be confirmed that there was never an intention to propose a reduction in the scope of the topic to questions of an ecological nature, or to any other subcategory of activities involving the physical uses of territory; nor, indeed, did any speaker in the Sixth Committee urge the desirability of such a reduction.[110]

73. It is understood that the topic should deal with those activities which have a risk of causing substantial or significant transboundary harm. It was explained by Mr. Quentin-Baxter that the term "risk" in this connection might refer to an inherent danger and might even imply an exceptionally high level of danger a connotation more exactly expressed, in his view, by the term "ultra-hazard". Further, an "ultra-hazard" was perceived as a danger that rarely materialized but that might, on that rare occasion, assume catastrophic proportions. It could also include, in his view, dangers such as air pollution that were insidious and might have massive cumulative effects.

74. Accordingly, article 1 proposed by Mr. Quentin-Baxter in his fifth report provided on the scope of the draft articles as follows:[111]

[107] The following activities were mentioned: "use and regulation of rivers crossing or forming an international boundary and avoidance of damage from floods and ice; use of land in frontier areas; spread, across national boundaries, of fire or any explosive force, or of human, animal or plant disease; activities which may give rise to transboundary pollution of fresh water, of coastal waters or of national airspace, or to pollution of the shared human environment, including the oceans and outer space; development and use of nuclear energy, including the operation of nuclear installations and nuclear ships and the carriage of nuclear materials; weather modification activities; overflight of aircraft and space objects involving a risk of accidental damage on the surface of the earth, in airspace or in outer space; and activities physically affecting common areas or natural resources in which other States have rights or interests." (Fourth report (footnote 2 above), p. 202, footnote 8)

[108] See the remarks of the Chairman of the Commission, Mr. Paul Reuter, when introducing the Commission's report in the Sixth Committee at the thirty-seventh session of the General Assembly (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 37th meeting, para. 12). Although some delegations in the Sixth Committee were disappointed, most were of the same opinion as the majority of the Commission (fourth report (footnote 2 above), p. 204, para. 12).

[109] Third report (footnote 2 above), p. 61, para. 48.

[110] Fourth report (footnote 2 above), p. 206, para. 17.

[111] Fifth report (footnote 2 above), p. 155.

The present articles apply with respect to activities and situations which are within the territory or control of a State, and which give rise or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of any other State.

The word "situation" was further explained to mean "a state of affairs, within the territory or control of the source State, which gives rise or may give rise to physical consequences with transboundary effects".[112] The Commission took the view at an early stage of its work that the scope should not be settled or narrowed until the content could be evaluated.[113]

75. Mr. Barboza approached the problem from a different angle. According to him, the concept of danger inherent in the concept of risk

is not absolute, but relative. It could vary, for example, according to the geographical location of the activity in question: location in the interior of a country with extensive territory is not the same as in a smaller country, or near a border, or on an international river, or in an area where there are steady or prevailing winds.[114]

76. Moreover, he felt that the articles of the proposed draft would apply "even if the risk were not foreseeable in the general sense, provided that the full scope of that risk was known to the State of origin".[115]

77. As regards situations of the type referred to in article 1 proposed by Mr. Quentin-Baxter, Mr. Barboza noted that there were two types of such situations: first, those arising from a human activity, for example, the construction of a dam or the accumulation of highly toxic materials; and secondly, those arising naturally in the absence of human activity, for example, spontaneous forest fires, pests, floods and the like. According to him, only situations of the first type would fit within the regime because they arise from activities involving risk[116] and not the latter which would come under the regime of responsibility for an act or omission in respect of the situation.[117] In this case, however, the State may absolve itself from any liability by demonstrating that it had employed all the means at its command to prevent it.[118]

78. As for activities that cause harm in the normal course of their operation, Mr. Barboza felt that they amounted to a continuous violation of the obligation of a State to prevent all significant (i.e. above a threshold of tolerance) transboundary harm caused by intentional or negligent State conduct. Accordingly, in his view, such a violation would amount to a wrongful act involving State responsibility.[119]

79. Mr. Barboza also endorsed the various conclusions drawn by the Commission during the time of Mr. Quentin-Baxter on the scope of the topic, which included three limitations or criteria: first, the transboundary element: effects felt within the territory or control of one State must have their origin in an activity or situation which takes place within the territory or control of another State; secondly, the element of a physical consequence: this involves a connection of a specific type, i.e. the consequence has to stem from the activity in question by reason of natural law. Thus, the causal relationship between the activity and the harmful effects has to be established through a chain of physical events. Thirdly, in keeping with the *Lake Lanoux* decision, these physical events must have social repercussions.[120]

80. Rejecting suggestions to expand the scope to include economic and social activities, Mr. Barboza reiterated that the topic should be confined to those activities with physical consequences where a cause-and-effect relationship could easily be established between the activity and the injury.[121]

81. While Mr. Barboza recommended several different formulations on the scope of the draft articles, the one provisionally adopted in 1994 read as follows:

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.[122]

82. The Commission considered the matter of the scope of the topic but could not arrive at any final conclusion on the type of activities required to be encompassed. At its forty-seventh session, in 1995, the Commission established a Working Group on the identification of dangerous activities.[123] It reviewed the ways in which the scope of some multilateral treaties dealing with transboundary harm and with liability and prevention had been defined in terms of the activities or substances to which they applied. The Working Group recognized that, while a precise definition of activities might be difficult to achieve, at some

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[112] Ibid., p. 166, para. 31.

[113] Fourth report (footnote 2 above), p. 204, para. 10.

[114] Third report (footnote 5 above), p. 49, para. 10.

[115] Ibid., p. 50, para. 14.

[116] Mr. Barboza noted moreover that several factors engendered responsibility in respect of human activities: "unjust enrichment, a disruption of the balance of rights and interests of States, and accordingly a violation of the principle of equality of States before the law." (Ibid., p. 51, para. 28)

[117] Ibid., paras. 25–26.

[118] Ibid., para. 30.

[119] See Barboza, loc. cit., p. 319. Zemanek distinguished between those activities which cause injury only in the event of an accident and those which permanently cause the emission of harmful substances and concluded that in the latter case, while society seems to accept a certain degree of pollution, if the limit established was exceeded either by accident or by a change in technical standards, the resulting damage must be compensated for ("La responsabilité des États pour faits internationalement illicites, ainsi que pour faits internationalement licites", p. 17, cited in Mr. Barboza's second report (footnote 5 above), p. 151, footnote 32). Handl excluded activities which involve permanent emissions of harmful substances from the scope of the present topic. In his view, "where States intentionally discharge pollutants in the knowledge that such discharge is bound to cause, or will cause with substantial certainty, significant harmful effects transnationally, the source State will clearly be held liable for the resulting damage. The causal conduct will be deemed internationally wrongful. Most cases of injurious transboundary environmental effects involve continuous transboundary pollution. Most of these situations consequently intrinsically involve questions of State responsibility" ("Liability as an obligation established by a primary rule of international law: some basic reflections on the International Law Commission's work", pp. 58–59, cited in Mr. Barboza's second report (footnote 5 above), p. 152, footnote 33).

[120] *Yearbook ... 1987*, vol. II (Part Two), p. 40, para. 126.

[121] Ibid., p. 44, para. 155.

[122] *Yearbook ... 1994*, vol. II (Part Two), p. 161. For an earlier formulation proposed on a trial basis by Mr. Barboza as draft article 2 giving a list of dangerous substances, see his sixth report (footnote 5 above), pp. 87–89, paras. 15–21, and annex, p. 105. It is noted that the "Sixth Committee was not generally favourable to the idea of a list of dangerous substances". See his seventh report (footnote 5 above), p. 79, para. 26.

[123] *Yearbook … 1995*, vol. II (Part Two), p. 89, para. 405.

stage it would be useful to specify a list of activities. However, it took the view that the work of the Commission could proceed for the time being taking into consideration the type of activities listed in various conventions dealing with the issues of transboundary harm, as for example, the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, the 1992 Convention on the Transboundary Effects of Industrial Accidents and the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.

83. The Commission accepted these conclusions. Further, it felt that the specification of the activities falling within the scope of the subject would depend upon the provisions on prevention to be adopted by the Commission and the nature of the obligations involved.[124]

84. The Working Group of the Commission accordingly proposed in 1996 that article 1 read as follows:

> The present articles apply to:
>
> (*a*) Activities not prohibited by international law which involve a risk of causing significant transboundary harm [; and
>
> (*b*) Other activities not prohibited by international law which do not involve a risk referred to in subparagraph (*a*) but none the less cause such harm;]
>
> through their physical consequences.[125]

85. While the members of the Working Group had different reasons for doing so, they all supported the view that at the current stage there was no need to spell out the activities to which the draft articles applied. The article thus recommended covers those activities which involve a "risk of causing significant transboundary harm".[126] Moreover, the element of "risk" was intended to limit the scope of the topic and excluded those activities which caused transboundary harm in their normal operation, such as, for example, creeping pollution.[127]

86. The criterion of "physical consequences", as has already been explained, would exclude transboundary harm caused by State policies in monetary, socio-economic or similar fields. It implies a connection of a very specific type. It means that the activities covered in these articles must themselves have a physical quality and the consequences must flow from that quality, not from an intervening policy decision.

B. The concept of significant harm: the question of a threshold

87. In defining the scope of the topic, a further question arises as to the type of harm that is required to be prevented. It is admitted that a certain level of harm is inevitable in the normal course of pursuing various developmental and other beneficial activities where such activities have a risk of causing transboundary harm. However, it is equally admitted that substantial transboundary harm is to be avoided or prevented by taking all measures practicable and reasonable under the circumstances. This was the approach taken by the Montreal Rules adopted by ILA.[128] It was thus recognized that "it is impossible to formulate a general rule of international law fixing a level at which the damages produced by transfrontier pollution can be deemed to be substantial".[129] As has been pointed out, the "yardstick must rather be determined in the light of the technical standard and the level of pollution generally accepted in the region concerned or even of the level of general damage caused by human influence on the environment".[130]

88. Mr. Quentin-Baxter, while approvingly quoting the above position of ILA, further made the point that "the responsibility of the source State will not be engaged unless the State authorities had the means of foreseeing that loss or injury was likely to be caused, as well as the duty to prevent its occurrence".[131] Moreover, he observed that, while the occurrence of loss or injury was a pure question of fact, "its legal significance has to be estimated in whatever context the States concerned have themselves provided".[132] In other words, if States concerned were not to regard the kind of loss or injury that occurred as giving rise to any right of reparation, that circumstance would clearly be decisive of any claim. In this sense, identifying or fixing the level at which harm is to be regarded as substantial or significant is not entirely a function of arriving at the same through pure scientific evidence and technique, even though inputs from that angle would not only be desirable but necessary.

89. The above theme reflected the policy of the schematic outline presented by Mr. Quentin-Baxter. Accordingly, the important objective of the scheme was to promote agreements between States in order to reconcile, rather than inhibit, activities which were predominantly beneficial, despite some nasty side effects. It was further recommended that such agreements should aim at mutual accommodation rather than mutual restriction, offer adequate safeguards and arrange for a better distribution of cost and benefits.[133] It was therefore suggested that agreements to be entered into between States might deal with (*a*) the way in which a loss or injury should be characterized, and whether the kind of loss or injury was foreseeable; (*b*) whether the loss or injury was substantial; and (*c*) whether the quantum of reparation was affected by the question of sharing, or by a change in the circumstances that existed when the activity which gave rise

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[124] Ibid., para. 408. For the view that the articles on prevention should essentially be directed at the establishment of an environmental impact assessment system and that the activities to which they applied should be described in precise detail, see *Yearbook ... 1993*, vol. II (Part Two), p. 24, para. 119.

[125] *Yearbook … 1996*, vol. II (Part Two), annex I, p. 101.

[126] For a definition of "risk of causing significant transboundary harm", see article 2 (ibid.).

[127] *Yearbook … 1994*, vol. II (Part Two), p. 164, para. (21) of the commentary to article 1.

[128] ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 1–3, resolution No. 2 1982 on legal aspects of the conservation of the environment, adopted by ILA at its Sixtieth Conference, held at Montreal, Canada, from 29 August to 4 September 1982.

[129] Paragraph 8 of the comments on article 3 submitted by the Committee on Legal Aspects of the Conservation of the Environment, ibid., p. 162, cited in Mr. Quentin-Baxter's fourth report (see footnote 2 above), p. 209, para. 27.

[130] Paragraph 9 of the comments on article 3, ibid., p. 163.

[131] Fourth report (footnote 2 above), pp. 209–210, para. 28.

[132] Third report (footnote 2 above), p. 57, para. 27.

[133] Ibid., pp. 59–60, paras. 37 and 39.

to the loss or injury was established.[134] Furthermore, in order to assist States, section 6 of the schematic outline provided a list of factors which could be taken into consideration by way of balancing the interests involved.

90. Mr. Quentin-Baxter therefore concluded that "[n]ot all transboundary harm is wrongful; but substantial transboundary harm is never legally negligible". Thus,

> [o]n the scale of harm, what lies on the far side of the point of wrongfulness is prohibited; and disobedience of that prohibition engages the rules of State responsibility. On the near side of the point of wrongfulness, activities which generate, or threaten to generate, substantial transboundary harm are carried on subject to the interests of other States. Those interests may be quantified ... or they may be at large.[135]

91. Mr. Barboza also generally agreed with Mr. Quentin-Baxter. He hoped that, with respect to activities involving a risk of causing transboundary harm, "injury was the consequence of lawful activities and had to be determined by reference to a number of factors". "When building a régime", he added, "States might negotiate the extent of the injury flowing from the activities contemplated in the agreement and thus resolve, among themselves, the question of the threshold of injury above which the liability of a State would be engaged".[136] Some members of the Commission and delegations in the Sixth Committee agreed with the approach that the concept of danger was relative and that it was for the States to identify the levels at which it could be regarded as "substantial", while others preferred a clearer indication of the concept of injury or the definition of "substantial harm" by giving reference to specific types of dangerous but lawful activities or substances.

92. Even though Mr. Barboza was of the view that no specific list or specification of dangerous substances could be attempted satisfactorily to define the concept of injury and hence the scope of the present topic, in order to accommodate the persistent view of some, he explored the possibility of listing not activities but substances which were inherently dangerous so that certain activities relating to them would most likely carry the risk of causing transboundary harm.[137]

93. Mr. Barboza's above proposal elicited three general views within the Commission: some members welcomed the list of substances, three members approved it only if such a list were to be exhaustive, and yet other members did not agree with formulating any list. In view of this, as a further clarification, Mr. Barboza observed that a list of such dangerous activities or substances would not in any case eliminate the need for an assessment of the risk involved on the basis of many factors which had to be taken into account. He pointed out that such factors could include: the type or source of energy used in a manufacturing activity, the substances manipulated in production, the location of the activity and its proximity to the border area, the vulnerability of the zones of affected States situated within the reach of the effect of an activity, etc.[138]

94. Article 2 (*a*) provisionally adopted by the Commission in 1994 defined "risk of causing significant transboundary harm" as encompassing "a low probability of causing disastrous harm and a high probability of causing other significant harm". This formulation treated threshold as a combined effect of risk and harm instead of separately dealing with "risk" and "harm" and required that such a combined effect should reach a level that was deemed significant.

95. The above formulation was later approved in 1996 by the Working Group of the Commission, which felt that obligations of prevention imposed on States should not only be reasonable but also sufficiently limited, as the activities under discussion were not prohibited by international law; there was a great need to reconcile the freedom of States in utilizing resources within their own territories for the development and benefit of their population with the requirement not to cause significant harm to other States.[139]

96. The proposed definition includes activities having a high probability of causing harm which, while not disastrous, are still significant. It would also include activities which have a low probability of causing disastrous harm, i.e. ultrahazardous activities. It would, however, exclude activities where there is a very low probability of causing significant transboundary harm.

97. The concept of "significant harm" was further clarified to mean something more than "detectable" or "appreciable" but not necessarily "serious" or "substantial". The harm must lead to real detrimental effects on such aspects as human health, industry, property, environment or agriculture in other States, which could be measured by fac-

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[134] Fourth report (footnote 2 above), p. 217, para. 54.

[135] Second report (footnote 2 above), p. 117, paras. 59–60.

[136] *Yearbook ... 1987*, vol. II (Part Two), pp. 40–41, para. 127.

[137] See article 2, annex to the sixth report (footnote 5 above), p. 105. See also pages 87–89, paras. 15–21 (ibid.).

The model adopted by Mr. Barboza for this purpose was based on a draft prepared by the Committee of Experts on Compensation for Damage caused to the Environment for the European Committee on Legal Cooperation of the Council of Europe on State liability for dangerous activities. That draft defined dangerous substances as those which created a significant risk of harm to persons or property or the environment such as flammable and corrosive materials, explosives, oxidants, irritants, carcinogens and toxic, ecotoxic and radiogenic substances as indicated in an annex. See Council of Europe, secretariat memorandum prepared by the Directorate of Legal Affairs (CDCJ (89) 60), Strasbourg, 8 September 1989.

Schwebel suggested that only a certain type of harm that had an impact of some consequence, for example, for health, industry, agriculture or environment, in the affected State or affected transboundary areas would require to be prevented. According to another observation, transboundary harm involving radiological, toxic or otherwise highly dangerous substances tended to be counted automatically as significant transboundary harm and hence should be prevented. See Handl, "National uses of transboundary air resources: the international entitlement issue reconsidered", p. 420. It may also be observed that different standards are prescribed as safe levels for clean air, drinking water or exposure to heat or radiation. Similarly, the levels of pesticides and chemicals used in agriculture or other fields have also given rise to standards of safe use.

[138] See *Yearbook ... 1990*, vol. II (Part Two), pp. 92–93, paras. 479–483; and Barboza, loc. cit., p. 335.

[139] *Yearbook … 1996*, vol. II (Part Two), pp. 107–108, para. (2) of the commentary to article 2. Mr. Quentin-Baxter had observed:

> "It is important, as a matter of legal policy, that duties of reparation should not be separated from, or substituted for, duties of prevention. Treaty regimes provide ample evidence that compensation is a less adequate form of prevention—prevention after the event. It is a justified way of filling gaps when full prevention is not possible—either in absolute terms or in terms of the economic viability of a beneficial activity; but it should not be allowed to become a tariff for causing avoidable harm."

(Second report (footnote 2 above), p. 123, para. 91)

tual and objective standards. It was also suggested that, considering that the activities involved are not prohibited by international law, "the threshold of intolerance of harm cannot be placed below 'significant'".[140]

98. The term "significant" thus denotes factual and objective criteria and involves a value judgement which depends on the circumstances of a particular case and the period in which such determination is made. In other words, a deprivation which is considered to be significant at one time may not be regarded so later.[141]

C. The criterion of transboundary harm: the concept of territory, control and jurisdiction

99. It may be recalled that Mr. Quentin-Baxter had proposed five draft articles in 1984 in his fifth report, article 1 of which defined the scope of the articles,[142] i.e. activities or situations which are within the territory or control of a State and which give rise or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of other States.

100. The terms "territory or control" were defined in article 2, paragraph 1, as follows:

(*a*) In relation to a coastal State, as extending to maritime areas insofar as the legal regime of any such area vested jurisdiction in that State in respect of any matter;

(*b*) In relation to a State of registry, or flag State, of any ship, aircraft or space object, as extending to the ships, aircraft and space objects of that State while exercising a right of continuous passage or overflight through the maritime territory or airspace of any other State;

(*c*) In relation to the use or enjoyment of any area beyond the limits of national jurisdiction, as extending to any matter in respect of which a right was exercised or an interest asserted.[143]

101. The definition thus proposed by Mr. Quentin-Baxter includes first the land territory over which a State enjoys sovereignty, the maritime zones over which the coastal State enjoys sovereignty, sovereign rights or exclusive jurisdiction and the airspace above its territory or territorial sea under its jurisdiction. It also takes into account the jurisdiction a State enjoys as a flag State over ships, aircraft and space objects when they operate on the high seas or in the airspace. The right of jurisdiction and control enjoyed by the coastal State is subject to the right of innocent passage enjoyed in the territorial sea. Further, the jurisdiction and control of the flag State in the high seas or in outer space is subject to the requirement of reasonable use to accommodate similar rights of other flag States.

102. In addition, it may also be noted that the exercise of sovereign rights or exclusive jurisdiction could also be subject to any other relevant principles of international law, treaties or other arrangements agreed to or entered into between two States.[144]

103. Thus defined, the scope of the topic concerned "effects felt within the territory or under the control of a State, but arising as a consequence of an activity or situation occurring, wholly or partly, within the territory or under the control of another State or States".[145]

104. Mr. Barboza, while adopting the above approach, also referred to the concept of control as including the situation referred to by ICJ in the *Namibia* case.[146] It may be recalled that the Court, after holding South Africa responsible for having created or maintained a situation which it had declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the de facto control over Namibia. It further stated that "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States".[147]

105. In the light of the above, the draft articles provisionally adopted by the Commission in 1994 limited the scope to activities "carried out in the territory or otherwise under the jurisdiction or control of a State" (art. 1) and defined further transboundary harm as "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border" (art. 2 (*b*)). It was explained that even though the expression "jurisdiction or control of a State" was "a more commonly used formula in some instruments", it was also found useful to mention the concept of territory in order to emphasize the territorial link, when such a link existed between activities under those articles and a State.[148]

106. Mr. Barboza dealt with the problem of extending the scope of the present topic to activities which harmed the global commons per se in his sixth report in 1990. He felt that harm to the environment per se as an independent ground for liability was something new and that, if such harm was to be measured on the basis of its impact on persons or property, it was difficult, at the current state of scientific development, to measure with a sufficient degree of precision what identifiable harm to the global commons would result in identifiable harm to human beings or property. He explained that, even though an overall correlation could be made between harm to the global commons, the environment in general and the well-being and quality of life of human beings, that did not seem to be enough to establish the causal link necessary under the international liability topic as currently formulated. He noted that this would require, perhaps, a different definition of harm and

[140] *Yearbook … 1996*, vol. II (Part Two), annex I, p. 108, paras. (4) and (5) of the commentary to article 2. The Working Group also defined significant harm as one that is not *de minimus* or that is not negligible. The commentary noted a number of examples where the idea of a threshold is reflected using "significant", "serious", or "substantial" as relevant criteria (ibid., para. (6)).

[141] Ibid., pp. 26–27, para. (7).

[142] Fifth report (footnote 2 above), p. 155.

[143] Ibid.

[144] Ibid., pp. 157–158.

[145] Ibid., p. 157, para. 7.

[146] *Yearbook ... 1987*, vol. II (Part Two), p. 45, para. 163.

[147] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 118.

[148] *Yearbook ... 1994*, vol. II (Part Two), pp. 161–162, para. (4) of the commentary to article 1.

a different threshold of harm.[149] He pointed out a further difficulty: in the case of harm to the global commons, the determination of the affected States would remain uncertain. It was noted that only one convention came close to imposing liability for harm to the environment per se, namely, the Convention on the Regulation of Antarctic Mineral Resource Activities, which showed that the matter was of only very recent origin.

107. According to Mr. Barboza, a review of State practice seemed to indicate that harm to the global commons had been dealt with through identification of certain harmful substances or areas of the global commons and making them subject to suitable regulations, such as restricting or banning the use of certain substances or banning any activity which would cause harm to certain parts of the global commons. This trend, in Mr. Barboza's view, indicated that the problem was better dealt with under the topic of State responsibility.[150]

108. Several members of the Commission also addressed the problem of the global commons. While everyone agreed that the problem of the continuous deterioration of the global commons was a serious matter, some members felt that the question should not be dealt with within the current topic. They noted that the subject raised difficulties in determining the State or States of origin, the affected State, as well as the assessment and determination of harm. In addition, they referred to the right to compensation and the obligation of prevention of harm which were difficult to implement if no single State could be identified as the affected State or the source State. Further, while some of them felt that the subject could be dealt with separately under the long-term programme of the Commission, others thought that the time was not yet ripe for the Commission to consider the topic.

109. Another group of members, however, felt that the matter required serious attention and that the concept of harm to the global commons was increasingly finding expression in numerous international and regional forums and decisions. According to them, the principles of common concern of mankind and of the protection of intergenerational equities being developed within the context of sustainable development and environmental law provided the content of the concept of harm to the global commons. For these reasons, a few members suggested that the topic of the global commons should be taken up separately by the Commission without delay.[151]

110. In view of the above, article 2 (*b*) provisionally adopted by the Commission in 1994 excluded activities which caused harm only in the territory of the State within which the activity had been undertaken or those activities which harmed the global commons per se but without any harm to any other State.[152]

[149] *Yearbook ... 1990*, vol. II (Part Two), p. 104, para. 527.

[150] Ibid., para. 529.

[151] *Yearbook ... 1991*, vol. II (Part Two), pp. 117–118, paras. 254–259.

[152] *Yearbook ... 1994*, vol. II (Part Two), p. 164.

Chapter IV

Scope of the draft articles: conclusions recommended for endorsement

111. The work of the Commission on the matter of the scope of the draft articles on international liability arising out of acts not prohibited by international law has culminated in some important conclusions on the activities to be covered, on the threshold of harm or damage required for triggering the obligation and on specifying or clarifying the concept of "transboundary damage". These conclusions are relevant for the purpose of the present assignment even though it is to be limited only to the consideration of the question of the duty of prevention and will not extend to the question of liability. Accordingly, they may be noted and endorsed:

(*a*) Article 1 (*a*) proposed by the Working Group of the Commission in 1996 emphasizes that the draft articles are limited, in their application, to those activities which involve a risk of causing significant transboundary harm through their physical consequences. That is, activities covered and the resulting transboundary consequences must have a physical quality, where a relationship between cause and effect could be established. Accordingly, harm caused by State policies in monetary, socio-economic or similar fields would be excluded;

(*b*) Also excluded are activities which result in significant transboundary harm over a period of time after interaction with various other factors, i.e. harm caused due to creeping pollution or harm arising from multiple sources where a strict chain of cause and effect cannot be established;

(*c*) It is equally clear, as our focus is on activities involving a *risk* of causing transboundary harm, that activities which actually or continuously cause significant harm in their normal operation are also excluded;

(*d*) Harm or damage required to be prevented is only significant harm or damage. That is, damage which is minimal or negligible and which is only detectable or appreciable but no more, is not covered. Activities which have a low probability of causing disastrous harm, i.e. ultrahazardous activities, are covered, as are those which have a high probability of causing other significant harm, i.e. hazardous activities. Accordingly, activities which have a very low probability of causing significant transboundary harm are not covered;

(*e*) Establishing a threshold of harm and actually defining what is significant in respect of particular activities is a function of scientific, temporal and political factors among other things. While scientific and technical input in identifying significant harm with respect to a given activity is important, what is not tolerated and hence "significant" is a function of accommodating conflicting but sometimes legitimate and multiple interests. Standards involved could vary from country to country and region to region as well as in time.[153] In establishing a threshold of significant harm, the combined effect of "risk" and "harm" would be the determining factor;

(*f*) The scope of the articles is to be limited to activities carried out in the territory or otherwise under the jurisdiction or control of the State having a risk of causing significant harm in the territory of or in other places under the jurisdiction or control of the State other than the State of origin, *whether or not the States concerned share a common border*. While the concept of jurisdiction or control is noted, the territorial link should be emphasized wherever such link exists between activities under consideration and a State. Further, the various concepts involved, i.e. "territory", "control" or "jurisdiction", have to be understood in accordance with the meaning given to them under relevant principles of international law, treaties or other arrangements agreed to or entered into between States. With respect to "control", it is the physical control of a territory and not sovereignty or legitimacy of title which would set in motion relevant obligations;

(*g*) Further, harm caused to the global commons which did not have social repercussions or effects upon persons or property or the interests of a State, where cause and effect cannot be linked, i.e. harm caused to the global commons per se, is also excluded from the scope of the present exercise;

(*h*) Activities excluded from the scope of the present exercise which result in significant harm are regulated in accordance with the applicable principles of international law or require regulation in accordance with legal regimes to be developed separately.

112. If the above conclusions are accepted, articles 1 (*a*) and 2 as proposed by the Working Group in 1996 could be endorsed without any further amendment. However, article 1 (*b*) dealing with activities which actually cause harm would have to be deleted. This provision was in any case placed within square brackets for further consideration at that time and the above review of the matter would indicate that these types of activities should be dealt with under the regime of State responsibility and not within the present topic.

113. The Special Rapporteur urges the Commission to consider and approve the above conclusions as the issues involved have been thoroughly debated over the past several years. They represent the opinion of a wide majority both in the Commission and in the Sixth Committee. Accordingly, these conclusions offer, in the opinion of the Special Rapporteur, a realistic chance of achieving consensus if not complete agreement.

[153] According to Schachter, identification of thresholds defining significant harm could vary from activity to activity and from region to region, depending upon the vulnerability involved as well as the options available in meeting the vital needs of the population. Accordingly, the threshold of significant harm could vary from a country which was highly developed to another country which is desperately seeking development (see *International Law in Theory and Practice*, p. 368). As discussed above, Mr. Quentin-Baxter had earlier come to a similar conclusion when he stated that standards of protection should take into account the means at the disposal of the acting State and the standards applied in the affected State and in regional and international practice (sect. 5 of the schematic outline, fourth report (footnote 2 above), pp. 224–225). He also noted that suggesting a standard was no longer a problem; the real problem was the application of standards by States which were at diverse levels of socio-economic and scientific development. It followed, according to this view, that the due diligence obligation was largely based on the capability of States to prevent the harm. As such, prevention as a principle has been applied differently in different regimes (see Sands, *Principles of International Environmental Law I*, p. 356). After surveying a number of international instruments, Sands observed that the identification and evaluation of substances, technology, processes and categories of activities which had or were likely to have significant adverse impact on the environment were, therefore, left to sovereign States. Moreover, the liability for the non-observance of that obligation arose only when the significant harm had resulted and not before.

PART TWO. THE CONCEPT OF PREVENTION: PRINCIPLES OF PROCEDURE AND CONTENT

114. Given the nature of the concept of prevention and the clarification of the scope of the topic presented in part one, a regime of prevention of significant transboundary harm arising out of dangerous activities could be organized around several principles of procedure and content. Principles of procedure might include those of: (*a*) prior authorization; (*b*) environmental impact assessment; (*c*) notification, consultation and negotiation; (*d*) the principles of dispute prevention or avoidance and settlement; and (*e*) non-discrimination. The principles of content might include those of: (*a*) precaution; (*b*) polluter-pays; and (*c*) equity, capacity-building and good governance.

CHAPTER V

Principles of procedure

A. The principle of prior authorization

115. The duty not to cause significant transboundary harm and to prevent any such harm carries with it the requirement that activities bearing such risk should not be allowed by a State within its territory without its prior authorization. The requirement of prior authorization is thus an important element of the principle of prevention.[154]

116. This requirement was identified by Mr. Barboza when he presented article 16 in his sixth report which dealt with unilateral preventive measures. It was repeated in his subsequent reports. However, starting with his ninth report, he dealt with the principle of prior authorization in a separate and independent article to highlight its importance. Thus, article 11 provisionally adopted by the Commission in 1994 stated:

> States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1.[155]

117. The same text was adopted as article 9 by the Working Group in 1996. The requirement of prior authorization implies that the granting of such authorization is subject to the fulfilment of necessary conditions and qualifications to ensure that the risk involved is properly assessed, managed and contained. It is up to each State to freely choose and prescribe methods and means to make this determination before granting the authorization. In addition, the requirement of prior authorization would also oblige States to put in place an appropriate monitoring machinery to ensure that the risk-bearing activity is conducted within the limits and conditions prescribed at the time it is authorized. For this purpose, States are required to adopt necessary legislative and administrative requirements. Such legislation could indicate the type of activities which would require prior authorization from the State.[156]

118. The requirement of prior authorization and the consequent requirement of seeking an environmental impact assessment statement would also apply in the case of any major change contemplated in the proposed activity after the granting of authorization which might transform the activity into one creating a significant risk of transboundary harm. This has been, in particular, provided under article 1 (*v*) of the 1991 Convention on Environmental Impact Assessment in a Transboundary Context. However, the Convention did not define the concept of "major change", and the decision on the applicability of that instrument will therefore be partly based on judgement. The basic criterion could be that the existing activity subject to a major change is included in appendix I to the Convention and that authorization from a competent authority is required for that change.[157] The following are some examples of major changes: building of additional production capacities, large-scale employment of new technology in an existing activity, re-routing of motorways, express roads or an airport runway changing the direction of take-off and landing. Consideration would also have to be given to a change in investments and production (volume and type), physical structure or emissions. It is also suggested that it would be worthwhile to examine cases where the major change would represent an increase of the same magnitude as the threshold specified in appendix I to the Convention or of a threshold proposed as

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[154] The requirement of prior authorization differs from the requirement of prior informed consent. The latter was developed in the context of the export of hazardous wastes or chemicals or other substances from one country to another. It provides that the importing State must give its consent before the hazardous product is exported from the country of origin. Such consent should be sought and received by the entities concerned by providing to the importing State full information on the product with a view to safeguarding the health and environment of the importing State. In the case of export of dangerous or hazardous substances, it is also provided that the country of origin should, as far as possible, ascertain before such export that the country of import has the necessary means and capacity to treat and deal with the hazardous substance intended for export. The prior informed consent requirement was used in non-binding instruments elaborated in the framework of UNEP and FAO and integrated into legally binding arrangements for international trade in hazardous wastes, such as the 1989 Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa and the 1993 EEC Regulation on the supervision and control of shipments of waste within, into and out of the European Community. For these and other considerations, see Handl and Lutz, *Transferring Hazardous Technologies and Substances: The International Legal Challenge*; see also Sands, op. cit., pp. 464–467.

[155] *Yearbook ... 1994*, vol. II (Part Two), p. 159.

[156] See the commentary on article 11 on the requirement of prior authorization (ibid., p. 166). It may be noted that the Working Group proposed in its commentary that the requirement of prior authorization should be considered as creating a presumption that the activities covered by the draft articles are taking place in the territory or otherwise under the jurisdiction or control of a State with the knowledge of that State (*Yearbook ... 1996*, vol. II (Part Two), annex I, p. 118, para. (3) of the commentary to article 9). Mr. Barboza in the annex to his sixth report proposed an article on assignment of obligations (art. 3) which stipulated that the State of origin had the obligation of reparation provided that it knew or had means of knowing that a relevant activity was being or was about to be carried out in its territory or in other places under its jurisdiction or control. It further provided that unless there was evidence to the contrary, it was to be presumed that the State of origin had the knowledge or the means of knowing that activities in question were being carried out in its territory (footnote 5 above). Members of the Commission had raised doubts as to the idea that the liability of a State was contingent upon the fact of knowledge or the means of establishing such knowledge. It was pointed out that such a concept of liability should be proportional to the effective control of the State or other entities operating within its control or jurisdiction and, more importantly, to the means at their disposal to prevent, minimize or redress harm. In order to take these considerations into account, particularly the circumstances of developing countries having vast territories and insufficient financial and administrative means to monitor activities in their territories, the Special Rapporteur introduced the above term "presumption" under article 3. This "presumption" is to be considered only in the case of a regime on liability, and even in that context it does give rise to some differences of opinion as to its relevance.

[157] See *Current Policies, Strategies and Aspects of Environmental Impact Assessment in a Transboundary Context* (United Nations publication, Sales No. E.96.II.E.11), p. 48.

appropriate. Particular consideration could also be given to cases where the proposed changes would bring existing activities to such thresholds.[158]

B. The principle of international environmental impact assessment

119. The duty to prevent significant transboundary harm involves the requirement of assessing whether a particular activity actually has the potential of causing such significant harm. In order to assess the potential harm involved, the practice of requiring a statement on environmental impact assessment (EIA) has become very prevalent.[159]

120. The legal obligation to conduct an EIA under national law was first developed in the United States of America in the 1970s. Later, Canada and Europe adopted the same approach and essentially regulated it by guidelines. In 1985, a European Community directive required member States to conform to a minimum requirement of EIA. Since then many other countries have also made EIA a necessary obligation under their national law before authorization is granted for developmental or hazardous industrial activities.[160]

121. It is desirable that the evaluation of the environmental consequences of any proposal be addressed at the earliest appropriate stage of decision-making and given the same attention as economic and social concerns. This ideally applies not only to private projects but also to those of Governments so that principles of ecological sustainability are built into key government decisions at all levels, wherever the possibility of a significant environmental impact cannot be reasonably excluded. Environmental assessment procedures for policies, plans and programmes should as much as possible reflect the principles of EIA that are applied to projects. However, environmental assessment of a policy, plan or programme should not be a substitute for EIA at the project level.

122. The principles of environmental assessment are usually specified in the principal act. They may also be specified in subordinate legislation either by regulation or by administrative procedures. A large number of developing countries seem to agree that "an EIA programme is best implemented under statutory authority".[161] If the environmental assessment process is embodied in regulations, then any violation thereof is a violation of law. However, if it is embodied in administrative procedures, they may be enforceable as law only if this is clearly provided in the principal legislation. Delegated legislations such as regulations, rules and by-laws are justiciable. Administrative procedures, however, are more like instructions and do not create legally enforceable obligations.[162]

123. National legislations on EIA address, in particular, the following points:

(*a*) The proposals or activities calling for EIA;

(*b*) The referral of those proposals or activities to the agency;

(*c*) The assessment or scoping (see paragraph 124 below) by the agency of the proposal to determine the environmental implications of that proposal or activity, including the need for an environmental impact statement (EIS);

(*d*) The form an EIS should take, should one be necessary;

(*e*) Public comment on a draft EIS;

(*f*) The preparation of a final EIS and dispute resolution of contentious matters arising in the course of the process;

(*g*) The submission of the EIS together with the comments of various bodies;

(*h*) The decisions and issues, such as monitoring and review requirements, to be taken into account.[163]

124. Tailoring the EIA study to the requirements of a specific activity is known as "scoping". Ideally, scoping should be a joint activity among the proponent, the Government and the public and other interested parties. More commonly, proponents are expected to prepare the report themselves or to pay its preparation by a competent, independent third party. Generally the expense of preparing EIA documents is borne by the proponent and included in the budget of a proposed activity. Similarly, environmental management costs of the activity, after authorization has been received are charged to the proponent's operational budget. The cost of reviewing the EIA documentation and supervising the proponent's implementation of the EIA results is usually borne by the Government.[164]

125. EIA legislation has traditionally been weak in providing for the follow-up to an EIA study. A survey of several national legislations revealed that in the case of such failures, they usually provide for penalties. Typical actionable offences include: failing to perform an EIA before implementing an activity; acting in contravention of the EIA process; concealing, manipulating or providing false information; and causing environmental damage. Violations of legal EIA obligations can result in temporary or permanent suspension of an activity, modification or suspension or revocation of an environmental licence, payment of a fine, compensation for damage, restoration

[158] Ibid.

[159] Ibid., p. vii. According to this United Nations study, EIA "has already shown its value for implementing and strengthening sustainable development, as it combines the precautionary principle with the principle of preventing environmental damage and also arranges for public participation".

[160] For a survey of various North American and European legal and administrative systems of EIA policies, plans and programmes, see *Application of Environmental Impact Assessment Principles to Policies, Plans and Programmes* (United Nations publication, Sales No. E.92.II.E.28), pp. 43–48; today approximately 70 developing countries have EIA legislation of some kind. Other countries either are in the process of drafting new and additional EIA legislation or are planning to do so. See Yeater and Kurukulasuriya, "Environmental impact assessment legislation in developing countries", p. 259, and p. 260, for the format of EIA adopted in most legislations.

[161] Yeater and Kurukulasuriya, loc. cit., p. 259.

[162] See Herbert, "Developing environmental legislation for sustainable development in small island States: some legal considerations from the Commonwealth Caribbean", pp. 1229–1230.

[163] Ibid.

[164] See Yeater and Kurukulasuriya, loc. cit., pp. 263–264.

obligations (or reimbursement of government restoration costs) or imprisonment.[165]

126. Once a significant risk of transboundary harm is assessed, as a result of an EIA or otherwise, this would trigger an obligation for the State of origin to notify States likely to be affected providing them with all available information including the results of any assessment made.[166] Giving notification in a timely fashion to the affected State or States would expedite the process of decision-making with respect to the project involved. In any case, States likely to be affected would have the right: (*a*) to know what the investigations were and the results of those investigations; (*b*) to propose additional or different investigations; and (*c*) to verify for themselves the results of such investigations. Moreover, this assessment must precede any decision to proceed with the activities in question. It obligates parties to conduct a prior investigation of risks and not an evaluation of the effects of an activity after an event.[167]

127. In the case of a shared resource or where the impact assessment would require investigations not only in the territory of the State of origin but also in the territory of the States likely to be affected, there is an advantage in involving the States affected even at the early stage of the process of developing an EIA. Such involvement could assist either a joint or a separate but simultaneous effort to bring in the necessary inputs for finalizing the EIA.[168]

128. The cases in respect of which an EIA is required cannot always be predetermined by objective criteria. An element of judgement will always be present. At the national level, specifics of the national EIA legislation, administrative practices and environmental conditions could provide an indication of the cases requiring EIA. Alternatively, using certain criteria, for example, location, areas and size of the activity, the nature of its impact, the degree of risk, public interest and environmental values, it would also be possible to develop a list of activities subject to an EIA. The list thus prepared or the criteria employed could be updated and revised on the basis of experience gained and further availability of better knowledge of materials used, their impact as well as technology. Certain substances are listed in some conventions as dangerous or hazardous and their use in any activity may itself be an indication that the activities might cause significant transboundary harm and hence require an EIA.[169]

129. There are also certain conventions that list the activities that are presumed to be harmful, which might signal that these activities might fall within the scope of the draft articles and hence require an EIA.[170]

130. In assessing the significance of the likely impact of an activity on the environment, it is necessary to keep in view both the extent and the magnitude of the impact. The possibility that an activity may lead to significant transboundary harm by contributing to the cumulative effect of existing, individually significant impacts should also be considered.[171]

131. The content of the risk assessment could vary from activity to activity and other factors involved. The 1987 UNEP Goals and Principles of Environmental Impact Assessment provided that: "Where the extent, nature or location of a proposed activity is such that it is likely to significantly affect the environment, a comprehensive environmental impact assessment should be undertaken" (principle 1). Under principle 4 a proper EIA should include, at a minimum:

(*a*) A description of the proposed activity;

(*b*) A description of the potentially affected environment, including specific information necessary for identifying and assessing the environmental effects of the proposed activity;

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[165] Ibid., p. 267.

[166] See part XII, sect. 4, of the 1982 United Nations Convention on the Law of the Sea, which deals with monitoring and environmental assessment of any risks or effects of pollution of the marine environment and the sharing of the results thereof with other States which are likely to be affected by such pollution because of planned activities under the jurisdiction and control of the State. Similarly, the Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (see paragraph 33 above), the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, the 1989 World Bank Operational Policy 4.01, the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, the 1991 Protocol to the Antarctic Treaty on Environmental Protection, the 1992 Convention on biological diversity and principle 17 of the Rio Declaration (see footnote 37 above) could also be cited as examples where the duty to conduct an EIA was envisaged. For a mention of these agreements, see New Zealand Ministry of Foreign Affairs and Trade, *New Zealand at the International Court of Justice—French Nuclear Testing in the Pacific: Nuclear Tests Case, New Zealand* v. *France (1995)* (Wellington, 1996), p. 184. See also articles 12 and 18 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.

[167] See *New Zealand at the International Court of Justice* … (footnote 166 above), pp. 182–183. Furthermore, one commentator observed:

> "One may, however, consider the function of notification and consultation in this regard. The aim of such cooperation is to enable possibly affected other States to bring into play and safeguard their interests. This process of cooperation will necessarily include an exchange of views as to the substantiality of the possible harm to be likely to occur. Consequentially, the question, if a certain matter is relevant relates to the perspective of the States possibly affected. As it is incumbent on that State to figure out and decide whether its interests are at stake, the answer to the question of relevance seems to be that all matters have to be notified which within a reasonable perspective may be deemed to be relevant."

(Stoll, "The international environmental law of cooperation", p. 47)

[168] See *Current Policies* ... (footnote 157 above), p. 69.

[169] See, for example, the 1974 Convention for the Prevention of Marine Pollution from Land-based Sources (art. 4) and the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area.

[170] See appendix I to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, where a number of activities such as crude oil refineries, thermal power stations, installations to produce enriched nuclear fuels, etc., are identified as possible dangers to the environment and requiring EIA under the Convention; annex II to the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, where activities such as the installations or sites for the partial or complete disposal of solid/liquid wastes by incineration on land or at sea, installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supplies have been identified as dangerous activities. The same Convention also has a list of dangerous substances in annex I. See *Yearbook … 1996*, vol. II (Part Two), annex I, pp. 119–120, para. (8) of the commentary to article 10, footnotes 96–97.

[171] *Current Policies* ... (footnote 157 above), p. 49.

(*c*) A description of practical alternatives, as appropriate;

(*d*) An assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including the direct, indirect, cumulative, short-term and long-term effects;

(*e*) An identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and alternatives, and an assessment of those measures;

(*f*) An indication of gaps in knowledge and uncertainties which may be encountered in compiling the required information;

(*g*) An indication of whether the environment of any other State or areas beyond national jurisdiction is likely to be affected by the proposed activity or alternatives;

(*h*) A brief, non-technical summary of the information provided under the above headings.[172]

132. Similarly, article 4 of the 1991 Convention on Environmental Impact Assessment in a Transboundary Context also provided, by way of guidance to States parties, in appendix II a list of nine items, similar to the one noted above, on which information should be required for the purpose of EIA.[173]

133. Implementation of the requirement of risk assessment through a statement on EIA and the duty to notify the risk involved to the States concerned raises several issues concerning: time limits for notification and submission of information; content of the notification; responsibility for the procedural steps that aim at public participation, in particular, participation of the public of the affected State in the EIA procedures of the State of origin and responsibility for the cost involved. In the context of an examination of these matters in respect of the implementation of the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, it has thus been observed:

> Current practice does not reflect the full implementation of the provisions of the Convention. There is at present a diverse experience in EIA in a transboundary context, and it can be concluded that until now no uniform approach to transboundary information exchange has been followed. The approaches proposed could serve as guidance to competent national authorities in the practical application of relevant provisions of the Convention. Experience gained in following these approaches could be examined in due course.[174]

134. It is also pertinent to note that, while reviewing the Antarctic Treaty System and the general rules of environmental law, one commentator observed that "adoption of environmental impact assessment at present cannot be considered to be more than a progressive trend of international law; we can hardly say that States consider such a practice legally binding under general international law".[175]

C. The principles of cooperation, exchange of information, notification, consultation and negotiation in good faith

135. The general principle of cooperation among States is an important principle in respect of prevention. Other relevant principles in this regard are the principles of good faith and good-neighbourliness. The principle of cooperation was emphasized in article 3 of the Charter of Economic Rights and Duties of States, adopted by General Assembly resolution 3281 (XXIX) of 12 December 1974, in General Assembly resolution 2995 (XXVII) of 15 December 1972 on cooperation between States in the field of the environment and in General Assembly resolution 3129 (XXVIII) of 13 December 1973 on cooperation in the field of the environment concerning natural resources shared by two or more States. In addition, principle 24 of the 1972 Stockholm Declaration,[176] states:

> International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big and small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

136. Similarly, the principle of cooperation was emphasized in article 197 of the United Nations Convention on the Law of the Sea, under which States are required to cooperate "in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features".

137. Article 8, paragraph 1, of the Convention on the Law of the Non-navigational Uses of International Watercourses provides that watercourse States have the general obligation to "cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse".

138. The greater reliance on the principle of cooperation is significant in that it marks a departure from the classical approach based on principles of coexistence amongst States and emphasizes a more positive or even more integrated interaction among them to achieve common ends,

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[172] For the full text, see Birnie and Boyle, op. cit.

[173] However, the list in the Convention contains no reference to the requirement of an indication as to whether the environment of any other State or area beyond national jurisdiction is likely to be affected by the proposed activity or alternatives, as noted in principle 4 (*g*) of the UNEP Goals and Principles of Environmental Impact Assessment. However, the Convention, in appendix II (*h*), suggests that, where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis should be included in EIA, a requirement not indicated in the UNEP Goals.

[174] *Current Policies …* (footnote 157 above), p. 46.

[175] Pineschi, "The Antarctic Treaty System and general rules of international environmental law", pp. 206–207. As regards the EIA legislation of developing countries, it was observed that its effectiveness remained unclear. Common problems which developing countries continue to face include: strong political and other support for unrestricted socio-economic development; burdensome institutional or administrative arrangements which cause delays and make EIA seem anti-development; a lack of national EIA expertise and financial resources to implement legislation; weak public participation; and the inability of EIA to affect actual decision-making; see Yeater and Kurukulasuriya, loc. cit., p. 267.

[176] See footnote 18 above.

while charging them with positive obligations of commission.[177]

139. Cooperation could involve both standard-setting and institution-building as well as action undertaken in a spirit of reasonable consideration of each other's interests and towards achievement of common goals. Accordingly, there are several treaties which incorporate principles of equitable sharing and adopt an integrated approach to the development of shared resources, particularly in the context of a river basin. Reference in this regard could be made to the 1959 Agreement (with annexes) for the full utilization of the Nile waters between the United Arab Republic and Sudan;[178] the 1960 Indus Waters Treaty between India and Pakistan;[179] the 1961 Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River basin[180] and the 1987 Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System.[181] In the case of petroleum resources where more than one State holds exploitation rights to overlapping, straddling or proximate reservoirs, it is common for States to enter into joint cooperation arrangements for the development of the resource. Contractual arrangements entered into in this regard, which are also referred to as "unitization agreements", determine the rights and obligations of the parties. Such inter-State unitization agreements were concluded between Saudi Arabia and the Sudan in 1974, between Norway and the United Kingdom of Great Britain and Northern Ireland in 1976, and between Australia and Indonesia in 1989.[182]

140. At the procedural level, cooperation embraces a duty to notify the potentially affected neighbouring State(s) and to engage in consultation with such State(s). The duty to notify would be specific in the case of a planned activity which has a risk of causing significant transboundary harm to other States or areas beyond national jurisdiction. Such a duty of cooperation could also involve regular exchange of data and information, as provided in article 9 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.

141. In either case, the duty of the State is to provide such information as is readily available to it. However, States are expected to employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other States to which it is communicated.

142. The duty of cooperation and the further duty to notify also implies that if any additional information is required by the other State, the same shall also be supplied.[183]

143. Where further information is provided to other concerned States at their request, such service can be rendered on payment of reasonable cost. Further, in considering the timing of notification and the extent of information to be given, it is difficult to define in an abstract manner any kind of standard because of uncertainty about what constitutes relevant harm and also because standards in this regard may vary. Moreover, it is obvious that the duty to notify and provide relevant information to other States concerned is related to national policies, procedures and law.[184]

144. In addition, the general duty to cooperate is also now understood to extend beyond the duty of the State in whose territory the risk-bearing activity is undertaken to third States and even to those States which actually are likely to be affected. As has been noted, "[t]his may indicate, that there is some idea of a common interest in reducing and mitigating the harm done. Apparently, this common interest is considered to supersede the very logic of liability in cases, where liability cannot be established or where the State responsible for the harm is not capable of reducing and mitigating the harm done".[185]

145. The general duty to cooperate could also be expressed through the establishment of joint planning commissions and/or other joint commissions.[186]

146. At the normative level, it is difficult to conclude that there is an obligation in customary international law to cooperate generally. States are prepared to recognize an international common interest and a general duty to cooperate only in carefully delimited areas. Accordingly, it has been observed that "[t]he great number of similar provisions in existing treaty regimes on each of those aspects of cooperation cannot be understood to constitute related customary international law rules which may be considered to generally apply in environmental matters".[187]

147. The duty to notify leads to a duty to consult with concerned States on the basis of the information supplied or needed. The objective of consultation is to reconcile conflicting interests and to arrive at solutions which are mutually beneficial or satisfactory. Article 17 of the general principles adopted by the Experts Group on Environmental Law of the World Commission on Environment

[177] Progressive development of the principles and norms of international law relating to the new international economic order: report of the Secretary-General (A/39/504/Add.1), annex II, summary of the analytical study, pp. 18–19. See also Francioni, "International co-operation for the protection of the environment: the procedural dimension", p. 203.

[178] United Nations, *Treaty Series*, vol. 453, p. 51.

[179] Ibid., vol. 419, p. 125.

[180] Ibid., vol. 542, p. 246.

[181] See Deng, "Peaceful management of transboundary natural resources", pp. 186–188.

[182] Ibid., pp. 194–197.

[183] However, it is pertinent to note here the observation of the arbitral tribunal in the *Lake Lanoux* case, which stated that "[a] State wishing to [engage in planned activities] which will affect an international watercourse cannot [unilaterally] decide whether another State's interests will be affected; the other State is the sole judge of that and has the right to information on the proposals" (footnote 85 above), p. 119. See also the argument of New Zealand before ICJ (footnote 166 above).

[184] See Stoll, loc. cit., p. 48.

[185] Ibid., p. 54; see also page 55, footnote 43. In addition see article 7 of the resolution on environment adopted by the Institute of International Law (footnote 54 above).

[186] See the resolution on the pollution of rivers and lakes and international law adopted by the Institute of International Law at its Athens session in September 1979, which contains articles on exchange of information, prior notification and the establishment of international agencies to combat pollution: *Yearbook of the Institute of International Law*, vol. 58, part II, p. 197. See also Deng, loc. cit., p. 192.

[187] Stoll, loc. cit., p. 64.

and Development[188] states that such consultations should be held in good faith, upon request, at an early stage, between the notifying State(s) and the notified State(s). The arbitral tribunal in the 1957 award in the *Lake Lanoux* case observed that, where different interests of riparian States are involved, "according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own".[189]

148. Mention may also be made in this regard of the case concerning the *Territorial Jurisdiction of the International Commission of the River Oder* considered by PCIJ, where the Court, rejecting the contention of Poland that the jurisdiction of the Commission ended where the Oder crossed into Poland, held that "it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, but in that of a community of interest of riparian States". It further added that

> This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to others.[190]

149. Considerations noted above in respect of the duty to consult would also apply in respect of the duty to negotiate which could arise thereafter. For example, article 17 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses points out that the consultations and negotiations "shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State". Moreover, in the case of planned activities, article 17, paragraph 3, further states that:

> During the course of consultations and negotiations, the notifying State shall, if so requested by a notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period of six months unless otherwise agreed.

150. It is well established that the obligation to negotiate, where it arises, does not include an obligation to reach an agreement.[191] However, as was pointed out by ICJ in the *North Sea Continental Shelf* cases, negotiation, to be in conformity with the obligation to negotiate, should be meaningful, be a genuine endeavour at bargaining, and not a mere affirmation of one's claims without ever contemplating to meet the adversary's claim.[192]

151. Thus, the obligation to consult and negotiate in good faith, as appropriate, does not amount to prior consent from or a right of veto of the States with which consultations are to be held. This has been further confirmed by the Commission in connection with the draft articles on the law of the non-navigational uses of international watercourses. While providing for the requirement of consultation with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements, the Commission stated that:

> Moreover, watercourse States are not under an obligation to conclude an agreement before using the waters of the international watercourse. To require conclusion of an agreement as a pre-condition of use would be to afford watercourse States the power to veto a use by other watercourse States of the waters of the international watercourse by simply refusing to reach agreement. Such a result is not supported by the terms or the intent of article 3. Nor does it find support in State practice or international judicial decisions (indeed, the *Lake Lanoux* arbitral award negates it).[193]

D. The principle of dispute prevention or avoidance and settlement of disputes

152. Though strictly not falling under the rubric of prevention of harm, the principle of dispute avoidance or prevention of disputes is also suggested as one of the components of prevention. It emphasizes the need to anticipate and prevent environmental problems. As part of the concept of dispute avoidance, States are urged to develop methods, procedures and mechanisms that promote, *inter alia*, informed decisions, mutual understanding and confidence-building.[194] Further, such procedures and methods would entail—apart from exchange of available information, prior informed consent, transboundary environmental impact assessment—the use of fact-finding commissions involving independent scientific and technical experts and panels as well as national reporting.

153. The emphasis on dispute avoidance has a compelling ring to it inasmuch as it is evident that, unlike normal illegal acts, environmental damage is required to be prevented as far as possible *ab initio*. Once such damage occurs, it is generally feared that its negative consequences cannot be fully wiped out through reparation and the situation prior to the event or incident generally cannot be restored. It has thus been suggested that:

> The rationale behind emphasis upon prevention or avoidance of environmental disputes is thus rooted in the clear preference of the policy of *forecasting* and *preventing* environmental damage to that of *reacting* and *correcting* such damage, when corrective measures would turn out to be simply otiose.[195]

154. The matter of dispute avoidance was also considered during the United Nations Conference on Environment and Development preparatory process and at the Rio

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[188] *Environmental Protection and Sustainable Development …* (see footnote 45 above), pp. 104–105.

[189] *International Law Reports, 1957*, p. 139 (see footnote 85 above).

[190] *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27.

[191] Murthy, "Diplomacy and resolution of international disputes", p. 163.

[192] See *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 47.

[193] *Yearbook … 1994*, vol. II (Part Two), p. 94, para. (17) of the commentary to draft article 3. According to one author, consultation means something more than notification but less than consent. See Kirgis Jr., *Prior Consultation in International Law*, p. 11: "*Consultation* means something more than notification, but less than consent." See also the Montreal Rules of International Law Applicable to Transfrontier Pollution, ILA, *Report of the Sixtieth Conference* (footnote 128 above).

[194] UNEP/IEL/WS/3/2 (see footnote 44 above), p. 6.

[195] The concept of dispute avoidance was also discussed at a meeting of experts convened by the Rockefeller Foundation at Bellagio, Italy, in 1974. It was later also echoed in the negotiations of the United Nations Conference of the Law of the Sea; see Adede, "Avoidance, prevention and settlement of international environmental disputes", p. 54.

Conference itself. A proposal put forward by Austria and five other States involved the establishment of a compulsory inquiry commission in which the Executive Director of UNEP was given an important role. The inquiry commission would have been given the mandate to clarify and establish the factual issues of a situation originating in one State and of concern to other States. The commission would have been competent to seek access to all relevant documents and to the site of the activity giving rise to the situation. The proposal, however, did not gather support at Rio as States were reluctant to subordinate national sovereignty and jurisdiction to the competence of such commissions. Accordingly, in chapter 39, paragraph 10, of Agenda 21 the Conference recommended that in the area of avoidance and settlement of disputes, States should further study and consider methods to broaden and make more effective use of the range of techniques currently available.[196]

155. Article 33 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses makes an attempt to project a role for compulsory fact-finding missions, while all other procedures of dispute settlement mentioned therein have been kept optional requiring the consent of all States parties involved.[197]

156. Fact-finding has also been the focus of United Nations efforts to enhance its capability under the Charter of the United Nations to maintain international peace and security. Accordingly, the General Assembly, in its resolution 46/59 of 9 December 1991, adopted a Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security the main purpose of which was to enhance the fact-finding capabilities of the Secretary-General, the Security Council and the General Assembly to enable them to exercise their functions effectively under the Charter. It provided, *inter alia,* that the Secretary-General, on his own initiative or at the request of the States concerned, should consider undertaking fact-finding missions in areas where a situation exists which might threaten the maintenance of international peace and security. When appropriate, he may bring the information obtained to the attention of the Security Council.[198]

157. Dispute avoidance also comprises techniques like seeking good offices, mediation and conciliation, in addition to fact-finding commissions. Boutros Boutros-Ghali, then Secretary-General of the United Nations, in his important contribution contained in his report entitled *An Agenda for Peace*, articulated these elements as part of a strategy of promoting preventive diplomacy and peacemaking. Preventive diplomacy is a measure to ease tensions before they result in conflict, or if conflict breaks out, to act swiftly to contain it and resolve its underlying causes. Such diplomacy "requires measures to create confidence; it needs early warning based on information gathering and informal or formal fact-finding; it may also involve preventive deployment and, in some situations, demilitarized zones".[199] The United Nations is also developing several early warning systems concerning environmental threats, the risk of nuclear accidents, natural disasters, mass movements of population, the threat of famine and the spread of disease. Attempts are further being made to synthesize information gathered with political indicators to assess whether a threat to peace exists and to analyse action that could be taken by the United Nations to avoid disputes or defuse a crisis.

158. Explaining the various options available in promoting peacemaking, the Secretary-General noted that:

> Mediation and negotiation can be undertaken by an individual designated by the Security Council, by the General Assembly or by the Secretary-General ... Frequently it is the Secretary-General himself who undertakes the task. While the mediator's effectiveness is enhanced by strong and evident support from the Council, the General Assembly and the relevant Member States acting in their national capacity, the good offices of the Secretary-General may at times be employed most effectively when conducted independently of the deliberative bodies.[200]

159. It may be noted that good offices or mediation could be offered as a means of preventing further deterioration of the dispute and as a method of facilitating efforts for the peaceful settlement of the dispute. In the case of good offices extended upon the initiative of a third party or at the request of one or more parties to the dispute, it is subject to the acceptance by all the parties to the dispute. The third party exercising good offices normally seeks to encourage the parties to the dispute to resume negotiations and thus provides them with a channel of communication. Of course, it could also take a more active role and make proposals for solutions at the request of the parties. In the latter case, the process amounts to almost mediation.

160. Mediation is thus essentially a method of peaceful settlement or avoidance of disputes where a third party intervenes to reconcile the claims of the contending parties and to advance its own proposals aimed at a mutually acceptable compromise solution. It is a distinctive method for facilitating a dialogue between the parties to an international dispute or situation aimed at scaling down hostilities and tensions and for achieving, through a political process controlled by the parties, an amicable solution to the problem involved. Mediation is best employed when both parties are willing to resolve their differences. However, no mediation can take place unless it is initiated by a third party and a mediator has been accepted or appointed by agreement among the parties.

161. As opposed to the methods described above, conciliation is a procedure which combines the elements of both inquiry and mediation. It provides the parties on the one hand with an objective investigation and evaluation of all aspects of the dispute and, on the other hand, with an informal third-party machinery for the negotiation and non-judicial appraisal of each other's legal and other claims, including the opportunity to define the terms for a solution susceptible of being accepted by them.[201]

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[196] Agenda 21 (see footnote 37 above), annex II.

[197] See McCaffrey and Rosenstock, "The International Law Commission's draft articles on international watercourses: an overview and commentary", p. 93.

[198] For an analysis of the Declaration, see Bourloyannis, "Fact-finding by the Secretary-General of the United Nations". See also Al-Baharna, "The fact-finding mission of the United Nations Secretary-General and the settlement of the Bahrain-Iran dispute, May 1970".

[199] Boutros-Ghali, *An Agenda for Peace*, pp. 46–47, para. 23.

[200] Ibid., p. 53, para. 37.

[201] For an analysis of the method of good offices, mediation and conciliation and State practice relating to them, see *Handbook on the Peaceful Settlement of Disputes between States* (United Nations publication, Sales No. E.92.V.7, document OLA/COD/2394), chap. II, sects. C–E.

162. Both mediation and conciliation would involve basically negotiations between the parties with the participation of a third party. While the parties have a role to play in both instances and have some control over the process, they have no direct influence over the solution to be proposed by a mediator or a conciliator.

163. Methods of dispute avoidance would have an innovative and influential role to play in bringing parties together by identifying their claims and clarifying their interests and resolving them in a flexible way through a process of negotiation and mutual concessions. As has been pointed out, through these methods the intermediaries could provide useful services to help the parties not only in initiating the process of dispute resolution but also in resolving possible procedural, technical and substantive difficulties encountered during the process. They could also address the needs, wants, concerns and fears of the parties concerned and persuade and convince the parties by what means they should resolve the dispute.[202]

164. All the techniques referred to in Article 33 of the Charter of the United Nations would no doubt best contribute to the prevention of disputes or their early resolution when employed with the consent of all the parties involved. Further, dispute avoidance is enhanced through improved compliance with international obligations and other implementation mechanisms. Degree of compliance with and implementation of international obligations would no doubt depend upon the existence and effectiveness of national policy, corresponding legislation and monitoring institutions.[203]

165. Several international environmental treaties also rely on self-reporting on a broad range of activities including, for example, efforts to curb trade in endangered species of wildlife, reduce greenhouse gas emissions, eliminate production of ozone-destroying substances and conserve biological diversity. National reporting is also an important element in enhancing implementation.

166. An expert group which studied the matter has made several recommendations with respect to enhancing compliance with and implementation of international obligations:

(*a*) Compliance frequently requires resources, including technologies or technical expertise, that are not readily available, particularly in developing countries. Failure to comply often reflects a lack of capacity rather than a lack of will. Accordingly, reliance on sanctions will typically not be appropriate except in response to flagrant violations of international norms caused by a lack of will rather than by a lack of capacity;

(*b*) Owing to the global nature of some environmental issues and the potentially high cost of compliance, particularly for developing countries and countries in transition, compliance and implementation must be approached in a spirit of global partnership. Such a partnership could include the provision of additional financial resources, technical assistance, transfer of technology and capacity-building. (One recent example that seeks to identify appropriate enabling mechanisms is the non-compliance procedure under the Montreal Protocol on Substances that Deplete the Ozone Layer, which allows countries to report difficulties with compliance to an implementation committee, thereby enlisting the help of other parties to the instrument in achieving compliance);

(*c*) Capacity-building of developing countries to implement their international obligations remains among the most crucial challenges for enabling compliance. Apart from various efforts to promote such capacity-building through specific provisions of international environmental treaties, in future, increased cooperation and new partnerships with and among different actors, including, for example, the financial institutions, industry, and environment and development, non-governmental organizations, will be critical for improving compliance and implementation;

(*d*) Compliance with reporting requirements could be enhanced by, *inter alia*, increasing capacity to gather information and compile the necessary reports; streamlining, harmonizing and integrating existing reporting requirements; increasing transparency and public involvement in reporting; and adopting new technologies and methodologies for reporting. International cooperation and assistance should also be targeted to assist developing countries and countries in transition in implementing coherent, effective and credible reporting systems;

(*e*) Subject to their constitutive instruments, international organizations can also play an enhanced role in this regard. Treaty secretariats should assist parties in enacting enabling domestic legislation to implement the treaty obligations. National compliance plans containing specific and measurable benchmarks should be developed and submitted to the treaty secretariats;

(*f*) Regional approaches to enhancing implementation and compliance may play an important role in the future. Processes of regional economic integration, to the extent that they aim at sustainable development, may contribute to monitoring or enhancing environmental performance. (As one example, note the independent review by OECD of the environmental performance of each member country, which includes implementation of international treaties);

(*g*) Many non-State actors have the expertise and resources to monitor and assist implementation efforts and draw attention to incidents of non-compliance. The non-State actors working in cooperation with Governments can contribute significantly to a culture of compliance by helping to build the capacity for implementation, by assisting in the transfer and dissemination of technology and knowledge, and by raising the general awareness of environmental issues;

(*h*) Increased education concerning environmental issues particularly at the local level is also important for facilitating improved compliance and implementation.

[202] See Lee, "How can States be enticed to settle disputes peacefully?", p. 292.

[203] Lang, "Compliance control in international environmental law: institutional necessities".

E. The principle of non-discrimination

167. The principle of non-discrimination or the equal right of access recognized by OECD is designed to make available to actual or potential "victims" of transfrontier pollution, who are in a country other than that where the pollution originates, the same administrative or legal procedures as those enjoyed by potential or actual victims of a similar pollution in the country of origin. Even though the principle thus stated is more relevant in the context of seeking remedies in the face of substantial harm that already occurred in its application, it provides in fact for a situation where two victims of the same transfrontier pollution situated on opposite sides of a common frontier have the same opportunity to voice their opinions or defend their interests both at the preventive stage before the pollution has occurred and in the curative stage thereafter. Accordingly, the national and foreign "victims" may participate on an equal footing at inquiries or public hearings organized, for example, to examine the environmental impact of a polluting activity and may undertake proceedings in relation to environmental decisions which they wish to challenge without discrimination before the appropriate administrative or legal authorities of the country where the pollution originates. They may also take legal action to obtain compensation for a damage or its cessation.[204]

168. The principle of non-discrimination is designed primarily to deal with environmental problems occurring among neighbouring States, as opposed to long-distance pollution. The principle aims at providing equal treatment for aliens on par with nationals in respect of legal rights and remedies and right of access to judicial and administrative forums they enjoy in their State. Successful operation of the principle would require some similarities between the legal systems in the neighbouring States and some similarities between their policies for the protection of the rights of persons, property and environment situated within their territories. A potential problem with the application of the principle lies in the fact that there are sometimes drastic differences between the substantive remedies provided in various States. Mention may be made in this context of the differences between the environmental laws of the United States and Mexico or between some Western European and Eastern European States. Difficulties have been experienced even within the OECD countries. One such difficulty relates to the long-standing tradition in some countries whereby administrative courts have no jurisdiction to hear cases concerning the extraterritorial effects of administrative decisions. A second difficulty, in a few countries, arises from conferring sole jurisdiction on the courts of the place where the damage occurred.[205]

169. Article 32 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses also deals with the principle of non-discrimination. It provides that natural or juridical persons who have suffered or are under a serious threat of suffering significant transboundary harm shall without discrimination have access in accordance with the national legal system of the State of origin to judicial or other procedures of that State or a right to claim compensation or other relief in respect of significant harm caused by activities carried on its territory. The Convention was adopted by a recorded vote, with 103 States in favour, 3 against and 27 States abstaining. Some States had reservations on the suitability and applicability of the principle of non-discrimination at a global level, particularly in respect of a community of States which are not economically, socially and politically integrated.[206]

170. The principle of non-discrimination has come before the Commission for consideration in various forms. Article 29 of the draft article presented by Mr. Barboza in his sixth report dealt with this concept. According to that provision, in the event of transboundary harm, a State would have the obligation through national legislation to grant its courts jurisdiction to deal with claims of liability from affected States or individuals or legal entities. Thus, the principle was presented as a component of a regime on civil liability.[207] The question of providing suitable remedies in case of transboundary harm to persons, property and the environment in the affected State within the law and procedure and through the legal and other forums of the affected State was also discussed in Mr. Barboza's tenth report, where different alternative channels for such remedies were noted.[208] The matter was left undecided, as the Commission took the decision at the time to limit the scope of the exercise initially to the question of prevention only. Accordingly, no article was adopted on this matter by the Commission. However, the Working Group adopted in 1996 article 20 on the principle of non-discrimination under chapter III on compensation or other relief.[209]

171. The rule of non-discrimination is meant to provide equality of access to all potential or actual victims of an activity bearing a risk of causing substantial harm without discrimination on grounds of nationality, residence or place of injury. However, the situation of potential victims is different from that of actual victims in terms of remedies available to them. Potential foreign victims are first protected by their own State, that is, the affected State to which the State of origin owes a duty of notification, consultation and negotiation in case of such activities. There is also the evolving requirement of EIA for seeking authorization under national law for dangerous activities, which in turn provides for public participation. Such participation could be extended to foreign potential victims on a par with nationals before various concerned forums or where joint assessment is undertaken by States of origin and the affected State, through forums established in

[204] See OECD Council recommendation C(76)55(Final) on equal access in matters of transfrontier pollution of 11 May 1976, cited in *Yearbook … 1995*, vol. II (Part One), document A/CN.4/471, pp. 82–84, paras. 118–129.

[205] Ibid., p. 83, para. 125.

[206] Colombia, Ethiopia, India and the Russian Federation had reservations on the article. The United Republic of Tanzania had reservations on the phrase "or the place where the injury occurred", as it might come in conflict with the territorial limitations of cause of action. See *Official Records of the General Assembly, Fifty-first Session, Sixth Committee*, 99th plenary meeting (A/51/PV.99), and corrigenda.

[207] See sixth report (footnote 5 above), pp. 99–100 and 109.

[208] See tenth report (footnote 5 above), pp. 146–148, paras. 91–109, where four alternatives were set out: (*a*) State to State; (*b*) private parties versus State of origin; (*c*) affected State versus private parties; and (*d*) private injured parties versus private liable parties.

[209] *Yearbook … 1996*, vol. II (Part Two), annex I, p. 129.

one's own State or before forums of the State of origin as per any agreed regime of prevention between the State of origin and the affected State.

172. Questions could still arise concerning public participation. Opinions could vary, referendums may not be representative of the true will of people and it may not be possible to express an opinion based on scientific evidence to enable the State to make reasonable and prudent decisions. Similarly, questions would also arise regarding the *locus standi* of foreign potential victims to participate in the preliminary assessment stage where no conclusion could be drawn about the nature and magnitude of the risk involved. However, once it is established that the risk is significant, there is a compelling need to give foreign potential victims suitable access to appropriate forums so as to enable the State of origin to take into consideration their views and interests. In this respect, there appears to be more than one possible option.

173. The case of foreign actual victims of transboundary harm is a different one. However, the matter must be discussed in a different context, as the present focus is only on prevention. The draft article adopted by the Working Group of the Commission in 1996 and the various alternatives indicated by Mr. Barboza in his tenth report could be reviewed, as appropriate, at a later stage.[210]

[210] For some of the alternatives discussed, see also Guruswamy, Palmer and Weston, op. cit., pp. 325–332.

Chapter VI

Principles of content

A. The principle of precaution

174. The principle of precaution states that where there are threats of serious or irreversible harm, a lack of full scientific certainty about the causes and effects of environmental harm shall not be used as a reason for postponing measures to prevent environmental degradation. Implementation of this principle would involve anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based upon the assumption that scientific certainty, to the extent it is obtainable, with regard to issues of environment and development may be achieved too late to provide effective responses to environmental threats. The principle also suggests that where there is an identifiable risk of serious or irreversible environmental harm, including, for example, extinction of species, widespread toxic pollution or major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment.[211]

175. One study which analysed at some depth the principle of precaution and resource conservation identified the following precautionary measures:

(*a*) Environmental protection should not only aim at protecting human health, property and economic interests, but also protect the environment for its own sake;

(*b*) Precautionary duties must not only be triggered by the suspicion of concrete danger but also by (justified) concern or risk potential;

(*c*) Prevention and abatement duties must not be conditioned on full scientific proof or a precise cause/effect relation and attainment of damage thresholds;

(*d*) A permit requirement for potentially dangerous activities, environmental monitoring, pollution control and minimal planning are crucial for planned resources and eco-management;

(*e*) This requires long-term planning. A human rights approach (right to decent environment) is desirable;

(*f*) There must be regional eco-management and, for a few areas, global cooperation instead of purely national management. Regular information, timely notification and consultation are essential conditions for this purpose. Joint monitoring, joint emergency regimes and joint scientific cooperation are also helpful;

(*g*) There must be no differentiation between domestic and international environmental damage. This internationalization and regional and global solidarity must also lead to technology transfer to developing countries to enable them to implement eco-management;

(*h*) Precautionary eco-management can be best achieved through extensive technical and regional planning, EIA, limitation of discharges through emission standards and treatment using the best available technology. The choice of technology should not be dependent upon economic criteria; quality standards should not replace emission standards;

(*i*) Precautionary eco-management also requires modern measures affecting the generation (and disposal) of wastes through product substitution, reduction or recycling of wastes. Financial incentives should support these minimization measures in the production processes. Insurance or funding solutions would also be necessary. The principle of solidarity should also allow funding for developing countries in the common interest, especially for enabling them to implement the necessary product substitution.[212]

[211] UNEP/IEL/WS/3/2 (footnote 44 above), p. 14.

[212] See Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law—The Precautionary Principle: International Environmental Law Between Exploitation and Protection.*

176. The precautionary principle has been incorporated in a number of international legal instruments, among them the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area and the 1992 Maastricht Treaty which states that the European Community policy on the environment shall be based on the precautionary principles. It is also incorporated in principle 15 of the Rio Declaration, which provides that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". Principle 15 further requires that "the precautionary approach shall be widely applied by States according to their capabilities".[213]

177. The precautionary principle has been included in some conventions setting forth the obligation of States parties to prevent the release of certain substances into the environment which may cause harm to humans or to the environment. For example, the 1991 OAU Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, states in article 4, paragraph 3 (*f*), that:

> Each Party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, inter alia, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. The Parties shall co-operate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production methods, rather than the pursuit of a permissible emissions approach based on assimilative capacity assumptions.

178. The parties to the 1985 Vienna Convention for the Protection of the Ozone Layer stated in the preamble that in agreeing to the various obligations contained in the Convention, they were "[m]indful also of the precautionary measures for the protection of the ozone layer which have already been taken at the national and international levels".

179. While reference to the precautionary principle or approach can be found in many other treaties or agreements, the precise formulation is not identical in each instrument. The traditional approach requires action only in case of scientific evidence establishing the likelihood of a serious hazard. This requires the party wishing to adopt a measure to prove a case for action based upon the existence of sufficient scientific evidence which may be difficult to obtain. The more modern approach would reverse the situation and would urge the States to take action to prevent, mitigate or eliminate grave and imminent harm taking into account the extent and probability of imminent damage if those measures are not taken.[214]

180. This might require States undertaking or permitting activities creating the risk of causing transboundary harm to establish that their activities or discharges of certain substances would not adversely or significantly affect the environment before the proposed activity is commenced. This interpretation may also require international regulatory action where scientific evidence suggests that the lack of action may result in serious or irreversible harm.

181. However, the 1990 Bergen Ministerial Declaration on Sustainable Development in the ECE Region was the first international instrument to treat this principle as one of general application and linked to sustainable development. It provided that:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[215]

182. The precautionary principle was recommended by the UNEP Governing Council in order to promote the prevention and elimination of marine pollution, which is increasingly becoming a threat to the marine environment and a cause of human suffering.[216] The 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa adopted this principle in order to achieve prevention of pollution through the application of clean production methods (art. 4 (3) (*f*)). The Convention also lowers the threshold at which scientific evidence might require action by not referring to "serious" or "irreversible" as adjectives qualifying harm. While the 1992 Convention on biological diversity refers to the principle indirectly only in its preamble, the 1992 United Nations Framework Convention on Climate Change established limits on the application of the precautionary principles by requiring a threat of "serious or irreversible damage" and by linking the commitment to an encouragement to take measures which are "cost-effective" (art. 3 (3)).

183. From the above it may be concluded that there is no uniform understanding of the meaning of the precautionary principle among States and other members of the international community. Identifying or fixing the level at which scientific evidence is sufficient to override arguments postponing measures or at which measures might even be required as a matter of international law is still an open question.[217]

184. Summing up the legal status of the precautionary principle, one commentator characterized it as "evolving". He further suggested that even though a good argument could be made that a principle which has received sufficient confirmation in various international treaties may be regarded as having acquired the status of a customary principle of international law, "the consequences of its application in any potential situation will be influenced by the circumstances of each case".[218]

185. The precautionary principle is essentially a good policy to be adopted by States. It is a policy of common sense and should be resorted to as a matter of self-interest. It is however understood that where the benefits of a certain activity, according to existing practices, far out-

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[213] See footnote 37 above.

[214] See Sands, op. cit., p. 209.

[215] "Action for a common future: report of the Economic Commission for Europe on the Bergen Conference" (8–16 May 1990) (A/CONF.151/PC/10), annex I, para. 7.

[216] See *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 25* (A/44/25), annex I, decision 15/27 of 25 May 1989; see also Sands, op. cit., p. 210.

[217] Sands, op. cit., p. 212.

[218] Ibid., pp. 212–213.

weigh consequences which are only feared or otherwise suspected, it would be difficult to yield to the demands of the precautionary principle when few viable alternatives exist to meet the urgent developmental demands of the population at large, which is predominantly poor.[219]

B. The polluter-pays principle

186. The polluter-pays principle was first enunciated by the OECD Council in 1972.[220] It was set out as an economic principle and as the most efficient means of allocating the costs of pollution prevention and control measures so as to encourage the rational use of scarce environmental resources. It also encourages, as a matter of economic policy, free-market internalization of the costs of publicly mandated technical measures in preference to inefficiencies and competitive distortions in governmental subsidies and thus attempts to avoid distortions in international trade and investment.[221]

187. The principle was originally intended to be applied by a State with regard to activities within its territory and was later extended by OECD in 1989 beyond chronic pollution caused by ongoing activities to cover accidental pollution. Accordingly, it was noted that:

> [I]n matters of accidental pollution risks, the polluter-pays principle implies that the operator of a hazardous installation should bear the cost of reasonable measures to prevent and control accidental pollution from that installation which are introduced by public authorities in member countries in conformity with domestic law prior to the occurrence of an accident in order to protect human health or the environment.[222]

188. The members of the European Community have committed themselves to the polluter-pays principle. That commitment appears in the 1986 Single European Act which amended the Treaty of Rome and granted the European Community for the first time the express power to regulate environmental affairs. The Act refers specifically to the polluter-pays principle as a principle governing such regulations and states that "[a]ction by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay" (art. 130 R, para. 2). The European Community has also been applying the polluter-pays principle to the sources of pollution. For example, the Community has approved a directive which expressly instructed member States to impose the costs of waste control on the holder of waste and/or prior holders or the waste generator in conformity with the polluter-pays principle.[223]

189. The application of the polluter-pays principle (and its costs) would involve both preventive as well as remedial measures. According to one commentator, in the United States of America, for example, if a source of accidental pollution is responsible for the restoration of the environment that responsibility is considered a measure for compensation for damage inflicted, not a preventive or protective measure. Such is also the case with remedial costs of hazardous waste clean-up.[224] The United States does not recognize the polluter-pays principle, even though it applies its main features in practice.[225]

190. The polluter-pays principle was adopted at the global level in 1992 as principle 16 of the Rio Declaration according to which:

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[226]

191. Since then the principle has also gained increasing acceptance and has been used as a guiding concept in designing national environmental laws and regulations. While developed countries have implemented various economic instruments for several years, developing countries and countries with economies in transition are beginning to incorporate economic instruments into their national legislation.[227]

192. Principle 16 of the Rio Declaration dealt with both costs of pollution and environmental costs, i.e. a set of costs broader than the costs of pollution prevention, control and reduction measures. The other costs to be considered in this regard are:

(*a*) The costs of remedial measures (e.g. the clean-up and reinstatement of the environment if this is not covered by the words "reduction measures");

(*b*) The costs of compensatory measures (compensation to victims of damage);

(*c*) The costs of "ecological" damage (compensation for damage to the environment in general, to the ecological system, compensation to public authorities for residual damage, fines for excessive pollution, etc.);

(*d*) The costs of pollution charges or equivalent economic instruments (tradable emission rights, pollution tax, eco-tax, etc.).[228]

193. Implementation of the polluter-pays principle has not been easy. In spite of their strong commitment to encourage the adoption of the principle in the national policies of various countries, and particularly in Europe, States have found various ways of justifying subsidy schemes by interpreting the polluter-pays principle according to

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[219] Rao, "Environment as a common heritage of mankind: a policy perspective", p. 208.

[220] See *Yearbook … 1995*, vol. II (Part One), document A/CN.4/471, p. 80, para. 102.

[221] See Gaines, "The polluter-pays principle: from economic equity to environmental ethos", p. 470.

[222] See the appendix to OECD recommendation C (89)88 of 7 July 1989, cited in *Yearbook … 1995*, vol. II (Part One), document A/CN.4/471, p. 80, para. 106.

[223] Ibid., para. 112.

[224] See Gaines, loc. cit., pp. 480–484.

[225] *Yearbook … 1995*, vol. II (Part One), document A/CN.4/471, p. 81, para. 114.

[226] See footnote 37 above.

[227] Economic instruments used in national laws and regulations include deposit/refund schemes, pollution fines, eco-management systems and eco-labelling systems. The polluter-pays principle has also been implemented by various means, ranging from pollution charges, process and product standards to systems of fines and liabilities. See E/CN.17/1997/8, paras. 87–90 (footnote 41 above).

[228] See Smets, "The polluter pays principle in the early 1990s", p. 134.

their convenience.[229] In the context of OECD, during the last 20 years, subsidies have been given in order to facilitate the implementation of environmental policies to take account of existing pollutants, to avoid forcing polluting enterprises to close because of stringent environmental requirements. Most OECD member countries are still providing direct or indirect financial aid to polluters and few of them have decided that all pollution-related costs shall henceforth be borne by polluters. In Southern Europe, the European Community is providing a significant amount of subsidies to aid countries in their environmental policies, sometimes for the purpose of implementing existing directives which were adopted without any linkage to the availability of Community funds.

194. Accordingly, the problem of abuse in the application of the polluter-pays principle has become a matter of some concern. To deal with such abuse, prevention procedures were developed within OECD. Thus, any Government which considers that a pollution control subsidy provided by another member country might introduce a significant distortion in international trade and investment may request that a consultation be initiated to establish whether assistance is in conformity with OECD guidelines. In the European Community, the Commission issued specific guidelines and can bring the case to the European Court of Justice which would examine whether the proposed subsidy is in conformity with article 92 of the Treaty of Rome and with other applicable texts. However, it is observed that no case of excessive subsidy in the area of pollution control was brought to the attention of the European Court of Justice or of OECD.[230]

195. There is thus a need for further clarity on various issues involved in the definition and application of the polluter-pays principle: clarification of the control costs to be borne by the polluter, valid exceptions to the polluter-pays principle, sharing of the pollution costs between the public bodies and polluters, and the most appropriate schemes and methods by which internalization could be achieved.

196. The application of the principle in a transboundary context could also give rise to several problems between the State of origin and the affected States. While in principle one might consider that costs of pollution control measures are to be carried out in the State of origin, exceptions could also be foreseen whereby such States could receive a subsidy to undertake pollution control measures.

197. The practice of OECD countries reveals that at the international level States very rarely pay for transboundary damage because it is up to the polluter to compensate the victims. Secondly, subsidies are very rare and polluting OECD members generally implement pollution control measures without any financial support from other member countries. There could however be some exceptions. Industrialized countries may subsidize developing countries. Even within the European Community, member States provide financial mechanisms to support other member States such as Greece, Ireland, Portugal and Spain. In the Arctic area, Scandinavian countries offer financial assistance to the Russian Federation. Similarly, such assistance was also provided to Eastern European countries to enhance the safety of Soviet-made nuclear reactors. Inter-State subsidies thus can also be used to overcome a historical situation detrimental to the environment.[231]

198. The practice is still evolving. Accordingly, it has been observed that "[a]t present, it is difficult to know whether PPP [polluter-pays principle] is adhered to because there is too much uncertainty on what is allowed and what is forbidden concerning subsidies or other fiscal measures for the benefit of polluters inside industrialized countries and also among developed and less developed countries".[232] For these and other reasons, it was also observed that "PPP was introduced in numerous international agreements as a guiding principle or as a binding principle but in general the meaning of this principle was not specified".[233]

199. Accordingly, Kiss considered the principle only as one of guidance for the economy and not a legal principle.[234] Sands noted that the polluter-pays principle has not achieved the broad geographic and subject-matter support that has been accorded to the principle of preventive action. He also noted that negotiations concerning principle 16 of the Rio Declaration indicated that a number of States, both developed and developing, would like to see these principles adopted only at the domestic level but not to apply to or govern relations or responsibilities between States at the international level.[235] Brown Weiss also shared this view and stated that the polluter-pays principle "does not translate easily into a principle of liability between states".[236]

C. The principles of equity, capacity-building and good governance

200. In the context of the development of international environmental law at Rio de Janeiro in 1992, the question of giving suitable priority to the interests and limitations of developing countries was given specific consideration. While a number of principles included in the Rio Declaration exhibited a sensitivity to the aspirations, needs and limitations of developing countries, difficulties remained in reconciling the special needs of developing countries

[229] See *Yearbook … 1995*, vol. II (Part One), document A/CN.4/471, p. 81, para. 113. See also E/CN.17/1997/8 (footnote 41 above).

[230] Smets, loc. cit., p. 140.

[231] Ibid., pp. 141–144; see also Brownlie, "State responsibility and international pollution: a practical perspective", in *International Law and Pollution*, cited in Magraw, "Legal treatment of developing countries: differential, contextual, and absolute norms", p. 83, footnote 53.

[232] Smets, loc. cit., pp. 143–144.

[233] Ibid., p. 133. One example of this is the reference to the polluter-pays principle in the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation as "a general principle of international environmental law". See also the 1992 Convention on the Transboundary Effects of Industrial Accidents, which takes into account that the polluter-pays principle is a general principle of environmental law.

[234] Kiss, "The Rio Declaration on Environment and Development", p. 61.

[235] Sands, "International law in the field of sustainable development: emerging legal principles", p. 66.

[236] Brown Weiss, "Environmental equity: the imperative for the twenty-first century", p. 21.

with the need to develop a universally applicable legal regime. Several ideas concerning intra-generational and inter-generational equity, capacity-building and good governance were discussed in this context.

1. Intra-generational equity

201. To put this matter in perspective, it is necessary first to recall briefly the special circumstances of developing countries. According to a recently published survey of the United Nations, it is predicted, based on certain assumptions, that the world population will grow to 9.4 billion by 2050 and will stabilize at around 11 billion by 2200. In contrast, in 1995, the world population stood at 5.7 billion. While Europe will see a declining trend in population growth by about 18 per cent from 728 million in 1995 to 595 million by 2150, the population in the United States and Canada will grow from 297 million in 1995 to 424 million by 2150. Further, the population in Asia, Africa and Latin America will also register a substantial increase from 1995 to 2150. Accordingly, Africa's population will grow from 700 million to 2.8 billion, China's will grow from 1.2 billion to 1.6 billion, India's from 900 million to 1.7 billion and the population of Latin America and the Caribbean will grow from 477 million to 916 million.[237] The enormous growth in population in the developing world must also be seen against the background of persistent poverty levels there.[238] In other words, unless miracles occur, much of this population in the developing world will live at the edge of poverty and will continue to confront a gap between the rich and the poor in terms of living standards. The priorities for the Governments of developing countries will continue to be providing food, clothing, shelter, minimal literacy and health standards through safe drinking water, sanitation facilities and primary health centres for their massive populations. While some attention will have to be paid to the liberalization of national trade policies and the globalization of trade, attracting investments and improving the infrastructure facilities for industry, these Governments will still have to allocate their limited resources on a priority basis to providing employment and fulfilling the other minimum vital needs of their population.

202. In addition to the above, it is also well known that the means of production and technologies at the disposal of developing countries are inefficient as well as environmentally unfriendly.

203. In these circumstances, the first question that arises in the context of promoting sustainable development is how to bridge the gap between developed and developing countries on the one hand and between rich and poor within countries on the other. The latter question should largely be addressed in the context of good governance, while the former question should be addressed in the context of equity, particularly intra-generational equity.

204. Intra-generational equity has several implications for the South.[239] It would mean, first, that the developmental needs of the South should continue to receive priority in any effort to promote a better global environment. Secondly, any regime providing for the protection of the environment should yield in favour of the South adequate environmental space for its future development. There is thus a need to enable developing countries to continue to utilize the technology available to them until they are in a position to acquire or develop more environmentally friendly technology. In other words, it is the view of the South that the North, with consumption levels at 80 per cent and only 20 per cent of the world's population, should not pre-empt high levels of global environmental space capable of absorbing pollution. Thirdly, developing countries must be given sufficient room within the current environmental constraints to develop rapidly enough to meet the needs and aspirations of their growing population by securing the necessary resources, technology and access to the markets of the world. This underlines the fact that the South can only achieve environmentally sound protection, development and lifestyle through the attainment of economic growth and development.

205. In view of the concerns thus expressed, principles 1, 3–7, 11 and 25 of the Rio Declaration reflect the interests of developing countries and the equities involved.[240] The important point of intra-generational equity is to avoid economic development taking "place in all countries on the environmental backs of the poor communities".[241] Application of the principle of equity could involve the development of a differential and con-

[237] See the projection made by the United Nations Population Division, based on a medium-fertility rate of two children per woman (*The Hindu*, 8 February 1998, p. 7).

[238] While it is understandable that there will be differences of opinion as to how to measure and conceptualize poverty, it has been suggested that, according to the criterion of "calorie consumption"—the prevailing measure of poverty in India—a daily calorie consumption of under 2,100 among urban dwellers and less than 2,400 in rural areas is a mark of poverty. Thus, in India alone, while the rural poverty level of 57.79 per cent in 1977–1978 decreased slightly to around 57.4 per cent in 1993–1994, in the urban sector the 1977–1978 level of 49.28 per cent rose to 65.4 per cent in 1993–1994. See Gupta, "Poverty and statistics", p. 12.

[239] On the general question of role of equity, see Schachter, *International Law in Theory and Practice*, pp. 50–65. See also Franck and Sughrue, "The international role of equity-as-fairness". For an analysis of the positions taken by the South at the Rio Conference, see Mensah, "The role of the developing countries", p. 36.

[240] Principle 1 emphasized that human beings are at the centre of concerns for sustainable development. Principle 3 noted that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. Principle 4 aimed at achieving sustainable development and making environmental protection an integral part of the development process. Principle 5 required States to cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development. Principle 6 required special priority to be given to the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable. Principle 7 dealt with common but differentiated responsibilities. Principle 11 noted that, while environmental standards, management objectives and priorities should be developed, standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries. Finally, principle 25 underlined that peace, development and environmental protection are interdependent and indivisible. For an analysis of these principles, see E/CN.17/1997/8 (footnote 41 above).

[241] Brown Weiss, "Environmental equity: the imperative for the twenty-first century", p. 17. It has been observed that the proposition on environmental justice advanced by Brown Weiss addressed the deep structure of the international legal order and would have to be understood in the context of the process of fundamental change or development, as one wished, of the international legal order beginning with decolonization and continuing with the so-called new international economic order process (Ginther, "Comment on the paper by Edith Brown Weiss").

textual norm in the evolving and interconnected areas of economic development, human rights and environmental protection/resources management law. On the basis of an examination of some relevant treaty regimes and other declarations and State practice, according to one observer, when fashioning international environmental norms, there is arguably an existing, general customary obligation, stemming primarily from State practice in those three areas, to take the effect on sustainable development in developing countries into account, in order to foster, or at least avoid unduly interfering with, such development and in order to ensure that the resultant norms are not impossible to comply with. Similarly, it may be argued that developed countries have a duty under customary law to assist developing countries in meeting international environmental norms relating to the progressive realization of international human rights.[242]

2. Inter-generational equity

206. The principle of inter-generational equity is of more recent origin. The 1972 Stockholm Declaration referred to inter-generational equity in principles 1 and 2.[243] Thereafter, references were made to the principle of inter-generational equity in several multilateral conventions.[244]

207. The Experts Group on Environmental Law of the World Commission on Environment and Development, which reviewed the merits of providing for the principle of inter-generational equity, recommended that States should "ensure that the environment and natural resources are conserved and used for the benefit of present and future generations".[245] This principle later found its place in the context of sustainable development. Thus principle 3 of the Rio Declaration reads as follows: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[246]

208. In the context of inter-generational equity, the environment is viewed more as a resource base for the survival of present and future generations. It has been observed that a twofold duty flows from this principle.[247] First, States have a basic duty to conserve options for future generations by way of trust by maintaining to the maximum extent possible the diversity of the natural resource base (a protective element). The second obligation concerns the prevention or abatement of pollution or other forms of degradation of natural resources or the environment which would reduce the range of uses to which the natural resources or environment could be put or which would confront future generations with enormous financial burdens to clean up the environment. It is this second obligation which is more relevant in the context of the present consideration of the principle of prevention.

209. The principle of inter-generational equity is also mentioned in the 1996 Istanbul Declaration on Human Settlements and the Habitat Agenda, which states that "[i]n order to sustain our global environment ... we commit ourselves to ... the preservation of opportunities for future generations".[248] Moreover, the United Nations Framework Convention on Climate Change refers to this principle in article 3, paragraph 1, as does the Convention on biological diversity in its last preambular paragraph.[249] In spite of such references to this principle in many international conventions and in other contexts,[250] the specific

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[242] See Magraw, loc. cit., p. 99.

[243] Principle 1 of the Stockholm Declaration read as follows:

> "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating *apartheid*, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated".

And according to principle 2:

> "The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate."

[244] Some of the relevant conventions are: the 1972 Convention for the Protection of World Cultural and Natural Heritage; the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora; the 1976 Convention for the Protection of the Mediterranean Sea against Pollution; the 1976 Convention on the Conservation of Nature in the South Pacific; the 1976 Convention on the prohibition of military or any other hostile use of environmental modification techniques; the 1978 Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution; the 1979 Convention on the Conservation of European Wildlife and Natural Habitats; the 1983 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region; and the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources. Article 30 of the Charter of Economic Rights and Duties of States, General Assembly resolution 36/7 of 27 October 1981 on the historical responsibility of States for the preservation of nature for present and future generations, and the World Charter for Nature, annexed to General Assembly resolution 37/7 of 28 October 1982, have also made reference to the principle of inter-generational equity.

[245] Article 2 of the General Principles concerning Natural Resources and Environmental Interferences, *Environmental Protection and Sustainable Development* … (footnote 45 above), pp. 42–45.

[246] For a review of the principle, see E/CN.17/1997/8 (footnote 41 above), paras. 24–28.

[247] See *Environmental Protection and Sustainable Development* … (footnote 45 above), p. 43.

[248] *Report of the United Nations Conference on Human Settlements (Habitat II), Istanbul, 3–14 June 1996*, chap. I, resolution I, annex I, para. 10 (United Nations publication, Sales No. E.97.IV.6).

[249] Article 3, paragraph 1, of the United Nations Framework Convention on Climate Change states: "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof." The last preambular paragraph of the Convention on biological diversity reads: "*Determined* to conserve and sustainably use biological diversity for the benefit of present and future generations."

[250] The haziness of its content did not deter the invocation of this principle in international jurisprudence. See the separate opinion of Judge Weeramantry in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 211. See also his dissenting opinion in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 288, where he observed that the concept of inter-generational rights is an important and rapidly developing principle of contemporary environmental law (ibid., p. 341). The Supreme Court of the Philippines has granted standing to 42 children as representatives of themselves as a future generation to protect their right to a healthy environment (the Children's Case) (see judgement of 30 July 1993, *Juan Antonio Oposa and others* v. *the Honourable Fulgencio S. Factoran and*

content thereof is not entirely clear. It has been pointed out that "[t]he nature and the extent of the right is left open, as is the question of whether such a right attaches to States, peoples or individuals".[251] To the extent that the principle is linked to the right to development, its implementation raises its own difficulties. In spite of doctrinal and conceptual problems, the right to development is gaining ground as an essential attribute of human rights and the general principle of equity.[252]

210. In an effort to clarify the content of the principle of inter-generational equity, it has been suggested that the following steps may be taken:[253]

(*a*) Requiring present generations to use their resources in a way that protects the sustainable development of future generations;

(*b*) Committing to the long-term protection of the environment;

(*c*) Ensuring that the interests of future generations are adequately taken into account in policies and decisions relevant to development;

(*d*) Avoiding and, if need be, redressing disproportionate environmental harm from economic activities;

(*e*) Ensuring a non-discriminatory allocation of current environmental benefits.

211. Many imaginative proposals have been put forward by commentators regarding an implementation strategy. According to one view, the rights of future generations might be used to enhance the legal standing of members of the present generation to bring claims on behalf of the former, by relying on substantive provisions of environmental treaties where doubts exist on the implementation of rights created and obligations enforceable by individuals.[254] Another commentator felt that reliance on the liability doctrine failed to address the external realities and to ensure equitable use; she therefore advocated a preventive approach to implement the principle of inter-generational equity.[255] It is evident that the pollution prevention approach reflects a growing willingness to relate the present to the future in the formulation of legal norms. Prevention of pollution from nuclear reactors which affects the ability of future generations to use natural resources and prevention of pollution to biological resources, water and soils would also help promote inter-generational equity.[256]

3. Capacity-building

212. Compliance with international environmental obligations in general and with obligations concerning the prevention of transboundary harm in particular involves the capacity of a State to develop appropriate standards and to bring more environmentally friendly technologies into the production process as well as the necessary financial, material and human resources to manage the process of development, production and monitoring of the activities. There is also a need to ensure that risk-bearing activities are conducted in accordance with applicable standards, rules and regulations and that the jurisdiction of courts may be invoked in respect of violations to seek necessary judicial and other remedies. Many developing countries are just beginning to appreciate the ills of pollution and unsustainable developmental activities. It has therefore been rightly pointed out that compliance with international environmental obligations requires resources, including technologies and technical expertise, that are not readily available, particularly in developing countries. A spirit of global partnership[257] is therefore recommended to enable developing countries and countries in transition to discharge the duties involved, in their own self-interest as well as in the common interest. Such a global partnership could entail, as in the case of some specific international environmental treaties, offering financial support through the development of common funds, facilitating the transfer of appropriate technology on fair and equitable terms[258] and providing necessary training and technical assistance.

another, Supreme Court of the Philippines, G. R. No. 101083). See also *M. C. Mehta* v. *Union of India (Tanneries)*, AIR 1988 Supreme Court 1115 (public interest litigation to prevent tanneries, which were polluting the River Ganga, from operating until they installed a primary effluent treatment plant). See for this and other cases, *Compendium of Summaries of Judicial Decisions in Environment Related Cases* (with special reference to countries in South Asia), SACEP/UNEP/NORAD Publication Series on Environmental Law and Policy No. 3 (1997).

[251] E/CN.17/1997/8 (footnote 41 above), para. 24. For a similar view, see also Sands, op. cit., p. 200. Another commentator has lamented that future generations are not effectively represented in the decision-making process today though decisions taken today would determine their welfare (Brown Weiss, "Intergenerational equity: a legal framework for global environmental change"), pp. 385 and 410–412. The same commentator also accuses the present generation of being biased in favour of itself (Brown Weiss, "Environmental equity: the imperative for the twenty-first century", p. 22).

[252] On the questions raised by the right to development, see Bulajić, *Principles of International Development Law*; Forsythe, *Human Rights and Development*; Hossain and Choudhury, eds., *Permanent Sovereignty over Natural Resources*; McDougal, Lasswell and Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*; Mutharika, "The principle of entitlement of developing countries to development assistance", pp. 154–236. See pages 237–351 (ibid.) for an analysis of the text of instruments relevant to this principle; Lachs, "Introduction of the subject: the right to development"; Rich, "The right to development as an emerging human right", pp. 305–306; Haq, "From charity to obligation: a third world perspective on confessional resource transfers", p. 389. See also Gandhi, *Right to Development in International Law: Prospects and Reality.*

[253] UNEP/IEL/WS/3/2 (footnote 44 above), annex I, p. 13.

[254] See Sands, op. cit., pp. 158–163 and 200. Brown Weiss also supports the proposal on the designation of an ombudsman for future generations or the appointment of commissioners for future generations (Brown Weiss, "Intergenerational equity …", pp. 410–412).

[255] Brown Weiss, "Environmental equity: the imperative for the twenty-first century", p. 22. It was also suggested that this principle could comprise three components: comparable options defined as conserving the diversity of natural and cultural resources; comparable quality; and comparable or non-discriminatory access to the benefits of the environmental system (Brown Weiss, "Environmental equity and international law", p. 15).

[256] Ibid., "Environmental equity and international law", p. 14.

[257] See UNEP/IEL/WS/3/2 (footnote 44 above), para. 14.

[258] The problem of transfer of technology was a matter of intensive study in different forums. For one such study prepared in the context of the development of the law relating to the new international economic order, see Espiritu, "The principle of the right of every State to benefit from science and technology". For a review of the obligation of transfer of technology incorporated in the United Nations Convention on the Law of the Sea, see Yarn, "The transfer of technology and UNCLOS III", p. 138.

213. Transfer of technology and scientific knowledge would require overcoming several well-known complications affecting such transfer, namely, restrictive practices of suppliers of technology, deficiencies in the bargaining process between the suppliers of technology and the developing countries and reallocation of a greater share of productive capacity to the developing countries.[259] What is also required is technology transfer which takes into account the conditions prevailing in developing countries. Dissemination and transfer of scientific knowledge give rise to problems governed by the law relating to patents and copyrights. It is admitted that transfer of technology and scientific knowledge should be undertaken under proper legal arrangements and regimes. Further, such transfer should be at a fair and reasonable cost. However, given the limited resources and urgent priorities of development, developing countries must be helped by the international community to acquire appropriate technology and scientific knowledge. For this purpose, international funding mechanisms and technical training programmes could be established. Such capacity-building of developing countries would be in the common interest of all States as it would promote greater compliance with duties of prevention.[260]

214. Apart from the need for international transfer of resources and technology and technical skills to developing countries and countries in transition, capacity-building would involve addressing and remedying numerous weaknesses, deficiencies and difficulties such as: weak or inadequate legislation, the lack of political influence of environmental authorities, low public awareness, lack of well-established target groups which represent specific interests, the lack of managerial skills and inadequate information bases. Strengthening institutional capabilities would imply decentralization and delineation of structures of authority and power between the federal and State Governments and between the State and the local authorities or municipalities; establishment of data centres, expert consultative bodies and monitoring bodies to improve enforcement and compliance with environmental permits, licences and EIA requirements; halting activities which violate environmental regulations; and ensuring preparedness measures for environmental emergencies. In addition, multidisciplinary, integrated research programmes should be promoted to better understand pollution transfer mechanisms, to apply the ecosystem approach to environmental management as well as to develop low- and non-waste technology. Continuous training for environmental administrators at all levels should be organized with particular attention to building and improving skills and knowledge of environmental law, environmental economics, environmental impact and risk assessment and auditing as well as conflict-resolution techniques.[261]

215. Agenda 21 envisaged a concerted and coherent approach linking a number of the above components to promote endogenous capacity-building. Environmental legislation touching upon various sectors of development-related activities has an important contribution to make towards promoting the capacity of a State to prevent transboundary harm.[262] In order for environmental law to become sound and effective it must be implemented through appropriate administrative and institutional practices and by the establishment of specialized tribunals dealing with environmental law matters or cases.[263]

4. Good governance

216. Several of the above requirements for enhancing the capacity of States to meet their duties of prevention culminate in the need for the maintenance of good governance to sustain the absorption of the inputs made and to profit therefrom so as to further improve such governance. Good governance is said to comprise the rule of law, effective State institutions, transparency and accountability in the management of public affairs, respect for human rights and the meaningful participation of all citizens in the political processes of their countries and in decisions affecting their lives.[264] It has also been stated that improving and enhancing governance is an essential condition for the success of any agenda or strategy for development. Improved governance could mean ensuring the capacity, reliability and integrity of the core institutions of the modern State. It could also mean improving the ability of government to carry out governmental policies and functions, including the management of implementation systems.[265]

217. Good governance in effect comprises the need for the State to take the necessary legislative, administrative or other actions to implement the duty of prevention, as

[259] For a discussion of these and other issues concerning technology-sharing, see Schachter, *Sharing the World's Resources*, p. 107.

[260] Despite the existence of profound differences in the allocation of goods and costs which are manifest in the negotiations about laws of competition, restrictive practices, patents, dispute settlement and *ordre public* in transnational contracts, States are moved by imperatives of justice and agree to principles of fairness through motives of: conscience, particularly when appeals are made on the basis of firm data and fundamental principles of legitimacy; interdependence; and a shared commitment to democratic, open and discursive processes not only within but among States. See Franck, "Fairness in the international legal and institutional system: general course on public international law", pp. 440–441.

[261] For an elaboration of these and other considerations, see *Guidelines on Integrated Environmental Management in Countries in Transition* (United Nations publication, Sales No. E.94.II.E.31), pp. 3–8.

[262] In pursuit of these various objectives, UNEP capacity-building programmes are based upon several fundamental considerations and have been organized in the area of national legislation and institutions, and of participation in the international legislative process, as well as with respect to specific target groups. UNEP programmes in capacity-building are conducted in association and collaboration with several agencies and bodies of the United Nations system as well as international organizations, universities and professional bodies. For an elaboration of these themes, see Kaniaru and Kurukulasuriya, "Capacity building in environmental law".

[263] Referring to the situation of environmental problems in India and particularly those affecting megacities such as Delhi, Krishna Iyer, a former Supreme Court judge of India, noted that "Delhi has the notoriety of being the fourth-most polluted city in the world, not because of statutory starvation but of law-enforcing lassitude". In this connection, he reviewed the National Environmental Tribunal Act, which proposes to establish special environmental tribunals in India; see Krishna Iyer, "Environmental Tribunal I and II".

[264] See report of the Secretary-General on the work of the Organization, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 1* (A/52/1), para. 22.

[265] See Boutros-Ghali, *An Agenda for Development*, pp. 45–46, paras. 125–126.

noted in article 7 of the draft approved by the Working Group of the Commission in 1996.[266] The requirement of taking the necessary measures imposed upon the State by way of good governance does not entail its becoming involved in all the operational details of the hazardous activity, which are best left to the operator himself. Thus, where these activities are conducted by private persons or enterprises, the obligation of the State is limited to establishing an appropriate regulatory framework or machinery to ensure effective implementation of the legal regime established by the State itself in accordance with its national legislation. Such a framework could be a matter of ordinary administration in most cases, and in the case of disputes, the relevant courts or tribunals should be established to provide for speedy and efficient legal remedies.[267]

218. In developing a national legislation, it has been found convenient to first construct an umbrella or a framework environmental law which lays down the basic legal principles without attempting to codify all relevant statutory provisions. Such legislation contains a declaratory statement of national environmental goals, establishes institutions for environmental management and provides for decision-making procedures, licensing and enforcement, planning and coordination, and dispute resolution, among other environmental management mechanisms.[268] Framework legislations usually call for further supplementing legislations and rules and regulations. Moreover, the aim of an environmental legislation should be to develop long-term management of threatened resources, conservation of scarce resources and prevention of degradation of renewable resources. In the context of the prevention of transboundary harm, such legislation should also provide for adequate safeguards to take into account the environmental needs of neighbouring States in regulating an activity where significant harm to such interests is possible or evident.

219. An examination of the requirement of adopting appropriate measures and suitable legislation indicates that, by way of good governance, States must: attempt to avoid the creation and operation of a multiplicity of laws and institutions; provide for coordination among institutions at the national, regional or local level; ensure strict enforcement of national laws and policies with the support of necessary infrastructure and resources, eliminating corruption and extraneous influences; recognize public interest; adopt integrated and holistic legislation and policy; and avoid ad hoc administrative decisions.[269] It is also recommended that statutory authorities be established as a central agency supported by enforcement, regulatory and intervention powers to deal with prevention of harm and protection of the environment. The legal independence of the agency should be enhanced by financial independence. Such an agency should be designed as an empowering institution, that is, its powers should strengthen existing institutions, while at the same time it should provide a focal point for strategic alliance at the local level.[270]

220. In addition, in the context of the prevention of transboundary harm, neighbouring States and States of the region should attempt to harmonize national laws, standards and other procedures concerning the operation of hazardous activities. This is highly necessary in order to have a more uniform and voluntary implementation of the duties of prevention involved and to avoid any differences in opinion or disputes which might otherwise arise.[271]

221. Public participation is an essential requirement of good governance. Keeping this in view, article 15 of the draft approved by the Working Group in 1996 states that States shall, whenever possible and by such means as appropriate, provide their own public likely to be affected by a hazardous activity with information relating to the activity, on the risk involved and the harm which might result and ascertain their views. This recommendation takes into consideration principle 10 of the Rio Declaration, which provides for public involvement in such decision-making processes. A number of other instances where such public participation is encouraged were also noted by the Working Group.[272]

222. The "public" includes individuals, interest groups (including non-governmental organizations) and independent experts. By "general public" is meant individuals who are not organized into groups or affiliated to specific groups. Public participation could be encouraged by holding public meetings or hearings which are announced in newspapers, radio and television. The public should be given opportunities for consultation and their participation should be facilitated by providing them with the necessary information on the proposed policy, plan or programme which is likely to have significant transboundary effects. However, requirements of confidentiality may affect the extent of public participation during the assessment process. Moreover, the public is frequently not involved or only minimally involved in efforts to determine the scope of a policy, plan or programme, EIA, or in the review of a draft document. Its participation is useful, however, in obtaining information regarding concerns related to the proposed action, additional alternatives and the potential environmental impact.[273]

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[266] *Yearbook … 1996*, vol. II (Part Two), annex I, p. 101.

[267] Rao, "International liability arising out of acts not prohibited by international law: review of current status of the work of the International Law Commission", p. 102.

[268] See Kaniaru and others, "UNEP's programme of assistance on national legislation and institutions", p. 161.

[269] See Herbert, loc. cit., p. 1214.

[270] Ibid., pp. 1215–1217.

[271] In order to help common understanding, and wherever applicable to develop internationally acceptable units and standards in transboundary EIA, ISO and the European Committee for Standardization have been focusing on such items as: sampling and monitoring methods, descriptive units (for example, μg/m3 for air quality), spatial and temporal scales control (e.g. volume of soil samples) and criteria for data quality control. It seems necessary to enlarge the scope of ongoing standardization activities. See *Current Policies* ... (footnote 157 above), p. 50.

[272] *Yearbook … 1996*, vol. II (Part Two), annex I, pp. 123–124.

[273] *Application of Environmental Impact Assessment Principles* ... (footnote 160 above), pp. 4 and 8. The World Bank recognizes that when a country's environmental problems are addressed, the chances of success are greatly enhanced if the local citizens are involved in efforts to manage pollution and waste. The Bank's rationale is based on four premises: first, local citizens are often better equipped than government officials in identifying priorities for action. Secondly, members of local communities often have knowledge of cost-effective solutions that are

(*Continued on next page.*)

223. Apart from the desirability of encouraging public participation in national decision-making on vital issues regarding development and the tolerance levels of harm in order to enhance the legitimacy of and compliance with the decisions taken, it is suggested that, given the development of human rights law, public participation could also be viewed as a growing right under national law as well as international law. However, it has also been noted that, "[w]hile norm-specification is likely to continue in this, as in most areas of international law, the future emphasis needs to be on monitoring, and especially on the unresolved problem of enforcing compliance with the norms that already exist".[274]

Conclusions

224. Until 1992, the Commission had been developing the concept of prevention as part of its work on international liability for injurious consequences arising out of acts not prohibited by international law. The concept thus developed indicated some duties that are essentially projected as obligations of conduct. Accordingly, the duties of prevention would oblige States to identify activities that are likely to cause significant transboundary harm and to notify the same to the States concerned. The duty of notification would naturally give rise to duties of consultation and negotiation. However, such duties would not involve any right of veto for other States in respect of activities to be undertaken within the territory of a State. Moreover, these duties also would not oblige States to agree on a regime invariably in every instance where risk of such significant transboundary harm is involved.

225. However, a State in whose territory a risk-bearing activity is planned is obliged because of the duty of prevention to undertake measures of prevention on its own, that is, unilateral measures of prevention, if there is no agreement between that State and the States likely to be affected. Such measures of prevention would involve the duty of due diligence or standards of care as are proportionate to the risk involved and the means available to the State concerned. The standard of due diligence could vary from State to State, from region to region and from one point in time to another.

226. Under the scheme developed, in the absence of harm, failure to perform the duties of prevention, as proposed, or non-compliance with obligations of conduct would not give rise to any legal consequences. However, such failure could give rise to some adverse inferences in respect of the State of origin or other entities involved, when the claim for reparation as part of liability was under consideration.

227. The concept of prevention thus developed has been generally endorsed. Some reservations were however expressed emphasizing the need to develop better guarantees for implementation of the duties of prevention.

228. The present effort of the Commission to separate the regime of prevention from the regime of liability provides it with an opportunity to take a fresh look at the question of consequences to be attached to the failure to comply with duties of prevention. For this purpose, it would be necessary to distinguish duties of prevention attached to the State from duties attached to the operators of risk-bearing activities.

229. Failure of duties of prevention attached to the State could be dealt with at the level of State responsibility or even as a matter of liability without attaching a taint of wrongfulness to or prohibiting the activity itself. The latter is the option adopted by the Commission so far. It could be endorsed, given the desirability of respecting the freedom of a State and the sovereignty it enjoys over its territory and resources in undertaking necessary developmental and other beneficial activities, irrespective of their adverse side effects, if suitable alternatives are not available. However, if there is strong support, the Commission could move the matter of consequences into the field of State responsibility.

230. In contrast, failure of the operator to comply with duties of prevention would and should attract the necessary consequences prescribed in the national legislation under which authorization is sought and given. Mostly they are civil penalties and, in extreme cases, entail cancellation of the permission to carry on the activity.

231. The various duties of prevention identified as principles of procedure and content are duties States are expected to undertake willingly and voluntarily, as their application would be in their own interest. A review of the principles amply showed that State practice in implementation is both evolving and flexible. Further, States have been showing a considerable degree of pragmatism by often not insisting on their rights but encouraging other States and operators and helping them to meet their obligations through incentives and application of economic instruments. Even though there has so far been some laxity on the part of States to meet their obligations in contributing to international funds established for enhancing the capacity of developing States to enable them to better meet their obligations, no doubt is cast upon the nature of the obligation itself.

232. The need to give due consideration to the needs, special circumstances and interests of developing countries in developing a regime of prevention is fully established. Such consideration is necessary while prescribing standards of care and in enabling such States to apply and enforce those standards. The case of States which are capable of showing sensitivity to the obligations established or undertaken but do not do so is admittedly different from those States which are willing but unable to implement them for good reason or for reasons beyond their control. The application of various principles of procedure and content noted as part of the concept of prevention would no doubt require a considerable amount of international

(*Footnote 273 continued.*)
not available to the Government. Thirdly, it is often the motivations and commitment of communities that see an environment project through to completion. Fourthly, citizen involvement can help build constituencies for change. See Mammen, "A new wave in environmentalism", p. 21.

[274] See Franck, loc. cit., p. 110. See also Craig and Ponce Nava, "Indigenous peoples' rights and environmental law".

cooperation, time and effort for them to acquire concrete shape and a firm base necessary for universal implementation.

233. The recommendations made by the Working Group of the Commission in 1996 cover many of the principles that form part of the concept of prevention. The Commission would be in a position to review their content and to take a decision on their inclusion in the regime of prevention it wishes to endorse, once it approves the general orientation and analysis of the content of the concept of prevention.

RESERVATIONS TO TREATIES

[Agenda item 4]

DOCUMENT A/CN.4/491 and Add.1–6*

Third report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

[*Original: French*]
[*30 April, 5 and 22 May, 19 June, 2, 17 and 19 July 1998*]

CONTENTS

* Incorporating documents A/CN.4/491/Corr.1, A/CN.4/491/Add.2/Corr.1, A/CN.4/491/Add.4/Corr.1 and A/CN.4/491/Add.6/Corr.1.

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International Opium Convention (The Hague, 23 January 1912)	League of Nations, *Treaty Series*, vol. VIII, p. 187.
Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva, 17 June 1925)	Ibid., vol. XCIV, p. 65.
General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (Paris, 27 August 1928)	Ibid., vol. XCIV, p. 57.
General Act of Arbitration (Pacific Settlement of International Disputes) (Geneva, 26 September 1928)	Ibid., vol. XCIII, p. 343.
International Convention for the Safety of Life at Sea (London, 31 May 1929)	Ibid., vol. CXXXVI, p. 82.
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Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (Geneva, 13 July 1931)	Ibid., vol. CXXXIX, p. 301.
Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946)	United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).
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Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	Ibid., vol. 78, p. 277.
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	Source
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European Convention on the Equivalence of Diplomas leading to Admission to Universities (Paris, 11 December 1953)	Ibid., vol. 218, p. 125.
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Geneva Conventions on the Law of the Sea (Geneva, April 1958)	
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Introduction

A. The earlier work of the Commission on the topic

1. First report on reservations to treaties and the outcome

(a) *The Special Rapporteur's conclusions in 1995*

1. In 1993 the Commission decided to include in its agenda the topic "Reservations to treaties".

2. The Special Rapporteur submitted his first report in 1995.[1] In that report, he summarized the Commission's earlier work on reservations and its outcome, also setting out a brief list of the problems posed by the topic and making suggestions as to the scope and form of the Commission's future work on the topic.

3. The Commission considered the report at its forty-seventh session in 1995. Summarizing the conclusions that he had drawn from the Commission's consideration of the report, the Special Rapporteur stated as follows:

(*b*)[2] The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose

[1] *Yearbook … 1995*, vol. II (Part One), p. 121, document A/CN.4/470.

[2] Subparagraph (*a*) concerned the amendment of the title of the topic; the original title was "The law and practice relating to reservations to treaties".

provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(*c*) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

(*d*) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[3]

4. These conclusions met with general approval both in the Sixth Committee and in the Commission itself and, although some Commission members expressed doubts as to one or another aspect of the approach taken, the approach was not called into question during consideration of the second report.[4] The Special Rapporteur views the conclusions as general guidelines to be used as a basis for consideration of the topic.

(b) *Questionnaires circulated to States and international organizations*

5. At its forty-seventh session, the Commission authorized the Special Rapporteur to prepare a detailed questionnaire, as regards reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions.[5] In paragraph 5 of its resolution 50/45 of 11 December 1995, the General Assembly invited States and international organizations, particularly those which were depositaries, to answer promptly the questionnaire prepared by the Special Rapporteur on the topic concerning reservations to treaties.

6. Accordingly, the Special Rapporteur drew up a detailed questionnaire that the Secretariat circulated to States Members of the United Nations and to the members of specialized agencies and the parties to the ICJ Statute.[6] So far, 32 States[7] have responded to the questionnaire, mostly confining themselves to answering the questions to which the Special Rapporteur had drawn special attention, relating more particularly to the issues dealt with in the second and third reports.[8] Most of the States concerned enclosed with their replies a wealth of very interesting documentation concerning their reservations practice.

7. In addition, the Special Rapporteur prepared a similar questionnaire that was circulated to international organizations that are depositaries of multilateral treaties. So far, 22 such organizations have responded to the questionnaire either completely or partially.[9]

8. The number of replies to the questionnaires,[10] which are long, detailed and technical—since it was only on the basis of such a text that a clear picture could be gained of the reservations practice of States and international organizations[11]—indicates that there is great interest in the topic and confirms that studying it meets a real need.

2. Second report and the outcome

(a) *Consideration of the second report by the Commission*

9. The second report, which was submitted in 1996, consisted of two entirely different chapters.[12] In the first, the Special Rapporteur set out an "Overview of the study" and made a number of suggestions with respect to the future work of the Commission on the topic of reservations to treaties.[13] Chapter II, entitled "Unity or diversity of the legal regime for reservations to treaties", was subtitled "Reservations to human rights treaties" and concluded that despite the great diversity of multilateral treaties, the reservations regime set out in articles 19 to 23 of the 1969 and 1986 Vienna Conventions was suitable for all treaties including human rights treaties, owing to its flexibility.

10. Furthermore, in view of the recent practice of human rights treaty monitoring bodies, the Special Rapporteur expressed the view that the Commission, as the United Nations body chiefly responsible for the progressive development and codification of international law, should state its views in that respect, and he annexed to his second report a draft resolution of the Commission on reservations to normative multilateral treaties including human rights treaties.[14]

11. The Special Rapporteur also annexed to his second report a bibliography concerning reservations to treaties.[15]

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[3] *Yearbook … 1995*, vol. II (Part Two), p. 108, para. 487.

[4] *Yearbook … 1997*, vol. II (Part Two), pp. 52–53, paras. 116–123.

[5] *Yearbook … 1995*, vol. II (Part Two), p. 108, para. 489.

[6] *Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annex II, p. 99.

[7] Argentina, Bolivia, Canada, Chile, Colombia, Croatia, Denmark, Ecuador, Estonia, Finland, France, Holy See, Germany, India, Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Monaco, Panama, Peru, Republic of Korea, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America. The Special Rapporteur wishes to express his gratitude to these States once again. He hopes that they will be able to supplement their replies and that other States will respond to the questionnaire in the near future.

[8] *Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annex II, p. 99, para. 6 of the questionnaire's covering note.

[9] BIS, Council of Europe, FAO Forum Secretariat, IAEA, ICAO, IFAD, ILO, IMO, IMF, ITU, LAIA, OSCE, UNESCO, UNIDO, UPU, WEU, WCO, WHO, WIPO, World Bank (IBRD, IDA, IFC, MIGA), WTO. The Special Rapporteur wishes to thank these organizations also; he hopes that organizations that have as yet not responded to the questionnaire will do so within the next few months. The questionnaire is reproduced in *Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annex III, p. 108.

[10] The percentages in question—17 per cent in the case of States (32 out of a total of 187 States that received questionnaires) and 38 per cent in the case of international organizations—may not seem very high, but they by far exceed the proportion normally found in connection with such exercises.

[11] The questionnaires are almost entirely factual. The aim is not to determine the "normative preferences" of States and international organizations but, rather, to attempt to establish, by means of their replies, what their actual practice is and in so doing identify difficulties they encounter.

[12] *Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1.

[13] Ibid., paras. 9–50.

[14] Ibid., para. 260.

[15] Ibid. annex I, p. 87. The Special Rapporteur wishes to take this opportunity to thank Commission members who kindly provided him

12. Owing to lack of time, the Commission was unable to consider the second report in 1996, at its forty-eighth session; the Special Rapporteur briefly presented it at that session, and some members stated their reactions in a very preliminary fashion.[16] However, the report was discussed in depth at the Commission's forty-ninth session, in 1997.[17]

13. This discussion gave rise to an extensive exchange of views in the Commission, and it was thus possible to establish or reaffirm that there was broad agreement on the approach to be taken. In particular:

(*a*) Members agreed that in principle the Vienna regime should be preserved and that all that was needed was to remedy its ambiguities and fill the lacunae in it;

(*b*) While stressing that the undertaking was ambitious, most speakers reaffirmed their support for the decision taken in the previous quinquennium to prepare a guide to practice accompanied, if necessary, by model clauses.

14. With respect to the legal regime of reservations to normative treaties, including human rights treaties, the Commission referred the draft resolution proposed by the Special Rapporteur[18] to the Drafting Committee; on the basis of the Drafting Committee's report the Commission adopted not a resolution but the "Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties".[19]

(b) *Consultation of human rights bodies on the preliminary conclusions of the Commission*

15. The Commission also decided to transmit its preliminary conclusions to the human rights treaty monitoring bodies. By means of letters dated 24 November 1997 transmitted through the Secretary of the Commission, the Special Rapporteur sent copies of the Preliminary Conclusions and of chapter V of the Commission's report on the work of its forty-ninth session to the chairpersons of human rights bodies with universal membership,[20] requesting them to communicate the documents in question to the members of their Committees and to inform him of any comments made. He also sent similar letters to the presiding officers of a number of regional bodies.[21]

16. The Special Rapporteur has so far received a response only from the Chairperson of the Human Rights Committee, who in a letter dated 9 April 1998, informed him that the Committee welcomed the opportunity to comment on the Preliminary Conclusions on reservations to normative multilateral treaties, including human rights treaties, and that it intended to study them and respond in greater detail at a later stage; in the meantime, however, the Committee indicated, with respect to paragraph 12 of the Preliminary Conclusions, that:

> [R]egional monitoring bodies are not the only intergovernmental institutions which participate in and contribute to the development of practices and rules. Universal monitoring bodies, such as the Human Rights Committee, play no less important a role in the process by which such practices and rules develop and are entitled, therefore, to participate in and contribute to it. In this context, it must be recognized that the proposition enunciated by the Commission in paragraph 10 of the Preliminary Conclusions is subject to modification as practices and rules developed by universal and regional monitoring bodies gain general acceptance.[22]

Furthermore, the Special Rapporteur has learned that a number of human rights bodies had been interested to take note of the communication in question and that they intended to respond to the Commission's Preliminary Conclusions. In addition, the chairpersons of bodies established pursuant to human rights instruments considered the issue at their meeting in February 1998.

(c) *Consideration of the report of the Commission by the Sixth Committee*

17. The great number of comments, mostly positive, made on the subject of the second report during the Sixth Committee debate in 1997 at the fifty-second session of the General Assembly is also indicative of the amount of interest there is in the topic of reservations to treaties: 50 delegations commented on the topic, often making detailed and well-argued remarks.[23]

18. The principle of the unity of the reservations regime, stated by the Commission in paragraphs 2 and 3 of its Preliminary Conclusions, met with wide approval.[24]

19. The discussions concerned above all the role of human rights bodies with respect to reservations, i.e. chiefly paragraphs 5 to 10 of the Preliminary Conclusions. As indicated in the topical summary prepared by the Secretariat,[25] there were two opposing positions. Some delegations thought that it was for States alone to decide on the admissibility of reservations and to determine the consequences of inadmissibility. A virtually equal number of delegations endorsed paragraphs 5 and 6 of the preliminary conclusions and expressed the view that the admissibility of reservations should be assessed jointly by

with titles of books and articles.

[16] See *Yearbook … 1996*, vol. II (Part Two), pp. 79–83, paras. 108–139.

[17] *Yearbook … 1997*, vol. II (Part Two), pp. 44–56, paras. 50–156.

[18] See paragraph 10 above.

[19] *Yearbook … 1997*, vol. II (Part Two), p. 57, para. 157.

[20] Letters were sent to the Chairpersons of the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child.

[21] Letters were sent to the presiding officers of the African Commission on Human and People's Rights, the European Commission of Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

[22] Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 40* (A/53/40), vol. I, annex IX.

[23] See *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 17th to 25th meetings (A/C.6/52/SR.17–25), and corrigendum.

[24] "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-second session" (A/CN.4/483), paras. 65–67; just two States (the Republic of Korea (A/C.6/52/SR.22, paras. 4–7) and, in a more qualified manner, Italy (A/C.6/52/SR.24, para. 82)) (see footnote 23 above) expressed the view that special regimes might be useful in certain cases; the model clauses that the Commission intends to adopt would no doubt meet that concern.

[25] A/CN.4/483, paras. 71–82 (see footnote 24 above).

monitoring bodies, where they existed, and States parties to the human rights conventions.

20. However, almost all delegations that expressed views "agreed with the Commission's Preliminary Conclusion 10 that the rejection of a reservation as inadmissible conferred some responsibility on the reserving State to respond or to take action. Given the consensual nature of treaties, reservations were inseparable from the consent of the State to be bound by a treaty";[26] only two States thought otherwise.[27] However, interesting suggestions were put forward *de lege ferenda* on this issue by a number of delegations, with the aim of establishing a dialogue between the reserving State and objecting States,[28] or between the reserving State and the monitoring body,[29] or of institutionalizing a centralized monitoring mechanism.[30]

21. With regard to form, in general, the Commission's initiative of adopting preliminary conclusions and consulting interested human rights bodies was well received by the Sixth Committee. However, one delegation expressed the view that there was no reason to limit consultation in that manner and that all monitoring bodies established under multilateral conventions, whatever their purpose, should be consulted;[31] that concern is reflected in paragraph 4 of General Assembly resolution 52/156 of 15 December 1997, in which the Assembly:

> *Takes note* of the invitation by the International Law Commission to all treaty bodies set up by normative multilateral treaties that may wish to do so to provide, in writing, their comments and observations on the preliminary conclusions of the Commission on reservations to normative multilateral treaties, including human rights treaties ...

However, the question remains as to exactly which bodies are to be consulted, apart from human rights bodies.

22. Furthermore, while some delegations in the Sixth Committee welcomed the Preliminary Conclusions, others believed that they had been adopted prematurely.[32] As the Special Rapporteur indicated when he addressed the Sixth Committee, speaking as the Special Rapporteur on reservations to treaties, that view appeared to be based on a misunderstanding:[33] the purpose of the text adopted by the Commission was to respond to recent initiatives on the part of a number of human rights bodies, and the text represented the provisional culmination of the discussion that took place in 1997 on the fundamental issue of the unity or diversity of the reservations regime; to have waited until consideration of the topic had been completed would have meant that neither the Sixth Committee nor the Commission itself would have been able to participate in the discussion initiated by the human rights bodies and, in particular, by general comment No. 24 of the Human Rights Committee.[34] Furthermore, the preliminary nature of the Commission's conclusions and its decision to consult interested human rights bodies would seem such as to allay the fears that were expressed (which were very much in the minority).

23. In any event, the Special Rapporteur considers that time should now be allowed to play its part: the Commission has taken a preliminary position and has consulted States[35] and the human rights bodies.[36] They must be given time to respond and it seems logical that the Commission should not revert to the topic until it has been apprised of their reactions and has completed its consideration of the most controversial questions left pending by the Vienna Conventions. The Special Rapporteur therefore proposes, in accordance with the work programme adopted at the forty-ninth session,[37] to submit draft definitive conclusions to the Commission in his fifth report, when consideration of the substantive questions relating to the regime of reservations to treaties has been completed.

24. The discussion in the Sixth Committee likewise gave the representatives of States an opportunity to confirm their agreement with the essential features of the general approach adopted by the Commission. A very great majority of delegations reiterated the support expressed in previous years for the preparation of a guide to practice,[38] and called on the Commission to respect the general framework of the Vienna Conventions,[39] the ambigu-

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[26] Ibid., para. 84.

[27] Costa Rica (A/C.6/52/SR.22, para. 19) and Greece (ibid., paras. 42–44); also see Sweden's statement on behalf of the Nordic countries (A/C.6/52/SR.21, paras. 11–12) (footnote 23 above).

[28] Statements by the United Kingdom (A/C.6/52/SR.19, para. 46) and Austria (A/C.6/52/SR.21, para. 6) (see footnote 23 above).

[29] Statements by Liechtenstein (A/C.6/52/SR.22, para. 25) and Switzerland (ibid., para. 85) (see footnote 23 above).

[30] Statements by Germany (A/C.6/52/SR.21, para. 46) and Chile (A/C.6/52/SR.22, para. 36) (see footnote 23 above).

[31] Statement by Tunisia (A/C.6/52/SR.22, para. 32) (see footnote 23 above).

[32] Statements by Mexico (A/C.6/52/SR.17, para. 22), the Netherlands (A/C.6/52/SR.21, para. 15), Guatemala (ibid., para. 65), Tunisia (A/C.6/52/SR.22, para. 32), Greece (ibid., para. 48), Switzerland (ibid., para. 87) and Bangladesh (A/C.6/52/SR.25, para. 24) (see footnote 23 above).

[33] A/C.6/52/SR.24 (see footnote 23 above), para. 97.

[34] Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex V.

[35] In paragraph 2 of its resolution 52/156, the General Assembly drew

> "*the attention* of Governments to the importance for the International Law Commission of having their views on all the specific issues identified in chapter III of its report and in particular on:
>
> ...
>
> (*b*) The preliminary conclusions of the Commission on reservations to normative multilateral treaties, including human rights treaties".

Three Governments, those of Liechtenstein, Monaco and the Philippines, have already sent their comments to the Special Rapporteur, who is extremely grateful to them and sincerely hopes that their example will be followed by many other Governments. He intends to give a detailed account of the views communicated to him on this issue in his fifth report.

[36] In its aforementioned observations (see footnote 35 above), Liechtenstein expressed the hope that non-governmental organizations active in the field of human rights would likewise be invited to express their views. The Special Rapporteur would welcome any communication that these non-governmental organizations might wish to send him.

[37] *Yearbook ... 1997*, vol. II (Part Two), p. 68, para. 221.

[38] A/CN.4/483, para. 90 (see footnote 24 above); only the Republic of Korea (A/C.6/52/SR.22, para. 4) expressed a preference for a legally binding instrument, while Canada (A/C.6/52/SR.21, para. 41) expressed reservations concerning the need for model clauses (see footnote 23 above).

[39] A/CN.4/483, paras. 61, 65 and 90–91 (see footnote 24 above). Only Sweden (speaking on behalf of the Nordic countries) (A/C.6/52/SR.21, paras. 8–9) and, more overtly, the Netherlands (ibid., para. 14)

ities and lacunae of which were nevertheless emphasized by many delegations.

25. In particular, the representatives of States requested the Commission to consider the following points:

(*a*) The precise definition of reservations, especially in comparison with interpretative declarations;

(*b*) The question of reservations to bilateral treaties;

(*c*) The legal regime of interpretative declarations;

(*d*) The precise scope of the concept of object and purpose of a treaty;

(*e*) The effects of an objection to a reservation;

(*f*) The problem of the validity of objections;

(*g*) The consequences of the impermissibility of a reservation; and

(*h*) The effects of reservations to provisions reproducing rules of *jus cogens*.

The Special Rapporteur proposes to take up each of these problems in due course (some of them during the course of 1998).

26. Generally speaking, the Special Rapporteur feels that the discussion in the Sixth Committee seems to confirm the validity of the general approach adopted by the Commission since 1995.

(d) *Action by other bodies*

27. Another sign of the international community's interest in the topic is the action taken by two bodies with which the Commission has a cooperative relationship: the Council of Europe and the Asian-African Legal Consultative Committee (AALCC).

28. With regard to the former, the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, at its 14th meeting, held on 9–10 September 1997, considered the preliminary conclusions adopted by the Commission and, more generally, the latter's work on the topic of reservations, and decided to establish the Group of Specialists on Reservations to International Treaties (DI-S-RIT), under the coordination of the representative of Austria, whose terms of reference were approved by the Committee of Ministers of the Council of Europe on 16 December 1997. The Group will be called upon to:

(*a*) Examine and propose ways and means and, possibly, guidelines to assist member States in developing their practice regarding their response to reservations and interpretative declarations actually or potentially inadmissible under international law; and

(*b*) Consider the possible role of the CAHDI as an observatory of reservations to multilateral treaties of significant importance to the international community raising issues as to their admissibility under international law, as well as of the reactions by Council of Europe member States Parties to these instruments.[40]

29. The Group held its first meeting in Paris on 26–27 February 1998 and on that occasion had an exchange of views with the Commission's Special Rapporteur. The conclusions drawn up by its presiding officer read as follows:

The Group shared the view of the ILC that the regime of the Vienna Convention is applicable to all treaties, including normative and human rights treaties, and that the regime should not be changed.

However, the Group considered that the question of the role of conventional bodies responsible for monitoring the application of treaties still required further examination. In addition, some delegations were unable to agree with preliminary conclusions 5 and following of the ILC concerning the articulation between the *lex lata* and *lex ferenda* provisions. On the whole however the Group agreed with the main thrust of the preliminary conclusions.[41]

30. AALCC held its thirty-seventh session in New Delhi from 13 to 18 April 1998, chaired by Mr. P. S. Rao. The Commission was represented at the session by Mr. Yamada. It should be noted that AALCC treated the question of reservations to treaties as a special topic and devoted particular attention to it.[42]

B. General presentation of the third report

1. Method used

31. Since there is a quasi-consensus, both in the Commission and among States, that the Vienna regime must be preserved, it would seem appropriate to base the work systematically on the provisions concerning reservations in the 1969, 1978 (to the limited extent to which they may be relevant to the general study of that regime) and 1986 Vienna Conventions.

32. The Special Rapporteur therefore proposes to base this report, and indeed the next three reports, on the following general outline:

(*a*) Each chapter will begin by recalling the relevant provisions of the three Vienna Conventions[43] and the *travaux préparatoires* leading to their adoption;

(*b*) Next, the Special Rapporteur will describe the practice of States and international organizations with regard to those provisions and any difficulties to which their application has given rise; in that context, the replies to questionnaires which he has received[44] will be particularly valuable;

(*c*) Simultaneously or in a separate section, as appropriate, he will describe the relevant judicial practice and the commentaries of jurists;

(*d*) On the basis of this information, he will propose a series of draft guidelines that will form the Guide to Prac-

questioned the sacrosanct character of the Vienna regime (see footnote 23 above).

[40] See Council of Europe, Committee of Ministers, 612th meeting of the Ministers' Deputies, document CM(97)187, para. 15; and decision 612/10.2 (16 December 1997).

[41] Council of Europe, Ad Hoc Committee of Legal Advisers on Public International Law, 15th meeting, document CAHDI (98) 9 Rev (Strasbourg, 3–4 March 1998).

[42] *AALCC Bulletin*, vol. 22, issue No. 1 (New Delhi, June 1998).

[43] In order to avoid any confusion, these provisions will be systematically printed in bold type.

[44] See paragraphs 5–8 above.

tice which the Commission intends to adopt,[45] together with preliminary commentaries specifying the scope he ascribes to them;[46]

(*e*) Where appropriate, the draft guidelines will be accompanied by model clauses which States could use when derogating from the Guide to Practice in special circumstances or specific fields.[47]

33. It goes without saying that it will be necessary to deviate from this outline on certain points. In particular, this will happen when the Vienna Conventions remain completely silent, for example in the case of interpretative declarations, to which the Conventions make absolutely no allusion. In such cases, the Special Rapporteur will revert to the usual methodology employed in preparing the Commission's draft articles, that is, he will base the work directly on international practice (see the second stage described above).

34. In other instances, however, the Vienna Conventions may provide sufficient guidelines for practice (for example, in the case of the "positive" definition of reservations[48]). The Special Rapporteur nevertheless feels that there would be no justification for excluding them from the study or even from the Guide to Practice under consideration. Silence on this point would make the draft incomplete and difficult to use, whereas its purpose is precisely to make available to "users"—legal services in ministries of foreign affairs and international organizations, ministries of justice, judges, lawyers, specialists in public or private international relations—a reference work that is as complete and comprehensive as possible.

35. The Special Rapporteur wishes to note, however, that despite his efforts to be as exhaustive, precise and rigorous as possible, he is well aware of the imperfections of his work. Since he has no assistance, his approach is necessarily empirical: there is a considerable amount of writing devoted to reservations,[49] practice takes many forms, and the replies to questionnaires already fill several volumes. A systematic analysis would necessitate the recruitment of a team of researchers and/or full-time work. Unfortunately, this is beyond the Special Rapporteur's means. He acknowledges, therefore, that he has often had to proceed by "taking soundings" and to trust his intuition. The Commission's methods of work nevertheless have the advantage of limiting the shortcomings of this method (or absence of method?): by reason of its consideration by the Commission, the individual study becomes a collective one. Furthermore, the reactions of Governments, both individually and collectively in the Sixth Committee, ensure that the work will be realistic and that, where necessary, the draft Guide to Practice can be brought into line with real needs.

36. On the other hand, the Special Rapporteur wishes to respond in advance to possible future criticism regarding the somewhat lengthy nature of the following expositions, especially those concerning the presentation of the *travaux préparatoires* relating to the relevant provisions of the three Vienna Conventions. There are, indeed, grounds for questioning the need for such a detailed description. The Special Rapporteur feels, however, that the description will be useful for at least two reasons. First, and this holds true for all the draft articles prepared by the Commission, it constitutes the basis and justification of the normative provisions (contained in the draft Guide to Practice) that will be derived from it. Secondly—and this is particularly true in the case of the present draft—it would seem useful for practitioners, and especially Governments, to have at their disposal documentation which is exhaustive (or as exhaustive as possible) in order that they may decide whether, in a given case, it would be appropriate to act on the basis of the proposed guide.

37. Lastly, attention must be drawn to a difficulty peculiar to the present study: the topic under consideration relates to "reservations to treaties" in general. This subject has already been treated in three conventional instruments, and while there is no doubt that the 1969 Vienna Convention is the primary instrument of reference and the starting point for any reflection on the topic, it would be unwise to neglect the 1978 Vienna Convention or, above all, the 1986 Vienna Convention. In accordance with the procedure followed from the first report onward, which has not been questioned either in the Commission or in the Sixth Committee, the Special Rapporteur intends to study all three Conventions simultaneously and combine the results in a Guide to Practice which will be "consolidated", in that it will contain provisions relating to reservations to treaties to which States and international organizations are parties and set forth the rules applicable in the case of succession of States.[50]

38. This method has a definite advantage in that it makes it possible to verify the coherence of the existing conventional provisions, carry out useful cross-checks and "test" the solidity of the structure as a whole. Moreover, the rules set forth in one convention often elucidate or complement those contained in the others (as is shown, for example, in chapter I of this report, in connection with the definition of reservations). Furthermore, the *travaux préparatoires* of each Vienna Convention (especially those of 1969 and 1986) are likewise complementary and often clarify each other.

39. Of course, the requisite distinctions will be made whenever necessary. Generally speaking, that does not pose any major problems, since the 1978 and 1986 Vienna Conventions seem to be the consequences, prolongations and illustrations of provisions of the 1969 Vienna Convention relating to specific, quite clearly defined issues. In some cases, however, the exercise will inevitably lead to the cumulation of existing provisions and make it necessary to reflect on the way in which they combine and relate to each other.

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[45] In order to avoid any confusion, these draft guidelines will be systematically printed in italics.

[46] The Special Rapporteur will not provide commentaries to the articles of the Vienna Conventions, except when he combines them in a "composite" article—on this point, see paragraph 40 below.

[47] In order to avoid any confusion, these model clauses will be systematically underlined.

[48] See paragraphs 78–82 below.

[49] See the non-exhaustive compilation in the aforementioned bibliography (footnote 15 above).

[50] The fifth part of the "provisional general outline of the study" set forth in *Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 (see paragraph 42 below), para. 37: "V. Status of reservations, acceptances and objections in the case of succession of States".

40. In certain cases it will also lead to the adoption of "composite texts" combining elements from each of the Vienna Conventions or from two of them. The definition of reservations, as presented in chapter I of this report, exemplifies this method, which must be used if comprehensive codification is the objective:

(*a*) The definition of reservations to treaties between States is contained in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention;

(*b*) If the aim is to define reservations to treaties "in general", this definition must be completed by that contained in article 2, paragraph 1 (*d*), of the 1986 Vienna Convention;

(*c*) Moreover, when the 1969 Vienna Convention was adopted, the question of succession of States was deliberately ignored;[51] during the preparation of the 1978 Vienna Convention, however, it was noted that the phenomenon of State succession had an impact on the definition of reservations, at least as conceived by the drafters of the three Vienna Conventions.

In a case such as this, simply juxtaposing the existing texts in the Guide to Practice would create very great complications for users; the problem can only be dealt with properly in a composite text.[52]

41. It may be noted that this course would be consistent with the hopes, or rather the predictions, of Mr. Paul Reuter who, during the discussion of his third report, envisaged that "it might perhaps be decided some day to try to combine the two sets of articles" and that an effort would be made to solve the problems raised by "any adjustments which the existence of two conventions might necessitate".[53] That is also one of the aims of the Guide to Practice, a fact which does not facilitate its preparation.

2. Plan of the third report

42. In chapter I of his second report, the Special Rapporteur presented a "provisional general outline of the study" that he intended to carry out.[54]

43. Very few comments were made on this general outline during the consideration of the second report in 1997, at the forty-ninth session.[55] However, the work programme adopted by the Commission at that session endorsed the main contours of that outline,[56] leading the Special Rapporteur to believe that he might follow them in preparing his future reports, including the third, but without regarding them as a rigid guide and adapting and clarifying them as appropriate.

44. That being so, and in accordance with the indications given in 1997 and in the work programme adopted by the Commission,[57] this report covers parts II and III of the provisional general outline, dealing respectively with the definition of reservations[58] and with the formulation and withdrawal of reservations, acceptances and objections.[59]

45. The Special Rapporteur nevertheless faced a problem concerning the legal regime of interpretative declarations. At the outset, he intended to treat this very important problem[60] as an element of part II, concerning the definition of reservations.[61] However, given the wealth of material it became clear that this solution was very unsatisfactory, especially since it would have been illogical to establish the legal regime of interpretative declarations before completing consideration of the legal regime of reservations. Thus, there were two options: a separate chapter could be devoted to the legal regime of interpretative declarations (which would have been placed right at the end of the study), or that regime could be considered in parallel with the regime of reservations, to which it would in a way constitute a counterpoise.

46. After some hesitation the Special Rapporteur chose the second alternative, and therefore plans systematically to present the draft guidelines of the Guide to Practice relating to the legal regime of interpretative declarations at the same time as the corresponding provisions relating to reservations. The two following chapters will illustrate this approach, since they deal simultaneously with the problems posed by the definition and formulation of reservations on the one hand and of interpretative declarations on the other.

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[51] See article 73 of the 1969 Vienna Convention.

[52] See paragraph 81 below.

[53] *Yearbook … 1974*, vol. I, 1279th meeting, p. 162, para. 52. Mr. Reuter was referring here to the 1969 Vienna Convention and the draft articles on the law of treaties between States and international organizations or between international organizations.

[54] *Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, paras. 37–50.

[55] *Yearbook ... 1997* (see footnote 4 above).

[56] Ibid., p. 68, para. 221.

[57] Ibid.

[58] The provisional outline contains the following headings: (*a*) positive definition; (*b*) distinction between reservations and other procedures aimed at modifying the application of treaties; (*c*) distinction between reservations and interpretative declarations; (*d*) the legal regime of interpretative declarations; (*e*) reservations to bilateral treaties (*Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, para. 37).

[59] Part III is subdivided into three sections:

A. *Formulation and withdrawal of reservations*: 1. Acceptable times for the formulation of a reservation; 2. Procedure regarding formulation of a reservation; 3. Withdrawal.

B. *Formulation of acceptances of reservations*: 1. Procedure regarding formulation of an acceptance; 2. Implicit acceptance; 3. Obligations of express acceptance.

C. *Formulation and withdrawal of objections to reservations*: 1. Procedure regarding formulation of an objection; 2. Withdrawal of an objection (ibid.).

[60] Several delegations drew attention to this problem during the discussion in the Sixth Committee (see A/CN.4/483, para. 91 (footnote 24 above)). See also the positions on this issue taken by several members of the Commission at the forty-ninth session (*Yearbook … 1997*, vol. II (Part Two), p. 52, para. 113).

[61] See footnote 58 (*d*) above.

CHAPTER I

Definition of reservations to treaties (and of interpretative declarations)

47. The three Vienna Conventions on the law of treaties, each in its respective article 2, provide a "positive" definition of reservations which is generally accepted and does not, in itself, pose any real problems. However, given the silence of the Conventions with regard to the concept of "interpretative declarations"—an omission which is, prima facie, difficult to explain—it is necessary to consider this subject *ex nihilo* and to derive from practice, the writings of jurists and judicial decisions a definition permitting the clearest possible distinction between the two institutions.

48. Furthermore, as indicated in the brief commentary on the proposed provisional plan of the study contained in his second report,[62] the Special Rapporteur also intends, for the sake of convenience, to study in this chapter the question of reservations to bilateral treaties, whose nature has often been disputed.

49. Lastly, as likewise noted in the second report on reservations to treaties,[63] it "seems useful to link the consideration of this question to that of other procedures, which, while not constituting reservations, are, like them, designed to and do, enable States to modify obligations under treaties to which they are parties", and thus constitute alternatives to reservations which may be useful in certain cases.

A. Definition of reservations and of interpretative declarations

50. Each of the Vienna Conventions of 1969, 1978 and 1986 contains a definition of the term "reservation". Taken together, these definitions make it possible to prepare a composite text which seems to constitute a satisfactory comprehensive definition. On the other hand, interpretative declarations were not defined in any of the Conventions, although such a course was sometimes envisaged during the *travaux préparatoires*.

51. Consequently, after the definitions of reservations embodied in the Vienna Conventions and the circumstances in which those definitions were adopted have been recalled (paras. 54–82), it will be necessary to examine the reactions to those definitions expressed in the writings of jurists and any difficulties that their implementation has caused in practice so that they may, if appropriate, be completed (paras. 83–117), before formulating a draft definition of interpretative declarations (paras. 118–413).

[62] *Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, para. 40.

[63] Ibid., para. 39.

THE DEFINITION OF RESERVATIONS IN THE VIENNA CONVENTIONS

(a) *Travaux préparatoires*

(i) *The 1969 Vienna Convention*

52. The definition of reservations did not give rise to lengthy discussion when the 1969 Vienna Convention was being drawn up.

53. The Commission's first Special Rapporteur on the law of treaties, Mr. James L. Brierly, proposed a definition of reservations, very different from that finally adopted, since he regarded reservations as a purely contractual institution.[64] The second Special Rapporteur, Sir Hersch Lauterpacht,[65] proposed no definition.

54. However, Sir Gerald Fitzmaurice, in his first report, issued in 1956, provided a very precise definition which, with a number of drafting changes, is the direct source of the existing definition and is all the more valuable because the third Special Rapporteur on the law of treaties took care to define reservations in contrast to "mere declarations". Article 13 (*l*), of the draft Code on the Law of Treaties which he prepared reads as follows:

> A "reservation" is a unilateral statement appended to a signature, ratification, accession or acceptance, by which the State making it purports not to be bound by some particular substantive part or parts of the treaty, or reserves the right not to carry out, or to vary, the application of that part or parts; but it does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty.[66]

55. Believing this definition to be self-explanatory,[67] Sir Gerald Fitzmaurice provided no commentary to it. However, article 37, paragraph 1, of the draft Code stated:

> Only those reservations which involve a derogation of some kind from the substantive provisions of the treaty concerned are properly to

[64] "That word [reservation] is used as meaning a special stipulation which has been agreed upon, between the parties to a treaty, limiting or varying the effect to the treaty as it applies between a particular party and all or some of the remaining parties" (*Yearbook … 1950*, vol. II, document A/CN.4/23, pp. 238–239, para. 84). For the discussion on this point, see *Yearbook … 1950*, vol. I, pp. 90–91. For a brief commentary on this definition, see paragraphs 106–111 below. The 1951 Brierly report on reservations to treaties proposes no definition but has an annex B entitled "Opinions of writers" which reproduces numerous definitions formulated by jurists (*Yearbook ... 1951*, vol. II, document A/CN.4/41, pp. 6–11). For a summary of this early work, see *Yearbook … 1995*, vol. II (Part One), document A/CN.4/470, pp. 127–129, paras. 12–22.

[65] See his first and second reports on the law of treaties (*Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 91-92 and 123–136, and *Yearbook ... 1954*, vol. II, document A/CN.4/87, pp. 131–133). See also *Yearbook … 1995*, vol. II (Part One), document A/CN.4/470, pp. 129–130, paras. 23–29.

[66] *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 110.

[67] Ibid., p. 119, para. 23.

be regarded as such, and the term reservation herein is to be understood as limited in that sense.[68]

Commenting on that provision, the Special Rapporteur emphasized that "[a] reservation only counts as such if it purports to derogate from a substantive provision of the treaty".[69]

56. The provisions concerning reservations proposed in the first report by Sir Gerald Fitzmaurice were not considered by the Commission, which did not revert to the question of reservations until 1962, when it examined the first report of Sir Humphrey Waldock.[70] In that report, the fourth Special Rapporteur proposed another definition of reservations, which was modelled very closely on that proposed by his predecessor and likewise defined interpretative declarations, at least *a contrario*:

> "Reservation" means a unilateral statement whereby a State, when signing, ratifying, acceding to or accepting a treaty, specifies as a condition of its consent to be bound by the treaty a certain term which will vary the legal effect of the treaty in its application between that State and the other party or parties to the treaty. An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation.[71]

57. The Special Rapporteur provided no commentary to this draft definition, believing it to be self-explanatory,[72] and strangely enough the Commission did not consider it, because the Special Rapporteur had suggested that the definitions (which were then set forth in draft article 1) could be taken up as appropriate in the course of the discussion.[73]

58. The question of the definition of reservations, though never taken up per se, was touched upon several times during the long discussion of the legal regime of reservations which took place at the fourteenth session. Interesting comments were made on that occasion. Thus, Mr. Lachs, who considered that on the whole the proposed definition was sound, felt that "an essential feature of a reservation was its unilateral character".[74] He particularly congratulated the Special Rapporteur on "the felicitous precision of the phrase 'which will vary the legal effect of the treaty'. That sentence also covered the cases, which were not unknown, where a reservation, instead of restricting, extended the obligations assumed by the party in question".[75]

59. During the same discussion, Mr. Castrén expressed doubt as to the wisdom of retaining the second sentence of the definition proposed by Sir Humphrey Waldock; in his view, "the explanatory and other statements referred to were rare in practice; moreover, if they occurred, it was difficult to see which authority was to decide the nature of the statement".[76] Although Mr. Tsuruoka urged that the distinction be maintained,[77] the allusion to explanatory statements disappeared as a result of circumstances which cannot be determined from a reading of the summary records.

60. In any event, the draft definition was referred to the Drafting Committee, which produced a text more elegant than that proposed by the Special Rapporteur; the second sentence of the latter text had been deleted without explanation. The new text read as follows:

> "Reservation" means a unilateral statement made by a state, when signing, ratifying, acceding to, accepting or approving[78] a treaty, whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that state.[79]

This text was adopted in the plenary meeting without discussion and without a vote.[80]

61. However, the slow evolution of the definition of reservations ultimately used in the 1969 Vienna Convention had not yet come to an end.[81] The definition still lacked precision on a point of some importance, which is covered in the final text: the irrelevance of phrasing or naming. This addition results from the mysterious transmutation effected by the Drafting Committee in 1965, at the seventeenth session. When introducing this clarification, Sir Humphrey Waldock noted that in adopting it, "[t]he Drafting Committee had sought to bring out that, however designated, any statement purporting to exclude or vary the legal effects of certain provisions of a treaty would

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[68] Ibid., p. 115.

[69] Ibid., p. 126, para. 92 (*b*).

[70] See *Yearbook … 1995*, vol. II (Part One), document A/CN.4/470, p. 130, paras. 33 and 35.

[71] *Yearbook ... 1962*, vol. II, document A/CN.4/144, pp. 31–32, article 1 (*l*).

[72] Ibid., p. 34, para. (14).

[73] Ibid., vol. I, 637th meeting, p. 47, para. 32. The same course was followed in 1965 during the second reading of the draft articles (*Yearbook ... 1965*, vol. I, 778th meeting, p. 17, para. 8).

[74] *Yearbook ... 1962*, vol. I, 651st meeting, p. 142, para. 49. Similar views were expressed by Mr. Rosenne, ibid., p. 144, para. 78, and Mr. Tunkin, who agreed with the view that "a reservation was a kind of offer by the reserving State, which the other Parties, in the exercise of their sovereignty, were free to accept or to reject" (ibid., 653rd meeting, p. 156, para. 25). Mr. Paredes did not quite agree with that view, because more than one State might make "identical reservations, jointly or separately" (ibid., 651st meeting, p. 146, para. 87); the present Special Rapporteur feels that this circumstance (which may in fact arise) does not call in question the unilateral character of each of those identical reservations.

[75] Ibid. It is interesting to note that, during the consideration of the first report on reservations to treaties, Mr. Tomuschat likewise approached the question from this angle, but took a totally opposite position (see *Yearbook … 1995*, vol. I, 2401st meeting, pp. 153–155; for the opposing view, see the position adopted by Mr. Bowett, ibid., p. 155). In its comments on the draft articles adopted in first reading, Japan likewise considered "that the words 'or vary' should be replaced by the words 'or restrict' because, in its view, only a statement which restricts the legal effect of a provision properly falls within the meaning of the term 'reservation'". Sir Humphrey Waldock contested that view, arguing that "[a] unilateral statement in which a State purports to interpret a provision as conferring upon it a larger right than is apparently created by the language of the provision, or purports to impose a condition enlarging its rights, would seem to require to be treated as a 'reservation'" (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 15).

[76] *Yearbook ... 1962*, vol. I, 652nd meeting, p. 148, para. 27.

[77] Ibid., p. 151, para. 64.

[78] The word "approve" was added by the Drafting Committee, for the sake of consistency with what subsequently became article 11 of the 1969 Vienna Convention.

[79] *Yearbook ... 1962*, vol. I, 666th meeting, p. 239, para. 1 (*f*).

[80] Ibid., p. 240, para. 9.

[81] In accordance with a suggestion by Israel, the English text (which read "… statement ... whereby it purports to exclude or vary the legal effect of *some* provisions") was brought into line with the French and Spanish texts ("*certaines* dispositions", "*algunas* disposiciones"*) (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 15).

constitute a reservation".[82] This draft definition, like the others, was adopted unanimously.[83]

62. Thereafter, the text of the definition[84] was not amended. The commentary that the Commission included in its report to the General Assembly on the work of its eighteenth session (1966), which was used as a working document at the United Nations Conference on the Law of Treaties, is therefore extremely important. It is short but significant for, once again, the Commission tacitly contrasts the concept of a reservation with that of an interpretative declaration (even if the latter term is not actually used):

> The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.[85]

63. In these circumstances it may seem strange that the Commission did not follow the original intention of its Special Rapporteur[86] and complete the definition of a reservation by defining an interpretative declaration. Sir Humphrey Waldock explained this apparent reversal in his observations and proposals relating to the observations of Japan and the United Kingdom, which were concerned because the draft did not mention "interpretative declarations".[87] His response deserves to be quoted at length:

> The Japanese Government notes that not infrequently a difficulty arises in practice of determining whether a statement has the character of [a reservation] or of [an interpretative declaration]; and it suggests the insertion of a new provision ... to overcome the difficulty. This suggestion appears to the Special Rapporteur to overlook the fact that the term "reservation" is already defined in article 1, paragraph 1 (*f*), in terms which indicate that it is something other than a mere interpretative understanding of the provision to which it relates.[88]

This indicates yet again that the concepts of reservation and interpretative declaration can only be defined in relation to each other.

64. Sir Humphrey Waldock adds:

> Statements of interpretation were not dealt with by the Commission in the present section [on reservations] for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties. In short, they appear to fall under the articles [relating to interpretation].[89]

65. Either inadvertently or with the intention of avoiding further discussion of this difficult issue at a very late stage in the work, the Special Rapporteur did not tackle the problem of the definition and legal regime of interpretative declarations in his sixth report. However, when commenting in that report on the observations of Governments, he did revert to questions linked to the interpretation of treaties. Furthermore, responding to a suggestion by the United States, he observed: "But it would seem clear on principle that a unilateral document cannot be regarded as part of the 'context' for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State's acceptance of the treaty is acquiesced in by the other parties." He emphasized that the "essential point" was "the need for express or implied assent".[90] In any case, the definition of interpretative declarations was not mentioned.

66. At the United Nations Conference on the Law of Treaties, six States submitted amendments to article 2, paragraph 1 (*d*), of the Commission's draft,[91] which were referred to the Drafting Committee. The Hungarian amendment was undoubtedly the broadest in scope.[92] Like Chile and China, Hungary wished to specify that a reservation could only be formulated with respect to a multilateral treaty, but above all, it wished it to be acknowledged that a reservation could be designed not only "to exclude or to vary the legal effect" of certain provisions of a treaty, but also to *interpret* that legal effect.[93]

67. If an amendment along these lines had been adopted, the concept of a reservation would have encompassed, and could not have been disassociated from, the concept of an interpretative declaration.[94] However, the Hungarian amendment, like the other amendments submitted, was not adopted. The Drafting Committee considered them all "superfluous",[95] and reproduced the text adopted by the

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[82] *Yearbook ... 1965*, vol. I, 820th meeting, p. 308, para. 20.

[83] Ibid., para. 26.

[84] Reproduced in *Yearbook ... 1965*, vol. II, p. 160, and in *Yearbook ... 1966*, vol. II, p. 178.

[85] *Yearbook ... 1966*, vol. II, pp. 189–190, para. (11) of the commentary to article 2.

[86] See paragraph 53 above.

[87] See *Yearbook ... 1965*, vol. II, p. 47.

[88] Ibid., p. 49, para. 1.

[89] Ibid., para. 2; the Special Rapporteur added a number of very interesting comments concerning the legal regime of interpretative declarations, to which it will be helpful to revert at a later stage.

[90] *Yearbook ... 1966*, vol. II, p. 98, para. (16) of the commentary to articles 69–71.

[91] These countries were Chile, China, Hungary, Sweden, Viet Nam and the United States. See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), report of the Committee of the Whole on its work at the first session of the Conference (A/CONF.39/14), p. 112, para. 35.

[92] Ibid., para. 35 (vi) (e). See also the explanations given by the Hungarian representative, Mr. Haraszti, ibid., *First Session, Vienna, 26 March–24 May 1968*, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 4th meeting, p. 23, paras. 24–25.

[93] This wording is rather strange, for although the meaning of "interpreting a treaty" is clear (?), the idea of "interpreting its legal effect" is more obscure. (See in this connection the position of Austria, ibid., 6th meeting, p. 33, para. 17.)

[94] "It was ... preferable to provide expressly that declarations as to interpretation were to be treated as reservations" (Mr. Haraszti, ibid., 4th meeting, para. 25).

[95] Ibid., *Second Session, Vienna, 9 April-22 May 1969*, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), 105th meeting, p. 346, para. 28. The Hungarian amendment nevertheless received a certain amount of support during the discussion in the Committee of the Whole (ibid., *First Session, Vienna, 26 March–24 May 1968* (footnote 92 above), 5th meeting: Syria (para. 5), Greece (para. 16), Italy (para. 22), Czechoslovakia (para. 30), Lebanon (para. 43), Switzerland (para. 54), Bulgaria (para. 59), Argentina (para. 69), USSR (para. 86); 6th meeting: Mongolia (para. 2), Central African Republic (para. 22)). It is open to question, however, whether most of the speakers were not expressing support for the addition of the word "unilateral" rather than for the idea of treating interpretative declarations as reservations, which was opposed by the United Kingdom (5th meeting, para. 96), the United States (ibid., para. 116), Ireland

Commission.[96] That text was adopted by the Committee of the Whole without a vote,[97] and then by the Conference by 94 votes to none, with 3 abstentions.[98]

(ii) *The 1978 and 1986 Vienna Conventions*

68. The question of the definition of reservations gave rise to no substantive discussion during the preparation of the 1978 and 1986 Vienna Conventions. In both cases it was more or less taken for granted that the definition adopted in 1969 would be used again.

69. With regard to the 1978 Vienna Convention, Sir Humphrey Waldock, once again the Special Rapporteur, did not propose the inclusion of a definition of reservations in the draft articles and explained that "[p]ersonally, he thought that cross-reference to the 1969 Vienna Convention on the Law of Treaties would be convenient as it would avoid having to frame a set of provisions on *such difficult questions as reservations*".*[99] The principle of such a referral having been called in question, not without reason,[100] the Drafting Committee adopted a definition of reservations which was in turn adopted by the Commission as part of the draft articles on succession of States in respect of treaties on 5 July 1972[101] and remained unchanged thereafter. As noted in the report of the Commission on the work of its twenty-fourth session, that definition "reproduce[s] the wording ... of the Vienna Convention" of 1969.[102]

70. No Government commented on the definition[103] and it was reproduced without change in the Commission's final report on the topic, with the same commentary as in 1972.[104]

71. No amendments were proposed to the text, which was adopted by the United Nations Conference on Succession of States in Respect of Treaties at the same time as the rest of article 2;[105] the question of the definition of reservations was not even mentioned.

72. With regard to the definition of reservations in article 2, paragraph 1 (*d*), of the 1986 Vienna Convention, the text originates in the proposal made by the Special Rapporteur, Mr. Reuter, in his third report, issued in 1974. That definition was based on the 1969 definition, the only difference being the addition of a reference to international organizations as well as States.

73. In his commentary, the Special Rapporteur observed:

> There is apparently no theoretical or practical reason to depart from the definition of reservations given in the 1969 Convention. It will be noted, however, that the fact that international organizations are not parties to multilateral treaties would suffice to explain why the practice of reservations does not exist among international organizations.[106]

74. On that basis, the Commission provisionally adopted a text which reflects its perplexity since, rather than reproducing the somewhat cumbersome list of ways of expressing consent contained in the 1969 definition, it proposed to simplify that wording by saying only: "'reservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing or consenting [*by any agreed means*]* to be bound by a treaty ...".[107]

75. According to the commentary, this change, based on an amendment by Poland and the United States at the United Nations Conference on the Law of Treaties,[108] which is the origin of the existing article 11 of the 1969 Convention (but which was not adopted in its original form)[109] has "the twofold advantage of being simpler than the corresponding provision of the Vienna Convention and of leaving in abeyance the question whether the terms 'ratification', 'acceptance', 'approval', and 'accession' could also be used in connexion with acts whereby an organization expressed its consent to be bound by a treaty".[110]

76. However, after adopting new provisions[111] which established an "act of formal confirmation" for international organizations as equivalent to ratification for States, the Commission, at its thirty-third session, in 1981, "saw

(6th meeting, para. 18) and Sir Humphrey Waldock, Expert Consultant (ibid., para. 29).

[96] At least in the case of the French text; the English and Russian texts were changed so as to bring the order of the words "signing, ratifying, accepting or approving" into line with that used in article 16 (which became article 11) of the 1969 Vienna Convention, as had already been done in the other versions (105th meeting, para. 28) (footnote 95 above).

[97] See *Official Records of the United Nations Conference on the Law of Treaties*, *First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), report of the Committee of the Whole on its work at the second session of the Conference (A/CONF.39/15), pp. 235–236, paras. 25–26.

[98] Ibid. (footnote 95 above), 28th plenary meeting, p. 157, para. 48.

[99] *Yearbook ... 1972*, vol. I, 1158th meeting, p. 42, para. 9.

[100] For a forceful argument against referral, see, for example, the statement by Mr. Ushakov (*Yearbook... 1974*, vol. I, 1272nd meeting, pp. 115–116, para. 31).

[101] *Yearbook... 1972*, vol. I, 1196th meeting, p. 271, para. 33.

[102] Ibid. vol. II, document A/8710/Rev.1, p. 232, para. (8) of the commentary to draft article 2.

[103] See the first report on succession of States in respect of treaties by Sir Francis Vallat, *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, p. 32, para. 151.

[104] *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, p. 176, para. (11) of the commentary to draft article 2.

[105] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, *Resumed session, Vienna, 31 July–23 August 1978*, vol. II, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.79.V.9), 14th plenary meeting, p. 20, para. 9. See also 52nd meeting, p. 125, para. 73 (provisional adoption of the Commission's draft and referral to the Drafting Committee, by 71 votes to 5 with 1 abstention), and 56th meeting, para. 36 (adoption by consensus on second reading).

[106] *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/279, p. 141.

[107] Ibid., document A/9610/Rev.1, p. 294.

[108] *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 91 above), p. 124, para. 104 (*a*).

[109] Ibid., paras. 106–108.

[110] *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, p. 295, para. (4) of the commentary to draft article 2. For the Commission's discussion of this provision, see *Yearbook ... 1974*, vol. I, 1279th meeting, pp. 162–163, paras. 55–56, and p. 164, para. 72, and 1291st meeting, pp. 231–232, paras. 15–20.

[111] Articles 2, paragraphs 1 (*b*)–1 (*b* bis), and 11 (*Yearbook … 1975*, vol. I, 1353rd meeting, paras. 2–8 and 59).

no reason that would justify the maintenance of the first reading text as opposed to returning to a text which could now more closely follow that of the corresponding definition given in the Vienna Convention".[112] It therefore reproduced the 1969 definition and added the act of formal confirmation to the list of circumstances in which a reservation could be made.[113] The Commission's final report on the draft, issued in 1982, reproduced the same text, accompanied by the same commentary.[114]

77. The Commission's text was adopted, without change or debate and by consensus, on 18 March 1986, by the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations;[115] no amendments were proposed.

(b) *Text of the definition*

78. Article 2, paragraph 1 (*d*), of the 1969 Vienna Convention reads as follows:

"reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

79. This definition is reproduced without change in article 2, paragraph 1 (*j*), of the 1978 Vienna Convention, which nevertheless adds a reference to the various circumstances in which a reservation can be made by a State "when making a notification of succession to a treaty":

"reservation" means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty or *when making a notification of succession to a treaty*,* whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.[116]

80. The 1969 definition was also the model for that given in article 2, paragraph 1 (*d*), of the 1986 Vienna Convention, which nevertheless, in accordance with its object, adapted the earlier definition to treaties concluded by international organizations:

"reservation" means a unilateral statement, however phrased or named, made by a State or *by an international organization when signing, ratifying, *formally confirming*,* accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State *or to that organization*.*[117]**

81. These texts, based on the 1969 definition and adapted to the particular object of the other two Vienna Conventions, are not mutually contradictory but on the contrary usefully complement each other. The various elements of those texts can be combined to produce the following composite text:[118]

"*'Reservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization.*"

82. Each of the three Vienna Conventions states explicitly that the definitions are given "for the purposes of the present Convention".

B. The definition of reservations tested in practice, judicial decisions and doctrine

83. This explanation obviously poses the question whether the composite definition given above can nevertheless be considered sufficiently general for the purposes of the Guide to Practice. It is generally acknowledged that this is not the case, for example, for the definition of treaties themselves, and that in particular, the limitation of treaties to international agreements concluded "in written form" is valid only for the purposes of the Vienna Conventions and does not call in question the inclusion of oral agreements in the general category of treaties.[119] It would seem, however, that the same does not apply in respect of the definition of reservations found in the Conventions. Although the definition is given for the purposes of implementing the Conventions themselves, it is considered sufficiently general to apply outside the Vienna Conventions regime.[120]

84. It does not seem essential, therefore, to maintain, for the purposes of the Guide to Practice the precautionary wording used by the drafters in entitling article 2 of the 1969, 1978 and 1986 Vienna Conventions "Use of terms" rather than, simply, "Definitions", so as to make it clear that this article is "intended only to state the meanings with which terms are used" in the Commission's draft articles in the first instance and subsequently in the definitive Conventions.[121]

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[112] *Yearbook ... 1981*, vol. II (Part Two), p. 123, para. (14) of the commentary to draft article 2; for the Commission's discussion of this initiative, apparently taken by the Drafting Committee, see *Yearbook ... 1981*, vol. I, 1692nd meeting, p. 262, paras. 13–17.

[113] *Yearbook ... 1981*, vol. II (Part Two), p. 121.

[114] *Yearbook ... 1982*, vol. II (Part Two), pp. 19–20, paras. (12)–(14) of the commentary to draft article 2.

[115] *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations*[C] *or between International Organizations, Vienna, 18 February–21 March 1986*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5), 5th plenary meeting, p. 11, para. 21.

[116] The words in italics indicate the addition made to the 1969 text.

[117] The words in italics indicate the additions made to the 1969 text.

[118] With reference to this idea, see paragraph 40 above.

[119] See article 3 of the 1969 and 1986 Vienna Conventions.

[120] See, for example, Ruda, "Reservations to treaties", p. 105; Gamble Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", pp. 374 and 394; Greig, "Reservations: equity as a balancing factor?", p. 26; and Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, p. 40.

[121] See *Yearbook ... 1966*, vol. II, p. 188, para. (1) of the commentary to article 2; see also the comments of Ruda and Horn (footnote 120 above).

85. The fact remains, however, that although the "Vienna definition"[122] may (and should) be considered generally valid in respect of reservations *to treaties*, it is obviously limited to that function. It might be advisable to remember that the technique of reservations is not limited to treaty law: it has become current in the context of adopting resolutions, whether in the form of recommendations or decisions, in some international organizations.[123]

86. Although within these limits the Vienna definition has undoubtedly become firmly established, it nevertheless raises difficult problems, due to what it says and also what it does not say. As one jurist has written, "This matter of a definition [of reservations], while relatively simple in the abstract, can be difficult in practice."[124] Although very widely accepted, this definition is not precise enough to resolve all the doubts that may arise concerning the nature of certain unilateral instruments that sometimes accompany the expression by States (and, much more rarely, by international organizations), of their consent to be bound. In particular, it fails to eliminate serious difficulties concerning the distinction between reservations and interpretative declarations, which it does not define.[125]

1. Establishment of the Vienna definition

87. Despite some nuances and the expression of some regrets, the definition of reservations that can be deduced from the Vienna Conventions has generally won approval in the writings of jurists. That definition has clearly been accepted in judicial practice, despite the relative rarity of precedents, and seems to constitute a point of reference for States and international organizations in their practice with regard to reservations.

(a) *Qualified approval in the writings of jurists*

88. A definition of reservations is undoubtedly useful, although its usefulness has sometimes been called in question.[126] Such a definition makes it possible to draw a distinction between "true" reservations, which correspond to the definition given, and instruments which may appear to be reservations but in fact are not. Such a distinction is all the more essential because, first, the terminology used by States is extremely variable (not to say capricious)[127] and secondly, because relatively precise consequences flow from this distinction: the entire reservations regime established in articles 19–23 of the 1969 and 1986 Vienna Conventions and article 20 of the 1978 Convention is affected.

89. It is therefore not surprising that efforts to define reservations were being made in the literature prior to the adoption of the 1969 Vienna Convention, and even before the preliminary work began. However, the adoption of that Convention put an end to the chaotic proliferation of doctrinal definitions, whose purpose thereafter was simply to complete or clarify the Vienna definition without calling it in question.

(i) *Summary overview of doctrinal definitions before 1969*

90. In the context of this report it is impossible to make an exhaustive survey of the doctrinal definitions which preceded the definition adopted in 1969: hardly any manual on public international law has ventured to undertake this task.[128] The definitions which are the most important will simply be recalled here, by reason of either the fame of their author and their influence, or their relative originality. They will be grouped according to their common features and the differences between them and the Vienna definition will be highlighted, so as to reveal any weak points they may have.

91. Horn, who has made a survey of this kind, draws a distinction between authors who have produced a "descriptive" definition, aimed at reflecting as comprehensively as possible the multiform practice of States, and those who have proposed a "stipulative" definition, aimed at channelling that practice.[129] In fact, this classification overlaps another, more directly operational for the purposes of this report, namely that which distinguishes between on the one hand, the writers who stress the form of reservations and view them primarily as instruments, and, on the other, those who emphasize the effect of reservations.

92. The most "formalistic" definition is probably that of Miller, author of one of the very first detailed studies on reservations, published in 1919:

> [A] reservation to a treaty may be defined as a formal declaration relating to the terms of the treaty made by one of the contracting Powers and communicated to the other contracting Power or Powers at or prior to the delivery of the instrument of ratification of the declarant.[130]

This is a very "neutral" definition, which says nothing about the effects of reservations and therefore cannot be used to distinguish between reservations and interpretative statements.[131]

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[122] This expression means the composite text resulting from the "addition" of the 1969, 1978 and 1986 definitions (see paragraph 81 above).

[123] See Flauss, "Les réserves aux résolutions des Nations Unies". States not only make "reservations" to resolutions adopted by international organizations, they also interpret them unilaterally by making formal statements for that purpose. See, for example, the concordant statements made by France, the United Kingdom and the United States on the occasion of the adoption on 25 May 1993 of Security Council resolution 827 (1993), establishing the International Tribunal for the Former Yugoslavia (S/PV.3217, pp. 10–19).

[124] Gamble Jr., loc. cit., p. 373; see also, for example, Macdonald, "Reservations under the European Convention on Human Rights", p. 434.

[125] Because of its importance, this particular problem is dealt with below in paragraphs 231–413.

[126] See the statement by the representative of Turkey, Mr. Kural, in the Sixth Committee of the General Assembly on 14 October 1950 (*Official Records of the General Assembly, Fifth Session, Sixth Committee*, 221st meeting, p. 55, para. 23).

[127] See paragraphs 223–230 and 252–259, below.

[128] Horn has rightly pointed out that, strangely enough, no effort was made to define reservations during the first attempts to codify their legal regime within the League of Nations and the Pan American Union (op. cit., p. 33).

[129] Op. cit.

[130] Miller, *Reservations to Treaties: Their Effect, and the Procedure in Regard Thereto*, p. 76.

[131] See paragraphs 231–413 below.

93. This formalistic definition has nevertheless remained largely isolated[132] and almost all the writers who have concerned themselves with reservations have combined the formal and substantive approaches, thus confirming that reservations can only be defined by combining their form and the effects they produce (or seek to produce), just as is done in the Vienna Conventions.

94. Thus, according to Anzilotti:

> [T]he word reservation indicates a declaration of will by which the State, while accepting the treaty as a whole, excludes from its acceptance certain specific provisions by which it nevertheless refuses to be bound.[133]

To a large extent this concise definition prefigures the Vienna definition inasmuch as it contains both a formal element (the reservation is a declaration, unilateral in that it emanates from "the State") and a substantive element (the State making the reservation is not bound by "specific provisions" of the treaty).

95. The same is true of the famous definition adopted at about the same time in the draft Convention on the Law of Treaties prepared by the Harvard Law School (the Harvard draft), which defines a reservation as follows:

> [A] formal declaration by which a State, when signing, ratifying or acceding to a treaty, specifies as a condition of its willingness to become a party to the treaty certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or States which may be parties to the treaty.[134]

Here again, the definition combines elements of form and of substance (concerning the effect of the reservation), and, like the Vienna definition, adds details concerning the time at which the declaration must be made in order to be termed a reservation.[135]

96. However, although in the period between the two world wars it was established that a reservation was a unilateral declaration[136] and that the time at which a declaration was made was relevant to its purposes, study of the doctrine of that period reveals wide disagreement among writers on the substantive aspect of the definition, that is, the anticipated effects of a declaration.

97. If one leaves aside the distinction between writers who include under one and the same definition both reservations and unilateral declarations and writers who exclude unilateral declarations,[137] the main dispute concerns the issue of the "limiting" or "excluding" effect of reservations as compared with their "modifying" effect:

> Writers who did mention only the 'excluding' or only the 'limiting' effect of reservations were [apart from Anzilotti, Strupp and the Harvard draft] Baldoni, Hudson, Pomme de Mirimonde, Accioly and Guggenheim. However, there were numerous writers that did admit the possibility of reservations having a 'modifying' effect on treaty norms. Holloway, Hyde, Kraus, Podestá Costa, Rousseau and Scheidtmann, to name just a few, advocated concepts that related to the 'modifying' effect of reservations, with or without referring to their 'excluding' effect".[138]

98. The dispute is by no means insignificant, and to a large extent it is still continuing, even though the 1969 Vienna Convention deliberately aligns itself with the second doctrinal trend referred to by Horn.[139]

(ii) *Contemporary doctrinal positions on the Vienna definition*

99. Clearly, when the Commission set about defining the concept of a reservation, it was not venturing into a doctrinal *terra incognita*; the path was in fact well marked, since a broad consensus had developed by the end of the period between the two wars that the definition should include a formal ("procedural") component and a substantive component, and, despite the dispute referred to above, the content of each of these components was quite narrowly circumscribed. This is perhaps why after 1969 commentaries on the Vienna definition were rather positive on the whole.

100. Imbert, who wrote one of the most incisive monographs on the subject of reservations, expresses the following view: "This definition appears very precise and complete. However, it is not entirely satisfactory; ... some of these terms are too general, whereas others are too restrictive."[140] In particular, he criticizes the definition for including elements that concern not the definition of reservations but their validity, specifying that they concern only "certain provisions" of the treaty in question, whereas, in his view, the purpose of a reservation is necessarily to restrict the obligations flowing from a treaty (viewed as a whole).[141] Oddly enough, he does not level the same criticism at the time aspect of the Vienna definition,[142] which would also appear to be more relevant to a legal regime applicable to reservations than to a definition

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[132] Horn (op. cit., p. 33) places in the same category of definitions that formulated by Genet, author of another major work on reservations, published in 1932: "Reservations are declarations made prior to, concomitant with, or posterior to an international diplomatic instrument by one or all the signatory States which limit, to a greater or lesser degree, both qualitatively and quantitatively, but always in a clearly defined way, the accession of that State or States to the convention that has been or is to be concluded" ("Les 'réserves' dans les traités", p. 103). This definition, which is very different from the Vienna definition, nevertheless introduces a "substantive" element that is absent from the one proposed by Miller.

[133] Anzilotti, *Cours de droit international*, p. 399.

[134] Research in International Law of the Harvard Law School, "Draft Convention on the Law of Treaties", *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 29, No. 4 (October 1935), p. 843.

[135] This is also the case, for example, for Strupp's definition in *Éléments du droit international public universel, européen et américain*, p. 286—this definition includes a definition of interpretative declarations.

[136] See, however, the curious position taken by Scelle, who defines a reservation as a "*treaty clause** emanating from an initiative of one or several Governments that have signed or acceded to a treaty setting up a legal regime that derogates from the general treaty regime" (*Précis de droit des gens: principes et systématique*, p. 472).

[137] See paragraphs 231–413 below.

[138] Horn, op. cit., p. 34. Horn believes that Scelle, Khadjenouri and Kappeler can also be included in the second category. Exact references are provided (ibid., p. 390, footnotes 7, 8 and 9).

[139] Article 2, paragraph 1 (*d*): "... a unilateral statement ... whereby it purports to exclude or to modify the legal effect ..."; see paragraphs 144–222 below.

[140] Imbert, *Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951*, p. 9.

[141] Ibid., pp. 14–15; on this point, see also paragraphs 132–143 below.

[142] "... when signing, ratifying, accepting, approving or acceding to a treaty ..." (1969 and 1986 text) "... when making a notification of succession to a treaty ..." (1978 text); see also paragraphs 132–143 below.

of reservations; by contrast, he suggests that the definition should be expanded in order to emphasize that "it may be expressly provided that reservations shall be made at a time other than when a State signs a treaty or expresses its consent to be bound by it".[143]

101. On the basis of these criticisms, Imbert proposes a more complete definition that he believes should make it possible to avoid any ambiguity:

> A reservation is a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, or when making a notification of succession to a treaty, *or at any other time stipulated by a treaty*,* whereby it purports to *limit or restrict the content or scope of the obligations flowing from the treaty with respect to that State.**[144]

102. Another eminent expert on reservations to treaties, Horn, partly endorsed these criticisms when he stated that "the expression 'excludes the legal effect of certain provisions' seems to lack the necessary precision".[145, 146] The definition given by Whiteman, who replaces the word "exclude" with the word "limit" appears to be a response to the same concern.[147]

103. It is nonetheless striking that, to the Special Rapporteur's knowledge, none of the writers who have examined the issue of reservations to treaties in particular calls the Vienna definition radically into question, and that they all, without exception, combine one or more formal elements (a declaration made at a given time) and a substantive element that concerns the effect of the declaration, a point on which the disagreements and hesitation are more pronounced.[148] Moreover, and above all, the great majority of contemporary writers adhere to the Vienna definition, which most of them simply reproduce.[149]

104. At the very least it can be said that, as indicated by Ruda, "notwithstanding the intention of the authors of the Convention, the doctrinal importance of Article 2, paragraph 1 (*d*), is undeniable".[150] This is unquestionably a rare doctrinal quasi-consensus, which means that it can be concluded that "[i]t is reasonable to assume that although the Vienna Convention is not yet universally adhered to, it [the Vienna definition] represents the more consensual statement on the subject".[151]

(b) *Establishment of the Vienna definition by means of practice and judicial decisions*

105. The Vienna definition has also been established implicitly through practice, and very explicitly through judicial decisions, and it is unquestionably an undeniable reference point in the area in question; it may thus be inferred without any great risk of committing an error that, although a process of trial and error may have preceded its adoption, the definition is of a customary nature.

(i) *Implicit establishment of the Vienna definition through practice*

106. It is hard to demonstrate on the basis of State practice that there is undeniable adherence to the Vienna definition, since States are rarely prompted to make explicit references to it.

107. It will be recalled, however, that despite a number of clashes, particularly concerning the amendment by Hungary, article 2 of the 1969 Vienna Convention was ultimately adopted without opposition,[152] and the definition laid down in paragraph 1 was not called in question in any way in either 1978 or 1986.[153]

108. It is also interesting to note that the restatement of the law applied by the United States in its foreign relations defines reservations on the basis of article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, which it simply paraphrases, while omitting the phrase "however phrased or named".[154] The very fact that this work takes care to emphasize that the United States Senate uses the word in a different sense[155] confirms that, in the view of the United States, the Vienna definition prevails at the international level.

109. Above all, it should be noted that when States "requalify" an interpretative declaration as a reservation[156] they sometimes explicitly invoke article 2 of the 1969 and

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[143] Imbert, op. cit., p. 12; see also pages 163–165.

[144] Ibid., p. 18; the words in italics differ from the wording of the (consolidated) Vienna definition.

[145] Horn, op. cit., p. 83.

[146] Gormley also opts for a much broader definition of reservations than the Vienna definition, since he includes "*all devices the application of which permit a state to become a party to a multilateral convention without immediately assuming all of the maximum obligations set forth in the text*"; however, this bias is attributable to the very purpose of the study in question, which concerns alternatives to reservations ("The modification of multilateral conventions by means of 'negotiated reservations' and other 'alternatives': a comparative study of the ILO and Council of Europe", p. 64); on this point, see paragraphs 231–413 below.

[147] Whiteman, *Digest of International Law*, p. 137: "The term 'reservation'... means a formal declaration by a State, when signing, ratifying, or adhering to a treaty, which modifies or limits the substantive effect of one or more of the treaty provisions as between the reserving State and other States party to the treaty". Also see Szafarz, "Reservations to multilateral treaties", p. 294.

[148] See in particular paragraphs 144–222 below.

[149] See, among many other examples: Bastid, *Les traités dans la vie internationale: conclusion et effets*, p. 71; Bowett, "Reservations to non-restricted multilateral treaties", pp. 67–68; Nguyen Quoc, Daillier and Pellet, *Droit international public*, p. 177; Greig, loc. cit., p. 26; Maresca, *Il diritto dei trattati: la Convenzione codificatrice di Vienna del 23 Maggio 1969*, pp. 287–288; Jennings and Watts, *Oppenheim's International Law*, p. 1241; Reuter, *Introduction to the Law of Treaties*, pp. 77 and 114–120; Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 51–54; Sucharipa-Behrmann, "The legal effects of reservations to multilateral treaties", p. 72; Brownlie, *Principles of Public International Law*, pp. 608–611; Carreau, *Droit international*, pp. 128–132; Combacau and Sur, *Droit international public*, pp. 131–135; Díez de Velasco Vallejo, *Instituciones de derecho internacional público*, pp. 119–125; Dupuy, *Droit international public*, pp. 194–198; Jiménez de Aréchaga, *El derecho internacional contemporáneo*, pp. 50–55; O'Connell, *International Law*, pp. 229–241; Rousseau, *Droit international public*, pp. 119–126; Seidl-Hohenveldern, *Völkerrecht*, pp. 72–75; Shaw, *International Law*, pp. 641–649; Verdross and Simma, *Universelles Völkerrecht: Theorie und Praxis*, pp. 466–472.

[150] Ruda, loc. cit., p. 105.

[151] Gamble Jr., loc. cit., p. 374.

[152] See paragraph 67 above.

[153] See paragraphs 71 and 77 above.

[154] American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States*, (Washington, D.C.), vol. 1 (14 May 1986), p. 180, para. 313.

[155] Ibid., p. 187, para. 314, comment *b*. The different meaning in question is unclear to a reader not familiar with United States practice.

[156] See paragraphs 231–413 below.

1986 Vienna Conventions. For example, Greece, when protesting against Turkey's "interpretative declarations" with respect to the European Convention on Human Rights, expressed the following view:

> [A]ny unilateral declaration which limits a State's contractual obligations is incontestably, from the point of view of international law, a reservation. This question concerns one of the most established principles of international treaty law, which has been codified by the two Vienna Conventions—the Convention of 1969 on the law of treaties and the Convention of 1986 on the law of treaties between States and international organisations or between international organisations. Both Conventions provide in identical terms that the expression "reservation" means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State (Article 2 para. 1 (d)).[157]

110. Even when States do not make an explicit reference to the Vienna definition they are clearly using it as a basis, sometimes paraphrasing parts of it; for example, when expressing opposition to a United States "declaration" with respect to the 1966 International Covenant on Civil and Political Rights, Finland and Sweden recalled that "under international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty".[158]

111. Moreover, in a number of contentious cases the States parties to the dispute in question have explicitly acknowledged that article 2, paragraph 1 (*d*), of the 1969 Vienna Convention "correctly defines a reservation". That was so where France and the United Kingdom were concerned in the *English Channel* case.[159] In addition, in the *Belilos* v. *Switzerland* case, which was submitted to the European Court of Human Rights, Switzerland invoked this same provision when it sought to establish that an interpretative declaration that it had itself formulated was in fact in the nature of a reservation.[160]

(ii) *Establishment of the Vienna definition by means of judicial decision*

112. The relevant judicial decision confirms that the Vienna definition is very widely accepted. Although ICJ has never taken up the issue of the definition of reservations, the Court of Arbitration set up in the above-mentioned *English Channel* case between France and the United Kingdom, and also the organs of the European Convention on Human Rights and the American Convention on Human Rights, have, in the rare instances in which they have been called on to state a position, reached conclusions that could not possibly be clearer in that respect.

113. In the *English Channel* case, the United Kingdom claimed that the reservations made by France to article 6 of the Convention on the Continental Shelf were not true reservations in the sense in which that term is understood in international law.[161] In its decision of 30 June 1977, the Court of Arbitration noted that the two States agreed that article 2, paragraph 1 (*d*), of the 1969 Vienna Convention correctly defined a reservation[162] and, without directly stating a position on that point itself, it accordingly concluded that the contested reservation was indeed a reservation.[163]

114. The European Commission of Human Rights, in the *Temeltasch* case, relied on the definition set out in article 2, paragraph 1 (*d*), of the Vienna Convention when requalifying a Swiss interpretative declaration concerning the European Convention on Human Rights.[164]

115. The American Court of Human Rights, without explicitly referring to article 2, paragraph 1 (*d*), of the 1969 Vienna Convention (to which article 75 of the American Convention on Human Rights expressly refers with respect to the reservations regime) did, however, explicitly reflect some elements of the definition set out in the Vienna Convention, particularly where it recalls that "[r]eservations have the effect of excluding or modifying the provisions of a treaty".[165]

116. This very striking consistency of practice, judicial decision[166] and doctrine leave little doubt that the Vienna definition is now customary in nature, as expressly acknowledged by the European Commission of Human Rights in the *Temeltasch* case:

> Since article 64 does not contain any definition of the expression "reservation", the Commission must analyse this concept, and also the concept of an "interpretative declaration", within their meaning under international law. In that connection, it will attach particular importance to the Vienna Convention on the Law of Treaties of 23 May 1969, which above all lays down rules existing under customary law and is essentially of a codifying nature.[167]

117. Moreover, this is the conclusion reached, whether implicitly[168] or explicitly,[169] by virtually all of the rel-

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[157] Letter of 6 April 1987 from the Deputy Minister for Foreign Affairs of Greece to the Secretary-General of the United Nations, reproduced in Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Applications Nos. 15299/89, 15300/89 and 15318/89, *Chrysostomos et al.* v. *Turkey*, vol. 68 (Strasbourg, 1983), p. 231.

[158] Text of the Finnish objection (United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1997*, chap. IV.4, p. 133; the Swedish objection is very similarly worded (ibid., p. 135).

[159] See the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 40, para. 55.

[160] European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132 (Registry of the Court, Council of Europe, Strasbourg, 1988), *judgment of 29 April 1988*, p. 21, para. 42.

[161] Decision of 30 June 1977 (see footnote 159 above), p. 15; also see pages 39–40, para. 54.

[162] See paragraph 112 above.

[163] See footnote 159 above.

[164] Decision of 5 May 1982, Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application No. 9116/80, *Temeltasch* v. *Switzerland*, vol. 31 (Strasbourg, 1983) pp. 146–148, para. 69 (where article 2, para. 2 (*d*), is quoted in full) to para. 82. The Commission did not take such a position in the *Chrysostomos et al.* case (see footnote 157 above).

[165] *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights*), Advisory Opinion OC–3/83 of 8 September 1983, *Series A: Judgments and Opinions*, No. 3, paras. 62 and 73.

[166] The States concerned by the above-mentioned decisions of the Franco-British Court of Arbitration and the European Commission of Human Rights were not bound by the 1969 Vienna Convention.

[167] Decision of 5 May 1982 (see footnote 164 above), para. 68.

[168] See footnotes 149–151 above.

[169] See, for example, Edwards Jr., "Reservations to treaties", pp. 369 and 372; and Greig, loc. cit., p. 26.

evant doctrine. In any event, this confirms that there is no reason to reconsider the definition adopted in 1969 and confirmed and supplemented in 1978 and 1986. However, the mere fact that the Vienna definition is widely accepted as constituting law does not mean that its interpretation and application do not pose any problems, which prompts the question whether it would be appropriate to expand on a number of points in the Guide to Practice.

2. Persistent problems with definitions

118. As has often been stressed, the definition of reservations contained in the three Vienna Conventions is analytical:

> The Vienna Convention definition of reservation may be referred to the class of analytical definitions, because it breaks down the concept of reservation into various constituents. It strives to indicate the criteria that have to be present before we may denote a class of phenomena by a single term. As an analytical definition it would be considered to be an example of the classical *per genus proximum et differentiam specificam* definition. Reservations would belong to the class of unilateral statements made by states when signing, approving or acceding to a treaty (*genus proximum*). They are distinguished from other unilateral statements presented at these moments, by their quality of "excluding" or "modifying" the legal effects of certain provisions of the treaty in their application to that state (*differentia specifica*).[170]

119. In simpler terms, the Vienna definition uses both formal and procedural criteria (a unilateral statement which must be formulated at a particular time) and a substantive element (resulting from the effects intended by the State formulating it), whatever the wording adopted. Each of these elements of a definition gives rise to some problems, but they are not equally important.

(a) "*A unilateral statement ...*"

120. The unilateral nature of reservations, as forcefully stated in the first few words of the Vienna definition, is not self-evident. Mr. Brierly, for example, took an entirely contractual approach to the concept of reservations:[171] according to the first Special Rapporteur of the Commission on the law of treaties, a reservation was indissociable from its acceptance and defined by the agreement reached on its content. In a more ambiguous way, Rousseau considers that a reservation is "a *unilateral* means of limiting the effects of the treaty ... Precisely on account of its legal nature—as a new offer of negotiations made to the other party or parties—it amounts to what is actually a treaty-based clause".[172] This position, which has now been completely abandoned, makes the reservation part of the treaty itself and is incompatible with the legal regime of reservations provided for in the 1969 Vienna Convention, which does not make the validity of a reservation subject to its acceptance by the other parties.

121. Although a reservation is a unilateral act separate from the treaty, however, it is not an autonomous legal act[173] in that, first of all, it produces its effects only in relation to the treaty to whose provisions it relates and to which its fate is entirely linked[174] and, secondly, its effects depend on the reaction (unilateral as well) or absence of reaction by the other States or international organizations which are parties. From this point of view, it is an "act-condition", an element of a legal relationship that it is not sufficient in itself to create. "A reservation is a declaration which is external to the text of a treaty. It is unilateral at the time of its formulation; but it produces no legal effects unless it is accepted, in one way or another, by another State."[175] "A reservation is a unilateral act at the time it is formulated, but seems to stop being one in its exercise."[176] However, this takes us from the question of the definition of reservations to that of their legal regime.

122. It is no longer open to dispute at present that reservations are unilateral statements emanating either from a State or from an international organization, i.e. formal acts which are separate from the treaty itself and are not of a treaty-based nature. This is not without consequence.

123. The use of the word "*déclaration*" puts the emphasis on the formal nature of reservations.[177] Although this is not specifically stated in article 2 of the Vienna Conventions, moreover, it would be contrary to the very spirit of that institution for a reservation to be formulated orally: without taking the form of a treaty, the reservation is "grafted" onto the treaty, which is also, in principle, a formal act. It is, of course, generally agreed that purely "oral" treaties do exist,[178] but they can hardly be seen as anything more than bilateral or, in any event, synallagmatic and between a small number of States. As shown in the next section, however, unilateral statements intended to modify the effect of certain provisions of such a treaty cannot be characterized as "reservations" proper.

124. What is more, article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions takes care of the problem:

> A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.[179]

125. A reservation is thus an *instrumentum* which is separate from that or those constituting the treaty, it being understood that there are other ways of achieving the same result as that sought by the treaty, either through the inclusion in the treaty itself of provisions varying its

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[170] Horn, op. cit., pp. 40–41.

[171] See the text of the definition proposed in 1951 (footnote 64 above); along the same lines, see Anderson, "Reservations to multilateral conventions: a re-examination", p. 453.

[172] Rousseau, *Principes généraux du droit international public*, pp. 290 and 296–297.

[173] As to the distinction between autonomous unilateral acts and acts linked to a treaty-based or customary provision, see Nguyen Quoc, Daillier and Pellet, op. cit., pp. 354–357.

[174] On this point, which was a matter of debate during the consideration of the *Nuclear Tests* case by ICJ (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 347 and 350), see paragraphs 144–222 below.

[175] Sinclair, op. cit., p. 51.

[176] Imbert, op. cit., p. 11.

[177] In this regard, see Horn, op. cit., p. 44, and Bishop Jr., "Reservations to treaties", p. 251; the Harvard draft definition defined a reservation as a "*formal** declaration" (see paragraph 95 above).

[178] See Reuter, op. cit., p. 30; and Sinclair, op. cit., p. 6.

[179] This provision will be discussed at length in the next report of the Special Rapporteur.

application, depending on the parties,[180] or through the conclusion of a later agreement between all or some of the parties.[181] In such cases, however, reference can no longer be made to reservations: these techniques are treaty-based, while reservations are by definition unilateral.[182]

126. This is certainly one of the key elements of the Vienna definition. "To some extent", it makes the reserving State "the master of the legal regime that is to exist between it and the other States".[183]

127. This point should be explained: the reservation is *always* unilateral in the sense that it has to reflect the intention of its author to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State, but this obviously does not prevent some contracting States or international organizations or some States or international organizations "entitled to become parties to the treaty"[184] from consulting one another to agree on the joint formulation of a reservation[185] (the same result is, moreover, achieved when, in expressing their consent to be bound, some States borrow the wording previously used by another reserving State): this was a common practice for the Eastern European countries until quite recently[186] and apparently still is, for the Nordic countries[187] and the States members of the European Union or of the Council of Europe.[188]

128. During the discussion of the draft which was to become article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, Mr. Paredes pointed out that a reservation could be made jointly.[189] Nothing more came of this comment and, in practice, States so far do not seem to have resorted to joint reservations.[190] This possibility cannot, however, be ruled out: the Special Rapporteur is not aware of such instruments, but a few rare examples of joint objections can be cited. For example, the European Community and its nine member States (at that time) objected in the same instrument to the "declarations" made by Bulgaria and the German Democratic Republic in connection with article 52, paragraph 3, of the TIR Convention[191] giving customs and economic unions the possibility of becoming parties.[192] In addition, while joint reservations may not exist, there have been joint declarations.[193] The possibility that the problem may arise in future cannot be ruled out and it would probably be wise for the Commission to adopt a position on this point and suggest what approach should be taken in such a case.

129. It truly appears that there is nothing to be said about the joint formulation of a reservation by several States or international organizations: it is hard to see what would prevent them from getting together to do something that they can no doubt do separately and in the same terms. This flexibility is all the more necessary in that, as a result of the proliferation of common markets and customs and economic unions, it is quite likely that the above-mentioned precedent of the joint objection to the TIR Convention will be repeated in the case of reservations, since such organizations often share competence with their member States and it would be quite artificial to require those States to act separately from the union to which they belong. Theoretically, moreover, such a practice would certainly not be contrary to the spirit of the Vienna definition: a single act emanating from several States may be regarded as unilateral when its addressee or addressees are not parties to it.[194]

130. To remove any ambiguity and avoid possible problems in future, the Vienna definition should therefore be clarified as follows:

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"1.1.1 The unilateral nature of reservations is not an obstacle to the joint formulation of a reservation by several States or international organizations."

131. The principle that a reservation is a unilateral statement thus does not seem to give rise to any major practical problems and, according to the Special Rapporteur, does not call for any explanations in the Guide to Practice, subject to the exclusion of similar institutions, as proposed in paragraphs 144–222 below.

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[180] It is in this sense, which does not have much to do with the institution of reservations as we know it, that the following extract from the dissenting opinion of Judge Zoričić to the ICJ judgment in the *Ambatielos* case should probably be interpreted: "A reservation is a provision agreed upon between the parties to a treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning" (*Ambatielos*, *Preliminary Objection*, *Judgment*, *I.C.J. Reports 1952*, p. 76).

[181] These techniques are considered briefly below (paras. 144–222). For a study which (deliberately) adds to the confusion complained of here, see Gormley, loc. cit., pp. 59–80 and 413–446.

[182] See Imbert, op. cit., p. 10.

[183] Basdevant, "La rédaction et la conclusion des traités et des instruments diplomatiques autres que les traités", p. 597.

[184] To borrow the term used in article 23 of the 1969 and 1986 Vienna Conventions.

[185] See Greig, loc. cit., p. 26; and Horn, op. cit., p. 44.

[186] See, for example, the reservations of Belarus, Bulgaria, Hungary, Mongolia, the German Democratic Republic, Romania, Czechoslovakia and the Soviet Union to section 30 of the Convention on the Privileges and Immunities of the United Nations; some of these reservations have been withdrawn since 1989 (United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. III.1, pp. 38–41).

[187] See, for example, the reservations of Finland and Sweden to articles 35 and 58 of the Vienna Convention on Consular Relations (United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. III.6, pp. 72–73) and those of Denmark, Finland, Iceland and Sweden to article 10 of the International Covenant on Civil and Political Rights (ibid., chap. IV.4, pp.124–129).

[188] See, for example, the reservations of Germany (No. 1), Austria (No. 5), Belgium (No. 5) and France (No. 6) to the International Covenant on Civil and Political Rights (ibid., pp. 123–125) or the declarations by all the States members of the European Community *in that capacity* to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (ibid., chap. XXVI.3, pp. 890–892).

[189] See footnote 74 above.

[190] Reservations formulated by an international organization are attributable to the organization and not to its members; they can therefore not be characterized as "joint" reservations.

[191] Customs Convention on the International Transport of Goods under Cover of TIR Carnets (with annexes).

[192] See United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. XI.A–16, p. 457.

[193] See paragraph 268 below.

[194] In this connection, see the first report of Mr. V. Rodríguez Cedeño on unilateral acts of States, reproduced in the present volume (A/CN.4/486, paras. 79 and 133).

(*b*) "... made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or [by a State] when making a notification of succession to a treaty ..."

132. The idea of including limits *ratione temporis* to the possibility of formulating reservations in the definition itself of reservations is not self-evident and, in fact, such limits are more an element of their legal regime than a criterion per se: a priori,[195] a reservation formulated at a time other than that provided for in article 2, paragraph 1, of the Vienna Conventions is not lawful, but that does not affect the definition of reservations.

133. Moreover, the oldest definitions of reservations did not usually contain this element *ratione temporis*: neither those proposed by Miller or Genet nor that of Anzilotti[196] put a time limit on the possibility of formulating reservations. However illogical it may be, the idea of including such a limit in the definition of reservations nevertheless gradually came to prevail for practical reasons because, as far as the stability of legal relations is concerned, there would be enormous disadvantages to a system which would allow the parties to formulate a reservation at any time. The principle *pacta sunt servanda* itself would be called into question because by formulating a reservation, a party to a treaty could call its treaty obligations into question at any time.

134. It is true that this would not be the case if the possibility of formulating reservations was made available to the signatories or to potential parties (States or international organizations "entitled to become parties" to the treaty) at any time *before* the expression of their definitive consent to be bound by the treaty or even before the entry into force of the treaty. Such freedom would, however, definitely complicate the task of the depositary and the other parties, which have to receive notification of the text of the reservation and be able to react to it within a certain time limit.[197] "The necessity of limiting the presentation of reservations to certain fixed moments became generally recognized in order to facilitate the registration and communication of reservations."[198]

135. The restrictive list in the Vienna Conventions of the times when such formulation can take place has nevertheless been criticized. On the one hand, it was considered that the list was incomplete, especially as it did not initially take account of the possibility of formulating a reservation at the time of a succession of States;[199] the 1978 Vienna Convention filled this gap. On the other hand, many writers pointed out that, in some cases, reservations could validly take place at times other than those provided for in the Vienna definition.[200] This apparent gap is, moreover, one of the strongest criticisms by Imbert. Noting that "it may be expressly provided that reservations will be formulated at a time other than when the State signs a treaty or establishes its consent to be bound by it",[201] he suggests that an explicit addition should be made to the Vienna definition to take account of this possibility and to make it clear that the formulation of the reservation may take place "at any other time provided for by the treaty".[202]

136. This addition seems unnecessary. It is of course quite correct that a treaty may provide for such a possibility, but, subject to what is stated on this problem in the next section of this chapter, what is involved is a conventional rule or *lex specialis* which derogates from the general principles embodied in the Vienna Conventions; these principles have a purely residual character of intention[203] and in no way form an obstacle to derogations of this kind.

137. The Guide to Practice in respect of reservations being drafted by the Commission is similar in nature, and it would not be advisable to recall under each of its headings that States and international organizations may derogate therefrom by including in the treaties which they conclude clauses on reservations subject to special rules.

138. On the other hand, it may be asked whether the actual principle of a restrictive list of the times when the formulation of a reservation may take place, as in article 2, paragraph 1, of the Vienna Conventions, is appropriate. This list does not cover all the means of expressing consent to be bound by a treaty, but the spirit of this provision is that the State may indeed formulate (or confirm) a reservation when it expresses such consent and this is the only time at which it may do so. It is therefore obvious that too much importance should not be attached to the letter of this list, failing as it does to correspond to the list in article 11 of the 1969 and 1986 Vienna Conventions,[204] which should have served as a model.

139. Moreover, the Commission and its Special Rapporteur had foreseen the problem during the discussion of the draft articles on the law of treaties between States and international organizations or between international organizations. Ultimately, however, since the Commission was anxious to keep as closely as possible to the 1969 text, it modelled its draft on that text and thereby rejected a helpful simplification.[205]

140. This problem, which so far does not appear to have given rise to any practical difficulty, but which might do

[195] See, however, paragraphs 135–136 below.

[196] See paragraphs 92–94 above.

[197] See article 23 of the 1969 and 1986 Vienna Conventions. The formal and temporal limits to the formulation of reservations will be the subject of the Special Rapporteur's next report.

[198] Horn, op. cit., p. 35.

[199] See Szafarz, loc. cit., p. 295.

[200] Ibid.; see also Gaja, "Unruly treaty reservations", pp. 310–313; Greig, loc. cit., pp. 28–29; Horn, op. cit., pp. 41–43; and Reuter, op. cit., p. 77.

[201] Imbert, op. cit., p. 12.

[202] Ibid., p. 18; see the full text of the definition proposed by this writer (para. 101 above).

[203] See the second report on reservations to treaties (*Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1), paras. 133 and 163.

[204] Article 11 of the 1986 Vienna Convention:

"1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

"2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed."

[205] See paragraphs 74–76 above.

so (when reservations are formulated at the time of an exchange of letters, for example), certainly does not justify a proposal by the Commission that the Vienna Conventions should be amended. Nonetheless, it should probably be specified in the Guide to Practice that:

"*1.1.2. A reservation may be formulated by a State or an international organization when that State or that organization expresses its consent to be bound in accordance with article 11 of the 1969 and 1986 Conventions on the Law of Treaties.*"

141. In addition, one specific point needs to be flagged. It may happen that the territorial scope of a treaty will vary over time because the territory of a State changes or because a State decides to extend the application of the treaty to a territory which has been placed under its jurisdiction and to which the treaty did not formerly apply.[206] On that occasion, the State which is responsible for the international relations of the territory may notify the depositary of new reservations in respect of that territory in its notification of the extension of the territorial application of the treaty.

142. This has recently occurred at least twice:

(*a*) On 27 April 1993, Portugal notified the Secretary-General of its intention to extend to Macao the application of the two 1966 international covenants on human rights. This notification included reservations in respect of that territory;[207]

(*b*) Likewise, on 14 October 1996, the United Kingdom notified the Secretary-General of its intention to apply to Hong Kong the 1979 Convention on the Elimination of All Forms of Discrimination against Women, subject to a number of reservations.[208]

The other contracting parties to these instruments neither reacted nor objected to this procedure.

143. This practice inevitably has an impact on the actual definition of reservations because it incorporates clarifications relating to the time of their formulation. It therefore seems prudent to specify, as, incidentally, has been suggested by various writers on the subject,[209] that a unilateral statement made by a State at the time of a notification of territorial application constitutes a reservation if, in all other respects, it fulfils the conditions laid down by the Vienna definition. It goes without saying that a clarification of this kind is without prejudice to any problem relating to the permissibility of such reservations.

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"*1.1.3 A unilateral statement which is made by a State at the time of the notification of the territorial application of a treaty and by which that State purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the territory in question constitutes a reservation.*"

[206] On this point, see paragraphs 178 et seq. below.

[207] See United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. IV.3, p. 118, and p. 120, note 16.

[208] Ibid., chap. IV.8, p. 186, note 11.

[209] See Szafarz, loc. cit., p. 295.

(c) "*... whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization*"

144. It is undeniably the third component of the Vienna definition which has given rise to the greatest problems and the liveliest theoretical debates. While no one questions their principle and it is generally recognized that the function of reservations is to purport to produce legal effects, the definition of these effects and their scope are still a matter of controversy.

The *differentia specifica*[210] of the Vienna Convention definition intended to clarify the "essence" of the very criteria of reservations, in fact give birth to new problems that had not been conceived of originally. How do reservations relate to the treaty text, and how do they affect the treaty norms? How do reservations actually change the relations between the reserving state and the confronted states? These questions bring into focus the meaning of expressions used in the definition of "reservation" such as the "... legal effect of certain provisions", "... in their application to the [*i.e., the reserving*] state ...", "excludes" and "modifies". All these expressions which according to the requirements for the terms used in the definition, are supposed to be simple and clear, are in fact imprecise.[211]

145. Essentially, "a reservation is a particularity which a State wishes to introduce in relation to a treaty to which it nevertheless expresses its intention to be bound";[212] and this "particularity" is expressed in legal terms: the reserving State is not in the same situation, in respect of the treaty, as the other contracting States, as a result of the modification of the legal effect of some of the provisions of the treaty.

146. It goes without saying, although it has rarely been pointed out,[213] that this criterion should be juxtaposed with article 21 of the 1969 and 1986 Vienna Conventions, which defines the legal effects of reservations.[214] Put another way, the formulation of a reservation purports to bring about the consequences which are described by that provision, on the subject of which it is not unimportant to note that, contrary to article 2, paragraph 1 (*d*):

(*a*) First, it makes no distinction between exclusion and modification (whereas the definition makes clear that the object of a reservation is to "exclude" or "modify");

(*b*) Secondly, it appears to admit that modification affects the provisions of the treaty to which the reservation itself relates (whereas article 2, paragraph 1 (*d*), deals with the exclusion or modification *of the legal effect* of those provisions);

[210] On this concept, see paragraph 118 above.

[211] Horn, op. cit., p. 45.

[212] Bastid, op. cit., p. 71.

[213] See, however, Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali*, pp. 150–151.

[214] Article 21, paragraph 1, of the 1969 Vienna Convention states:

"A reservation established with regard to another party in accordance with articles 19, 20 and 23:

"(*a*) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

"(*b*) modifies those provisions to the same extent for that other party in its relations with the reserving State."

(*c*) Thirdly, however, both articles emphasize the fact that the reservation relates to *certain provisions* of the treaty and not to the treaty itself.

147. These clarifications should be borne in mind if an interpretation is required of the definition contained in article 2, paragraph 1, to which the "general rule of interpretation" embodied in article 31 of the 1969 Vienna Convention applies: article 21 is a component of the general context of which the terms to be interpreted form part.

(i) *Modification of the effect of the treaty or its provisions?*

148. Having made this point, the first issue to be considered is the effect of reservations on the treaty: do they modify[215] the treaty itself, its provisions or the obligations deriving from it? One writer who has raised this question, in a different form and with some vehemence, is Imbert. According to him, "it is precisely the link which the drafters of the Vienna Convention established between reservations and the provisions of a convention which seems to be most open to criticism because a reservation does not eliminate a *provision*, but an *obligation*".[216]

149. The Special Rapporteur does not believe that this criticism is justified. First of all, it prejudges the answer to another basic question that relates to "extensive"[217] reservations. Secondly, it is contrary to the letter both of article 2, paragraph 1 (*d*), and article 21. Although the drafters of the Vienna Conventions were not always entirely consistent, they referred expressly in both cases *to the provisions** of the treaty rather than directly *to the obligations** deriving therefrom. There is good reason for this. Moreover by focusing on the "*legal effect** of certain provisions of the treaty", the danger of taking an overly categorical stance on the thorny issue of "extensive" reservations is avoided, but the same result is achieved: a reservation modifies not the provision to which it relates, but its legal effect, which, in most cases, takes the form of an obligation.

150. In this respect, article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions is better drafted than article 21, paragraph 1. It is unclear how a reservation, which is an instrument *external* to the treaty, could modify *a provision of that treaty*. It might exclude or modify its application, i.e. its effect, but not the text itself, i.e. the provision.

151. However, Imbert raises another, perhaps more serious matter:

> The words "certain provisions" strike me as not particularly apt, insofar as they do not paint a complete picture. Their use is prompted by the praiseworthy desire to rule out reservations which are too general and imprecise (comment by the Government of Israel on the Commission's first draft, *Yearbook ... 1965*, vol. II, p. 15; statement by the representative of Chile at the first session of the Vienna Conference (A/CONF.39/11/C.1/SR.4, para. 5) and which ultimately result in the complete negation of the compulsory nature of the treaty (see the often cited reservation by the United States to the General Act of Algeciras of 7 April 1906[218]) It may be asked however, whether article 2 was the right place to bring up this matter, which actually relates to the validity of reservations. The fact that a statement entails improper consequences should not prevent it from being regarded as a reservation (this is, for example, the case with reservations by which States subordinate, in a general and indeterminate manner, the application of a treaty to respect for national legislation). Moreover, practice abounds in examples of reservations which are perfectly valid even though they do not relate to specific provisions; they exclude the application of the treaty as a whole in well defined cases.[219]

152. This is true. As other writers have indicated,[220] practice certainly departs from the letter of the Vienna definition in the sense that many reservations relate not to specific provisions of the treaty, but to the entire instrument itself. There are countless examples; a few will suffice to illustrate this trend:

(*a*) When ratifying the International Covenant on Civil and Political Rights, one of the reservations formulated by the United Kingdom was as follows:

> The Government of the United Kingdom reserve the right to apply to members of and persons serving with the armed forces of the Crown and to persons lawfully detained in penal establishments of whatever character such laws and procedures as they may from time to time deem to be necessary for the preservation of service and custodial discipline and their acceptance of the provisions of the Covenant is subject to such restrictions as may for these purposes from time to time be authorised by law.[221]

(*b*) When ratifying the 1976 Convention on the prohibition of military or any other hostile use of environmental modification techniques, Austria formulated the following reservation:

> Considering the obligations resulting from its status as a permanently neutral state, the Republic of Austria declares a reservation to the effect that its co-operation within the framework of this Convention cannot exceed the limits determined by the Status of permanent neutrality and membership with the United Nations.[222]

(*c*) When signing the Final Acts of the Regional Administrative Conference for the Planning of the Maritime Radionavigation Service (Radiobeacons) in the European Maritime Area in 1985, France reserved

> its Government's right to take whatever action it may consider necessary to ensure the protection and proper operation of its maritime radio-

[215] For the purposes of this first part of the discussion, the word "modify" is interpreted in a broad and neutral sense and includes the idea of exclusion.

[216] Imbert, op. cit., p. 15.

[217] See paragraphs 204 et seq. below.

[218] "... in acquiescing in the regulations and declarations of the conference, in becoming a signatory to the General Act of Algeciras and to the Additional Protocol, ... and in accepting the application of those regulations and declarations to American citizens and interests in Morocco, [the United States] does so without assuming obligation or responsibility for the enforcement thereof." (General Act of the International Conference at Algeciras, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776–1909*, William M. Malloy, ed., vol. II (Washington, Government Printing Office, 1910), p. 2182).

[219] Imbert, op. cit., pp. 14–15; the footnotes are reproduced only partially in brackets.

[220] See, for example, Szafarz, loc. cit., p. 296. See, however, Hylton, "Default breakdown: the Vienna Convention on the Law of Treaties' inadequate framework on reservations", p. 422.

[221] United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. IV. 4, p. 130.

[222] Ibid., chap. XXVI.1, p. 878. Along the same lines, see, for example, the similarly conceived reservations of Austria and Switzerland to the 1972 Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (Swiss reply to the questionnaire on reservations).

navigation service, which uses the phase measurement multifrequency system.[223]

(*d*) In its reply to the questionnaire on reservations, Argentina noted that it had formulated the following reservations when it ratified the 1982 International Telecommunication Convention:

> The Delegation of the Argentine Republic reserves for its Government the right:
>
> 1. Not to accept any financial measure which may entail an increase in its contribution;
>
> 2. To take any such action as it may consider necessary to protect its telecommunication services should Member countries fail to observe the provisions of the International Telecommunication Convention (Nairobi, 1982)…[224]

None of the other contracting States or States entitled to become parties to these treaties raised any objection to these reservations.

153. There is no doubt that the practice of formulating "across-the-board" reservations relating not to specific provisions of the treaty, but to its provisions as a whole, is contrary to the letter of the Vienna definition. But the sheer number and consistency of such reservations, together with the lack of objections to them in principle, reflect a social need which it would be absurd to challenge in the name of abstract legal reasoning.[225] Moreover, the interpretation of legal norms cannot remain static. Article 31, paragraph 3, of the 1969 Vienna Convention itself invites the interpreter of a conventional rule to take account "together with the context: ... (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", and, as ICJ has clearly stated, a legal principle should be interpreted in the light of "the subsequent development of international law ...".[226]

154. In order to dispel ambiguity and avoid any controversy, it would therefore seem both reasonable and helpful in the Guide to Practice to use the broad interpretation which States actually give to the ostensibly restrictive wording of the Vienna definition on the anticipated effect of reservations. Needless to say, this kind of precise definition in no way prejudges the permissibility (or impermissibility) of reservations: whether they relate to certain provisions of a treaty or to the treaty as a whole, they are subject to the substantive rules on the validity (or permissibility) of reservations.[227]

155. In the light of these considerations, it is proposed that the Guide to Practice should state:

"*1.1.4 A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which the State or the international organization intends to implement the treaty as a whole.*"

156. It would, however, appear self-evident that a reservation cannot produce effects outside the sphere of treaty relations established by a given treaty: as it is not an "autonomous" unilateral act, it is linked to the treaty in respect of which it is made.

157. This was indirectly questioned by France in connection with the *Nuclear Tests* case in 1974: in France's view, the reservations it had linked to its statement of acceptance of the Court's optional jurisdiction rebounded, as it were, on the General Act of Arbitration (Pacific Settlement of International Disputes), an earlier treaty also covering the judicial settlement of disputes.[228] In view of the reasoning adopted by the Court, it did not take a decision on this claim, but it was meticulously refuted in the joint dissenting opinion of four judges; after citing article 2, paragraph 1 (*d*) of the 1969 Vienna Convention *in extenso*, they add:

> Thus, in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations.[229]

158. In fact, this observation appears to be so clear and undeniable and is such an inevitable consequence of the general definition of reservations that it does not seem necessary to devote a paragraph of the Guide to Practice stating the obvious.

(ii) *Exclusion, modification or limitation of the legal effect of the provisions of a treaty?*

159. Basing itself on the definition given in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, the European Commission of Human Rights found, in the *Temeltasch* case,

> This interpretation attaches decisive importance only to the material part of the definition, i.e. the exclusion or alteration of the legal effect of one or more specific provisions of the treaty in their application to the State making the reservation.[230]

160. This was also the position of the Court of Arbitration set up for the purpose of settling the Franco-British dispute over the delimitation of the continental shelf of the English Channel. But the Court, also taking article 2, paragraph 1 (*d*), as its basis, provided an important clari-

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[223] ITU, *Final Acts of the Regional Administrative Conference for the Planning of the Maritime Radionavigation Service (Radiobeacons) in the European Maritime Area* (Geneva, 1986), p. 32.

[224] United Nations, *Treaty Series*, vol. 1531, p. 436.

[225] It should also be stressed that, if the terms used in the Vienna definition were to be taken literally, it would be unnecessary to include a clause in certain treaties expressly prohibiting general reservations as is done in article 64, paragraph 1, of the European Convention on Human Rights. This relatively common practice continued after the adoption of the 1969 Vienna Convention.

[226] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion , I.C.J. Reports 1971*, p. 31.

[227] This central question should constitute the subject of the fourth report on reservations to treaties. See also paragraphs 408–410 below and draft guideline 1.4 (para. 411).

[228] See discussion of the French argument in the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock attached to the Judgment of 20 December 1974, *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 347.

[229] Ibid., p. 350.

[230] Decision of 5 May 1982 (see footnote 164 above), p. 146, para. 71.

fication, perfectly in keeping with the letter of the text, which it merely paraphrased:

> This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State.[231]

161. Beyond divergences over details (but not necessarily insignificant ones, as will be seen below), there is a broad consensus, in both the writings of jurists and legal decisions, to the effect that a reservation has been made when a unilateral statement "purports to derogate from a substantive provision of the treaty".[232]

162. This broad consensus leaves aside the question of the strength of the "dispensatory" effect of the reservations. The Vienna definition provides the following clarification: in entering its reservation, the State "purports to exclude or to modify the legal effect [of certain provisions][233] of the treaty in their application to that State". But this "clarification" in turn raises a few difficult problems.

163. It does, however, highlight the fact that the reservation must be meant to have an effect on the application of the treaty itself. This excludes the following, in particular:

(*a*) Conditional ratifications, i.e. conditions placed by a State on the entry into force of a treaty in its application to that State, which, when fulfilled, cause the treaty to apply in its entirety;[234] and

(*b*) Interpretative declarations;[235] but also

(*c*) Statements, generally called "reservations" by their authors, which neither have nor purport to have an effect on the treaty or its provisions and cannot be qualified as interpretative declarations as they also do not interpret or purport to interpret the treaty, with which they simply have no direct relationship.

(iii) *Reservations relating to "non-recognition"*

164. The clearest examples of this type of statement are the "reservations relating to non-recognition",[236] or, at least, some of them.

165. States very frequently link the expression of their consent to be bound to a statement in which they indicate that this expression of consent does not imply the recognition of one or more of the other contracting parties or, in a more limited way, of certain situations, generally territorial, relating to one or more of the other parties.

166. Horn categorically states that not all such statements are reservations, because of the practical problems that would entail, but he does feel that they exclude "the implementation of the whole norm system" provided for by the treaty.[237] Similarly, Whiteman, reflecting what appears to be the position of the majority of legal writers,[238] is of the view that "[i]t is questionable whether a statement on this subject, even when designated as a reservation, constitutes a reservation as generally understood since it does not purport, in the usual circumstances, to amend or modify any substantive provision of the treaty".[239]

167. In the opinion of the Special Rapporteur, things are less simple. He is far from certain that the general category of "reservations relating to non-recognition" exists; it is a convenient heading, but one which covers some very diverse situations.

168. The following is one example: in accordance with the usual (but not constant) practice of the Arab States, Saudi Arabia made the following statement on signing the Agreement establishing the International Fund for Agricultural Development:

> The participation of the Kingdom of Saudi Arabia in the Agreement shall in no way imply recognition of Israel and shall not lead to entry into dealings with Israel under this Agreement.[240]

169. This statement contrasts with that of the Syrian Arab Republic on the same occasion:

> It is understood that the ratification of this Agreement by the Syrian Arab Republic does not mean in any way recognition of Israel by the Syrian Arab Republic.[241]

170. The statement by the Syrian Arab Republic corresponds to what might be considered a "precautionary step": its author is anxious to point out that he does not recognize Israel and that the ratification of the constituent instrument of IFAD (on which both parties will sit) does not imply a change in attitude. This adds nothing to existing law, since it is generally accepted that participation in

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[231] Decision of 30 June 1977 (see footnote 159 above), p. 40, para. 55.

[232] Council of Europe, Committee of Legal Advisers on Public International Law, "Issues concerning reservations (meeting in Vienna, 6 June 1995): summary and suggestions by the delegation of Austria" (CAHDI (95) 24), p. 4, para. 2.4.

[233] On the meaning of the square brackets, see draft guideline 1.1.4 of the Guide to Practice (para. 155 above).

[234] See Bishop Jr., loc. cit., pp. 304–306; Horn, op. cit., pp. 98–100; and the examples given.

[235] See paragraphs 231–413 below.

[236] Concerning which Verhoeven has rightly pointed out that they are in some respects very different from the reservations, in the strict sense of the term, found in the law of treaties (*La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales*, p. 431, footnote 284).

[237] Horn, op. cit., pp. 108–109.

[238] On this point, see in particular Bot, *Nonrecognition and Treaty Relations*, pp. 30–31, 132–139 and 252–254; Lachs, "Recognition and modern methods of international cooperation", pp. 252–259; Lauterpacht, *Recognition in International Law*, pp. 369–374; and Verhoeven, op. cit., pp. 428–448.

[239] Whiteman, op. cit., p. 158.

[240] United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. X.8, p. 403; see also the statements of Iraq and Kuwait, couched in similar terms (ibid.).

[241] Ibid. See also the Syrian Arab Republic's first, albeit slightly more ambiguous, statement, in respect of the Vienna Convention on Diplomatic Relations (ibid., chap. III.3, p. 58): "The Syrian Arab Republic does not recognize Israel and will not enter into dealings with it." The statement made by Argentina on acceding to the 1954 Convention relating to the Status of Stateless Persons is not in the least ambiguous: "The application of this Convention in territories whose sovereignty is the subject of discussion between two or more States, irrespective of whether they are parties to the Convention, cannot be construed as an alteration, renunciation or relinquishment of the position previously maintained by each of them." (Ibid., chap. V.3, p. 248.); this example is an interesting one for the issue is the recognition not of a State or Government, but of a situation (see also Spain's statements concerning the 1958 Geneva Conventions on the Law of the Sea in respect of Gibraltar (ibid., chaps. XXI.1, p. 783, XXI.2, p. 789, XXI.3, p. 793, and XXI.4, p. 796).

the same multilateral treaty does not signify mutual recognition, even implicit.[242] Even if that were not the case,[243] it would not mean that the statement was a reservation: the statement by the Syrian Arab Republic does not purport to have an effect on the treaty or its provisions.

171. This is in striking contrast to the statement by Saudi Arabia, which expressly excludes any treaty relations with Israel. In this case, it is indeed the application of the treaty that is excluded.[244] The same contrast is found, for example, between the reactions of Australia and Germany to the accession of certain States to the Geneva Conventions of 12 August 1949. While repeating its non-recognition of the German Democratic Republic, the Democratic People's Republic of Korea, the Democratic Republic of Viet Nam and the People's Republic of China, Australia nevertheless took "note of their acceptance of the provisions of the Conventions and their intention to apply them".[245] Germany, however, excludes any treaty relations with South Viet Nam.[246]

172. In this connection, it has been stated that such statements would still not be reservations, since "reservations imply a modification of the operation of obligations and rights *ratione materiae* but not *ratione personae* nor *ratione loci*".[247] This distinction, which is not based on the text of the Vienna definition, is quite artificial: the principle is that, when a State or an international organization becomes party to a treaty, that State or that international organization is linked by all of its provisions to all of the other parties; this is the very essence of the *pacta sunt servanda* principle. By refusing to enter into treaty relations with one of the States parties to the constituent instrument of IFAD, Saudi Arabia is indeed seeking to exclude or to modify the legal effect (of certain provisions) of the treaty in their application to it. This can give rise to serious practical difficulties, especially when the constituent instrument of an international organization is involved,[248] but there is no reason why such a statement should not be qualified as a reservation.

173. The same is true of the less typical reservation by which the United States maintains that its participation in the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs

> does not involve any contractual obligation on the part of the United States of America to a country represented by a régime or entity which the Government of the United States of America does not recognise as the government of that country until such country has a government recognised by the Government of the United States of America.[249]

This is in contrast to Cameroon's statement concerning the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, which is also drafted in general terms, but which does not seek to produce effects on the relations established under the Treaty:

> Under no circumstances could the signing by the Federal Republic of Cameroon have the effect of entailing recognition by Cameroon of Governments or regimes which, prior to such signing, had not yet been recognized by the Federal Republic of Cameroon according to the normal traditional procedures established by international law.[250]

174. The analysis proposed above follows from the Vienna definition, as interpreted by draft paragraph 1.1.4 of the Guide to Practice.[251] Nevertheless, it does not seem pointless to make it clear in the Guide that "reservations relating to non-recognition" are not always genuine reservations within the meaning of the law of treaties. To avoid any ambiguity, which is a potential source of difficulty, it would be desirable to specify that a statement of non-recognition is in fact a reservation if the author stipulates that it partly or wholly excludes the application of the treaty between the author and the State(s) it does not recognize, whereas, *a contrario*, a statement of non-recognition does not constitute a reservation if the State making it does not intend it to produce a legal effect in its treaty relations with the State(s) it does not recognize.

175. Two problems arise, however. First, statements of this type can be made at the time the author State expresses its consent to be bound[252] and, in that case, the *ratione temporis* criterion required under the Vienna definition for a reservation to exist[253] is fulfilled; there is then no difficulty in regarding such statements as genuine reservations. But such statements may also be made by States already bound by the treaty, in response to accession by another State party.[254] From a literal reading of article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, it is not possible to talk here of reservations proper because they are made *after* the final expression of consent of the author to become a party. This would, however, be an extremely formalistic view: such statements are made under exactly the same terms and produce exactly the same effects as reservations relating to non-recognition made "within the time limit". It therefore seems justifiable to label them as reservations regardless of when they are made (here too, without in any way prejudging their validity).

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[242] See Verhoeven, op. cit., pp. 429–431. Kuwait clearly reaffirms this in the statement it made on acceding to the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*: "It is understood that the Accession of the State of Kuwait [to the International Convention] does not mean in any way recognition of Israel by the State of Kuwait." (United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. IV.7, p. 168.)

[243] That is, if participation in the same multilateral treaty did imply mutual recognition.

[244] And, for the reasons explained above, in paragraphs 31–40, a statement purporting to exclude the effects of a treaty as a whole is indeed a reservation.

[245] United Nations, *Treaty Series*, vol. 314, pp. 335–336.

[246] Ibid., vol. 954, p. 459: "[T]he Federal Government (of FRG) does not recognize the Provisional Revolutionary Government as being a body competent to represent a State and ... consequently, it is unable to consider the Provisional Revolutionary Government as a Party to the Geneva Conventions of 12 August 1949."

[247] Horn, op. cit., p. 109.

[248] Curiously, Israel objected to the statement by the Syrian Arab Republic (United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. X.8, p. 404, note 12), but does not appear to have reacted to the reservations of Iraq, Kuwait and Saudi Arabia.

[249] Ibid., chap. VI.8, p. 274. It may be noted that the issue here is non-recognition of a Government (the United States was referring to El Salvador) rather than of a State.

[250] Similarly, see the statement by Benin in connection with the same treaty (United Nations, *Status of Multilateral Arms Regulation and Disarmament Agreements*, p. 40) or the one by the Republic of Korea when it signed the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (ibid., p. 176).

[251] See paragraph 40 above.

[252] See paragraphs 165–170 above.

[253] See paragraphs 132–143 above.

[254] See the "declaration" made by Germany on 29 March 1974 concerning accession by the Provisional Revolutionary Government of the Republic of South Viet Nam to the Geneva Conventions of 12 August 1949 (footnote 246 above).

176. Secondly, it is not uncommon in the law of treaties,[255] including reservations,[256] for the basis to be not the expressly declared will but an implicit intention which is apparent from circumstances. In that case, it would be possible to admit that, in the event of silence in the statement or ambiguity regarding the legal effects it is designed to achieve, the author's intention can be inferred from the circumstances. In the opinion of the Special Rapporteur, it is preferable to dismiss such a solution. The practice regarding "reservations relating to non-recognition" is abundant and States seem to be quite careful in modulating their wording in terms of their aim. In any event, since the objective is to remove any ambiguity, it is definitely desirable for States[257] to specify their intention.

177. A provision of this kind, included in the Guide to Practice, could be such as to encourage them:

"*1.1.7*[258] *A unilateral statement by which a State purports to exclude the application of a treaty between itself and one or more other States which it does not recognize constitutes a reservation, regardless of the date on which it is made.*"

(iv) *Reservations having territorial scope*

178. The question of reservations having territorial scope may be seen in rather similar terms. These are statements whereby a State excludes the application of a treaty which it signs,[259] or some of its provisions,[260] to one or more territories under its jurisdiction because they form an integral part of its own territory, because they are Non-Self-Governing Territories or because it is competent in some other respect to act on behalf of that territory in its international relations.

179. In the past, such reservations consisted primarily of what were called "colonial reservations", i.e. declarations by which administering Powers made known their intention to apply or not to apply a treaty or certain of its provisions to their colonies or to certain of their colonies. Commenting in 1926 on the reservations of this type made by France and the United Kingdom to the 1912 International Opium Convention, Malkin expressed the view that "[t]hese two 'reservations' were really not reservations in the ordinary sense but were rather excluding declarations as regards colonies. In ordinary cases no question of the consent of the other signatories arises as regards such declarations".[261]

180. Whatever might have been the situation at the time, this conclusion is highly debatable today in the light of the Vienna definition: these are definitely reservations in the strict sense of the term; these unilateral statements, made by a State when expressing its formal consent to be bound, purport to exclude the legal effect of the treaty or of certain of its provisions in their application to that State.

181. Curiously, modern-day legal writers continue to express doubts in this connection. Horn, for example, is of the view that:

> The question whether a statement bearing upon the implementation *ratione loci* of a treaty by excluding certain territories from the application of the treaty constitutes a reservation, cannot be answered without analyzing the object of the treaty and the effect of such a territorial statement upon its operation. Does the statement really change the legal effect of the treaty by bringing about an alteration in the treaty obligations and the corresponding rights? Do the confronted states have to face any encroachment on their legal position due to the territorial statement?[262]

182. This excellent specialist in reservations has given a complicated answer to these questions. According to him, such territorial statements would constitute genuine reservations only if the object of the treaty in question was effectively territorial (for example, the creation of a demilitarized zone) or if it contained an express provision that it applied to the entire territory of the States parties or to a part of the territory expressly covered by the treaty.[263] Actually, it is difficult to see the justification for such subtleties. Under the terms of article 29 of the 1969 Vienna Convention:

> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Accordingly, only if the treaty itself *excluded* some territories from its scope and the territorial statement was confined to reproducing this provision could such a statement, devoid of any legal effect, be regarded as a reservation. In all other cases, the author of the territorial state-

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[255] See articles 12, paragraph 1 (*c*), 14, paragraph 1 (*d*), 40, paragraph 5, 29 and 45 (*b*) of the 1969 Vienna Convention.

[256] See article 20, paragraph 2, of the 1969 Vienna Convention.

[257] It appears to be a very marginal problem in the case of international organizations, but could nonetheless arise in the case of international integration organizations (European Union).

[258] For reasons of internal logic, it seemed preferable to include this paragraph, which deals with a particular category of (non-)reservations, at the end of the Guide to Practice on the definition of reservations.

[259] See, for an early example, the statement by Denmark when it ratified the 1930 Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes (United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. II.8, p. 964), and, for a more recent example, those by the United Kingdom excluding the application of the 1958 Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas and the Convention on Fishing and Conservation of the Living Resources of the High Seas, to the "States in the Persian Gulf" (ibid., chaps. XXI.1, p. 783; XXI.2, p. 789, and XXI.3, p. 793). As curiosities, see also reservations that the United Kingdom formulated when it acceded to many treaties further to the unlawful proclamation of independence of Southern Rhodesia between 1965 and 1980 (see the British reservations to the two International Covenants of 1966: "[T]he provisions of the Covenant shall not apply to Southern Rhodesia unless and until they inform the Secretary-General of the United Nations that they are in a position to ensure that the obligations imposed by the Covenant in respect of that territory can be fully implemented." (Ibid., chaps. IV.3, p. 115, and IV.4, p. 130.); and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (ibid., chap. IV.2, p. 101) or the total exclusion by the United States from all of its territory of transport governed by the 1970 Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ibid., *Treaty Series*, vol. 1299, p. 355). Objections were made to this reservation by France and Italy (ibid., vol. 1347, pp. 342 and 344).

[260] See, for example, the carefully limited reservations of the United Kingdom regarding the application to Fiji of the International Convention on the Elimination of All Forms of Racial Discrimination (United Nations, *Treaty Series*, vol. 677, p. 437; these reservations were confirmed by Fiji in its declaration of succession; ibid., vol. 854, pp. 223–224) and the many reservations included in the notification by Portugal of the application of the international human rights covenants to Macao (ibid., *Multilateral Treaties Deposited with the Secretary-General …*, chap. IV.3, pp. 118 and 120, note 16).

[261] Malkin, "Reservations to multilateral conventions", p. 153.

[262] Horn, op. cit., pp. 100–101.

[263] Ibid., p. 101.

ment does purport to exclude the legal effect of the treaty or some of its provisions (legal effect determined by the law of treaties),[264] in their application to that State, which brings us back to the Vienna definition.

183. It is true, however, that article 29 of the 1969 Vienna Convention leaves open the question of the definition of the territory of the State. Are Non-Self-Governing Territories (within the meaning of Chapter XI of the Charter of the United Nations) or territories which have broad internal autonomy, but do not themselves handle their international relations (for instance, the Faeroe Islands and Greenland in relation to Denmark), to be considered as forming part of the territory of the State for the purposes of the law of treaties? This report is not the appropriate place to try and answer this delicate question and, in all likelihood, there is no point in trying to do so in order to define reservations.[265] It is enough to consider that, *if*, under either its own provisions or under the principles of general international law, a treaty applies to a particular territory that the declaring State intends to exclude from the application of the treaty, the statement is indeed in the nature of a reservation, since it purports to prevent the treaty from producing its effects in respect of a territory to which it would normally be applicable. It goes without saying that here, too, this clarification, which relates purely to the definition of a reservation, does not prejudge the permissibility (or impermissibility) of such a reservation; it simply means that the rules applicable to reservations to treaties are applicable to such statements.

184. In addition, as in the case of reservations relating to non-recognition,[266] such statements can be made either when the State expresses its formal consent to be bound or, but only in the case of partial reservations,[267] relating to territory, when giving notification of the treaty's application to a territory.[268] This feature should be taken into account in the definition of this type of reservation.

185. In the opinion of the Special Rapporteur, these clarifications should appear in the Guide to Practice:

"*1.1.8 A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation, regardless of the date on which it is made.*"

(v) *Other reservations purporting to exclude the legal effect of the provisions of the treaty*

186. Reservations relating to non-recognition (when they are genuine reservations) and reservations having territorial scope represent subcategories of reservations belonging to the more general category of reservations purporting to *exclude* the legal effect of the treaty or of certain of its provisions.[269] In formulating a reservation of this kind, the State or the international organization intends to "neutralize" one or more provisions of the treaty. It maintains[270] the status quo ante.

187. This does not necessarily mean complete freedom to act. The parties may well be bound in another way, either by the existence of a customary rule on the same subject matter[271] or even because the same parties are bound by an earlier treaty to which a reservation signifies refusal of modification by the new treaty. When this is not the case, the State retains, in the field covered by the reservation, discretionary power, whereas it would have been bound by the implementation of the treaty.[272]

188. A traditional example of reservations intended to exclude the legal effect of certain provisions of the treaty in their application to the reserving State is to be found in the reservations to dispute settlement clauses, such as the reservations made by the Eastern European countries to article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which establishes the competence of ICJ to settle disputes relating to the interpretation and application of that Convention,[273] and to article XII authorizing the exclusion of Non-Self-Governing Territories from the scope of the Convention, which led to the request for the Court's advisory opinion of 28 May 1951.[274]

189. Reservations of this type, clearly excluding the application of one or more provisions[275] of the treaty, are extremely frequent. Their interpretation and applica-

[264] The same is obviously true when the possibility of such reservations is allowed for in the treaty itself (see the examples of such territorial reservations clauses in Imbert, op. cit., pp. 236–237).

[265] See, however, the way in which Imbert (ibid., p. 17) and Horn (op. cit., pp. 101–103) deal with the problem.

[266] See paragraph 164 above.

[267] It is obvious that a State would not be able to exclude a territory from the scope *ratione loci* of a treaty after the treaty has become applicable to the territory.

[268] See, for example, footnote 260 above.

[269] The effect of reservations relating to non-recognition is to render all of the treaty's provisions inoperative in relations between the reserving State and the non-recognized State; conversely, territorial reservations may be either general or specific.

[270] It maintains, but does not restore. The treaty has not entered into force for it, since the reservation is made at the time it expresses consent to be bound.

[271] "It will ... be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 96).

[272] On the conflict between these two notions in international law, see, above all, Jovanović, *Restriction des compétences discrétionnaires des États en droit international*.

[273] Most of these States have withdrawn the reservation, but Albania, Algeria, Bahrain, India, Malaysia, Morocco, the Philippines, Rwanda, Singapore, Spain, the United States, Venezuela, Viet Nam and Yemen still maintained it as at 31 December 1996 (see United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. IV.1, pp. 86–88).

[274] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Advisory Opinion, I.C.J. Reports 1951*, p. 15.

[275] The provision in question may consist of one word; see, for example, Portugal's reservation to article 6 of the Agreement on the Status of the North Atlantic Treaty Organisation, national representatives and international staff ("The premises of the Organisation shall be inviolable. Its property and assets, wheresoever located and by whomsoever held, shall be immune from search, requisition, confiscation, *expropriation** or any other form of interference"). Portugal agreed to the article "[r]eserving the non-application of Article 6 in case of expropriation" (example cited by Imbert, op. cit., p. 234).

tion generally[276] do not give rise to particular problems, regardless of the reasons on which they were based.[277]

190. The reservation may also purport to exclude the legal effect of the treaty or some of its provisions either in certain circumstances or on certain categories of persons or activities.

191. One example of the first category of such "exclusion" reservations is to be found in the reservations by most States parties to the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, under the terms of which the instrument

> will automatically cease to be binding on the Government (of the reserving State) in respect of any hostile State whose armed forces or allies fail to respect the prohibitions that form the subject of this Protocol.[278]

Similarly, it will be noted that the reservation made by France on 14 February 1939 to the 1928 General Act of Arbitration (Pacific Settlement of International Disputes) to the effect that "in future that accession shall not extend to disputes relating to any events that may occur in the course of a war in which the French Government is involved".[279]

192. As an example of this latter kind of exclusion reservation, mention might be made of the reservation whereby Guatemala:

> reserves its right:
>
> (1) To consider that the provisions of the Convention [1954 Customs Convention on the Temporary Importation of Private Road Vehicles] apply solely to natural persons and not to legal persons and bodies corporate as provided in chapter I, article 1;[280]

and the reservation by which several countries exclude the application of certain provisions of the International Covenant on Civil and Political Rights to the military[281] or, for the exclusion of certain categories of activities, the reservation of Yugoslavia to the 1960 Convention relating to the unification of certain rules concerning collisions in inland navigation, whereby that country:

> reserves the right to provide by law that the provisions of this Convention shall not apply on waterways reserved exclusively for its own shipping.[282]

(vi) *Reservations purporting to modify the legal effect of the provisions of the treaty*

193. Writers seem to attach great importance to the question whether a reservation excludes or modifies[283] the legal effect of the provisions of the treaty. These attempts at classification (which vary, moreover, from one writer to another) are nonetheless of limited interest for the purposes of a definition of reservations, for it matters little whether the unilateral statement excludes or modifies the effect of the provisions of the treaty. It must have an actual consequence for the application of the treaty.[284]

194. In support of this remark, it is enough to point out that "modifying reservations" are reservations which, without setting aside a provision of the treaty, have the effect of unilaterally modulating the treaty's object or the terms and conditions of its application. This may relate to the actual substance of the obligations stemming from the treaty or to their binding force.

195. The first subcategory of these "modifying reservations" is by far the largest, on the understanding that, in this case, the modulation of the effect of the treaty may be the result:

(*a*) Either of the substitution by the reserving State of provisions of its internal law for provisions contained in the treaty, e.g.:

> The Argentine Government states that the application of the second part of article 15 of the International Covenant on Civil and Political Rights shall be subject to the principle laid down in article 18 of the Argentine National Constitution;[285]

(*b*) Or of the substitution of obligations stemming from other international instruments for provisions of the treaty to which the reservation is attached, e.g.:

> Articles 19, 21 and 22 in conjunction with Article 2 (1) of the Covenant shall be applied within the scope of Article 16 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms;[286]

(*c*) Or again of a different formulation, devised for the occasion by the reserving State, regardless of any pre-existing rule, e.g.:

> Article 14 (3) (d) of the Covenant shall be applied in such manner that it is for the court to decide whether an accused person held in custody has to appear in person at the hearing ...[287]

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[276] See, however, in paragraphs 217 et seq. below, the discussions to which reservations of the kind made to article XII of the Convention on the Prevention and Punishment of the Crime of Genocide give rise.

[277] Imbert deals separately with exclusionary reservations based on a concern to ensure that the internal law of the reserving State prevails (op. cit., pp. 234–235). Regardless of the reason, if the State purely and simply rejects the application of a provision of the treaty, it is quite clearly an exclusionary reservation. The situation might well differ if the State does not exclude application of the provision(s) to which the reservation relates, but intends to limit their effect; in this case, it is more of a modifying reservation (see paragraph 195 below), but this distinction has no bearing on the *definition* of reservations.

[278] Imbert, op. cit., p. 236.

[279] United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. II.29, p. 1000. Similar reservations to the General Act were also made by Canada (ibid., p. 998), New Zealand (ibid., p. 999) and the United Kingdom (ibid., p. 997).

[280] Ibid., chap. XI.A–8, p. 439. See also in this respect the reservation by India (ibid.).

[281] See, in particular, the reservations by France (No. 3), the United Kingdom and Malta (No. 4), ibid., chap. IV.4, pp. 124, 126–127 and 130, respectively.

[282] Ibid., chap. XII.3, p. 635. See also the reservation of the Russian Federation to the 1974 Convention on a Code of Conduct for Liner Conferences (ibid., chap. XII.6, p. 644).

[283] See the lengthy development on the distinction by Horn, op. cit., pp. 80–87, and Imbert, op. cit., pp. 233–238, in the two most comprehensive monographs on reservations since 1969.

[284] See paragraphs 144–147 above.

[285] "Understanding" by Argentina concerning the International Covenant on Civil and Political Rights, United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. IV.4, p. 122.

[286] Reservation No. 1 by Germany to the same Covenant (ibid., p. 125).

[287] Reservation No. 2 by Germany (ibid.).

196. An effort may also be made to modify the effects of the treaty not by modulating the treaty's object or the terms and conditions of its application, but by modulating the binding force of some of its provisions. This is the case whenever the reserving State, while not rejecting the objective in question, "softens" the strictness of its obligations by means of a reservation:

> In relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively.[288]
>
> The provisions of articles 17 and 18 are recognized as recommendations only.[289]

This amounts to a changeover from "hard" obligations to "soft" obligations or, if one prefers, from obligations of result to obligations of conduct.[290, 291]

197. Although, for the purposes of the definition of reservations, it is not important to determine whether unilateral statements by States or international organizations parties to the treaty exclude or modify the effect of the provisions of the treaty to which they relate, it is essential to make sure that they are designed to produce a genuine legal effect; otherwise they would not be reservations, but interpretative declarations.[292] Yet this is not always evident.

198. For example, in the *English Channel* case, the United Kingdom challenged the claim that France's third reservation to article 6 of the Convention on the Continental Shelf constituted a genuine reservation. It contended that it was in fact "an interpretative declaration—a mere advance notice by the French Government of the areas in which it considers special circumstances to exist".[293]

199. The reservation was worded as follows:

> In the absence of a specific agreement, the Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:
>
> ...
>
> —if it lies in areas where, in the Government's opinion, there are "special circumstances" within the meaning of Article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast.[294]

200. The Court rejected the British claim on this point. It noted that:

> although the ... reservation doubtless has within it elements of interpretation, it also appears to constitute a specific condition imposed by the French Republic on its acceptance of the delimitation régime provided for in Article 6. This condition, according to its terms, appears to go beyond mere interpretation …[295]

Then, recalling the Vienna definition and stressing the fact that the latter is not limited to the exclusion or modification of *the provisions* of the treaty, but also covers their *legal effect*,[296] the Court stated:

> This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this "reservation" is to be considered a "reservation" rather than an "interpretative declaration".[297]

201. Although the problem does not seem to have been raised so far, the qualification of some declarations made by international organizations at the time of the expression of their consent to be bound by a treaty may also give rise to controversy, particularly in the case of reservations on the division of competence between an organization and its member States.[298] It is extremely difficult to determine whether or not such declarations constitute reservations within the meaning of the Vienna Conventions. It nonetheless seems difficult to suggest guidelines that would remove uncertainty in a case of this kind, for everything depends on circumstances and on the actual wording of the declaration.[299]

202. Without going into extensive detail and subject to the clarifications to be provided below with regard to the distinction between reservations and interpretative declarations, it does not appear possible to include further explanations in the Guide to Practice on the criteria contained in the Vienna definition.

(vii) *The problem of "extensive" reservations*

203. There is no doubt that the expression "to modify the legal effect of certain provisions of the treaty" refers

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[288] Reservation by Australia to article 10 (ibid., p. 122).

[289] Reservation by Italy to the 1954 Convention relating to the Status of Stateless Persons (ibid., chap. V.3, p. 250).

[290] The Special Rapporteur does not use these expressions in the sense in which they appear in articles 20 and 21 of the draft articles on State responsibility adopted by the Commission on first reading (see *Yearbook … 1996*, vol. II (Part Two), p. 60) and which seems to him to be questionable in the extreme.

[291] On this point, see Horn, op. cit., pp. 85–86. This writer includes reservations of this kind among "exclusionary" reservations.

[292] See paragraphs 231–413 below.

[293] Decision of 30 June 1977 (see footnote 161 above), p. 39, para. 54.

[294] Ibid., p. 29, para. 33.

[295] Ibid., p. 40, para. 55.

[296] See paragraph 160 above.

[297] Decision of 30 June 1977 (see footnote 161 above), p. 40, para. 55.

[298] See, for example, the declaration made by the European Community at the time of the signature of the United Nations Framework Convention on Climate Change (United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. XXVII.7, p. 933).

[299] The declaration by the European Community mentioned in footnote 298 above does not appear to be a reservation properly speaking. It indicates that "[t]he European Economic Community and its Member States declare, for the purposes of clarity, that the inclusion of the European Community as well as its Member States in the lists in the Annexes to the Convention is without prejudice to the division of competence and responsibilities between the Community and its Member States, which is to be declared in accordance with article 22 (3) of the Convention", the legal effect of which is therefore not modified. However, the declaration made by the Community when signing the Montreal Protocol on Substances that Deplete the Ozone Layer could be interpreted as a genuine reservation ("In the light of article 2.8 of the Protocol, the Community wishes to state that its signature takes place on the assumption that all its member states will take the necessary steps to adhere to the Convention and to conclude the Protocol", ibid., chap. XXVII.2, p. 913). In substance, this is a "reservation under internal law", which is no different from those made by some federal States to preserve the competence of the Federation's member States (see the reservation of Switzerland to the European Convention on the Equivalence of Diplomas leading to Admission to Universities, which was included with that country's reply to the questionnaire: "The Swiss Federal Council declares that the competence of cantons in the field of education, as established by the Federal Constitution, as well as the autonomy of universities are reserved for the implementation of the Convention.") (United Nations, *Treaty Series*, vol. 1704, p. 276.)

to reservations which *limit* or *restrict* this effect and, at the same time, to the reserving State's obligations under the treaty "because 'restricting' is a way of 'modifying'".[300] And it is true, in this respect, that the amendments proposed during the United Nations Conference on the Law of Treaties[301] would not have added anything to the final text.[302]

204. If they had been adopted, however, they would have drawn attention to a serious ambiguity in the text as it stands. Theoretically, there are indeed three ways in which a State may seek to modify the legal effect of the provisions of a treaty by means of a unilateral statement:

(*a*) The State making the statement may seek to minimize its obligations under the provisions of the treaty (and this is the purpose of all the reservations cited as examples above);

(*b*) It may also accept additional obligations;

(*c*) Lastly, it may seek to strengthen the obligations of the other States parties.

205. The last two categories of reservations are at times lumped together under the term "extensive reservations". For example, Ruda defines "extensive reservations" as "declarations or statements purporting to enlarge the obligations included in the treaty", and he includes "unilateral declarations whereby the State assumes obligations, without receiving anything in exchange, because the negotiations for the adoption of the treaty have already been closed".[303]

206. In all likelihood, it is a mixture of this kind that lies at the root of the discussion between two members of the Commission on the subject of the definition of reservations. During the discussion of the first report on reservations to treaties, Mr. Tomuschat emphasized that "an important element was missing" from the Vienna definition "namely, that, by virtue of a reservation, a State party could only reduce the scope of its obligations towards other States parties and under no circumstances unilaterally increase rights not set forth in the treaty".[304] Mr. Bowett questioned that assertion and, referring to the 1977 arbitration in the *English Channel* case, pointed out that the French reservation in question,[305] "by allowing France not to apply the median line, but another boundary line based on the special circumstances, had in fact increased the rights of its author".[306]

207. This discussion seems to have been the result of a misunderstanding, which can be cleared up if care is taken to distinguish between the additional obligations which the author of the "reservation" wishes to assume and the *rights* that he is trying to acquire. This is the distinction proposed by Horn between "commissive reservations", by which the State making the declaration undertakes more than the treaty requires, and "extensive reservations proper", whereby "a state will strive to impose wider obligations on the other parties assuming correspondingly wider rights for itself".[307]

(viii) *Statements designed to increase the obligations of their author*

208. Although, according to the same author, "it is highly unlikely that any state will declare its willingness to accept unilaterally obligations beyond the terms of the treaty",[308] such cases do arise. A famous example, which was given by Mr. Brierly in his first report on the law of treaties, is provided by the statement which South Africa made when it signed the General Agreement on Tariffs and Trade in 1948:

> As the article reserved against stipulates that the agreement "shall not apply" as between parties which have not concluded tariff negotiations with each other and which do not consent to its application, the effect of the reservation is to enlarge rather than restrict the obligations of South Africa.[309]

Mr. Lachs also relied on that example in asserting the existence of reservations in cases "where a reservation, instead of restricting, extended the obligations assumed by the party in question".[310]

209. The statement by South Africa gave rise to considerable controversy:

(*a*) Mr. Brierly, in keeping with his general definition of reservations,[311] regarded it as a proposal of reservation, since it involved an offer made to the other parties which they had to accept for it to become a valid reservation;[312]

(*b*) Mr. Lachs regarded it purely and simply as an example of an extensive reservation;[313]

(*c*) Horn saw it as a mere declaration of intent without any legal significance;[314] and

(*d*) Imbert considered that "the statement of the South African Union could only have the effect of increasing the obligations of that State. *Accordingly*,* it did not constitute a reservation, which would *necessarily** restrict the obligations under the treaty" because, as he stated categorically, "there are no 'extensive reservations'".[315]

210. The latter position appears justified, but for reasons that differ from those put forward by this author, which beg the question and do not find support in the Vienna definition.[316] If it is in fact right that one cannot speak of "commissive reservations" it is because this kind of state-

[300] Horn, op. cit., p. 80.

[301] The amendments proposed by Sweden (add [a comma and] the word "limit" after the word "exclude") and Viet Nam (add a comma and the words "to restrict" after the word "exclude"), *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 91 above).

[302] See Horn, op. cit., p. 80.

[303] Ruda, loc. cit., p. 107.

[304] *Yearbook … 1995*, vol. I, 2401st meeting, p. 154, para. 4.

[305] See paragraph 199 above.

[306] *Yearbook … 1995*, vol. I, 2401st meeting, p. 155, para. 8.

[307] Horn, op. cit., p. 90.

[308] Ibid.

[309] *Yearbook ... 1950*, vol. II, p. 239, para. 85.

[310] *Yearbook ... 1962*, vol. I, 651st meeting, p. 142, para. 49.

[311] See footnote 64 above.

[312] *Yearbook ... 1950*, vol. II, p. 239, para. 86.

[313] *Yearbook ... 1962*, vol. I, 651st meeting, p. 142, para. 49.

[314] Horn, op. cit., p. 89.

[315] Imbert, op. cit., p. 15.

[316] Which point, incidentally, is challenged by Imbert (see paragraphs 148–149 above).

ment cannot have the effect of modifying the legal effect of the treaty or of some of its provisions: they are undertakings which, though admittedly entered into at the time of expression of consent to be bound by the treaty, have no effect on that treaty. In other words, whereas reservations are "non-autonomous unilateral acts",[317] such statements impose autonomous obligations on their authors and constitute unilateral legal acts which are subject to the legal rules applicable to that type of instrument,[318] and not to the regime of reservations.

211. Obviously, it does not follow from this finding that such statements cannot be made. In accordance with the well-known ICJ dictum:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations ... When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.[319]

But these statements are not reservations in that they are independent of the instrument constituted by the treaty, particularly because they can undoubtedly be formulated at any time.

212. This may be one of the reasons why these statements seem so unusual: as they are made outside the treaty context and they do not appear in collections of treaties or in the instruments that summarize treaty practice.[320] Nonetheless, it would probably be as well to explain in the Guide to Practice that they do not constitute reservations so as to dispel any ambiguity as to their legal regime.

"*1.1.5 A unilateral statement made by a State or an international organization by which that State or that organization undertakes commitments going beyond the obligations imposed on it by a treaty does not constitute a reservation [and is governed by the rules applicable to unilateral legal acts],*[321] *even if that statement is made at the time the State or international organization expresses its consent to be bound by the treaty.*"

(ix) *Reservations designed to increase the rights of their author*

213. "Extensive reservations proper", namely, statements whereby a State seeks to increase not its own obligations, but those of other States parties to the treaty to which they relate,[322] give rise to entirely different problems which are also a source of much confusion.

214. In this case, a distinction should be made between three kinds of statement which are related only in appearance:

(*a*) Statements which, because they are designed to exempt their author from certain obligations under the treaty, restrict, by correlation, the rights of the other contracting parties;

(*b*) Statements whereby a State (or as the case may be, an international organization) proclaims its own right to do or not to do something which is not provided for by the treaty;

(*c*) Statements designed to impose new obligations, not provided for by the treaty, on the other parties to it.

215. Only the last mentioned category of statement deserves the name "extensive reservations" *sensu stricto*. To the Special Rapporteur's knowledge, there are no examples.[323] Imbert takes the contrary view: according to him, "practice provides numerous examples of such statements and, in particular, statements whereby some States do not accept the terms of the article indicating that the convention does not automatically apply to the colonial territories". He considers, however, that they are not reservations, as they are designed to increase the obligations of the other contracting parties—a claim which, according to him, is "inadmissible; statements which could have such a result are in fact only statements of principle which are in no way binding on the other States parties".[324]

216. Though appealing (since it appears to comply with the principle whereby a State cannot impose obligations on another State against its will), this position is not self-evident. In point of fact, every reservation is designed to increase the rights of the reserving party and, conversely, to limit those of the other contracting parties. As Mr. Bowett pointed out in 1995,[325] by reserving its right not to apply the principle of equidistance provided for in article 6 of the Convention on the Continental Shelf, France increased its rights and restricted those of the United Kingdom. It is probably not overstating the case to say that the many States which formulated a reservation to article XII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[326] have in fact done the same thing: they challenge a right conferred by that Convention on the administrating Powers and make it clear that they are not ready to enter into treaty relations with them if the exer-

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[317] See paragraph 121 above.

[318] In this connection, see Ruda, loc. cit., p. 107.

[319] Judgment of 20 December 1974, *I.C.J. Reports 1974* (see footnote 228 above), p. 267.

[320] Despite his efforts, the Special Rapporteur has not found any clear examples of this type of statement. They must be distinguished from certain reservations whereby a State reserves the right to apply its national law with the explanation that it goes further than the obligations under the treaty. For example, when ratifying the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, Thailand pointed out that, as its "drugs law goes beyond the provisions of the Geneva Convention and the present Convention on certain points, the Thai Government reserves the right to apply its existing law" (United Nations, *Multilateral Treaties Deposited with the Secretary-General*, chap. VI.8, p. 275; in the same connection, see the declaration by Mexico (ibid.). This is a case of an explanation given to a "reservation under internal law" (see paragraphs 193–194), which, in any event, does not give rise to rights for the other States parties (see in this connection the explanations given by Horn (op. cit., p. 89) on reservations comparable to the 1931 Convention).

[321] The Special Rapporteur is aware that the words in square brackets fall outside the actual context of the definitions that are the subject of this part of the Guide to Practice. Since, however, he will not have another opportunity to revert to statements of this kind (which, as they are not reservations, do not fall within the ambit of the topic), it seems to him that these words would probably be useful.

[322] See paragraph 208 above.

[323] See, however, paragraph 220 below.

[324] Imbert, op. cit., p. 16.

[325] See paragraph 206 above.

[326] See paragraph 188 above.

cise of that right is claimed, it being for them to raise an objection if they do not mean to forgo it. There is nothing particularly novel in this as compared with exclusionary reservations. If a State rejects a compulsory settlement clause, for example, article IX of the 1948 Convention (in other words, a right created in favour of the other parties to bring it before ICJ), it also restricts the rights of those other States. Contrary to Imbert's view,[327] there is no reason why they would not be required to make an objection to such statements, whether they relate to article IX or to article XII of the 1948 Convention. In both cases, that would seem necessary to preserve their rights under the treaty and, in the specific case, several administrating Powers have done so.[328]

217. The same reasoning seems to hold true in the case of other reservations which are sometimes presented as "extensive reservations", such as, for example, the statement in which the German Democratic Republic indicated its intention to bear its share of the expenses of the Committee against Torture only so far as they arose from activities within its competence as recognized by the German Democratic Republic.[329] It is doubtful whether such a reservation is lawful,[330] but it is not because it would have the consequence of increasing the financial burden on the other parties that it should not be described as a reservation or that it would, by its nature, differ from the usual "modifying" reservations.

218. This seems to apply too in the case of another example of "extensive reservation" given by Szafarz: the "reservations formulated by Poland and other socialist countries" to article 9 of the Convention on the High Seas, under which "the rule expressed in Article 9 [relating to the immunity of State vessels] applies to all ships owned or operated by a State",[331] would constitute "extensive reservations" because "the reserving state simply widens its rights (and not its obligations), increasing by the same token the obligations of its partners".[332] Once again, there is in fact nothing special about this: such a reservation "operates" like any modifying reservation. The State which formulates it modulates the rule laid down in the treaty[333] as it sees fit and it is up to its partners to accept it or not.

219. In actual fact, reservations that impose obligations on other States parties to the treaty to which they relate are extremely common[334] and, while they often give rise to objections and are probably sometimes unlawful, they are still covered by the law applicable to reservations and are treated as such by the co-contracting States. The error made by the authors who exclude "extensive reservations" from the general category of reservations stems from a mistaken basic assumption: they reason as though the treaty between the reserving State or international organization and its partners is necessarily in force, but that is not so. The reservation is *formulated* (or confirmed) at the time of expression of consent to be bound, but it produces its effects only after they have accepted it in one way or another.[335] Furthermore, it is self-evident that the State which formulates the reservations is bound to respect the rules of general international law. It may seek to divest one or more provisions in the treaty of effect, but, in so doing, it makes a renvoi to existing law "minus the treaty" (or "minus the relevant provisions"). In other words, it may seek to increase its rights *under the treaty* and/or to reduce those of its partners *under the treaty*, but it cannot "legislate" via reservations and the Vienna definition precludes this risk by stipulating that the author of the reservation must seek "to exclude or to modify the legal effect of certain provisions *of the treaty*"* and not "of certain rules of general international law".

220. It is from that standpoint that doubts may arise whether another "reservation", about which much has been written,[336] has the nature of a genuine reservation, namely, the reservation of Israel to the provisions of the Geneva Conventions of 12 August 1949 on the Red Cross emblems to which they wanted to add the shield of David. This doubt stems from the fact that this "reservation" is not designed to exclude or modify the effect of provisions *of* the treaties in question (which in fact remain unchanged), but to add a provision *to* those treaties.

221. No firm conclusions concerning the definition of reservations can automatically be drawn from the foregoing. At the same time, given the importance of the discussions on the existence and nature of "extensive reservations", it would seem difficult to say nothing about the matter in the Guide to Practice.

222. The main elements that emerge from the brief study above are as follows:

(*a*) It is not unusual for a unilateral declaration to aim at minimizing the obligations incumbent on its author under the treaty and, conversely, to reduce the rights of the other parties to treaties;

(*b*) Such a declaration should in principle be regarded as a reservation;

(*c*) Unless, instead of seeking to exclude or modify the provisions of the treaty, it amounts to adding one or more provisions that do not appear in it.

On this basis, the Guide to Practice might provide:

"*1.1.6 A unilateral statement made by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a*

[327] Imbert, op. cit., p. 16.

[328] See United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. IV.1, pp. 89–91.

[329] Ibid., chap. IV.9, p. 200, note 5.

[330] Edwards Jr., loc. cit., pp. 392–393.

[331] United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. XXI.2, p. 789.

[332] Szafarz, loc. cit., pp. 295–296.

[333] See paragraph 194 above.

[334] See the examples given by Horn (op. cit., pp. 94–95): reservations to the Vienna Convention on Diplomatic Relations which concerns certain immunities; reservations to the provisions of the Convention on the High Seas concerning the freedom to lay submarine cables and pipelines; and reservations to the Convention on the Territorial Sea and the Contiguous Zone relating to the right of innocent passage.

[335] See article 20 of the 1969 and 1986 Vienna Conventions; see also paragraph 121 above.

[336] Cf. Pictet, *Les Conventions de Genève du 12 août 1949: Commentaire*, pp. 330–341, and Horn, op. cit., pp. 82–83 (who doubt whether it is a reservation), and Rosenne, "The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David", pp. 9–54, and Imbert, op. cit., pp. 361–362 (who take the contrary view).

treaty and by which its author intends to limit the obligations imposed on it by the treaty and the rights which the treaty creates for the other parties constitutes a reservation, unless it adds a new provision to the treaty."

(d) "*... however phrased or named ...*"

223. It is abundantly clear from the Vienna definition that the wording or name of a unilateral statement which is designed to exclude or modify the legal effect of the treaty in its application to its author constitutes a reservation. "Thus, the test is not the nomenclature but the effect the statement purports to have".[337] Any nominalism is precluded. A reservation can be called a "statement" by its author,[338] but it is still a reservation if it also meets the criteria laid down in the Vienna Conventions.

224. The problems raised by the differentiation between unilateral statements which constitute reservations and those which do not are the subject of more detailed consideration in paragraphs 231–413 below.

225. At this stage, it suffices to note that inter-State practice and jurisprudence refrain from any nominalism; they do not dwell on what to call the unilateral statements which States combine with their consent to be bound, but try to pinpoint the actual intentions as they emerge from the substance of the statement and even of the context in which it was made.

226. So far as jurisprudence is concerned, the most remarkable example of an interpretative declaration being reclassified as a reservation is probably provided by the judgement delivered by the European Court of Human Rights in the *Belilos* v. *Switzerland* case. Switzerland accompanied its instrument ratifying the European Convention on Human Rights by a unilateral declaration which it entitled "interpretative declaration".[339] It nonetheless considered that it was a genuine reservation:

> Like the Commission and the Government, the Court recognises that it is necessary to ascertain the original intention of those who drafted the declaration.
>
> ...
>
> In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content.[340]

227. The European Commission of Human Rights followed the same approach five years earlier in the *Temeltasch* case. On the basis of article 2, paragraph 1 (*d*), of the 1969 Vienna Convention[341] and agreeing

> on this point, with the majority of legal writers and considers that where a State makes a declaration, presenting it as a condition of its consent to be bound by the Convention and intending to exclude or alter the legal effect of some of its provisions, such a declaration, *whatever it is called*,* must be assimilated to a reservation ...[342]

228. On the other hand, the Court of Arbitration appointed to settle the Franco-British dispute in the *English Channel* case concerning the delimitation of the continental shelf carefully considered the United Kingdom argument that the third French reservation to article 6 of the Convention on the Continental Shelf was in fact no more than a mere interpretative declaration.[343]

229. The practice of States follows the same lines; when reacting to certain unilateral statements presented as being purely interpretative, they do not hesitate to proceed to reclassify them as reservations and to object to them.[344] Finland was particularly punctilious in this regard in its objections to the "reservations, understandings and declarations made by the United States of America" to the International Covenant on Civil and Political Rights:

> It is recalled that under international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty.[345]

230. These few examples are amply sufficient to show that it is common in practice to undertake the reclassification for which the Vienna definition calls without any special difficulties arising with the definition of reservations themselves. It therefore does not seem to be necessary to amplify that definition in any way for the purpose of the Guide to Practice. On the other hand, it would probably be useful to try to draw normative conclusions from the foregoing review concerning the definition of what can be regarded as "the mirror image" of reservations, namely, interpretative declarations and, in that connection, to lay down criteria for the distinction.

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[337] Bowett, loc. cit., p. 68; see also Jennings and Watts, op. cit., p. 1241: "... a State cannot, therefore, avoid its unilateral statement constituting a reservation just by calling it something else." Doctrine subsequent to 1969 is unanimous on the matter; before that, it was more divided (see Holloway, *Modern Trends in Treaty Law: Constitutional Law, Reservations and the Three Modes of Legislation*, p. 486).

[338] English is richer than French in this regard; see Gamble Jr., loc. cit., p. 374: "Thus, a reservation might be called a declaration, an understanding, a statement, or a reservation." The words "understanding" and "statement" have hardly any other translation in French than "*déclaration*". See also Sucharipa-Behrmann, whose enumeration is even richer: "The designation of the statement as reservation, declaration, interpretative declaration, understanding, proviso or otherwise is irrelevant" (loc. cit., p. 72).

[339] See paragraph 111 above.

[340] Judgment of 29 April 1988 (see footnote 160 above), pp. 23–24, paras. 48–49.

[341] See paragraph 114 above.

[342] Decision of 5 May 1982 (see footnote 164 above), p. 147, para. 73.

[343] Decision of 30 June 1977 (see footnote 159 above). See paragraph 112 above.

[344] See, among the very numerous examples, the formula used by Japan, which stated that "it does not consider acceptable any unilateral statement *in whatever form*,* made by a State upon signing, ratifying or acceding to the Convention on the Territorial Sea and the Contiguous Zone, which is intended to exclude or modify for such State legal effects of the provisions of the Convention" (United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. XXI.1, p. 784); the objections of Germany to "declarations to be qualified in substance as reservations" made by several States to the Convention on the High Seas (ibid., chap. XXI.2, p. 790); and the objections of a number of States to the (belated) "statements" by Egypt concerning the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (ibid., chap. XXVII.3, pp. 924–925).

[345] Ibid., chap. IV.4, p. 133; see also the objections of Sweden (ibid., p. 135).

C. The distinction between reservations and interpretative declarations

1. Frequency of interpretative declarations

231. Notwithstanding the apparent silence of the 1969 and 1986 Vienna Conventions on this phenomenon, States have always felt that they could attach to their expression of consent to be bound by a multilateral treaty declarations whereby they indicate the spirit in which they agree to be bound; these declarations do not, however, seek to modify or exclude the legal effect of certain provisions of the treaty and thus do not constitute reservations.

232. The long-standing practice of such declarations has been in existence since multilateral treaties themselves first appeared. Generally speaking, it dates back to the Final Act of the Congress of Vienna in 1815, which brought together "in a general instrument" all treaties concluded in the wake of Napoleon's defeat.[346] With this initial appearance of the multilateral format came both a reservation[347] and an interpretative declaration. The latter came from Great Britain, which, when the instruments of ratification were exchanged, declared that article VIII of the Treaty of Alliance concluded with Austria, Prussia and Russia, which invited France to join the Alliance, must be "understood as binding the Contracting Parties ... to a common effort against the power of Napoleon Buonaparte ..., but is not to be understood as binding His Britannic Majesty to prosecute the War, with a view of imposing upon France any particular Government".[348]

233. This practice developed as the number of multilateral conventions on increasingly numerous, varied and sensitive topics grew.[349] Today it has become extremely common—one might almost say systematic, at least in certain areas such as human rights or disarmament.

234. The table below was compiled on the basis of replies from States to the questionnaire on reservations. It has absolutely no scientific value,[350] but it is interesting nonetheless in that it empirically establishes the extent of this phenomenon: interpretative declarations are as widely used as reservations.[351]

States	*Interpretative declarations*	*Reservations*
1. Argentina	19	13
2. Bolivia	10	2
3. Canada	23	–
4. Chile	10	7
5. Colombia	–	4
6. Croatia	3	1
7. Denmark	2	36
8. Ecuador	1	1
9. Estonia	5	10
10. Finland	5	28
11. France	46	24
12. Germany	11	–
13. Holy See	2	2
14. India	8	–
15. Israel	1	10
16. Japan	5	12
17. Kuwait	2	–
18. Malaysia	6	3
19. Mexico	25	19
20. Panama	1	–
21. Peru	1	9
22. Republic of Korea	5	14
23. San Marino	–	1
24. Slovakia	1	–
25. Slovenia	2	3
26. Spain	71	37
27. Sweden	7	22
28. Switzerland	16	48
29. United Kingdom	–	45
30. United States	28	–

[346] Bastid, op. cit., p. 25.

[347] That of Sweden to the provisions relating to sovereignty over the Duchy and Principality of Lucca; see Bishop Jr., loc. cit., pp. 261–262.

[348] Ibid. Bishop Jr. views this declaration as a reservation; it would seem more accurate to consider it an interpretative declaration (see, in this sense, Sapienza, who makes a careful analysis of the text of the declaration and its context, op. cit., pp. 28–34).

[349] See Sapienza, op. cit., pp. 8–19.

[350] It draws a comparison between the responses to question 3.1 ("Has the State attached any interpretative declarations to the expression of its consent to be bound by the multilateral treaties to which it is a party? (Please list the treaties and provide the text of the declarations)") and 1.2 (a comparable question pertaining to reservations). Not all States that responded to the questionnaire answered these questions (in which case they were omitted from the list), and those that did answer them did not necessarily furnish an exhaustive list of their reservations and declarations; what is more, States did not always specify the criteria they used in making such a distinction. See *Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annex II.

[351] None of the international organizations that responded to the questionnaire claimed to have made a reservation or a declaration to a treaty to which they were party. This finding is not terribly significant: those organizations having the possibility of becoming parties to multilateral treaties are essentially integration organizations, yet the most important among them, the European Communities, did not, unfortunately, respond to the questionnaire at this time. In principle, the the European Communities do not appear to have attached any reservations to their consent to be bound by such treaties. They have, however, made interpretative declarations when signing or expressing their consent to be bound. See, for example, the declaration made to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context:

> "It is understood, that the Community Member States, in their mutual relations, will apply the Convention in accordance with the Community's internal rules, including those of the EURATOM Treaty, and without prejudice to appropriate amendments being made to those rules.
>
> "The European Community considers that, if the information of the public of the Party of origin takes place when the environmental impact assessment documentation is available, the information of the affected Party by the Party of origin must be implemented simultaneously at the latest.
>
> "The Community considers that the Convention implies that each Party must assure, on its territory, that the public is provided with the environmental impact assessment documentation, that it is informed and that its observations are collected."

(United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. XXVII.4, p. 927)

2. Usefulness of the distinction

235. For a long time, then, the two types of unilateral declaration were not clearly distinguished in State practice or in doctrine. In the latter case, the dominant view grouped them together, and authors who made a distinction generally found themselves embarrassed by it.[352]

236. The preparatory work for the 1969 Vienna Convention[353] and the subsequent adoption of that instrument have hardly contributed to a uniform doctrinal approach,[354] the current state of which is summarized by Horn as follows:

> To sum up, legal doctrine has not succeeded in doing away with the uncertainty from which the notion of interpretative declarations suffered throughout all the deliberations of the ILC and the Vienna Conference. Some writers, such as Sinclair, Elias and O'Connell contend for different reasons that interpretative declarations should not be identified with reservations. The concept of reservation and the concept of interpretative declaration were independent and non-overlapping. Others like Tomuschat demand that these declarations should be identified with reservations. The concept of interpretative declaration formed part of the broader concept of reservation. A third group chose a position between these two extremes by counting only interpretative declarations presented as an absolute condition for participation in the treaty as reservations. The concept of interpretative declaration and the concept of reservation were distinct but partly overlapping.[355]

237. It is true that the preparatory work for the 1969 Vienna Convention is unlikely to dispel any doubts that may be had with regard to their true legal nature: not only does the Convention not define them, but the positions taken during its elaboration probably help to make a controversial concept even more obscure. This was in fact the case, as the preparatory process drew to a close, with the positions taken by Sir Humphrey Waldock, Special Rapporteur, who, after rejecting a Japanese proposal which sought to define interpretative declarations positively on the pretext that the problem was one of interpretation, nevertheless maintained that such documents could not be considered contextually relevant for the purposes of interpreting a treaty.[356]

238. These uncertainties are not necessarily bad. After all, imprecision in the rule of law can be constructive and lead to fruitful developments by allowing practice to set the norm (or determine the absence thereof) based on needs and circumstances. In the view of the Special Rapporteur, however, this is not the case with the situation at hand: whatever its flaws or inadequacies, the regime of reservations set out in articles 19 to 23 of the Vienna Conventions is a relatively limiting *corpus juris*; it is therefore important for States and international organizations to know exactly the instruments to which it applies. This is true first of all for the State or international organization expressing its consent to be bound, which must choose between a genuine reservation or a "mere" interpretative declaration; it is true also for the depositary, who must communicate the reservation to the other States parties and to States entitled to become parties,[357] and it is equally true for the other States parties themselves, whose silence on a reservation has effects that are codified in the Conventions.[358] "However elusive the distinction may be in certain cases, the consequences of this distinction are important."[359]

239. It is true that this reasoning implies that the problem is partially solved in that it postulates that the regime applicable to interpretative declarations is distinct from the regime for reservations, an assumption which some authors contest.[360] The approach taken in the present report[361] is based on this assumption, the merits of which can only be determined to the extent that the legal regime of interpretative declarations is spelled out.

240. Suffice it at this stage to note that States (and, to a lesser degree, international organizations) make this distinction whenever they formulate unilateral declarations when signing multilateral treaties or expressing their consent to be bound and their partners do not treat all of them, at least not always, in the same manner, any more than does case law.[362]

241. Moreover, the question of a distinction between reservations and interpretative declarations is one of the questions on which the representatives of States in the Sixth Committee[363] and the members of the Commission[364] have focused most frequently in the debates on earlier reports on reservations to treaties. This would seem sufficient to establish that clarification of this distinction meets a genuine need.

242. However, this is a particularly difficult task, since the inconsistency of the terminology and the broad range of reasons that lead States to formulate interpretative declarations make the search for distinguishing criteria tricky, and applying such criteria is likewise not unproblematic.

(a) *The difficulty in distinguishing between reservations and interpretative declarations*

243. "The question of determining the nature of a statement is one of the very fundamental problems in reservation law."[365] Its solution is complicated by the variety of

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[352] See the survey of doctrine prior to 1969 made by Horn, op. cit., p. 229; see also McRae, "The legal effect of interpretative declarations", p. 156; Sapienza, op. cit., pp. 69–82 (prior to the Second World War) and pp. 117–122 (post-1945); and Sinclair, op. cit., pp. 52–53.

[353] See paragraphs 52–67 above.

[354] See again the accounts by Horn, op. cit., pp. 234–235, and Sapienza, op. cit., pp. 203–207.

[355] Horn, op. cit, p. 235.

[356] See paragraphs 62–64 above and paragraph 348 below.

[357] Article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions.

[358] Article 20.

[359] Bowett, loc. cit., p. 69.

[360] See in particular Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties: comments on arts. 16 and 17 of the ILC's 1966 draft articles on the law of treaties", p. 465.

[361] See paragraphs 45–46 above.

[362] See paragraphs 160–161 above and 279–283 below.

[363] See in particular the statements made on this topic by Sweden, speaking on behalf of the Nordic countries, *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 21st meeting (A/C.6/52/SR.21), para. 13; South Africa, para. 57; and the Republic of Korea (ibid., 22nd meeting (A/C.6/52/SR.22), para. 6).

[364] See in particular the statements by Mr. Tomuschat (*Yearbook … 1995*, vol. I, 2401st meeting), Mr. Razafindralambo (ibid., 2402nd meeting), Mr. Robinson (ibid.), Mr. He (ibid., and *Yearbook … 1997*, vol. I, 2500th meeting), Mr. Villagrán Kramer (*Yearbook … 1995*, vol. I, 2403rd meeting), Mr. Elaraby (ibid., 2404th meeting), Mr. Yamada (ibid., 2407th meeting), Mr. Arangio-Ruiz (ibid.) and Mr. Addo (*Yearbook … 1997*, vol. I, 2500th meeting).

[365] Horn, op. cit., p. 336.

objectives pursued by the authors of such declarations and the imprecision of the terminology used.

(i) *Obstacles arising from the variety of reasons that lead States to make interpretative declarations*

244. Surely, if words have meaning, then the provisions of a treaty are to be interpreted, in principle, without—and this is the difference between interpretative declarations and reservations—modifying or excluding their legal effect. Over and above this, however, the reasons that lead States to use this process appear to be fairly varied, as demonstrated by the responses of States to the questionnaire on reservations to treaties.

245. In certain situations, it is clear that the executive power must reassure the national parliament as to the actual scope of a treaty by which the State is to be bound. Bishop Jr. considers that this was the case with the "reservation" of the United States to the Convention for the Pacific Settlement of Disputes concluded at the First Hague Peace Conference in 1899[366] and the British and American declarations on the subject of the 1928 Kellogg-Briand Pact for the renunciation of war as an instrument of national policy.[367] Likewise, when ratifying the 1929 International Convention for the Safety of Life at Sea, the United States attached understandings to its instrument, stipulating that:

> These "understandings" were adopted by the Senate to meet objections which had been made to ratification of the Convention by the United States because of apprehension in some quarters that the Act of Congress approved March 4, 1915, known as the Seaman's Act, might be affected thereby.[368]

246. Very often this concern relates to a desire to put forward an interpretation that is compatible with the provisions of internal legislation,[369] which is one of the most frequently cited reasons for such declarations.[370] This was the case, for example, with the declaration by Switzerland in respect of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[371] or the famous declaration by France concerning article 27 of the International Covenant on Civil and Political Rights:

> In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned.[372]

247. In other instances, declarations are intended to recall the existence of general principles of international law that the author State considers to be of special importance. For example, Sweden explained the declaration it made when signing the United Nations Convention on the Law of the Sea as being mainly of a security policy nature.[373] And this was probably the spirit of the declarations made by Belarus, the Russian Federation, Ukraine and Viet Nam in respect of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character: these four States felt it necessary to declare, in very similar terms, that

> the principle of the absolute inviolability of the offices of delegations to international conferences is a rule of customary international law which must be observed by all States.[374]

248. An interpretative declaration can also be formulated with a view to recalling the position taken by a State during the negotiations which led to the adoption of the treaty. This was how Argentina partially explained the declarations it attached to its ratification of the United Nations Convention on the Law of the Sea and Mexico explained those which accompanied its signature of the Treaty on the Non-Proliferation of Nuclear Weapons, the 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 (Seabed Treaty), and the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction.[375] Likewise, the only interpretative declaration mentioned by Peru in response to the questionnaire on reservations (question 3.1) concerned the "Protocol of Cartagena de Indias" (Protocol of Amendment to the Charter of the Organization of American States) and consisted of a reaffirmation of the country's position during the negotiations.[376]

249. Finally, it cannot be denied that some unilateral declarations are presented as "interpretative" with a view to getting around the prohibition or limitation on reservations stipulated in the treaty to which they apply, or as the result of the general rules applicable to reservations (particularly *ratione temporis*).[377]

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[366] Bishop Jr., loc. cit., p. 256; this famous "reservation" interprets the Convention as being compatible with the Monroe Doctrine.

[367] Ibid., pp. 307 and 309.

[368] Ibid., p. 311.

[369] In its reply to the questionnaire on reservations, the Holy See indicated that the declarations it made were intended to spell out the effects of the treaty obligation in relation to the very nature of the Holy See (reply to question 3.4).

[370] In its response to question 3.4 of the questionnaire on reservations, Mexico said that in general, declarations were related to the internal application of the instruments in respect of which they were formulated, in the light of the provisions of national legislation. Kuwait's response to question 3.4 was similar.

[371] United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. XVIII.7, p. 713.

[372] Ibid., chap. IV.4, p. 124.

[373] Reply to question 3.1 of the questionnaire on reservations; also comparable are Panama's reply to question 3.4 on the subject of the declaration that country attached to its instrument of ratification of the "Protocol of Cartagena de Indias" (*Inter-American Treaties and Conventions: Signatures, Ratifications, and Deposits with Explanatory Notes*, Treaty Series No. 9 Rev. 1993, A–50, p. 3) and the declaration by Japan concerning the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. XXVII.3, p. 922).

[374] United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. III.11, pp. 81–82.

[375] Ibid., chap. XXI.6, pp. 801–802 (Argentina); ibid., *Treaty Series*, vol. 729, p. 294, and vol. 1563, p. 442 (Mexico). Also in reply to question 3.4 of the questionnaire on reservations.

[376] *Inter-American Treaties and Conventions* … (see footnote 373 above), p. 2. The declaration made at the time of signature, 5 December 1985, is clearer in this regard than that which accompanied the instrument of ratification, dated 18 September 1996.

[377] See the "declarations" made by Yugoslavia to the Seabed Treaty (United Nations, *Treaty Series*, vol. 955, p. 193) and Migliorino, "Declarations and reservations to the 1971 Seabed Treaty", p. 111. In the past, some States also sought to bypass the requirement that reservations must be unanimously accepted; see Holloway, op. cit., p. 486.

250. A number of commentators[378] have noted that some of the "interpretative declarations" attached by nuclear-weapon States to their ratification of the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), article 27 of which prohibits reservations but not interpretative declarations, and of the protocols to the Treaty, were actually reservations.[379] Similarly, the interpretative nature of some of the declarations made by States concerning the United Nations Convention on the Law of the Sea, articles 309 and 310 of which prohibit reservations but expressly permit declarations, provided that they "do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State", was contested by other States parties.[380]

251. Furthermore, even when a reservation might be possible, it is clear that States often prefer to make use of so-called "interpretative" declarations, which ostensibly make their hesitation less obvious. Denmark noted in its reply to questions 3.1 to 3.13.2 of the questionnaire on reservations that there even seemed to be a tendency among States to cast their reservations in terms of interpretative statements either because the treaty did not allow for a reservation proper or because it looked "nicer" with an interpretative declaration than a real reservation.

(ii) *Obstacles arising from unclear terminology*

252. An important element of the definition of reservations has to do with its indifference to the terminology used by States or international organizations when they formulate them, a fact that the 1969 and 1986 Vienna Conventions highlight by defining a reservation as "a unilateral statement, *however phrased or named* * ...".[381]

253. This "negative precision" eschews any nominalism to focus attention on the actual content of declarations and on the effect they seek to produce, but—and here is the reverse side of the coin—this decision to give precedence to substance over form runs the risk, in the best of cases, of encouraging States not to pay attention to the name they give to their declarations, thereby sowing confusion or unfortunate ambiguity; in the worst cases, it allows them to play with names in the (often successful) hope of misleading their partners as to the real nature of their intentions. By giving the name of "declarations" to instruments that are obviously and unquestionably real reservations, they hope not to arouse the vigilance of the other States parties while attaining the same objectives; conversely, to give greater weight to declarations that clearly have no legal effect on the provisions of a treaty, they label them "reservations", even though under the terms of the Vienna definition they are not.

254. Regardless of the true objectives pursued by States, it must be admitted that the terminology in this area is marked by a high level of confusion. While in French one encounters few terms other than "*réserves*" and "*déclarations*",[382] English terminology is much more varied, since certain English-speaking States, particularly the United States of America, use not only "reservation" and "(interpretative) declaration", but also "statement", "understanding", "proviso", "interpretation", "explanation" and so forth.[383]

255. Instruments having the same objective can be called "reservations" by one State party and "interpretative declarations" by another. For example, France and Monaco have used identical terms to spell out the way in which they interpret article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, yet Monaco submitted this interpretation as a reservation, while France formally announced that its intention was merely to "record [its] interpretation" of that provision.[384] Suy gives the example of identically worded declarations by Italy and Trinidad and Tobago regarding article 15 of the International Covenant on Civil and Political Rights, but described as a declaration by the former and a reservation by the latter; "[at] the request of the Secretariat, the

[378] The Special Rapporteur does not intend, at least not at this stage, to give his views on the relative merits of these analyses or of the "requalifications" invoked by some co-contracting parties.

[379] See, for example, Gros Espiell, "La signature du traité de Tlatelolco par la France et la Chine", and Boniface, *Les sources du droit du désarmement*, pp. 76–82.

[380] See in particular the many objections raised in connection with the declaration by the Philippines (United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. XXI.6, pp. 824–826).

[381] See paragraphs 223–230 above.

[382] This would seem to hold true in general for all the romance languages: in Spanish, the distinction is made between "*reserva*" and "*declaración (interpretativa)*", in Italian between "*riserva*" and "*dichiarazione (interpretativa)*", in Portuguese between "*reserva*" and "*declaracão (interpretativa)*", and in Romanian between "*rezervă*" and "*declarație (interpretativ)*". The same holds true for Arabic, German and Greek.

[383] See footnote 338 above. Whiteman describes United States practice this way:

> "The term 'understanding' is often used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than a substantive reservation ...
>
> "The terms 'declaration' and 'statement' are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty."

(Op. cit., pp. 137–138); see also the letter dated 27 May 1980 from Arthur W. Rovine, Assistant Legal Adviser for Treaty Affairs, United States Department of State, to Ronald F. Stowe, Chairman, Committee on Aerospace Law, International Law Section, American Bar Association, reproduced in Leich, ed., *Digest of United States Practice in International Law*, pp. 397–398. These various names can have a legal impact on some domestic legislation; they seem not to in the area of international law, and it is not certain that the distinctions are categorical, even at the internal level. Thus during the debate in the United States Senate on the Convention on the Organisation for Economic Co-operation and Development, when the Chairman of the Committee on Foreign Relations asked what the difference was between declaration, understanding, and reservation, the Under-Secretary of State for Economic Affairs replied: "Actually the difference between a declaration and an understanding, I think, is very subtle, and I am not sure that it amounts to anything" (quoted by Whiteman, op. cit., p. 192). As the Special Rapporteur understands it, in Chinese, Russian and the Slavic languages in general, it is possible to draw distinctions between several types of "interpretative" declarations.

[384] United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. IV.2, pp. 97, 99 and 108, note 16. Poland and the Syrian Arab Republic have also declared in the same terms that they do not consider themselves bound by the provisions of article 1, paragraph 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, but the former expressly called this statement a "reservation", while the latter labelled it a "declaration" (ibid., chap. XVIII.7, p. 713).

Government of Trinidad and Tobago indicated that it was simply an interpretative declaration".[385]

256. Sometimes instruments having the same purpose are qualified as "reservations" by some States, "interpretations" by others and not qualified at all by still others.[386] In some cases, a State will employ various expressions that make it difficult to tell whether they are attempting to formulate reservations or interpretative declarations and whether they have different meanings or scope. France, for example, upon acceding to the International Covenant on Civil and Political Rights, used the following:

> The Government of the Republic considers that ...;
>
> The Government of the Republic enters a reservation concerning ...;
>
> The Government of the Republic declares that ...;
>
> The Government of the Republic interprets ...;

with all of these formulas appearing under the heading "Declarations and reservations".[387]

257. Thus the same words can, in the view of the very State employing them, cover a range of legal realities. In accepting the Convention on the Inter-Governmental Maritime Consultative Organization, Cambodia twice used the word "declares" to explain the scope of its acceptance. In response to a request for clarification from the United Kingdom, Cambodia explained that the first part of its declaration was "of a political nature" but that the second part was a reservation.[388]

258. It sometimes happens that, faced with an instrument entitled "declaration", the other parties to the treaty view it in different ways and treat it either as such or as a "reservation", or, conversely, that objections to a "reservation" refer to it as a "declaration". For example, while several of the "Eastern bloc" countries identified their statements of opposition to article 11 of the Vienna Convention on Diplomatic Relations (which deals with the size of missions) as "reservations", the countries that objected to those statements sometimes called them "reservations" (Germany and the United Republic of Tanzania) and sometimes "declarations" (Australia, Belgium, Canada, Denmark, France, the Netherlands, New Zealand, Thailand and the United Kingdom).[389]

259. At the limit of this terminological confusion, there are even occasions when States make interpretative declarations by means of a specific reference to the provisions of a convention on reservations. Such was the case of a "declaration" made by Malta with regard to article 10 of the European Convention on Human Rights which referred to article 64 of that instrument.[390]

[385] "Droit des traités et droits de l'homme" (Treaty law and human rights), p. 945.

[386] See in this connection the comments by Horn (op. cit., p. 294) on the subject of declarations made in respect of the International Covenant on Civil and Political Rights.

[387] Example cited by Sapienza, op. cit., pp. 154–155. Full text in United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. IV.4, p. 124.

[388] United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. XII.1, pp. 612 and. 631, note 10.

[389] Ibid., chap. III.3, pp. 58–63.

[390] Example cited by Schabas, "Article 64 ", p. 926.

(b) *The definition of interpretative declarations*

260. It goes without saying that the elements listed above are not in themselves likely to facilitate the search for an indispensable criterion for distinguishing between reservations and interpretative declarations. It should be possible to seek one empirically, however, by starting, as is generally done,[391] with the definition of reservations in order to extract, by means of comparison, the definition of interpretative declarations. At the same time this also makes it possible to distinguish both interpretative declarations and reservations from other unilateral declarations that fall into neither of these categories.

(i) *Interpretative declarations in the light of the definition of reservations*

261. It appears prima facie that the four constituent elements of the definition of reservations[392] "discriminate" unequally, given that two of them, the character of a unilateral declaration and the indifference to nominalism, are surely to be found in the definition of interpretative declarations. This is less clear where the criterion of *ratione temporis* is concerned, since excluding it from the definition of interpretative declarations would in any case not be sufficient to justify a regime other than the regime of reservations. It is therefore the teleological element, the aim of the author, that would at first glance seem to be the determining one.

262. For the sake of convenience, it might be useful to distinguish between those elements of the definition that are common to both institutions and the teleological element, which involves the criterion of distinction itself, and to consider separately the question, of secondary importance but controversial, as to when an interpretative declaration may be made.

a. Elements common to the definitions of reservations and interpretative declarations

263. These common elements are: first, that both are unilateral declarations made by States or international organizations; and, secondly, that their name or phrasing is irrelevant to their definition.

"A unilateral declaration ..."

264. "As concerns the outer requisites and their formal appearance, interpretative declarations may not be distinguished from reservations. Both are unilaterally initi-

[391] See Sapienza, op. cit., p. 142. Horn points out that there are two possible approaches: "It appears that writers mean different things when they talk about interpretative declarations. Some have meant the term 'interpretative declaration' as used on various occasions by states, others have had an objective concept of interpretative declaration in mind" (op. cit., p. 236). The attempt made in this report represents an intermediate approach: it begins with the twofold postulate according to which: (*a*) reservations and interpretative declarations are distinct legal realities, as empirical observation of State practice shows (and this is related to the first of the approaches identified by Horn); and (*b*) interpretative declarations are intended ... to interpret the provisions of a treaty and not to exclude or modify their legal effect in their application to the State formulating them (this relates to the second approach, which is more "normative" than "descriptive").

[392] See paragraphs 78–82 above.

ated, cast in writing and presented at clearly identifiable moments."[393]

265. There would seem to be little point in dwelling on the first aspect: an interpretative declaration is just as much a unilateral declaration as is a reservation. It is in fact this common point that lies at the origin of the whole problem of distinguishing between them: they present themselves in the same manner; nothing distinguishes them as to form.

Joint formulation of an interpretative declaration

266. At most it must be noted that, as with reservations, this unilateral character poses no obstacle to their joint formulation by several States and/or international organizations. And while draft guideline 1.1.1, which recognizes this possibility vis-à-vis reservations, is not, to the best of the Special Rapporteur's knowledge, based on any precedent,[394] the same cannot be said with regard to interpretative declarations.

267. Indeed, as in the case of reservations, it is not uncommon for several States to consult with each other before formulating identical or quite similar declarations. This was the case, for example, with several interpretative declarations formulated by the "Eastern bloc" countries prior to 1990,[395] with those made by the Nordic countries in respect of several conventions,[396] or with the declarations made by 13 States members of the European Community when signing the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, and confirmed upon ratification, which stated:

> As a Member State of the European Community, [each State] will implement the provisions of the Convention on the Prohibition of Chemical Weapons, in accordance with its obligations arising from the rules of the Treaties establishing the European Communities to the extent that such rules are applicable.[397]

268. At the same time, and contrary to what has occurred thus far in the area of reservations, there have also been truly joint declarations, formulated in a single instrument, by "the European Community and its Member States" or by the latter alone. This occurred in the case of:

(*a*) Examination of the possibility of accepting annex C.1 of the 1976 Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials of 22 November 1950;[398]

(*b*) Implementation of the 1992 United Nations Framework Convention on Climate Change;[399]

(*c*) Implementation of the 1992 Convention on biological diversity;[400]

(*d*) Implementation of the 1995 Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.[401]

269. There are real precedents which justify a fortiori the adoption of a draft guideline on interpretative declarations similar to draft guideline 1.1.1 on reservations:

"*1.2.1 The unilateral nature of interpretative declarations is not an obstacle to the joint formulation of an interpretative declaration by several States or international organizations*."

270. As is the case with reservations, it must be understood, first, that such a formulation cannot limit the discretionary competence of each of the "joint declarants" to withdraw, or even modify,[402] the declaration as it affects that party and, secondly, that this draft guideline does not prejudge the permissibility or validity of the declarations in question any more than does any other draft guideline in this part of the Guide to Practice.

The question of verbal interpretative declarations

271. As indicated above,[403] a reservation is conceivable only if it is formulated in writing. This is not necessarily so for interpretative declarations.

272. The reasons why reservations must necessarily be in written form are the following:

(*a*) Article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions requires it;

(*b*) It is made indispensable by the very definition of reservations and by their legal regime; seeking to exclude or modify the legal effects of the provisions of a treaty in their application to the State formulating them, they must be subject to objections and may not enter into force unless accepted by the other contracting parties in one way or another.

273. These reasons do not apply to interpretative declarations to the same extent:

(*a*) Their legal regime is not set out in the Vienna Conventions;

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[393] Horn, op. cit., p. 236.

[394] See paragraph 128 above.

[395] See, for example, the declarations by Belarus, Bulgaria, Hungary, Mongolia, Romania, the Russian Federation and Ukraine concerning articles 48 and 50 of the Vienna Convention on Diplomatic Relations (Cuba formulated an express reservation; the wording of Viet Nam's declaration is ambiguous) (United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. III.3, pp. 55–58) or those of Albania, Belarus, Bulgaria, Hungary, Poland, Romania, the Russian Federation and Ukraine concerning article VII of the 1953 Convention on the Political Rights of Women (ibid., chap. XVI.1, pp. 682–684).

[396] See, for example, the declarations by Denmark, Finland, Iceland, Norway and Sweden concerning article 22 of the 1963 Vienna Convention on Consular Relations (ibid., chap. III.6, pp. 72–74).

[397] Ibid., chap. XXVI.3, pp. 890–892.

[398] Ibid., chap. XIV.5, p. 667.

[399] Ibid., chap. XXVII.7, p. 933.

[400] Ibid., chap. XXVII.8, p. 938.

[401] Ibid., chap. XXI.7, pp. 839–840.

[402] On this point, see paragraph 336 below.

[403] Paragraphs 123–124.

(*b*) As will be established,[404] they do not necessarily elicit reactions from the other contracting parties;

(*c*) Since they are related to the rules governing the interpretation of treaties, they call, at least in some cases, for a more flexible, less formalistic legal regime than that applicable to reservations.

274. It therefore seems a priori that there is nothing to prevent the verbal formulation of interpretative declarations. Yet for the sake of symmetry, since the definition of reservations does not expressly mention their written form, the Special Rapporteur will refrain from proposing at the current stage a draft guideline along these lines. He will do so when he takes up, in his next report, the question of the formulation of reservations and interpretative declarations.

"... however phrased or named ..."

275. The second point that reservations and interpretative declarations have in common has to do with the non-relevance of the name or designation given to them by the author.[405]

276. This is contested by some authors who believe that it is appropriate to take States at their word and to consider as interpretative declarations those unilateral declarations which have been so titled or worded by their authors.[406] This position has the dual merit of simplicity (an interpretative declaration is whatever States declare is one) and of conferring "morality" on the practice followed in the matter by preventing States from "playing around" with the names they give to the declarations they make with a view to sidestepping the rules governing reservations or misleading their partners.[407]

277. However, this position runs up against two nullifying objections:

(*a*) First, it is incompatible with the Vienna definition itself: if a unilateral declaration can be a reservation "however phrased or named", this of necessity means that simple "declarations" (even those expressly qualified as interpretative by their author) may constitute true reservations, but it also and necessarily implies that terminology is not an absolute criterion that can be used in defining interpretative declarations;

(*b*) Secondly, it runs counter to the practice of States, jurisprudence and the position of most doctrine.

278. Virtually all authors who have recently dealt with the delicate distinction between reservations and interpretative declarations cite numerous examples of unilateral declarations presented as interpretative declarations by the States formulating them which they themselves consider to be reservations or vice versa.[408] For example:

(*a*) Bowett considers that the reservation by the Soviet Union to the Vienna Convention on Diplomatic Relations with regard to mission size "was not a true reservation", but was simply an interpretation;[409]

(*b*) Horn devotes an entire chapter of his important work[410] to a consideration of "doubtful statements"; these include the declaration by the Sudan concerning article 38 of the same Convention,[411] those made by several States to the 1951 Convention relating to the Status of Refugees,[412] that of Italy concerning article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone,[413] all of which he considers to be true reservations even though the States in question presented them as interpretative declarations;

(*c*) McRae considers that Canada's "reservation" to articles 23 and 24 of the Convention relating to the Status of Refugees is in reality a simple interpretative declaration;[414]

(*d*) Migliorino endeavours to demonstrate that several "interpretative declarations" formulated when signing or ratifying the 1971 Seabed Treaty were in reality reservations, while the "reservational" nature of some unilateral declarations presented as such is doubtful;[415]

(*e*) Sapienza also provides a goodly number of examples of cases he considers dubious, including the declarations by France concerning the International Covenant on Civil and Political Rights, the Agreement governing the activities of States on the moon and other celestial bodies, the Convention on prohibitions or restrictions on the use of certain conventional weapons, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child; the declaration by Italy concerning the International Covenant on Civil and Political Rights; those of the United Kingdom concerning the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child; the declarations by the Netherlands concerning the Convention relating to the Status of Refugees, the Convention against torture and other cruel, inhuman or degrading treatment or punishment and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and the declarations by Germany concerning the Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Civil and Political Rights.[416]

[404] See footnote 451 and paragraph 337 below.

[405] For a discussion of this element of the definition of reservations, see paragraphs 163–166 above.

[406] See, for example, the analysis of the declaration made by France when signing the Treaty of Tlatelolco in 1973 and the analysis thereof by Gros Espiell, loc. cit., p. 141. However, the author also bases himself on other parameters. This was also the position taken by Japan in 1964 in its observations on the draft articles on the law of treaties adopted by the Commission on first reading (see paragraph 346 below).

[407] See paragraphs 249–251 above.

[408] The Special Rapporteur wishes to recall (see footnote 378 above) that it is not his intention to discuss these analyses himself or to contest them; the following examples are simply intended to show that the prevailing doctrine does not attach critical significance to the terminology used by States.

[409] Bowett, loc. cit., p. 68.

[410] Op. cit., pp. 278–324.

[411] Ibid., p. 279.

[412] Ibid., p. 300.

[413] Ibid., pp. 312–313.

[414] McRae, loc. cit., p. 162, footnote 1.

[415] Migliorino, loc. cit., pp. 106–123.

[416] Sapienza, op. cit., pp. 154–176.

279. In making such reclassifications, the authors generally have little difficulty in basing themselves on the practice of the States themselves, who, faced with unilateral declarations presented by their authors as being interpretative, do not hesitate to raise objections to them because they expressly consider them to be reservations.[417]

280. There are countless examples of this phenomenon. To mention only a few that relate to recent conventions, there are:

(*a*) The objection of the Netherlands to Algeria's interpretative declaration concerning paragraphs 3 and 4 of article 13 of the International Covenant on Economic, Social and Cultural Rights:

> In the opinion of the Government of the Kingdom of the Netherlands, the interpretative declaration … must be regarded as a reservation to the Covenant. From the text and history of the Covenant it follows that the reservation with respect to article 13, paragraphs 3 and 4 made by the Government of Algeria is incompatible with the object and purpose of the Covenant. The Government of the Kingdom of the Netherlands therefore considers the reservation unacceptable and formally raises an objection to it;[418]

(*b*) The reactions of many States to the declaration by the Philippines in respect of the United Nations Convention on the Law of the Sea:

> The Byelorussian Soviet Socialist Republic considers that the statement which was made by the Government of the Philippines upon signing the United Nations Convention on the Law of the Sea and confirmed subsequently upon ratification of that Convention in essence contains reservations and exceptions to the said Convention, contrary to the provisions of article 309 thereof;[419]

(*c*) The objection of Mexico, which considered that:

> the third declaration submitted by the Government of the United States of America ... constitutes a unilateral claim to justification, not envisaged in the Convention, for denying legal assistance to a State that requests it, which runs counter to the purposes of the Convention;[420]

(*d*) The reaction of Germany to a declaration by which Tunisia indicated that it would not adopt, in implementation of the Convention on the Rights of the Child, "any legislative or statutory decision that conflicts with the Tunisian Constitution":

> The Federal Republic of Germany considers the first of the declarations deposited by the Republic of Tunisia to be a reservation. It restricts the application of the first sentence of article 4 ...[421]

281. It also happens that "reacting" States contemplate both solutions and express their reactions in accordance with whether the text is a reservation or an interpretative declaration, again regardless of the term used by the author to designate it. Germany, the United Kingdom and the United States reacted to an interpretative declaration by Yugoslavia concerning the 1971 Seabed Treaty by considering it first as an actual interpretative declaration (which they rejected) and then as a reservation (which they considered to be late and inconsistent with the object and purpose of the treaty).[422] In the same spirit, Germany and the Netherlands objected to declarations made by the countries of Eastern Europe with regard to "the definition of piracy as given in the Convention *in so far as the said declarations are to be qualified as reservations**".[423] Likewise, several States questioned the real nature of the (late) "declarations" by Egypt concerning the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal.[424]

282. Judges and arbitrators are no more reluctant to question the real nature of unilateral declarations formulated by States in respect of a treaty and, where necessary, to reclassify them.[425]

283. In its decision in the case of *T. K.* v. *France*, the Human Rights Committee, basing itself on article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, decided that a communication concerning France's failure to respect article 27 of the International Covenant on Civil and Political Rights was inadmissible because France, on acceding to the Covenant, had declared that "in the light of article 2 of the Constitution of the French Republic, ... article 27 is not applicable so far as the Republic is concerned". The Committee observed

> in this respect that it is not the formal designation but the effect the statement purports to have that determines its nature.[426]

284. In an individual opinion which she attached to the decision, Mrs. Higgins criticized this position, pointing out that, in her view,

> the matter [was not] disposed of by invocation of article 2 (1) (*d*) of the Vienna Convention on the Law of Treaties, which emphasizes that intent, rather than nomenclature, is the key.
>
> An examination of the notification of 4 January 1982 shows that the Government of the Republic of France was engaged in two tasks: listing certain reservations and entering certain interpretative declarations. Thus in relation to articles 4 (1), 9, 14 and 19, it uses the phrase "enters a reservation". In other paragraphs it declares how terms of the Covenant are in its view to be understood in relation to the French Constitution, French legislation or obligations under the European Convention on Human Rights. To note, by reference to article 2 (1) (*d*) of the Vienna Convention, that it does not matter how a reservation is phrased or named, cannot serve to turn these interpretative declarations into reservations. Their content is clearly that of declarations. Further, the French notification shows that deliberately different language was selected to serve different legal purposes. There is no reason to suppose that the contrasting use, in different paragraphs, of the phrase "reservation" and "declaration" was not entirely deliberate, with its legal consequence well understood by the Government of the Republic.[427]

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[417] See footnotes 378 and 408 above.

[418] United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. IV.3, p. 117.

[419] Ibid., chap. XXI.6, p. 824; see also the reactions, in the same terms or in the same spirit, of Australia, Bulgaria, the Russian Federation and Ukraine (ibid., pp. 824–826).

[420] Ibid., chap. VI.19, p. 314.

[421] Ibid., chap. IV.11, pp. 218 and 221.

[422] Example cited by Migliorino, loc. cit., p. 110.

[423] United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. XXI.2, pp. 790–791.

[424] See in particular the reaction of Finland: "Without taking any stand to the content of the declarations, which appear to be reservations in nature ..." (ibid., chap. XXVII.3, p. 925).

[425] On this point, see paragraphs 226–228 above.

[426] Human Rights Committee, Communication No. 220/1987, decision of 8 November 1989, *T. K.* v. *France* (*Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40* (A/45/40), vol. II, annex X, p. 123, para. 8.6). See also, to the same effect, the decisions *M.K.* v. *France* of the same day (Communication No. 222/1987) (ibid., pp. 127–133), *S.G.* v. *France* of 1 November 1991 (Communication No. 347/1949), *G.B.* v. *France* of 1 November 1991 (Communication No. 348/1989) and *R.L.M.* v. *France* of 6 April 1992 (Communication No, 363/1989) (ibid., *Forty-seventh Session, Supplement No. 40* (A/47/40), annex X, pp. 346–371).

[427] Ibid., *Forty-fifth Session, Supplement No. 40* (A/45/40), vol. II, annex X, appendix II, p. 125.

285. There is, of course, no need to take a position on the substance of the specific problem on which the Human Rights Committee was to decide. Two points, however, must be raised with regard to Mrs. Higgins's opinion:

(*a*) On the one hand, although she reached a different conclusion from the majority in the case at hand, she did not contest the fact that, where necessary, a declaration presented as being interpretative could be considered to be a reservation;

(*b*) On the other hand, and it is here that she distinguishes herself from the majority, she nevertheless attaches great significance to the nomenclature used by the "declaring" Government, particularly as the Government had, in this case, formulated both reservations and interpretative declarations.[428]

286. This problem was in fact posed in the same terms in the *Belilos* v. *Switzerland* case:[429] Switzerland had also formulated both reservations and interpretative declarations, and the European Commission of Human Rights proved to be more sensitive to this aspect of the question than the Committee had been in *T. K.* v. *France*: it maintained that

> if a State made both reservations and interpretative declarations at the same time, the latter could only exceptionally be equated with the former.[430]

287. The European Court of Human Rights proved to be less categorical, but somewhat embarrassed:

(*a*) First, it concurred with Mrs. Higgins's reasoning, pointing out that it "cannot see how" the lack of terminological uniformity "could in itself justify describing the declaration in issue as a reservation";[431]

(*b*) Secondly, basing itself on the *travaux préparatoires* for the adoption of Switzerland's instrument of ratification, it noted that the "declaration" appeared to qualify "Switzerland's consent to be bound by the Convention";[432]

(*c*) Thirdly, it observed that one of the things that made it difficult to reach a decision in the case was the fact that "the Swiss Government have made both 'reservations' and 'interpretative declarations' in the same instrument of ratification", although the Court did not draw any particular conclusion from that observation;[433]

(*d*) Lastly, it did not formally reclassify the disputed interpretative declaration as a reservation, but merely stated that it intended to "examine the validity of the interpretative declaration in question, *as in the case of a reservation**".[434]

288. In its decision in the *Temeltasch* case, handed down six years later, the European Commission of Human Rights did not hesitate to reclassify an interpretative declaration as a reservation.[435]

289. From these observations the following conclusions may be drawn: if the phrasing and name of a unilateral declaration are not part of the definition of an interpretative declaration any more than they are of the definition of a reservation, they nevertheless constitute an element that must be taken into consideration and which can be viewed as having particular (although not necessarily vital) significance when a State formulates both reservations and interpretative declarations in respect of a single treaty at the same time.

290. This observation is consistent with the more general doctrinal position that:

> [T]here is a potential for inequity in this aspect ["however phrased or named"] of the definition. Under the Vienna Convention, the disadvantages of determining that a statement is a reservation are ... imposed upon the other parties to the treaty ... It would be unfortunate in such circumstances if the words "however phrased or named" were given an overriding effect. In exceptional circumstances it might be possible for a party to rely upon an estoppel against a State which attempts to argue that its statement is a reservation ... While this is a matter of interpretation rather than the application of equitable principles, it is in keeping with notions of fairness and good faith which underlie the treaty relations of States.[436]

291. Without reopening the debate on the principle posed by the 1969 Vienna Convention with regard to the definition of reservations, a principle which ought to extend to the definition of interpretative declarations,[437] it would seem legitimate, then, to spell out in the Guide to Practice the extent to which it is possible to remain indifferent to the nominalism implied by the expression "however phrased or named". This could be achieved by admitting that there is a presumption, not indisputable, attached to the name a declaring State gives to its declaration. The Commission might also stipulate that when a State formulates reservations and interpretative declarations at the same time, this presumption, while still disputable, is reinforced.

Guide to Practice:

"1.2.2 It is not the phrasing or name of a unilateral declaration that determines its legal nature but the legal effect it seeks to produce. However, the phrasing or name given to the declaration by the State or international organization formulating it provides an indication of the desired objective. This is the case in particular when a State or an international organization formulates several unilateral declarations in respect of a single treaty and designates some of them as reservations and others as interpretative declarations."

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[428] Curiously, the French declaration on article 27 is drafted in such a way that it appears to interpret the French Constitution more than the Covenant.

[429] See paragraph 226 above.

[430] See the judgement of the Court in this case, European Court of Human Rights (footnote 160 above), para. 41.

[431] Ibid., p. 23, para. 46.

[432] Ibid., p. 24, para. 48.

[433] Ibid., para. 49.

[434] Ibid. Reading the Judgment one gets the distinct impression that this was the outcome sought by the Court and which guided its thinking. See, in particular, the commentary of Bourguignon, "The Belilos case: new light on reservations to multilateral treaties"; Cameron and Horn, "Reservations to the European Convention on Human Rights: the Belilos case", pp. 69–86; Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme (à propos de l'arrêt Belilos du 29 avril 1988)", pp. 301–305; and Macdonald, loc. cit., pp. 438–442.

[435] Decision of 5 May 1982 (see footnote 164 above), pp. 146–148, paras. 68–82.

[436] Greig, loc. cit., pp. 27–28; see also page 34.

[437] See paragraphs 343–357 below.

292. Similarly, it is possible that the treaty in respect of which the declaration is being made may itself provide an indication, or at least a presumption, of the legal nature of the declaration. This is the case in particular when a treaty prohibits reservations of a general nature[438] or to certain of its provisions.[439]

293. In such situations, declarations made in respect of provisions to which any reservation is prohibited must be considered to constitute interpretative declarations.

This would comply with the presumption that a State would intend to perform an act permitted, rather than one prohibited, by a treaty and protect that State from the possibility that the impermissible reservation would have the effect of invalidating the entire act of acceptance of the treaty to which the declaration was attached.[440]

294. It goes without saying, however, that such a presumption is not indisputable either, and that if the declaration is really intended to exclude or modify the legal effect of the provisions of the treaty and not simply to interpret them, then it must be considered to be an impermissible reservation and treated as such.

Guide to Practice:

"1.2.3 When a treaty prohibits reservations to all or some of its provisions, a unilateral declaration formulated in respect thereof by a State or an international organization shall be considered to constitute an interpretative declaration and not a reservation. If, however, the declaration seeks to exclude or modify the legal effect of certain provisions of the treaty in their application to its author, the declaration must be considered an impermissible reservation."

b. The teleological factor, a criterion for distinguishing between interpretative declarations and reservations

295. All interpretative declarations seek to interpret the provisions of a treaty. However, while the State or international organization formulating them may, in some cases, limit itself to proposing an interpretation, in others it may seek to impose that interpretation on the other contracting parties or, in any case, make it a condition for being bound, so that a distinction must be drawn between two very different types of interpretative declarations. In other words, while all interpretative declarations are intended to clarify the meaning and the purpose of the provisions of the treaty in question, some have another function in that they condition acceptance of the treaty by the State or international organization formulating them.

Clarifying the meaning and scope of the provisions of a treaty, an element common to the definition of all interpretative declarations

296. Like reservations, interpretative declarations, no matter how phrased or designated, are unilateral declarations. However, they are not to be confused with them: unlike reservations, they seek neither to exclude nor to modify the legal effect of the treaty in respect of which they are made; in this respect they differ greatly from reservations, as Fitzmaurice noted as early as 1962.[441] As their name indicates, they are intended to interpret.

297. This can and must constitute the central element of their definition, yet it poses difficult problems nonetheless, the first of which is determining what is meant by "interpretation". This is a highly complex concept, the elucidation of which would far exceed the scope of the present report.[442] In truth, it is probably not useful for the purpose of defining interpretative declarations. Suffice it to say, in a phrase often recalled by ICJ, that the expression "to construe" (*interprétation* in French) must be understood as meaning to give a precise definition of the meaning and scope of a binding legal instrument,[443] in this case a treaty. What is essential is that interpreting is not revising.[444] While reservations ultimately modify, if not the text of the treaty, at least its legal effect,[445] interpretative declarations are in principle limited to clarifying the meaning and the scope of the treaty as the author State or international organization perceives them.

298. But this raises further difficult problems, of which two are:

(*a*) First, the interpretation covered by the declaration is not imposed as such on the other contracting parties; accordingly, the definition as outlined thus far necessarily leads to the question of the scope of interpretative declarations;

(*b*) Secondly, it must be acknowledged that this scope is not unequivocal: if the definition adopted is to be "operational" and lead usefully to the application of coherent legal rules separate from those applicable to reservations, a distinction must be made between two categories of interpretative declarations, still in terms of the authors' desired objective.

299. It is not insignificant that the rules relating to reservations and those relating to the interpretation of treaties appear in different parts of the 1969 and 1986 Vienna Conventions: the former are included in part II, which deals with the conclusion and entry into force of treaties,

[438] As, for example, in the case of article 309 of the United Nations Convention on the Law of the Sea.

[439] As, for example, in the case of article 12 of the Convention on the Continental Shelf, which deals with reservations to articles 1–3. See the decision of 30 June 1977 (footnote 159 above), pp. 32–33, paras. 38–39; see also the individual opinion of Herbert W. Briggs, ibid., pp. 123–124.

[440] Greig, loc. cit., p. 25.

[441] See paragraph 56 above.

[442] Regarding the concept of interpretation, see in particular the reports by Lauterpacht, "De l'interprétation des traités"; Degan, *L'interprétation des accords en droit international*; McDougal, Lasswell and Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure*; Sur, *L'interprétation en droit international public*; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités"; and Bos, "Theory and practice of treaty interpretation".

[443] See *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 10; see also *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950*, p. 402.

[444] See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion*, *I.C.J. Reports 1950*, p. 229; and *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 196.

[445] See paragraphs 144–222 above.

while the latter are to be found in part III, together with those dealing with observance and application of treaties.

300. In fact, there is no gap between the formation and the application of international law[446] or between interpretation and application: "The implementation of rules implies that they have already been interpreted. Implementation may be explicit or implicit, in which case it may become confused with measures of application."[447] Some have even gone so far as to affirm that "the rule of law, from the moment of its creation to the moments of its application to individual cases, is a matter of application".[448]

301. Thus interpretative declarations formulated unilaterally by States or international organizations with regard to the meaning or the scope of the provisions of a treaty can only be one of many elements used in interpreting them. They coexist with other interpretations—contemporaneous, previous or subsequent—that may originate with other contracting parties or third organizations that are entitled to give an interpretation that is authentic and can be imposed on the parties.

302. This also means that the "interpretation of the terms of a treaty ... could not be considered as a question essentially within the domestic jurisdiction of a State"[449] and that consequently each State or international organization that formulates such a declaration may choose to submit another interpretation which, in certain cases, may be imposed on all the parties to a treaty or among those who disagree as to the meaning and scope of its provisions, as in cases of arbitration or determination of jurisdiction.

303. In fact, it cannot be concluded that a unilateral interpretative declaration is devoid of any legal effect. This problem will be considered in greater detail when the Special Rapporteur takes up the important question of the legal effect of reservations, and thus of interpretative declarations, in a later report.

304. In the meantime, it is to be noted that an interpretative declaration, according to the overview presented by Simon,

> is likely first of all to produce legal effects in respect of the formulating State by virtue of the principle of good faith, or indeed by the application of the rules of estoppel. Thus ICJ, in the *International Status of South West Africa* case, stated:
>
> > "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument."[450]
>
> Secondly, the unilateral interpretation by one of the parties to the treaty may be accepted, explicitly or tacitly, by all of the other contracting parties, thereby becoming an authentic interpretation of the treaty. Thirdly, the unilateral interpretation of one part of the treaty may be accepted, explicitly or tacitly, by some of the other contracting parties, thereby becoming a plurilateral interpretation that may have certain legal effects *inter partes*.[451]

305. From this standpoint, interpretative declarations can be seen as "offers" of interpretation, governed by the fundamental principle of good faith, but lacking any inherent authentic or binding character. Their authors may, however, endeavour to broaden their scope, so that they come closer to being a reservation without actually becoming one.

"Mere" and "conditional" interpretative declarations

306. This is what happens when a State or international organization does not limit itself to proposing an interpretation in advance, but makes its interpretation a condition of its consent to be bound by the treaty.

307. The distinction between these two types of interpretative declaration was clearly and authoritatively drawn by McRae in an important article published in 1978. Exploring the effect of interpretative declarations, he noted that:

> two situations have to be considered. The first is where a State attaches to its instrument of acceptance a statement that simply purports to offer an interpretation of the treaty, or part of it. This may be called a "mere interpretative declaration"* The second situation is where a State makes its ratification of or accession to a treaty subject to, or on condition of, a particular interpretation of the whole or part of the treaty. This may be called a "qualified interpretative declaration". In the first situation the State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected ... If, on the other hand, the declaring State wishes to assert its interpretation regardless of what a subsequent tribunal might conclude, that is, the State when making the declaration has ruled out the possibility of a subsequent inconsistent interpretation of the treaty, a different result should follow. This is a "qualified interpretative declaration". The State is making its acceptance of the treaty subject to or conditional upon acquiescence in its interpretation.

* They are referred to as "mere declaratory statements" by Detter, *Essays on the Law of Treaties* (1967), pp. 51–52.[452]

308. This makes for a good point of departure, with two small provisos:

(*a*) First, in order to make the distinction, the author probably places too much emphasis on the prospect of a future intervention by a judge or arbitrator;[453]

(*b*) Secondly, the expression "*qualified** interpretative declarations" has little meaning, at least in French and Spanish, and it would probably be better to stress, in their

[446] "We know that, fundamentally, the act of implementing norms is not in international law organically distinct from their formation. In other words, States [and international organizations] whose international obligations constitute the source of the elements of law formation, are also responsible for their implementation" (Combacau and Sur, op. cit., p. 163).

[447] Ibid.

[448] Arnaud, "Le médium et le savant: signification politique de l'interprétation juridique", p. 165 (quoted by Simon in *L'interprétation judiciaire des traités d'organisations internationales*, p. 7).

[449] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 70; see also *Nationality Decrees Issued in Tunisia and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, pp. 29–30.

[450] *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 135–136.

[451] Simon, op. cit., pp. 22–23, footnotes omitted. It will be noted that the legal effects of unilateral interpretations depend less systematically on the reaction of the other parties than do reservations.

[452] McRae, loc. cit., pp. 160–161.

[453] See paragraph 324 below.

name itself, the criterion that distinguishes them from "mere" interpretative declarations, namely their conditional nature, i.e. the fact that the State subordinates its consent to be bound to the interpretation it puts forward. The term that will be used here, then, is "conditional interpretative declaration", as opposed to "mere interpretative declarations".

309. Far from being purely doctrinal or academic in character, this distinction, which has been used by a number of authors,[454] corresponds to an undeniable practical reality.

310. It is not uncommon for a State, when formulating a declaration, to state expressly that its interpretation constitutes the sine qua non to which its consent to be bound is subordinate. For example, France attached to its signature[455] of Additional Protocol II of the Treaty of Tlatelolco a four-point interpretative declaration, stipulating:

> In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States.

The conditional nature of the French declaration here is indisputable.

311. Although it is drafted less categorically, the same can surely be said of the "understanding" recorded by the Islamic Republic of Iran in connection with the United Nations Convention on the Law of the Sea:

> The main objective [of the Islamic Republic of Iran] for submitting these declarations is the avoidance of eventual future interpretation of the following articles in a manner incompatible with the original intention and previous positions or in disharmony with national laws and regulations ...[456]

312. In other cases, the conditional nature of the declaration can be deduced from its drafting. For example, its categorical wording leaves little doubt that the interpretative declaration made by Israel upon signing the 1979 International Convention against the taking of hostages should be considered a conditional interpretative declaration:

> It is the understanding of Israel that the Convention implements the principle that hostage taking is prohibited in all circumstances and that any person committing such an act shall be either prosecuted or extradited pursuant to article 8 of this Convention or the relevant provisions of the Geneva Conventions of 1949 or their additional Protocols, without any exception whatsoever.[457]

313. The same holds true for the interpretative declaration made by Turkey in respect of the Convention on the prohibition of military or any other hostile use of environmental modification techniques:

> In the opinion of the Turkish Government the terms "widespread", "long lasting" and "severe effects" contained in the Convention need to be clearly defined. So long as this clarification is not made the Government of Turkey will be compelled to interpret itself the terms in question and consequently it reserves the right to do so as and when required.[458]

314. Conversely, a declaration such as the one made by the United States when signing the 1988 Protocol to the 1979 Convention on long-range transboundary air pollution concerning the control of emissions of nitrogen oxides or their transboundary fluxes is clearly a mere interpretative declaration:

> The Government of the United States of America understands that nations will have the flexibility to meet the overall requirements of the protocol through the most effective means.[459]

315. It is in fact only rarely that the conditional nature of an interpretative declaration is so clearly apparent from the wording used. Most often, the declaring State or international organization simply says that it "understands that ...", "considers that ..." ("*considère que ...*",[460] "*estime que ...*"[461]) or "declares that ...",[462] or that it "interprets" a particular provision in a particular way,[463] or that, "according to its interpretation" or its "understanding", a particular provision has a certain meaning[464] or that it "understands that ...".[465] In such situations the distinction between "mere" and "conditional" interpretative declarations poses problems similar to those posed by the distinction between reservations and interpretative declarations, and these problems must be solved in accordance with the same principles.[466]

316. Moreover, it is not uncommon for the true nature of interpretative declarations to become clear when they are contested by the other parties to the treaty. This is demonstrated by some famous examples.

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[454] For examples, see Cameron and Horn, loc. cit, p. 77, and Sapienza, op. cit., pp. 205–206.

[455] See United Nations, *Treaties Series,* vol. 936, p. 419. The declaration was confirmed upon ratification on 22 March 1974.

[456] United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. XXI.6, p. 811.

[457] Ibid., chap. XVIII.5, p. 705.

[458] Ibid., chap. XXVII.1, p. 878.

[459] Ibid., p. 903.

[460] For examples (of which there are a great many), see the declaration made by Brazil when signing the United Nations Convention on the Law of the Sea (ibid., chap. XXI.6, p. 804), the second declaration made by the European Community when signing the Convention on Environmental Impact Assessment in a Transboundary Context (ibid., chap. XXVII.4, p. 927), or those made by Bulgaria to the Vienna Convention on Consular Relations (ibid., chap. III.6, p. 71) or to the Convention on a Code of Conduct for Liner Conferences (ibid., chap. XII.6, p. 641).

[461] See—again, out of many examples—the declarations made by Finland concerning the Convention on a Code of Conduct for Liner Conferences (ibid., chap. XII.6, p. 642).

[462] See the second and third declarations made by France concerning the International Covenant on Economic, Social and Cultural Rights (ibid., chap. IV.3, p. 112) or that made by the United Kingdom when signing the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (ibid., chap. XXVII.3, p. 923).

[463] See—again, from a wealth of examples—the declarations made by Algeria and Belgium in respect of the International Covenant on Economic, Social and Cultural Rights (ibid., chap. IV.3, pp. 111–112), the declaration by Ireland in respect of article 31 of the Convention relating to the Status of Stateless Persons (ibid., chap. V.3, p. 250) or the first declaration made by France when signing the Convention on biological diversity (ibid., chap. XXVII.8, p. 938).

[464] See the declarations by the Netherlands concerning the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (ibid., chap. XXVI.2, p. 885) or those made by Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu in respect of the United Nations Framework Convention on Climate Change (ibid., chap. XXVII.7, pp. 933–934).

[465] See the declarations made by Brazil when ratifying the United Nations Convention on the Law of the Sea (ibid., chap. XXI.6, p. 804).

[466] See paragraphs 378–406 below.

317. The first example concerns the declaration that India attached to its instrument of ratification of the constituent instrument of IMCO.[467] In its response to the questionnaire on reservations to treaties, the country summarized the episode as follows:[468]

> When the Secretary-General notified the Inter-Governmental Maritime Consultative Organization (IMCO) of the instrument of ratification of India subject to the declaration, it was suggested that in view of the condition which was "in the nature of reservation" the matter should be put before the IMCO Assembly. The Assembly resolved to have the declaration circulated to all IMCO members but until the matter has been decided, India was to participate in IMCO without vote. France and the Federal Republic of Germany lodged objections against the declaration made by India, France on the ground that India was asserting a unilateral right to interpret the Convention and Germany on the ground that India might in the future take measures that would be contrary to the Convention.
>
> In resolution 1452 (XIV) adopted on 7 December 1959, the General Assembly of the United Nations, noting the statement made on behalf of India at the 614th meeting of the Sixth Committee (Legal) explaining that the Indian declaration on IMCO was a declaration of policy and that it did not constitute a reservation, expressed the hope "that, in the light of the above-mentioned statement of India an appropriate solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India".
>
> In a resolution adopted on 1 March 1960, the Council of the Inter-Governmental Maritime Consultative Organization, taking note of the statement made on behalf of India referred to in the foregoing resolution and noting, therefore, that the declaration of India has no legal effect with regard to the interpretation of the Convention "considers India to be a member of the Organization".

318. Cambodia also made an ambiguous declaration with regard to the same convention establishing IMCO.[469] Several Governments stated that they assumed that it was a declaration of policy and did not constitute a reservation; and that it had no legal effect with regard to the interpretation of the Convention. Accordingly,

> In a communication addressed to the Secretary-General on 31 January 1962, the Government of Cambodia stated that "... the Royal Government agrees that the first part of the declaration which it made at the time of the acceptance of the Convention is of a political nature. It therefore has no legal effect regarding the interpretation of the Convention. The statements contained in the third paragraph of the declaration, on the other hand, constitute a reservation to the Convention by the Royal Government of Cambodia".[470]

319. In the view of the Special Rapporteur, it is far from obvious that a mere interpretative declaration can be assimilated to a purely political declaration and be void of any legal effect.[471] Yet these precedents confirm that there is a discrepancy between some declarations, in which the State or international organization formulating them does no more than explain its interpretation of the treaty, and others in which the authors seek to impose their interpretation on the other contracting parties.

320. This discrepancy is of great practical significance. Unlike reservations, mere interpretative declarations place no conditions on the expression by a State or international organization of its consent to be bound; they simply attempt to anticipate any dispute that may arise concerning the interpretation of the treaty. The declarant "sets a date", in a sense; it gives notice that, should a dispute arise, its interpretation will be such, but it does not make that point a condition for its participation in the treaty. Conversely, conditional declarations are closer to reservations in that they seek to produce a legal effect on the provisions of the treaty, which the State or international organization accepts only on condition that the provisions are interpreted in a specific way. As McRae writes,

> The significance of the former lies in the effect it may have in subsequent proceedings to interpret the treaty, and this significance will vary according to whether the declaration has been accepted, ignored or objected to by other contracting parties. The latter type of interpretative declaration, on the other hand, must be assimilated to a reservation, for by asserting that its interpretation overrides any contrary interpretation the declarant has purported to exclude or to modify the terms of the treaty.[472]

321. The Special Rapporteur does not think that this last formula is quite accurate: even when it is conditional, an interpretative declaration does not constitute a reservation in that it does not try "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to the State or organization formulating it, but to impose a specific interpretation on those provisions. Even if the distinction is not always obvious, there is a tremendous difference between application and interpretation. "The mere fact that a ratification is conditional does not necessarily mean that the condition needs to be treated as a reservation."[473]

322. This is in fact the direction taken in jurisprudence:

(*a*) In the *Belilos* v. *Switzerland* case, the European Court of Human Rights considered the validity of Switzerland's interpretative declaration from the standpoint of the rules applicable to reservations, yet without assimilating one to the other;[474]

(*b*) Likewise, in a text that is admittedly a bit obscure, the Court that settled the dispute between France and the United Kingdom concerning the continental shelf in the *English Channel* case analysed the third reservation by France concerning article 6 of the Convention on the Continental Shelf "as a specific condition imposed by the French Republic on its acceptance of the delimitation régime provided for in Article 6", adding: "This

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[467] The text of the declaration appears in United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. XII.1, p. 613.

[468] With regard to this episode, see in particular: McRae, loc. cit., pp. 163–165; Horn, op. cit., pp. 301; and Sapienza, op. cit., pp. 108–113.

[469] For text, see United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. XII.1, pp. 612–613. Regarding this episode see in particular McRae, loc. cit., pp. 165–166, and Sapienza, op. cit., pp. 177–178.

[470] United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. XII.I, p. 631, note 10. See also footnote 388 above.

[471] It is interesting that Indonesia, which made a declaration comparable to the one made by India and encountered similar reactions, also admitted that its declaration constituted an interpretation of article 1 (*b*), but added that it could not accept the assumption made by the Governments that had raised an objection "that this declaration has no legal effect with regard to the interpretation of the Convention" (ibid., note 12); this position appears to have legal merit. The legal effects of interpretative declarations, along with those of reservations, will be considered in greater detail in a later report.

[472] McRae, loc. cit., p. 172.

[473] Greig, loc. cit., p. 31.

[474] See paragraph 287 above. In the *Temeltasch* case, the European Commission of Human Rights was more cautious: completely (and intentionally) adhering to McRae's position, it "assimilated" the notions of conditional interpretative declarations and reservations (footnote 164 above), pp. 130–131, paras. 72–73.

condition, according to its terms, appears to go beyond mere interpretation."[475] This would seem to establish *a contrario* that it could have been a conditional interpretative declaration and not a reservation in the strict sense of the term.

323. The fact remains that, even if it cannot be entirely "assimilated" to a reservation, a conditional interpretative declaration does come quite close, as Reuter has written: "Reservations essentially spell out a condition: the State consents to be bound provided certain legal effects of the treaty do not apply to it, either by exclusion or modification of a rule or by its interpretation or application."[476]

324. Nor does the Special Rapporteur agree with those criticisms levelled by Horn at the distinction proposed by McRae. Horn affirms that "[t]he character of a declaration as an absolute condition for participation in a treaty does not automatically turn it into an 'excluding' or 'modifying' device";[477] however, this clearly shows that their conditional character brings interpretative declarations quite close to reservations without assimilating them thereto, and thus it is incorrect to say that "[t]he 'excluding' or 'modifying' effect can only be asserted at the very moment one of the many possible interpretations is finally authoritatively established as the only right and valid one".[478] An authentic or jurisdictional interpretation that is contrary to one put forward by the declarant will establish that the latter's interpretation was not the "right" one, but it will not make the interpretative declaration into a reservation. All one can conclude is that interpreting declarations in different ways will create complex problems if the initial interpretative declaration was conditional, and these difficulties should be taken into consideration when the Commission considers the legal rules applicable to conditional interpretative declarations.

325. Likewise, it is doubtless excessive to maintain that the distinction between mere and conditional interpretative declarations "puts other States in a very difficult if not impossible position".[479] They may in fact react differently to different declarations, so that it may be necessary to spell out as clearly as possible both the criteria for making the distinction and the legal regime applicable to both. However, it cannot be concluded that, just because it may be difficult to make the distinction in some cases, the distinction does not exist.

326. The present report, which is devoted exclusively to defining reservations and, by way of contrast, interpretative declarations, is not the place in which to dwell at length on the consequences of the distinction between the two types of interpretative declaration. However, it now seems fairly obvious that the legal regime of conditional interpretative declarations would be infinitely closer to that of reservations than would the rules applicable to mere interpretative declarations, which essentially fall under the "general rule of interpretation" codified in article 31 of the 1969 and 1986 Vienna Conventions. In the case of conditional interpretative declarations, strict rules, particularly as regards time limits, must be followed in order to prevent, insofar as possible, disputes among the parties as to the reality and scope of their commitment under the treaty. Such precautions are less indispensable in the case of mere interpretative declarations.

327. In view of the foreseeable consequences of the distinction and its practical importance, it should be included in the Guide to Practice. However, bearing in mind the striking degree to which reservations overlap with conditional interpretative declarations, it would be preferable, before suggesting a definition for the latter, to explore the appropriateness of including in the definition of conditional interpretative declarations the *ratione temporis* element, which is an integral part of the definition of reservations.

c. The temporal element of the definition

328. One of the major elements of the definition of reservations concerns the moment at which a unilateral declaration must be formulated in order to qualify as a reservation. While this stipulation would seem to have more to do with the legal regime of reservations than with their actual definition, practical considerations aimed at preventing abuses have resulted in its becoming an element of the definition.[480] These considerations do not carry the same weight in the case of interpretative declarations, at least those that the declarant formulates without making the proposed interpretation a condition for participation in the treaty.

329. Although it is not possible to discuss the legal regime applicable to interpretative declarations in detail, it bears repeating that such declarations[481] are governed by the rules of interpretation of treaties, which themselves are placed in the Vienna Conventions close, and rightly so, to the rules governing the application of treaties. Thus, even if an instrument made by a party "in connection with the conclusion of the treaty" can, under certain conditions, be considered for the purposes of interpreting the treaty to be part of the "context", as expressly provided in article 31, paragraph 2 (*b*), of the 1969 and 1986 Vienna Conventions, this does not imply any exclusivity *ratione temporis*. Moreover, paragraph 3 of article 31 expressly invites the interpreter to take "into account, together with the context", any subsequent agreement between the parties and any subsequent practice followed.

330. Such subsequent agreements or practices may be supported by interpretative declarations that may be formulated at any time in the life of the treaty: at its conclusion, at the time a State or international organization expresses its final consent to be bound, or at the time of

[475] Decision of 30 June 1977 (see footnote 159 above), p. 40, para. 55.

[476] Reuter, op. cit., pp. 77–78. The inherent conditional character of reservations is stressed in numerous doctrinal definitions, including that of the Harvard Law School (see paragraph 95 above); see also Horn, op. cit., p. 35, and the examples cited). The definition proposed by Sir Humphrey Waldock in 1962 also specifically included conditionality as an element in the definition of reservations; it was subsequently abandoned in circumstances that are not clear (see paragraphs 56–60 above).

[477] Horn, op. cit., p. 239.

[478] Ibid.

[479] Sinclair, op. cit., p. 53.

[480] See paragraphs 132–143 above.

[481] See paragraphs 299 et seq. above.

application of the treaty.[482] If the interpretation proposed by the declarant is accepted, expressly or implicitly, by the other contracting parties, the interpretative declaration constitutes an element of a subsequent agreement or practice.

331. This was the position taken by Sir Humphrey Waldock in his fourth report on the law of treaties, in which he pointed out that a declaration could have been made

> during the negotiations; or at the time of signature, ratification, etc., or afterwards in the course of the "subsequent practice".[483]

332. Independently of these general considerations, to confine the formulation of interpretative declarations to a limited period of time, as the definition of reservations does, would have the serious drawback of being inconsistent with practice, even if—it goes without saying—it is quite often at the moment they express their consent to be bound that States and international organizations do formulate such declarations.

333. It is indeed striking to note that States tend to get around the *ratione temporis* limitation of the right to formulate reservations by submitting them, occasionally out of time, as interpretative declarations. This was the case, for example, of the "declaration" made by Yugoslavia in respect of the 1971 Seabed Treaty[484] or of the declaration made by Egypt regarding the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal.[485] In these two cases, the "declarations" elicited protests on the part of the other contracting parties, who were motivated by the fact that the declarations were actually reservations and, in the second case, the fact that article 26 of the Basel Convention (which prohibits reservations) authorizes States to formulate declarations, within certain limits, only "when signing, ratifying, accepting, approving, formally confirming or acceding to this Convention".

334. It can be concluded *a contrario* that if true interpretative declarations had been involved (and if the Basel Convention had not set any time limits), the declarations could have been formulated at a time other than the moment of signature or consent to be bound.

335. This is in fact quite normal in practice. It should be pointed out, as Greig does, that when they formulate objections to reservations or react to interpretative declarations formulated by other contracting parties, States or international organizations often go on to propose their own interpretation of the treaty's provisions.[486] There is no prima facie reason not to consider such "counter-proposals" as veritable interpretative declarations, at least when they seek to clarify the meaning and scope of the treaty in the eyes of the declarant; however, they are by definition formulated after the time at which formulation of a reservation is possible.

336. Under these circumstances, it would hardly seem possible to include in a general definition of interpretative declarations a specification of the time at which such a declaration is to be made.

337. This silence should not lead to the conclusion, however, that an interpretative declaration may in all cases be formulated at any time:

(*a*) For one thing, this might be formally prohibited by the treaty itself;[487]

(*b*) Furthermore, it would seem to be out of the question that a State or international organization could formulate a *conditional* interpretative declaration at any time in the life of the treaty: such laxity would cast an unacceptable doubt on the reality and scope of the treaty obligations; and

(*c*) Lastly, even mere interpretative declarations can be invoked and modified at any time only to the extent that they have not been expressly accepted by the other parties to the treaty or that an estoppel has not been raised against them.

338. These are questions that will have to be clarified in chapter II of the Guide to Practice, on the formulation of reservations and interpretative declarations. At the very most, one can imagine including in the definition of conditional interpretative declarations an express mention of the *ratione temporis* limitation on their formulation. This is justified for reasons comparable to those that have made such a clarification necessary in the area of reservations: by definition such declarations constitute conditions on the declarant's participation in the treaty and are thus, like reservations themselves, closely linked to the entry into force of the treaty.

339. For these reasons it would seem useful to reintroduce the *ratione temporis* element into the definition of conditional interpretative declarations, since it is one of the distinguishing features of reservations, even though it does not belong in the definition of interpretative declarations in general.

Guide to Practice:

"1.2.4 A unilateral declaration formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to

[482] This last possibility was recognized by ICJ in its advisory opinion of 11 July 1950 concerning the international status of South West Africa: "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument" (see footnote 450 above); in fact, the Court based itself on declarations made by South Africa in 1946 and 1947 on the interpretation of its mandate over South-West Africa, an agreement that had been concluded in 1920.

[483] *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 49.

[484] See footnote 377 above.

[485] See United Nations, *Multilateral Treaties Deposited with the Secretary-General …*, chap. XXVII.3, note 5, p. 924.

[486] Greig, loc. cit., pp. 24 and 42–45. See the example cited by this author (p. 43) of the reactions of the Netherlands to the reservations of Bahrain and Qatar to article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations, and the "counter-interpretation" of articles I and II of the Treaty on the Non-Proliferation of Nuclear Weapons made by the United States in reaction to point 8 of the declaration by Italy concerning that Treaty (United Nations, *Treaty Series*, vol. 1018, pp. 416–418).

[487] See paragraph 333 above.

a treaty, or by a State when making notification of succession to a treaty, whereby the State or international organization subordinates its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration [which has legal consequences distinct from those deriving from simple interpretative declarations]."[488]

(ii) *The proposed definition and its consequences*

340. The definition of interpretative declarations does not appear in any of the provisions of the 1969, 1978 and 1986 Vienna Conventions. However, it would seem possible to elicit it by systematically contrasting it with the definition of reservations, as has been done above. In addition, the definition used for interpretative declarations leads one to exclude from this category of unilateral declarations instruments that are sometimes and erroneously included.

a. The proposed definition

341. Although the Commission ultimately decided that there was no point in including a definition of interpretative declarations in its 1966 draft articles on the law of treaties,[489] the Commission did discuss this idea several times during its preparation of the text.

342. While the first two Special Rapporteurs, Mr. James Brierly and Sir Hersch Lauterpacht, neglected to define interpretative declarations, Sir Gerald Fitzmaurice did: in his very first report, in 1956, he defined interpretative declarations negatively by contrasting them with reservations, specifying that the term "reservation"

> does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty.[490]

343. This was a "negative", or "reverse" definition, however, which made it clear that reservations and interpretative declarations were separate legal instruments but did not positively define what was meant by the term "interpretative declaration". Moreover, the wording used *in fine*, which, one assumes, was probably intended to cover what this report refers to as "conditional interpretative declarations", lacked precision, to say the least.

344. This second flaw was partially corrected by Sir Humphrey Waldock, who, in his first report, submitted in 1962, removed some of the ambiguity that marked the final part of the definition proposed by his predecessor, but again put forward an entirely negative definition:

> An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation.[491]

345. This process makes it clear what an interpretative declaration is not; it is of little use in defining what it is, a question in which the Commission subsequently lost interest.[492]

346. It was this omission that Japan tried to fill when it noted, in its comments on the draft adopted by the Commission on first reading, that "not infrequently a difficulty arises in practice of determining whether a statement is in the nature of a reservation or of an interpretative declaration", and suggested "that a new provision should be inserted ... in order to overcome this difficulty".[493] However, the suggestion of Japan did nothing more than call for the addition of a paragraph to draft article 18 (subsequently article 19):

> A reservation, in order to qualify as such under the provisions of the present articles, must be formulated in writing, and expressly stated as a reservation.[494]

347. Here again, the definition of interpretative declarations was not a "positive" one, and the proposed addition had more to do with the legal regime of reservations than with their definition. Moreover, this proposal was incompatible with the definition of reservations that was ultimately selected, which rejected nominalism entirely.

348. Curiously, very few authors have hazarded any doctrinal definitions of interpretative declarations since the adoption of the 1969 Vienna Convention.

349. Horn considers that "[a]n interpretative declaration is an interpretation, which is distinguished from other interpretations by its form and by the moment it is presented".[495] However, while this author devotes a long chapter to an attempt at "clarifying the concept of interpretative declaration",[496] he does not propose any definition in the true sense of the word. What is more, his underlying assumptions would seem debatable: from the foregoing, it appears that neither the form of these declarations nor the moment at which they are formulated can characterize them or distinguish them from reservations.

350. The definition of the term "understanding" given by Whiteman[497] is more directly usable in that she considers interpretative declarations both as they relate to reservations (an understanding "is not intended to modify or limit any of the provisions of the treaty" and, positively, "is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than as a substantive reservation". As for the terms "declaration" and "statement", they "are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or

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[488] The Special Rapporteur agrees that the phrase in square brackets goes beyond the strict framework of definitions which are the subject of this report; however, he feels that this information may be useful in justifying the emphasis placed on this distinction.

[489] See paragraphs 63–65 above.

[490] See footnote 66 above.

[491] *Yearbook ... 1962*, vol. II, document A/CN.4/144, pp. 31–32.

[492] See paragraphs 59 et seq. above. The commentary on draft article 2, paragraph 1 (*d*), however, stipulates that a declaration that is merely a "clarification of the State's position" does not "amount to a reservation" (*Yearbook ... 1966*, vol. II, p. 190).

[493] *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, pp. 46–47.

[494] Comments transmitted in a note verbale dated 4 February 1964 (A/CN.4/175), p. 78; see also pages 70–71.

[495] Horn, op. cit., p. 237.

[496] Ibid., chap. 25, pp. 236–277.

[497] See footnote 383 above.

obligations stipulated in the treaty".[498] Although there is no need to distinguish between these three terms, which, generally speaking, have no equivalent in languages other than English,[499] these definitions have the merit of highlighting certain indisputable characteristics of interpretative declarations:

(*a*) They seek to clarify or explain, not to modify or exclude;

(*b*) These clarifications or explanations are placed on record.

351. Finally, in his recent book on interpretative declarations, Sapienza bases himself on the following definition of interpretative declarations: they are the

> unilateral declarations through which States, at the moment they express their commitment to be bound by the provisions of a multilateral treaty (and occasionally even at the time of signature, although that does not constitute a true expression of obligation, strictly speaking), clarify, to a certain extent, their point of view with regard to the interpretation of a provision of the treaty itself or to associated problems or to the application of the treaty.[500]

352. Despite the excessive shades of meaning and ambiguity that surround some definitions (and the Special Rapporteur's disagreement insofar as the moment of the formulation of interpretative declarations is concerned), this one combines, in broad outline, the conclusions reached through the most systematic comparison possible of interpretative declarations with reservations.

353. It seems clear to the Special Rapporteur from the foregoing that, like a reservation, an interpretative declaration:

(*a*) Is a unilateral declaration made by a State or an international organization;

(*b*) However phrased or named, but which is distinguished by the fact that, if it is not conditional,[501] it can be formulated at any time; and

(*c*) Purports not to exclude or modify the legal effect of certain provisions of the treaty (or the treaty in its entirety[502]) in its application to that State or that international organization, but to clarify the meaning or scope attributed by the declarant to those provisions.

354. These are the elements that the Special Rapporteur believes ought to be included in the definition of interpretative declarations in the Guide to Practice:

"*1.2 'Interpretative declaration' means a unilateral declaration, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions.*"

355. It goes without saying that, here again, this definition in no way prejudges the validity or the effect of such declarations. Moreover, this definition has, in the eyes of the Special Rapporteur, the dual advantage of making it possible to distinguish clearly between reservations and interpretative declarations, while being sufficiently general to encompass different categories of interpretative declarations; in particular, it encompasses both conditional and mere interpretative declarations, the distinction between which is covered in draft guideline 1.2.4.

b. The distinction between interpretative declarations and other unilateral declarations made in respect of a treaty

356. Another advantage of the proposed definition lies in the fact that it also makes it possible to distinguish between interpretative declarations and other unilateral declarations formulated by a State or an international organization, possibly at the time of the declarant's expression of consent to be bound by the treaty, but which are neither interpretative declarations nor reservations and most likely have little to do with the law of treaties.

357. The extreme diversity of unilateral declarations made by a State "concerning" a treaty has already been stressed in this report: some of them are reservations in the sense of the Vienna definition as draft guidelines 1.1.1 to 1.1.8 of the Guide to Practice endeavour to reflect it, while others are in fact intended to clarify the meaning or scope of the treaty in question and merit the name "*interpretative* declarations"; still others, however, lack any clear character and cannot be placed in either of the above categories.

358. Some of these atypical declarations have already been considered above. Examples include:

(*a*) A unilateral declaration that is used by its author to make commitments that go beyond the obligations imposed by the treaty in respect of which the declaration is made;[503]

(*b*) A declaration that can be construed as an offer to add a new provision to the treaty;[504]

(*c*) A "declaration of non-recognition", when the declaring State does not intend to prevent application of the treaty in its relations with the unrecognized entity.[505]

359. However, this list is far from being exhaustive: the signing of a treaty by a State or an international organization or the expression of its consent to be bound can be, and frequently is, the occasion for declarations of all sorts that do not seek to exclude or modify the legal effect of the provisions of the treaty or to interpret them.

360. This is the case when a State expresses, in one of these situations, its opinion, positive or negative, with regard to the treaty, and even sets forth improvements that it feels ought to be made as well as ways of making them.

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[498] Whiteman, op. cit., pp. 137–138.

[499] See footnotes 382–383 above.

[500] Sapienza, op. cit., p. 1.

[501] With regard to this (important) exception, see draft guideline 1.2.4 above (para. 339).

[502] Regarding this point, see draft guideline 1.1.4 above (para. 155).

[503] See paragraphs 207–211 above and draft guideline 1.1.5 (para. 212).

[504] See paragraphs 219–221 above and draft guideline 1.1.6 *in fine* (para. 222).

[505] See paragraphs 164–177 and, *a contrario*, draft guideline 1.1.7 (para. 177).

Declarations by several States regarding the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects afford some notable examples:

(*a*) 1. The Government of the People's Republic of China has decided to sign the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects adopted at the United Nations Conference held in Geneva on 10 October 1980.

2. The Government of the People's Republic of China deems that the basic spirit of the Convention reflects the reasonable demand and good intention of numerous countries and peoples of the world regarding prohibitions or restrictions on the use of certain conventional weapons which are excessively injurious or have indiscriminate effects. This basic spirit conforms to China's consistent position and serves the interest of opposing aggression and maintaining peace.

3. However, it should be pointed out that the Convention fails to provide for supervision or verification of any violation of its clauses, thus weakening its binding force. The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices fails to lay down strict restrictions on the use of such weapons by the aggressor on the territory of his victim and to provide adequately for the right of a state victim of an aggression to defend itself by all necessary means. The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons does not stipulate restrictions on the use of such weapons against combat personnel. Furthermore, the Chinese texts of the Convention and Protocol are not accurate or satisfactory enough. It is the hope of the Chinese Government that these inadequacies can be remedied in due course;[506]

(*b*) After signing the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be excessively Injurious or to Have Indiscriminate Effects, the French Government, as it has already had occasion to state

—through its representative to the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons in Geneva, during the discussion of the proposal concerning verification arrangements submitted by the delegation of the Federal Republic of Germany and of which the French Government became a sponsor, and at the final meeting on 10 October 1980;

—on 20 November 1980 through the representative of the Netherlands, speaking on behalf of the nine States members of the European Community in the First Committee of the thirty-fifth session of the United Nations General Assembly;

Regrets that thus far it has not been possible for the States which participated in the negotiation of the Convention to reach agreement on the provisions concerning the verification of facts which might be alleged and which might constitute violations of the undertakings subscribed to.

It therefore reserves the right to submit, possibly in association with other States, proposals aimed at filling that gap at the first conference to be held pursuant to article 8 of the Convention and to utilize, as appropriate, procedures that would make it possible to bring before the international community facts and information which, if verified, could constitute violations of the provisions of the Convention and the Protocols annexed thereto.[507]

361. These are simple observations regarding the treaty which reaffirm or supplement some of the positions taken during its negotiation, but which have no effect on its application.[508]

362. This is also the case when a State makes a declaration in which it calls on all or some other States to become parties to a treaty[509] or to implement it effectively.[510]

363. The same is true when a State takes the opportunity afforded by its signature of a treaty or its expression of consent to be bound by it to recall certain aspects of its policy with regard to the subject area of the treaty, as China did when it signed the Comprehensive Nuclear-Test-Ban Treaty:

1. China has all along stood for the complete prohibition and thorough destruction of nuclear weapons and the realization of a nuclear-weapon-free world.[511]

Similarly, when it became a party to the Convention on the Rights of the Child, the Holy See (among others) made the following declaration:

By acceding to the Convention on the Rights of the Child, the Holy See intends to give renewed expression to its constant concern for the well-being of children and families.[512]

364. In the same spirit, Migliorino notes that some declarations made in the instruments of ratification of the 1971 Seabed Treaty, notably those of Canada and India, concerning types of weapons other than nuclear weapons, do not purport to modify the rights and obligations ensuing from the Treaty or to interpret it; "Their main purpose is to avoid that the Treaty prejudice the position of States making the declaration with respect to certain issues of the law of the sea on which States have different positions and views."[513]

365. What these diverse declarations have in common is that the treaty in respect of which they are made is simply a pretext, and they bear no legal relationship to it: they could have been made under any circumstances, they

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[506] United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. XXVI.2, p. 883; see also the declarations made by the United States (ibid., p. 886) and Romania (ibid., p. 885).

[507] Ibid., pp. 883–884; see also the declaration made by Italy (ibid., pp. 884–885).

[508] See also, for example, the long declaration made by the Holy See in 1985 when ratifying the two 1977 Protocols Additional to the Geneva Conventions of 12 August 1949, United Nations, *Treaty Series*, vol. 1419, pp. 394–396 (text also attached to the reply from the Holy See to the questionnaire on reservations to treaties).

[509] See the declaration by the United States concerning the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects: "The United States Government welcomes the adoption of this Convention, and hopes that all States will give the most serious consideration to ratification or accession" (United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. XXVI.2, p. 886), or the one by Japan concerning the Treaty on the Non-Proliferation of Nuclear Weapons: "The Government of Japan hopes that as many States as possible, whether possessing a nuclear explosive capability or not, will become parties to this Treaty in order to make it truly effective. In particular, it strongly hopes that the Republic of France and the People's Republic of China, which possess nuclear weapons but are not parties to this Treaty, will accede thereto" (ibid., *Treaty Series*, vol. 1035, pp. 342–343).

[510] See the declaration by China concerning the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction: "III. States Parties that have abandoned chemical weapons on the territories of other States parties should implement in earnest the relevant provisions of the Convention and undertake the obligation to destroy the abandoned chemical weapons" (United Nations, *Multilateral Treaties Deposited with the Secretary-General* …, chap. XXVI.3, p. 891).

[511] Ibid., chap. XXVI.4, p. 895.

[512] Ibid., chap. IV.11, p. 214; see also the aforementioned declaration by the Holy See (footnote 508) on the subject of the Protocols Additional to the Geneva Conventions of 12 August 1949: "Lastly, on this occasion the Holy See reaffirms its deep conviction regarding the fundamentally inhuman nature of war."

[513] Migliorino, loc. cit., p. 107; see also pages 115–119.

have no effect on its implementation, nor do they seek to do so.

366. They are thus neither reservations nor interpretative declarations. What is more, they are not even governed by the law of treaties, which in turn offers no help in assessing their validity (which is dependent on other rules of international law, both general and specialized) or in determining the legal regime applicable to them.

367. The Special Rapporteur believes that it would be useful to spell this out in order to avoid any confusion. That is the intention of the following draft guideline:

Guide to Practice:

"1.2.5 A unilateral statement made by a State or by an international organization whereby that State or that organization expresses its views on the treaty or on the subject area covered by the treaty without purporting to exclude or to modify the legal effect of its provisions, or to interpret it, constitutes neither a reservation nor an interpretative declaration [and is not subject to application of the law of treaties]."

368. A somewhat different situation from those described above concerns what one might call "informative declarations", whereby the formulating State informs its partners, for example, of the internal authorities that will be responsible for implementing the treaty.

369. Horn, who calls these "declarations of domestic relevance", provides a series of examples concerning United States practice, placing them in three categories: "Statements initiated by the Senate may authorize the President to issue more concrete instructions for the implementation of the treaty obligations on the internal level, or by means of agreements of a specific kind with the other parties, or they may let certain measures of implementation pend later authorization by Congress."[514]

370. Authorization to ratify the IAEA statute was given by the United States Senate,

> subject to the interpretation and understanding, which is hereby made a part and condition of the resolution of ratification, that (1) any amendment to the Statute shall be submitted to the Senate for its advice and consent, as in the case of the Statute itself, and (2) the United States will not remain a member of the Agency in the event of an amendment to the Statute being adopted to which the Senate by a formal vote shall refuse its advice and consent.[515]

371. This declaration was attached to the United States instrument of ratification (the State party called it an "interpretation and understanding"), with the following explanation:

> The Government of the United States of America considers that the above statement of interpretation and understanding pertains solely to United States constitutional procedures and is of a purely domestic character.[516]

372. Occasionally, however, the distinction between an "informative" declaration and an interpretative declaration may be unclear, as Sweden notes in its reply to the questionnaire on reservations:[517] "It should be noted that some of the declarations referred to include purely informative as well as interpretative elements. Only the latter are being dealt with here, although the distinction may sometimes be vague." By way of example, Sweden, explaining the reasons for the declaration attached to its instrument of ratification of the 1980 European Outline Convention on transfrontier co-operation between territorial communities or authorities, stated that the reason for the declaration was not only to provide information on Swedish authorities and bodies which would fall within the scope of the Convention, but also to convey that its application would be confined to those indicated; e.g. to exclude other bodies such as parishes which under Swedish law are local public entities.

373. Here it can probably be said that this is really a reservation by means of which the author seeks to exclude the application of the treaty to certain types of institution to which it might otherwise apply. At the very least, it might be a true interpretative declaration explaining how Sweden understands the treaty. But this is not the case with purely informative declarations, which, like those of the United States cited earlier,[518] cannot have any international effect and concern only relations between Congress and the President.

374. The problem arose in connection with a declaration of this type made by the United States in respect of the Treaty Relating to the Uses of the Waters of the Niagara River concluded with Canada.[519] The Senate would only authorize ratification through a "reservation" that specifically identified the competent national authorities for the United States side;[520] this reservation was transmitted to Canada, which accepted it, stating that it did so "because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada's rights or obligations under the Treaty".[521] Following an internal dispute, the District of Columbia Court of Appeal ruled, in a judgement dated 20 June 1957, that the "reservation" had not modified the treaty in any way, and that since it related only to the expression of purely domestic concerns, it did not constitute a true reservation in the sense of international law.[522] This reasoning is further upheld[523] by the fact that the declaration did not purport to produce any effect at the international level.

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[514] Horn, op. cit., p. 104.

[515] Text in Whiteman, op. cit., p. 191; see also (p. 192) the "interpretation and explanation" attached to the instrument of ratification of the Convention on the Organisation for Economic Co-operation and Development.

[516] Ibid., pp. 191–192.

[517] Reply to question 3.1.

[518] Paragraphs 369–371.

[519] Signed in Washington on 27 February 1950 (United Nations, *Treaty Series*, vol. 132, p. 223).

[520] This famous declaration is known as the "Niagara reservation"; see Henkin, "The treaty makers and the law makers: the Niagara reservation".

[521] Quoted by Whiteman, op. cit., p. 168.

[522] *Power Authority of the State of New York* v. *Federal Power Commission*, 247 F.2d 538–544 (D.C. Cir., 1957); for a fuller account of the case, see Whiteman, op. cit., pp. 166–169; Bishop Jr., loc. cit., pp. 317–322; and Horn, op. cit., pp. 105–106.

[523] The fact that the "Niagara reservation" was formulated in the context of a bilateral treaty does not weaken this reasoning; quite the contrary: while a "reservation" to a bilateral treaty can be viewed as an offer to renegotiate (see chapter II below), which, in this case, Canada

(*Continued on next page.*)

375. For the same reasons it would be difficult to call this declaration an "interpretative declaration": it does not interpret one or more of the provisions of the treaty but is directed only at the internal modalities of its implementation. It can also be seen from United States practice that "informative declarations" are not systematically attached to the instrument by which the country expresses its consent to be bound by a treaty;[524] this clearly demonstrates that they are exclusively domestic in scope.

376. Accordingly, it would seem valid to say that "informative" declarations, which simply give indications of the manner in which the State or international organization plans to implement the treaty at the internal level, are not interpretative declarations, even though, unlike the declarations mentioned above,[525] they are directly linked to the treaty.

377. For this reason, it appears that they ought to be covered by a separate provision of the Guide to Practice:

"*1.2.6 A unilateral declaration formulated by a State or an international organization in which the State or international organization indicates the manner in which it intends to discharge its obligations at the internal level but which does not affect the rights and obligations of the other contracting parties is neither a reservation nor an interpretative declaration*."

3. Putting the distinction into action

378. It is apparent from the foregoing that interpretative declarations are distinguished from reservations principally by the objective which the State or international organization sets when making them: by formulating a reservation, the authors seek to exclude or modify the legal effect of some of the provisions of a treaty (or the treaty in its entirety) as they apply to them; by making an interpretative declaration, they seek to clarify the meaning and the scope they attribute to the treaty or to certain of its provisions.

379. As to the equally important distinction between mere interpretative declarations and conditional interpretative declarations, it, too, is based on the declarant's intentions: in both cases, the author seeks to interpret the treaty, but in the first, the interpretation in question is not made a condition for participation in the treaty, whereas in the second, it is inseparable from the expression of the declarant's consent to be bound.

380. These distinctions are fairly clear as to their principle, yet they are not easily put into practice, particularly since States and international organizations seldom explain their intentions, even taking pains at times to disguise them, and since the terminology used does not constitute an adequate criterion for distinguishing them. The objective of this section is to provide some information regarding the substantive rules[526] that should be applied in order to distinguish between reservations and interpretative declarations and, within the latter category, between mere interpretative declarations and conditional interpretative declarations.

(a) *Stating the problem—the "double test"*

381. It has been written that, "[i]n the relations of men and nations it always seems rational to look at the substance rather than the form in appraising communications. But, a substance test throws a burden on those at the receiving end (or tribunals that may decide disputes) to recognize a statement for what it is rather than for what it is titled".[527]

382. It is necessary first of all to agree on the nature of this "material test". In fact, it is a double test, one that is both subjective (what did the declarant *want* to say?) and objective (what did he *do*?)

383. Notwithstanding what has occasionally been written, these two questions are alternatives: the first helps determine whether an interpretative declaration is conditional or not, and the second distinguishes interpretative declarations from reservations.

384. In reality, the second question tends to overshadow the first insofar as the distinction between reservations and interpretative declarations is concerned. While article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions defines the term "reservation" as a unilateral declaration by means of which a State or an international organization "*purports** to exclude or to modify the legal effect of certain provisions of the treaty", the actual criterion has its basis in the effective result of the declaration: if implementing of the declaration results in a modification or exclusion of the legal effect of the treaty or certain of its provisions (as would happen if the rules of the law of treaties were applied normally in the absence of a declaration), then the statement is a reservation, "however phrased or named"; if the declaration simply clarifies the meaning or scope that its author attributes to the treaty or to certain of its provisions, it is an interpretative declaration. If it does none of this, then it is a unilateral declaration that is made "in connection with the treaty" but has no connection to the law of treaties nor, in the view of the Special Rapporteur, to the topic under consideration.[528]

385. There exist in jurisprudence some formulas which imply that the objective test should be combined with the subjective test in order to determine whether a text is a reservation or an interpretative declaration. For example, in the *Belilos* v. *Switzerland* case, "[l]ike the Commission and the Government, the Court recognises that it is necessary to ascertain *the original intention** of those

(*Footnote 523 continued.*)
accepted, it is quite significant that the Court of Appeals held that it had no international scope. It would in fact be difficult to see how Canada could have "objected" to a declaration that did not concern it.

[524] See Miller, op. cit., pp. 170–171; and Whiteman, op. cit., pp. 186 et seq.

[525] Paragraphs 362–369.

[526] The rules of procedure concerning the formulation of reservations, interpretative declarations, acceptances and objections will be the subject of a detailed study and draft guidelines in the Special Rapporteur's next report.

[527] Edwards Jr., loc. cit., pp. 368–369; see also Greig, loc. cit. (para. 290 above).

[528] See in particular draft guidelines 1.1.5, 1.2.5 and 1.2.6 (paras. 212, 367 and 377 respectively).

who drafted the declaration".[529] Likewise, in the *English Channel* case, the Franco-British Court of Arbitration held that, in order to determine the nature of the reservations and declarations made by France regarding the Convention on the Continental Shelf, "[t]he question [was] one of *the respective intentions** of the French Republic and the United Kingdom in regard to their legal relations under the Convention ...".[530]

386. The problem is poorly stated: certainly, the declarant's intention is important (does he seek to exclude or to modify the legal effect of the provisions of the treaty?). But to answer this question, it is necessary, and sufficient, to note what the consequence of implementing the declaration would be. The two tests thus overlap, and the answer to the second question makes it possible to answer the first at the same time. This was in fact the reasoning followed both by the European Court of Human Rights and the Court of Arbitration in the *English Channel* case.

387. Some authors think it useful to complicate the first problem further by pointing out that if a State has given, when expressing its consent to be bound, an interpretation that subsequently proves to be erroneous because it is rejected by a judge or arbitrator or body competent to issue an authoritative interpretation, the nature of the interpretative declaration is retroactively modified: "The statement's nature as a reservation is established at the same time the propagated interpretation is established as the incorrect one."[531]

388. To the Special Rapporteur, this is just another artificial complication: it is true that if an authentic or authoritative interpretation comes to light after the declarant has put forward his own interpretation, that interpretation is called into question, but this in no way modifies the *nature* of the original unilateral interpretation: it stands. The interpretation is revealed to be erroneous, and the question arises as to what *effects* it then has. The problem of definition is solved, to be replaced by the problem of the regime of mere or conditional interpretative declarations.[532]

389. On the other hand, the answer to the first question (what was the declarant's intention?) is crucial in distinguishing conditional interpretative declarations from mere interpretative declarations. In other words, does the interpretation put forward by the State or international organization constitute a condition for its participation in the treaty or not? If not, the declaration is a mere interpretative declaration; if so, it is a conditional interpretative declaration.

390. Thus there is not really any "double test", but rather a succession of questions. Faced with a unilateral declaration by a State or an international organization on the subject of a treaty, the following questions must be asked in succession: does the declaration have the effect of excluding or modifying the legal effect of the provisions of a treaty? If the answer to this (objective) question is affirmative, there is no need to go any further: the declaration is a reservation; it is only when the answer is negative and the effect of the declaration is in fact only a clarification of the meaning or scope of the treaty that a second (subjective) question needs to be asked: does the proposed interpretation constitute, for the declarant, a condition of his participation in the treaty?

391. The Special Rapporteur does not think it necessary to devote a specific guideline in the Guide to Practice to setting out the manner in which the problem is stated. This would seem to him to be sufficiently evident from the definition of reservations and interpretative declarations on the one hand and that of conditional interpretative declarations on the other. Nevertheless, should the Commission decide otherwise, "cautionary" guidelines drafted as follows might be contemplated:

[*Guide to Practice:*

"1.3.0 The classification of a unilateral declaration as a reservation depends solely on the determination as to whether it purports to exclude or to modify the legal effect of the provisions of the treaty in their application to the State or international organization that formulated it.

"1.3.0 bis *The classification of a unilateral declaration as an interpretative declaration depends solely on the determination as to whether it purports to clarify the meaning or the scope that the declarant attributes to the treaty or to certain of its provisions*.

"1.3.0 ter *The classification of an interpretative declaration as a conditional interpretative declaration depends solely on the determination as to whether the declarant intended to subordinate its consent to be bound by the treaty to the interpretation that is the subject of the declaration."*]

(b) *The prescribed methodology*

392. Admittedly, the problem at hand and the test to solve it have no effect on the methodology used. In all cases, a unilateral declaration should be interpreted in terms of the circumstances of the situation; "[e]ach case must be considered on its own merits",[533] starting with the principle of the indifference of nominalism raised by the Vienna definition.

393. However, as established above, to make these determinations, there are valid reasons for preferring certain methods or indications of interpretation:

(*a*) As stipulated in draft guideline 1.2.2, the phrasing or name used by the declarant gives an indication of his intention which cannot be overlooked;

(*b*) This is particularly true when the State or international organization makes several separate declarations and takes care to title them differently (draft guideline 1.2.2);

[529] European Court of Human Rights (see footnote 160 above), p. 23, para. 48.

[530] Decision of 30 June 1977 (see footnote 159 above), p. 28, para. 30.

[531] Horn, op. cit., p. 326.

[532] See also paragraph 324 above.

[533] Memorandum issued in 1950 by the United States Department of State to the Department of Labor, quoted by Bishop Jr., loc. cit., p. 304; see also Jennings and Watts, op. cit., p. 1242: "Whether these [statements] constitute reservations is a question which can only be answered on the merits of each particular instance."

(*c*) Or, when called upon to explain his position further, the declarant clarifies his intention;[534] and

(*d*) Bearing in mind the general presumption that States will behave in conformity with international law,[535] the State (or international organization) must, as stipulated in draft guideline 1.2.3, be assumed to have intended to make an interpretative declaration and not a reservation if the treaty in respect of which the declaration is made prohibits reservations.

394. Nevertheless, there are often cases in which these indications are absent, since States and international organizations often do not give names to the unilateral declarations they formulate and the treaty may not contain a reservations clause. In any case, none of these presumptions is indisputable.

395. These presumptions should then be confirmed, or their absence offset, by turning to the normal rules of interpretation in international law. "Discerning the real substance of the often complex statements made by States upon ratification of, or accession to, a multilateral treaty is a matter of construction and must be solved through the ordinary rules of interpretation."[536]

396. More precisely, there is justification for turning to the rules of interpretation of treaties. Whether the unilateral declarations are reservations or interpretative declarations, they are clearly legal instruments distinct from the treaty with which they are associated,[537] but unlike general policy declarations[538] or purely "informative" declarations,[539] they are inextricably linked with the treaty whose meaning they seek to interpret or of whose provisions they purport to exclude or modify the legal effect.

397. This was clearly highlighted by the Inter-American Court of Human Rights in its advisory opinion of 8 September 1983 concerning the death penalty:

> Reservations have the effect of excluding or modifying the provisions of a treaty and they become an integral part thereof as between the reserving State and any other States for whom they are in force. Therefore, ... it must be concluded that any meaningful interpretation of a treaty calls for an interpretation of any reservation made thereto. Reservations must of necessity therefore also be interpreted by reference to relevant principles of general international law and the special rules set out in the Convention itself.[540]

398. No doubt the Inter-American Court had in mind the rules applicable to the interpretation of reservations, but, *mutatis mutandis*, this reasoning can be applied to cases where the thing that is to be determined is not the meaning of a reservation but, backing up a step, the legal nature of a unilateral declaration linked to a treaty. In practice this is often how judges and arbitrators proceed when confronted with a problem of this type.

399. In all cases of which the Special Rapporteur is aware, the "general rule of interpretation" set out in article 31 of the 1969 Vienna Convention[541] has been implemented as a matter of priority; where necessary, this rule has been supplemented by recourse to the "supplementary means of interpretation" contemplated in article 32.[542] In its 1983 opinion, the Inter-American Court of Human Rights explained itself in the following terms:

> It follows that a reservation [but this holds true in general for any unilateral declaration that relates to the provisions of a treaty] must be interpreted by examining its text in accordance with the ordinary meaning which must be attributed to the terms in which it has been formulated within the general context of the treaty of which the reservation forms an integral part.[543] This approach must be followed except when the resultant interpretation would leave the meaning ambiguous or obscure or would lead to a result which is manifestly absurd or unreasonable. A contrary approach might ultimately lead to the conclusion that the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation relates, including even all such matters which the State might subsequently declare that it intended the reservation to cover.
>
> The latter result cannot be squared with the Vienna Convention, which provides that a reservation can be made only when signing, ratifying, accepting, approving or acceding to a treaty. (Vienna Convention, Art. 19.) Thus, without excluding the possibility that supplementary means of interpretation might, in exceptional circumstances, be resorted to, the interpretation of reservations must be guided by the primacy of the text. A different approach would make it extremely difficult for

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[534] See paragraphs 257 and 316–318 above.

[535] "There is well-established general principle of law that bad faith is not presumed" (*Lake Lanoux* case (France/Spain), award of 16 November 1957; original French text in UNRIAA, vol. XII (Sales No. 63.V.3), p. 305; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook … 1974*, vol. II (Part Two), document A/5409, pp. 194–199, paras. 1055–1068. See also Nguyen Quoc, Daillier and Pellet, op. cit., pp. 416–417; and Horn, op. cit., p. 326.

[536] Coccia, "Reservations to multilateral treaties on human rights", p. 10.

[537] See paragraphs 120–126 above.

[538] See draft guideline 1.2.5 (para. 367).

[539] See draft guideline 1.2.6 (para. 377).

[540] Advisory Opinion OC–3/83 (see footnote 165 above), p. 84, para. 62.

[541] Article 31:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> "(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> "(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> "3. There shall be taken into account, together with the context:
>
> "(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> "(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> "(*c*) any relevant rules of international law applicable in the relations between the parties.
>
> "4. A special meaning shall be given to a term if it is established that the parties so intended."

[542] Article 32:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> "(*a*) leaves the meaning ambiguous or obscure; or
>
> "(*b*) leads to a result which is manifestly absurd or unreasonable."

[543] The Special Rapporteur has some hesitation with regard to this wording: a reservation (or a declaration) is an integral part of the State's expression to be bound, but not, strictly speaking, of the treaty itself.

other States Parties to understand the precise meaning of the reservation.[544]

400. Even though doctrine has barely contemplated the problem from this standpoint,[545] jurisprudence is unanimous in considering that priority must be given to the actual text of the declaration:

(*a*) This condition [imposed by the third reservation of France to article 6 of the Convention on the Continental Shelf], *according to its terms*,* appears to go beyond mere interpretation; ... the Court ... accordingly, concludes that this "reservation" is to be considered a "reservation" rather than an "interpretative declaration";[546]

(*b*) In the instant case, the Commission will interpret the intention of the respondent Government by taking account both of *the actual terms of the above-mentioned interpretative declaration** and the travaux préparatoires which preceded Switzerland's ratification of the [European] Convention [on Human Rights].

The Commission considers that *the terms used*, *... taken by themselves*,* already show an intention by the Government to prevent ...

...

*In the light of the terms used** in Switzerland's interpretative declaration ... and the above-mentioned travaux préparatoires taken as a whole, the Commission accepts the respondent Government's submission that it intended to give this interpretative declaration the effect of a formal reservation";[547]

(*c*) "In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine *the substantive content***";[548]

(*d*) If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration. In the present case, the statement entered by the French Government upon accession to the [International] Covenant [on Civil and Political Rights] is clear: it seeks to exclude the application of article 27 to France and emphasizes this exclusion semantically with the words "is not applicable".[549]

401. Stranger still, bodies that have had to rule on problems of this type have, in order to bolster their arguments, at times "jumped" directly from the terms of the declaration to be interpreted to the *travaux préparatoires,* barely touching on its context (even though it is specifically mentioned in the general rule of interpretation in article 31 of the 1969 Vienna Convention, while recourse to the *travaux préparatoires* is only one of the "supplementary means of interpretation" discussed in article 32).

402. In the *Belilos* v. *Switzerland* case, the European Court of Human Rights, after admitting that "the wording of the original French text" of the Swiss declaration, "though not altogether clear, can be understood as constituting a reservation",[550] "[l]ike the Commission and the Government, ... recognises that it is necessary to ascertain the original intention of those who drafted the declaration" and, in order to do so, takes into account "the preparatory work done on the declaration",[551] as the Commission had done in the same case and in the *Temeltasch* case.[552]

403. It is true that this relatively intensive recourse to the preparatory work has been carried out by bodies established in connection with the European Convention on Human Rights; neither the Franco-British Court of Arbitration in the *English Channel* case[553] nor the Human Rights Committee in the case of *T. K.* v. *France*[554] makes the slightest mention of it.

404. Such caution is justified. As has been noted, "[s]ince a reservation is a unilateral act by the party making it, evidence from that party's internal sources regarding the preparation of the reservation is admissible to show its intention in making the reservation".[555] Still, in the everyday life of the law, it would appear difficult to recommend that *travaux préparatoires* be consulted regularly in order to determine the nature of a unilateral declaration relating to a treaty: they are not always made public,[556] and in any case it would be difficult to require foreign Governments to do so.

405. On the other hand, in view of these precedents, it would not be reasonable to exclude any recourse to the *travaux préparatoires.*

406. The balance between these contradictory considerations is, frankly speaking, adequately struck in articles 31 and 32 of the 1969 Vienna Convention, which give preference to the "general rule of interpretation" based on interpreting the treaty in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, without excluding, where necessary, recourse to "supplementary means of interpretation". In the view of the Special Rapporteur, these rules can and should be applied not only when interpreting reservations and interpretative declarations, but also when determining their nature.

Guide to Practice:

"1.3.1 To determine the legal nature of a unilateral declaration formulated by a State or an international organization in respect of a treaty, it is appropriate to apply the general rule of interpretation of treaties set out in article 31 of the Vienna Convention on the Law of Treaties.

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[544] Advisory Opinion OC–3/83 (see footnote 165 above), pp. 84–85, paras. 63–64.

[545] See, however, Horn, op. cit., pp. 263–272, and, for a clearer and more concise account, Greig, loc. cit., p. 26.

[546] Decision of 30 June 1977 (see footnote 159 above).

[547] *Temeltasch* case (see footnote 164 above), pp. 147–148, paras. 74–75 and 82.

[548] European Court of Human Rights (see footnote 160 above), p. 24, para. 49. In the same case, the Commission reached a different conclusion, also basing itself "both on the wording of the declaration and on the preparatory work" (ibid., p. 21, para. 41); the European Commission of Human Rights, more clearly than the Court, gave priority to the terms used in the Swiss declaration (ibid., annex, p. 38, para. 93); see the commentary by Cameron and Horn, loc. cit., pp. 71–74.

[549] Human Rights Committee (see footnote 426 above).

[550] European Court of Human Rights (see footnote 160 above), p. 22, para. 44.

[551] Ibid., p. 23, para. 48.

[552] Decision of 5 May 1982 (see footnote 164 above), pp. 147–148, paras. 76–80.

[553] See footnote 159 above.

[554] See footnote 426 above.

[555] Jennings and Watts, op. cit., p. 1242. The authors cite as proof the ICJ judgment in the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1978*, p. 3, in particular, p. 32).

[556] In the *Belilos* v. *Switzerland* case (footnote 160 above), the representative of the Swiss Government referred to the internal debates within the Government but took cover behind their confidential nature (see Cameron and Horn, loc. cit., p. 84).

Recourse may be had to the supplementary means of interpretation contemplated in article 32 of the Convention in order to confirm the determination made in accordance with the preceding paragraph, or to remove any remaining doubts or ambiguities."

4. Conclusion

407. The function of the draft guidelines proposed in this chapter must be appreciated for what it is: an effort to limit uncertainties by helping decision makers determine the nature of unilateral declarations they intend to formulate in respect of a treaty and, above all, characterize certain declarations made by other States or international organizations with a view to reacting to them appropriately.

408. One point must be stressed: it is only definitions that are at issue here, and this marks the dual limit of this exercise. First, they do not in any way prejudge the validity of the unilateral declarations they describe; and, secondly, these definitions are of necessity general frameworks, and it would be naive to hope that they are sufficient in themselves to eliminate any classification problems in the future.

409. The first point needs little explanation. Defining is not regulating. "*Énonciation des qualités essentielles d'un objet*"[557] (A statement of the essential qualities of an object), a definition has as its sole function the placing of an individual declaration in a general category. This classification, however, in no way prejudges the validity of the declarations it describes: a reservation may be permissible or impermissible, but it is still a reservation if it corresponds to the chosen definition, and the same holds true for interpretative declarations.

410. Going even further, it could be said that accurately determining the nature of a declaration is the indispensable prerequisite for the application of a particular legal regime, and precedes the determination of its permissibility. It is only after a particular instrument has been defined as a reservation that it can be decided whether or not it is permissible and to determine its legal scope, and the same is true for interpretative declarations.

411. In order to avoid any ambiguity, it might be useful to spell this out in the Guide to Practice:

"*1.4 Defining a unilateral declaration as a reservation or an interpretative declaration is without prejudice to its permissibility under the rules relating to reservations and interpretative declarations, whose implementation they condition*."

412. Regardless of how carefully reservations are defined and distinguished from interpretative declarations and other types of declaration made in respect of treaties, some uncertainty will always persist. It is inherent in any attempt at interpretation.

> While analyzing the definition of reservation one must bear in mind certain natural limits of the practical usefulness of all definitions and descriptions accepted in this regard. It must be remembered that neither the description contained in the Vienna Convention nor the definition itself, be it formulated with utmost care, can prevent difficulties that might appear in practice while evaluating the character of certain declarations. The difficulties have their source in the subjectivism of evaluations. The situation is made worse by the fact that such declarations are frequently formulated in a vague or even ambiguous manner. Such situations are especially probable in cases of interpretative declarations of all kinds.[558]

413. To counter this drawback, the only solution is not, obviously, to refine the definitions further but for States and international organizations to endeavour to "play fair" and formulate declarations whose content is clear, spelling out their nature with precision. One should not harbour too many illusions in this regard: while ambiguities may be unwitting in some cases, they are all too often deliberate and correspond to political objectives from which no guide to practice will ever be able to dissuade decision makers.

[557] *Grand Larousse encyclopédique*.

[558] Szafarz, loc. cit., p. 297.

Chapter II

"Reservations" and interpretative declarations in respect of bilateral treaties

414. Although it appears simple, the question of reservations to bilateral treaties is one of those that elicits the most questions and controversies, either because such reservations are considered impossible, are likely to create major problems, or because emphasis is placed on the special regime applicable to them.

415. Since the Special Rapporteur's first report[559] was considered in 1995, members of the Commission have taken somewhat divergent positions with regard to the importance, or even the existence, of reservations to bilateral treaties. While some members felt that such reservations were a particularly important aspect of the topic,[560] others felt that they could be summarized briefly, or even ignored altogether,[561] largely because they were not really

[559] See footnote 1 above.

[560] Mr. Lukashuk (*Yearbook … 1995*, vol. I, 2402nd meeting, pp. 159–160; *Yearbook … 1996*, vol. I, 2460th meeting, p. 200; and *Yearbook … 1997*, vol. I, 2487th meeting, p. 91); Mr. He (*Yearbook … 1997*, vol. I, 2500th meeting, p. 184); Mr. Brownlie (ibid., p. 187) and Mr. Goco (ibid., 2502th meeting, pp. 198–199); see also some of the positions taken by States in the Sixth Committee ("Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-second session" (A/CN.4/483), p. 12, paras. 90–93).

[561] Mr. Rosenstock (*Yearbook … 1995*, vol. I, 2401st meeting, pp. 153–154), Mr. Rao (ibid., p. 155), Mr. Ferrari Bravo (*Yearbook … 1997*, vol. I, 2500th meeting, pp. 184–185).

reservations[562] or because they were governed by a logic quite different from that underlying multilateral treaties.[563]

416. Although the Special Rapporteur has said that he leans more towards the second viewpoint, he has agreed to prepare a study without any preconceived notions on the subject.[564] That is the purpose of this chapter.

417. It does in fact seem appropriate to him to link the question of reservations to bilateral treaties with the question of the definition of reservations, since the principal point of disagreement concerns the determination of whether what some States and authors term "reservations" to bilateral treaties are in fact reservations. Accordingly, he will endeavour to answer this question by looking at the practice of States in this area and the way the question is dealt with by doctrine in the provisions of the 1969 and 1986 Vienna Conventions and their *travaux préparatoires*. This analysis will be supplemented by a look at the specific problems posed by the formulation of interpretative declarations in respect of bilateral treaties.

A. "Reservations" to bilateral treaties

418. A review of the text and the *travaux préparatoires* of the three Vienna Conventions of 1969, 1978 and 1986 in this area results in ambiguous conclusions insofar as the possibility of attaching "reservations" to bilateral treaties is concerned. However, with this study it is possible to formulate draft guidelines which the Special Rapporteur believes would, if adopted, resolve the persistent ambiguities in this area.

1. The difficulty in interpreting the silence of the Vienna Conventions on reservations to bilateral treaties

419. The 1969 and 1986 Vienna Conventions say nothing about interpretative declarations made in respect of bilateral treaties, which is logical, since they do not take up the question of interpretative declarations. What is more surprising is that they are equally silent on the subject of reservations to bilateral treaties: neither article 2, paragraph 1 (*d*), which defines reservations, nor articles 19 to 23, which set out their legal regime, raise or exclude the possibility of such reservations. Nowhere does the word "bilateral" appear.[565] And the 1978 Vienna Convention explicitly contemplates only reservations to multilateral treaties.

(a) *The 1969 Vienna Convention*

420. At best, it can be said that articles 20, paragraph 1, and 21, paragraph 2, are directed at "the other contracting States [and contracting organizations]" or "the other parties to the treaty",[566] both in the plural, and that article 20, paragraph 2, deals separately with treaties in whose negotiation a limited number of States or international organizations have participated, which is exactly what happens when a treaty involves only two parties. However, this argument does not in itself provide sufficient justification to say that the Vienna Conventions acknowledge the existence of reservations to bilateral treaties: the phrase "limited number of ... negotiating States" may mean "two or more States", but it can also he interpreted as indicating only those multilateral treaties that bind a small number of States.[567]

421. At first glance, the *travaux préparatoires* for this provision would seem to suggest that it does not concern bilateral treaties. While at the outset of its work on reservations the Commission was divided only with regard to reservations to multilateral treaties,[568] in 1956 Sir Gerald Fitzmaurice stressed, in his initial report, the particular features of the regime of reservations to treaties with limited participation, a category in which he expressly included bilateral agreements.[569] Likewise, in his first report, in 1962, Sir Humphrey Waldock did not exclude the case of reservations to bilateral treaties, but treated it separately.[570]

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[562] Mr. Tomuschat (*Yearbook … 1995*, vol. I, 2401st meeting, pp. 154–155) and Mr. Yamada (ibid., 2407th meeting, pp. 190–192). One member of the Sixth Committee also felt that "considering reservations to bilateral agreements would be equivalent to renegotiating those instruments" ("Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session" (A/CN.4/472/Add.l, p. 43, para. 168).

[563] Mr. de Saram (*Yearbook … 1995*, vol. I, 2404th meeting, p. 166) and Mr. Crawford (*Yearbook … 1997*, vol. I, 2500th meeting, p. 187).

[564] See statements made on 6 July 1995 (*Yearbook … 1995*, vol. I, 2412th meeting, pp. 222–223); 3 June 1997 (*Yearbook … 1997*, vol. I, 2487th meeting, pp. 87–90); and 27 June 1997 (ibid., 2501st meeting, p. 190).

[565] This is also a dominant feature of the two Vienna Conventions as a whole: the word "bilateral" appears only once, in article 60, paragraph 1, concerning the termination or suspension of the operation of a treaty as a consequence of its breach (this peculiar feature was noted by Mr. Crawford during the discussion in the Commission in 1997 on reservations to treaties (*Yearbook … 1997*, vol. I, 2500th meeting, p. 187)).

[566] See in this connection a remark by Mr. Calle y Calle during the preparation of the draft articles on treaties concluded between States and international organizations or between two or more international organizations (*Yearbook ... 1981*, vol. I, 1650th meeting, p. 43, para. 22).

[567] During the debate on this provision, Mr. Verdross said that "[t]he distinction between an ordinary *multilateral** treaty and a *multilateral** treaty concluded between a restricted group of states was not clear, since no numerical criterion was laid down by which to determine what constituted a 'restricted' group" (*Yearbook ... 1962*, vol. I, 663rd meeting, p. 226, para. 64); similarly: Mr. Tunkin (ibid., p. 227, para. 81, and 664th meeting, p. 232, para. 34).

[568] As early as its second session, in 1950, the Commission stated that "the application … in detail" of the principle that a reservation could become effective only with the consent of the parties "to the great variety of situations which may arise in the making of *multilateral** treaties was felt to require further consideration" (*Yearbook … 1950*, vol. II, document A/1316, p. 381, para. 164). The study requested of the Commission in General Assembly resolution 478 (V) of 16 November 1950 was supposed to (and did) focus exclusively on "the question of reservations to multilateral conventions".

[569] See draft article 38 (Reservations to bilateral treaties and other treaties with limited participation) which he proposed: "In the case of bilateral treaties, or plurilateral treaties made between a limited number of States for purposes specially interesting those States, no reservations may be made, unless the treaty in terms so permits, or all the other negotiating States expressly so agree" (*Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115).

[570] See draft article 18, paragraph 4 (*a*): "In the case of a bilateral treaty, the consent of the other negotiating State to the reservation shall automatically establish the reservation as a term of the treaty between the two States" (*Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 61).

422. However, this reference to bilateral treaties disappeared from the draft text after Sir Humphrey Waldock's proposals were considered by the Drafting Committee in the same year.[571] The summary records of the discussion do not explain why this happened, but the explanation is most likely given in the introductory paragraph to the commentary on draft articles 16 and 17 (future articles 19 and 20 of the 1969 Vienna Convention) contained in the Commission's 1962 report and included in its final report in 1966:

> A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement either adopting or rejecting the reservation the treaty will be concluded; if not, it will fall to the ground.[572]

423. In a case that clearly illustrates this, the United States suggested, in its observations on the draft adopted on first reading, that the relevant section should be entitled "Reservations to multilateral treaties", to which the Special Rapporteur replied:

> The articles [in this section] are directed to reservations to multilateral treaties, while the notion of a reservation to a bilateral treaty is legally somewhat meaningless. In law, a reservation to a bilateral treaty appears purely and simply as a counter-offer and, if it is not accepted, there can be no treaty. However, in order to remove the slightest possible risk of misunderstanding, it is proposed that the title to the section should explicitly confine its contents to reservations to *multilateral* treaties.[573]

While some members of the Commission expressed doubts,[574] the proposal was adopted by the Commission.[575]

424. Thus when it adopted the draft article (art. 17, para. 2) which was the source of current article 20, paragraph 2, the text was contained in part II, section 2, entitled "Reservations to *multilateral** treaties".[576] In fact, all that can be concluded from this is that, in the eyes of the Commission, the rules it had adopted were not applicable to reservations to bilateral treaties, and it was pointless to adopt any rules adapted to cover such reservations, since they posed no problem. And yet the Commission also seemed to be acknowledging that reservations could be made to bilateral treaties.

425. However, even this general, subtle conclusion is cast into doubt by the positions taken during the United Nations Conference on the Law of Treaties and the decision of that Conference to revert to the heading "Reservations" for part II, section 2, of the 1969 Vienna Convention.

426. To begin with, it will be noted that France and Tunisia had submitted a joint amendment which reintroduced an explicit reference to reservations to bilateral treaties and sought to stipulate, in article 17, paragraph 2 (subsequently article 20, paragraph 2, of the 1969 Vienna Convention), that

> A reservation to *a bilateral treaty** or to a restricted multilateral treaty requires acceptance by all the contracting States.[577]

Introducing this amendment, the representative of Tunisia said that the text as drafted by the Commission might lead erroneously to an excessively restrictive interpretation of the article "as allegedly covering only multilateral treaties, to the exclusion of bilateral treaties".[578] The amendment was sent to the Drafting Committee[579] and dropped by the sponsors.[580]

427. However, a proposal by Hungary to delete the reference to multilateral treaties from the title of the section on reservations[581] was sent by the Committee of the Whole to the Drafting Committee,[582] which adopted it[583] and whose decision was recorded at the plenary meeting on 29 April 1969, after Mr. Yasseen, Chairman of the Drafting Committee, explained that the Committee had endeavoured not to prejudge the issue of the possible wording of reservations to bilateral treaties:

> In the title of Section 2, the Drafting Committee had adopted an amendment by Hungary (A/CONF.39/C.1/L.137) to delete the words "to multilateral treaties" after the word "reservations", since the adjective "multilateral" did not modify the noun "treaty" in the definition of a reservation given in article 2, paragraph 1 (*d*); that did not, of course, prejudice the question of reservations to bilateral treaties.[584]

428. However, the day after this decision was taken, the question occasioned an interesting exchange of views between the President of the Conference, Mr. Roberto Ago, and the Chairman of the Drafting Committee:

> 19. The PRESIDENT said that, personally, he had been surprised to hear that the Drafting Committee had entertained the idea of reservations to bilateral treaties. As a law student, he had been taught that that idea was a contradiction in terms, for when one party to such a treaty proposed a change, that constituted a new proposal, not a reservation. He had interpreted the abbreviation of the title of Section 2 as an admission that the applicability of reservations only to multilateral treaties was self-evident. If there were any doubt on the matter, the Drafting

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[571] See draft article 18 *bis* proposed by the Drafting Committee (*Yearbook ... 1962*, vol. 1, 663rd meeting, p. 225, para. 61).

[572] *Yearbook ... 1962*, vol. II, document A/5209, pp. 180–181, and *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 203. In his first report, Sir Humphrey Waldock simply said: "Reservations to bilateral treaties present no problem" (*Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 62; but see paragraph 423 below).

[573] *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 45.

[574] See in particular the comments by Mr. Ruda, who said that he "preferred the title 'Reservations' because some of the provisions of the 1962 articles 18 to 22 ... could apply both to bilateral and to multilateral treaties" (*Yearbook ... 1965*, vol. I, 797th meeting, p. 154, para. 66).

[575] See *Yearbook ... 1965*, vol. II, document A/6009, p. 161.

[576] Ibid., and *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 202.

[577] *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* (footnote 91 above), report of the Committee of the Whole on its work at the second session of the Conference (A/CONF.39/15), p. 239, para. 53 (*b*).

[578] Ibid., *First session, Vienna, 26 March–24 May 1968* (footnote 92 above), 21st meeting, p. 111, para. 44.

[579] Ibid., 25th meeting, pp. 135–136, paras. 32 and 41.

[580] Ibid., *Second session,Vienna, 9 April–22 May 1969* (footnote 95 above), 84th meeting, p. 213, para. 3; France explained that decision by the fact that "it would be for the States concerned to include in their treaties provisions allowing for the special nature of restricted multilateral treaties", although no mention was made of bilateral treaties.

[581] Ibid., *First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969* (footnote 91 above), document A/CONF.39/C.1/L. 137; see also similar amendments submitted by China (A/CONF.39/C.1/L.13) and Chile (A/CONF.39/C.1/L.22).

[582] Ibid. (footnote 92 above), 20th meeting, p. 106, para. 56.

[583] Ibid., 28th meeting, p. 146, para. 2 (Drafting Committee's decision on the titles of parts, sections and articles of the Convention and statement by the Chairman of the Drafting Committee.

[584] Ibid., *Second session* (see footnote 95 above), 10th plenary meeting, p. 28, para. 23.

Committee would do well to revert to the title proposed by the International Law Commission.

20. Mr. YASSEEN, Chairman of the Drafting Committee, said that some members of the Drafting Committee had thought that the practice of certain States might convey the impression that reservations could be made to bilateral treaties. The deletion of the reference to multilateral treaties from the title of Section 2 did not, however, mean that the Drafting Committee had decided that reservations to bilateral treaties were possible. The purpose of the deletion had merely been not to prejudge the question in any way.

21. Speaking as the representative of Iraq, he said he fully shared the President's view that any change proposed to a bilateral treaty represented a new offer and could not be regarded as a reservation.

22. The PRESIDENT asked whether the Drafting Committee agreed that the procedures set out in the articles in Section 2 related only to multilateral treaties.

23. Mr. YASSEEN, Chairman of the Drafting Committee, said he was not in a position to confirm that statement on behalf of the entire Drafting Committee, which had not been unanimous on the point.

24. The PRESIDENT said that, independently of the principle involved, the procedures laid down in the articles on reservations that the Conference had considered were not applicable to bilateral treaties.[585]

429. Apparently, the Conference did not return to this question.

430. Commenting on this exchange of views, Ruda endorsed the statement by Mr. Ago: "This statement was not challenged and the Convention has no provisions regarding reservations to bilateral treaties."[586] Conversely, Szafarz believes that "[o]ne may conclude from the amendments tabled at the conference and discussion that: a) the above description [in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention] does not exclude the possibility of its application also to bilateral treaties".[587] Edwards Jr. is more circumspect: basing himself on practice and on the ambiguity of the *travaux préparatoires*, he maintains that the latter "actually leaves the matter ambiguous given the statement of the President of the Vienna Conference. Further examination of the *travaux* does not resolve the matter but instead suggests that action was taken at the Conference, without strenuous objection, but with differing views on whether there would be any impact on bilateral treaties".[588] This was, in fact, the relatively inconclusive conclusion to be drawn from the *travaux préparatoires*.

(b) *The 1986 Vienna Convention*

431. The question was hardly discussed during the preparation of the 1986 Vienna Convention. Right at the outset the Special Rapporteur, Mr. Reuter, said "treaties concluded by international organizations are almost always bilateral treaties, for which reservations may come into play in theory but are of no interest in practice".[589]

[585] Ibid., 11th plenary meeting, p. 37.

[586] Ruda, loc. cit., p. 110.

[587] Szafarz, loc. cit., p. 294.

[588] Edwards Jr., loc. cit., p. 404.

[589] *Yearbook ... 1975*, vol. II, document A/CN.4/285, p. 36; see also *Yearbook... 1975*, vol. I, 1348th meeting, p. 238, para. 40, and *Yearbook... 1981*, vol. I, 1648th meeting, p. 29, para. 28. Reuter took the same position in his book (op. cit., p. 78): "[W]hile they are technically possible in bilateral treaties, reservations in that case have no practical meaning nor any genuine function to fulfil since they in fact amount to reopening negotiations which have just ended."

432. Moreover, while the Commission had initially considered devoting specific provisions to reservations made to treaties concluded between several international organizations, it was thought that "the opportunity for an international organization to formulate a reservation, even at the stage of formal confirmation, would afford the States members of that organization useful safeguards with respect to undertakings signed too hastily".[590] On that occasion the Commission noted:

This remark carried so much weight that it was argued that the system of reservations established by article 19 should be extended to the case of treaties between two international organizations. That raised the question whether the mechanism of reservations can operate generally in the case of bilateral treaties. Although the text of the Vienna Convention does not formally preclude this possibility,[591] the Commission's commentaries of 1966 leave no doubt that it regarded reservations to bilateral treaties as going beyond the technical mechanism of reservations and leading to a proposal to reopen negotiations.[592] The Commission did not wish to start a debate on this question, although most of its members considered that the régime of reservations could not be extended to bilateral treaties without distorting the notion of a "reservation". Considered as a whole, however, the texts of draft articles 19 and 19 *bis* in fact relate to multilateral treaties.[593]

433. Ultimately, these articles were not retained in the final draft adopted by the Commission, which went back to the system used in the 1969 Vienna Convention.[594] It was this text which, with a slight modification, was adopted by the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations in 1986, and the question of reservations to bilateral treaties was apparently not taken up again.[595] The Commission thus reverted to the 1969 text (with the necessary additions to deal with the topic under consideration) and to the ambiguities which persist in that text.

(c) *The 1978 Vienna Convention*

434. It appears that the question of reservations to bilateral treaties in the case of a succession of States was not raised during the discussion in the Commission or at the United Nations Conference on Succession of States in Respect of Treaties of 1978. However, the 1978 Vienna Convention tends to confirm the general impression gathered from a review of the 1969 and 1986 Vienna Conven-

[590] *Yearbook ... 1977*, vol. II (Part Two), p. 106, para. (2) of the commentary to draft article 19.

[591] The commentary refers the reader to the statement by the Chairman of the Drafting Committee of the United Nations Conference on the Law of Treaties, cited in paragraph 427 above.

[592] The commentary refers the reader to the commentary made in 1966 (see footnote 572 above).

[593] *Yearbook … 1977*, vol. II (Part Two), p. 106, para. (3) of the commentary to draft article 19; the discussion referred to in the commentary took place at the 1649th–1651st meetings (*Yearbook ... 1981*, vol. I); see in particular the statements by Mr Ushakov, p. 38, Mr. Reuter, pp. 40 and 44, Sir Francis Vallat, p. 42, Messrs Riphagen, Calle y Calle, Tabibi and Njenga, pp. 42–43); see also the statement by the Chairman of the Drafting Committee, Mr. Díaz González (ibid., 1692nd meeting), pp. 262–263; *Yearbook ... 1981*, vol. II (Part Two), pp. 137–138, and *Yearbook ... 1982*, vol. II (Part Two), p. 34: "[I]t was pointed out that there had been examples in practice of reservations to bilateral treaties, that the question was the subject of dispute, and that the Vienna Convention was cautiously worded and took no stand on the matter."

[594] *Yearbook … 1982*, vol. II (Part Two), p. 34.

[595] See *Yearbook … 1995*, vol. II (Part One), document A/CN.4/470, pp. 139–140, paras. 87–88.

tions that the legal regime of reservations provided for in those Conventions (to which article 20, paragraph 3, of the 1978 Vienna Convention refers) is applicable solely to multilateral treaties and not to bilateral treaties.[596] Indeed, article 20, the only provision of that instrument to deal with reservations, is included in section 2 of part III,[597] which deals with multilateral treaties,[598] and expressly stipulates that it is applicable "[w]hen a newly independent State establishes its status as a party or as a contracting State to a *multilateral* treaty by a notification of succession".

435. Here again, however, the only conclusion that can be drawn is that the Vienna regime is not applicable to reservations to bilateral treaties, including in cases of succession of States. This does not mean, however, that the concept of "reservations" to bilateral treaties is inconceivable or non-existent.

2. The practice of States with regard to reservations to bilateral treaties

436. If, as the responses to the questionnaire on reservations to treaties indicate, international organizations do not appear to attach "reservations" to their signature or act of formal confirmation of bilateral treaties to which they are parties,[599] this is not the case with States, some of which do not hesitate to make unilateral statements which they call "reservations" in respect of bilateral treaties, while others claim to be opposed to them.

437. A review of State practice in the area of reservations to bilateral treaties is hardly more conclusive than a review of the provisions of the 1969, 1978 and 1986 Vienna Conventions in the light of their *travaux préparatoires*: such practice exists, but it is unclear whether it can be interpreted as confirming the existence of reservations to bilateral treaties as a specific institution. This is a practice which has been in existence for a long time and is geographically circumscribed.

438. The oldest example of a "reservation" to a bilateral treaty goes back to the resolution of 24 June 1795, in which the United States Senate authorized ratification of the "treaty of amity, commerce and navigation between the United States of America and Great Britain" (Jay Treaty) of 19 November 1794, "on condition that there be added to the said treaty an article, whereby it shall be agreed to suspend the operation of so much of the 12th article as respects the trade which his said majesty thereby consents may be carried on, between the United States and his islands in the West Indies, in the manner, and on the terms and conditions therein specified".[600] The Senate consequently asked the President to renegotiate the Treaty with the British Government, which accepted the amendment—a word which was actually in use at the time and which remained so for many years.[601]

439. The search for the partner State's consent is, moreover, a constant in United States practice in this area. As the Department of State noted in its instructions to the United States Ambassador in Madrid following Spain's refusal to accept an "amendment" to a 1904 extradition treaty which the Senate had adopted: "The action of the Senate consists in advising an amendment which, if accepted by the other party, is consented to in advance. In other words, the Senate advises that the President negotiate with the foreign government with a view to obtaining its acceptance of the advised amendment."[602] Such consent is usually given, but this is not always the case.

440. For example, Napoleon accepted a modification made by the United States Senate to the Convention of Peace, Commerce and Navigation of 1800 between France and the United States, but then attached his own condition to it, which the Senate accepted.[603] An even more complicated case concerns ratification of the Convention of Friendship, Commerce and Extradition between the United States and Switzerland of 25 November 1850, which was the subject of a request for amendments, first by the United States Senate, then by Switzerland, and then again by the Senate, all of which were adopted and the instruments of ratification, which had been amended three times, were exchanged five years after the date of signature.[604]

441. In other cases, the partner of the United States has refused the amendment requested by the Senate, and the treaty has not entered into force. For example, the United Kingdom rejected amendments to an 1803 convention concerning the border between Canada and the United States and an 1824 convention for suppression of the African slave trade which the United States Senate had requested.[605] Another famous rejection of the United States Senate's demands, again by the British Government, involves the treaty of 20 December 1900 dealing with the Panama Canal, which was consequently renegotiated and led to the signing of a new agreement, the Hay-Pauncefote Treaty of 18 November 1901.[606]

442. Despite these "failures", the practice of reservations by the United States to bilateral treaties is firmly established, and the United States often subordinates its ratification of a bilateral treaty to acceptance by the other party of the changes sought by the Senate.[607]

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[596] See on this subject the observations of Mr. Mikulka during the debate on the Special Rapporteur's first report (*Yearbook … 1995*, vol. I, 2406th meeting, pp. 186–188).

[597] Which concerns only "newly independent States".

[598] Chapter II deals with bilateral treaties.

[599] FAO, however, notes that, when presented with or presenting a "standard" agreement, amendments are sought and made as needed, rather than making reservations.

[600] Quoted by Bishop Jr., loc. cit, pp. 260–261; Bishop even cites a precedent that goes back to the Articles of Confederation: in 1778, the United States Congress demanded and obtained renegotiation of the Treaty of Commerce with France of 6 February 1778 (ibid., footnote 13).

[601] Ibid., p. 261. Concerning the terminology used in United States domestic practice, see also footnote 655 below.

[602] Quoted by Hackworth, op. cit., p. 115.

[603] Owen, "Reservations to multilateral treaties", pp. 1090–1091, and Bishop Jr., loc. cit., pp. 267–268.

[604] Bishop Jr., loc. cit., p. 269.

[605] Ibid., p. 266.

[606] Hackworth, op. cit., pp. 113–114.

[607] See the many examples cited by Hackworth, op. cit, pp. 112–130; Kennedy, "Conditional approval of treaties by the U.S. Senate", pp. 100–122; and Whiteman, op. cit., pp. 159–164.

443. In 1929, Owen estimated that somewhere between 66 and 87 bilateral treaties had been subject to a "reservation" by the United States after the Senate had imposed a condition on their ratification.[608] More recently, Kennedy compiled detailed statistics covering the period from 1795 to 1990. These data show that the United States Senate made its advice and consent to ratify conditional for 115 bilateral treaties during that period, a figure that includes interpretative declarations, which account for 15 per cent on average of all bilateral treaties to which the United States has become a party in just under two centuries.[609] The same statistics show that this practice of "amendments" or "reservations" involves all categories of agreement and is particularly frequent in the area of extradition, friendship, commerce and navigation treaties, and even peace treaties.[610]

444. In its response to the questionnaire on reservations, the United States confirmed that this practice remains important where the country's bilateral treaties are concerned. The United States attached to its response a list of 13 bilateral treaties that were accepted with reservations between 1975 and 1985.[611] Such was the case, for example, of the Panama Canal Treaties[612, 613] the Special Agreement under which Canada and the United States agreed to submit their dispute on the delimitation of maritime zones in the Gulf of Maine area to ICJ,[614] and the Supplementary Extradition Treaty between the United States of America and with the United Kingdom of 25 June 1985.[615]

445. It is striking to note, however, that only the United States gave an affirmative answer to question 1.4 of the questionnaire.[616] All other States that answered this question did so in the negative.[617] Some of them simply said that they did not formulate reservations to bilateral treaties, but others went on to provide some interesting details.

446. Spain, for example, said that it had not formulated any reservations to bilateral treaties, as no provision was made in Spanish law for that practice. This would seem to imply that Spain does not rule out this possibility in international law.

447. Germany proved to be more sceptical on this point, saying that it had not formulated reservations to bilateral treaties. It shared the commonly held view that a State seeking to attach a reservation to a bilateral treaty would in effect refuse acceptance of that treaty as drafted. That would constitute an offer for a differently formulated treaty incorporating the content of the reservation and would thus result in the reopening of negotiations. The replies from Italy and the United Kingdom were very similar.

448. However, the United Kingdom added that it did not itself seek to make reservations a condition of acceptance of a bilateral treaty. If Parliament were (exceptionally) to refuse to enact the legislation necessary to enable the United Kingdom to give effect to a bilateral treaty, the United Kingdom authorities would normally seek to renegotiate the treaty in an endeavour to overcome the difficulties.

449. The fact remains that the response to the questionnaire was far from universal, and examples of "reservations" to bilateral treaties from States other than the United States can in fact be found. These include, first of all, the counter-proposals made by some States in response to the reservations of the United States; early examples have been cited above,[618] and there are others. Japan, for example, did not agree to ratification of the Treaty of Friendship, Commerce and Navigation of 2 April 1953 with the United States except by means of a "reciprocal" reservation.[619] Sometimes the initiative seems to have been taken first by the partner country of the United States. Owen cites the example of an 1857 treaty with New Granada [Colombia], which proposed "modifications" that were accepted by the United States.[620] Similarly, Portugal, Costa Rica and Romania expressed their desire that extradition treaties concluded with the United States in 1908, 1922 and 1924 respectively should not be applicable if the person to be extradited would be subject to the death penalty in the United States; the United States accepted this condition.[621] In 1926 El Salvador ratified a commercial treaty with the United States subject to a number of reservations, most of which were withdrawn at the request of the latter; it nevertheless accepted two of them, which it considered minor. These are reflected in a protocol issued in connection with the exchange of ratifications, although they are described there as "understandings".[622]

450. It is interesting to note that this practice, even when not employed by the United States, is limited to relations with that country. Yet it is difficult to draw any firm conclusions from this observation. For one thing, the fact that the Special Rapporteur is unable to provide any examples other than the ones relating to the United States may be

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[608] Owen, loc. cit, p. 1091.

[609] Kennedy, loc. cit., p. 98.

[610] Ibid., pp. 99–103 and 112–116.

[611] The Special Rapporteur is not sure whether this means that the United States has not formulated any reservations to a bilateral treaty since 1985. Kennedy, who seems to have made a complete inventory in studying this practice (loc. cit.), offers no examples later than that date.

[612] The United States Senate resolution of 16 March 1976 stipulates that ratification of the second treaty is subject to two "amendments", two "conditions", four "reservations" and five "understandings".

[613] Treaty concerning the permanent neutrality and operation of the Panama Canal (with annexes) and Panama Canal Treaty (with annex, agreed minute, related letter, and reservations and understandings made by the United States (Washington, D.C., 7 September 1977), United Nations, *Treaty Series*, respectively vol. 1161, p. 177, and vol. 1280, p. 3. Concerning the ratification of these two treaties, see in particular Fischer, "Le canal de Panama: passé, présent, avenir", and Edwards Jr., loc. cit., pp. 378–381.

[614] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246.

[615] The United States Senate resolution of 17 July 1986 requesting these changes called them "amendments".

[616] The question read: "Has the State formulated reservations to bilateral treaties?" (*Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annex II).

[617] The following States answered in the negative: Bolivia, Canada, Chile, Croatia, Denmark, Finland, France, Germany, Holy See, India, Israel, Italy, Japan, Kuwait, Mexico, Monaco, Panama, Peru, Republic of Korea, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland.

[618] Paragraph 440 above.

[619] See Whiteman, op. cit, p. 161.

[620] Owen, loc. cit., p. 1093.

[621] Hackworth, op. cit., pp. 126–127 and 129–130.

[622] Ibid., pp. 127–128, and Bishop Jr., loc. cit., p. 269. For another example concerning a "reservation" rejected by the United States, see paragraph 454 below.

explained by the exceptional wealth of documentation pertaining to that country, whereas the practice may exist elsewhere and its existence go unknown for want of readily accessible publications or commentary. Conversely, it is quite striking that the constitutional justifications for this practice cited by the United States can be found elsewhere, and yet they have not led other States in similar constitutional situations to formulate reservations to their bilateral treaties.

451. In the United States, the Senate's power to make the President's ratification of both multilateral and bilateral treaties subject to certain reservations is generally deduced from article II, section 2, clause 2, of the Constitution, which stipulates: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur ..."[623] In truth, however, all democratic countries, whether theirs is a parliamentary, presidential or assembly form of government, appear to find themselves in this situation, and yet this does not lead them to formulate reservations to the bilateral treaties they conclude.

452. Imbert does not share this point of view, believing that a distinction should be made between parliamentary and presidential forms of government. In presidential regimes, he maintains, "as, for example, in the United States, the role of elected assemblies is obviously much more important. Indeed, the United States Senate is not only a legislative assembly. It is also an indispensable collaborator. When it reviews a treaty, it tends to act as an adviser to the Government: it considers the prospect of amending the treaty to be entirely natural".[624] This may explain the respective "state of mind" of parliamentary and executive authorities in each case, but in strictly legal terms, nothing prevents a parliament whose authorization is a requirement for ratification from conditioning such ratification by formulating a reservation.

453. The three most recent constitutions of the French Republic have made ratification of many categories of treaty by the President of the Republic subject to parliamentary authorization:[625] thus France finds itself, *mutatis mutandis*, in the same situation as the United States, and while France may formulate reservations to multilateral treaties at the request of its parliament,[626] it appears never to have done so in the case of bilateral treaties.

454. Nevertheless, the case of France reveals at least one instance in which a parliament has sought to make legislative authority to ratify subject to the formulation of a reservation. During the debate on the Washington Agreement of 29 April 1929 for the reimbursement of French debts to the United States (once again, the same country), the Finance Committee of the Chambre des députés proposed a text incorporating reservations into the authorization act (which would have compelled the President of the Republic to formulate them upon depositing the instrument of ratification). This project was abandoned at the request of the Minister for Foreign Affairs and the Minister of Finance for reasons of expediency[627] although not for legal reasons. It should also be noted that, given the parliament's hesitation in this case, the executive power took the initiative of requesting the inclusion of a safeguard clause making the repayment subject to payment of reparations by Germany. This was what the United States would have called a "reservation" in its own practice, and it refused to accept it.[628]

455. From this review, admittedly incomplete, the following conclusions may be drawn:

(*a*) With the exception of the United States, States seldom formulate reservations to bilateral treaties, although exceptions do exist (but these apparently occur only in the context of bilateral treaty relations with the United States);

(*b*) This practice, which may elicit constitutional objections in some countries, does not do so at the international level, if only because the States concluding treaties with the United States, having on occasion rejected reservations proposed by that country, have never raised any objections of principle and have even, in some cases, submitted their own "counter-reservations" of a similar nature.

3. The legal nature of "reservations" to bilateral treaties

456. It must nevertheless be questioned whether these "reservations" are true ones in other words, whether they correspond to the Vienna definition.[629] Once again, it is easiest to hold the different elements of that definition up to the practice of reservations to bilateral treaties. It will then be seen that, despite some obvious points in common with reservations to multilateral treaties, "reservations" to bilateral treaties are different in one key respect: their intended and their actual effects.

457. From practice, as described above, it appears that reservations to bilateral treaties are formulated unilaterally by States (and, a priori, nothing prevents an international organization from doing the same) once the negotiations have ended, and they bear different names that may reflect real differences in domestic law, but not in international law. From these different standpoints, they meet the first three criteria set out in the Vienna definition:

> 1.1 "Reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty ...
>
> (para. 512 below)

[623] See, for example, Henkin, loc. cit., p. 1176; Bishop Jr., loc. cit., pp. 268–269; and Whiteman, op. cit., p. 138.

[624] Imbert, op. cit., p. 395.

[625] Article 8 of the Constitutional Act of 16 July 1875, article 27 of the 1946 Constitution and article 53 of the 1958 Constitution; for commentary on this provision, see Pellet, "Article 53", pp. 1005–1058, especially pp. 1039–1042 and 1047–1051.

[626] See the examples given by Pellet, loc. cit., pp. 1041 and 1048, and Imbert, op. cit., pp. 394–395; in the latter case, the examples also cover Belgian and Italian practice. Imbert notes that in a parliamentary regime, assemblies "may authorize ratification by proposing reservations. However, this option is not exercised frequently, either because of practical difficulties (such as, for example, the need to reopen negotiations), or simply because it is regarded with much suspicion" (p. 394).

[627] Regarding this episode, see Kiss, *Répertoire de la pratique française en matière de droit international public*, pp. 284–285.

[628] Rousseau, *Droit international public*, pp. 122–123.

[629] See paragraph 81 above.

(a) *The moment when "reservations" to bilateral treaties are formulated*

458. Admittedly, this definition cannot be used as it stands: reservations to bilateral treaties are consistent with this first part of the Vienna definition, but some of the details contained in that definition have no logical application to them. This is particularly evident as regards the moment when a reservation to a bilateral treaty may be made.

459. In the first place, it is inconceivable that a reservation to a bilateral treaty be formulated at the time of signature. Of course, it may happen that the negotiator only places his signature at the bottom of the treaty "subject to" subsequent confirmation, and he may on that occasion indicate the points on which the State he represents has concerns. Technically speaking, however, this does not correspond to a reservation but to an institution apart from the law of treaties: that of signature *ad referendum*, by which the signatory accepts the text of a treaty only on condition that his signature be confirmed by the appropriate authority; if this is done, the treaty is considered to have been signed from the outset;[630] if it is not done, the treaty becomes void or is renegotiated.

460. Secondly, it goes without saying that it is impossible to accede to a bilateral treaty. Although the Vienna Conventions do not define it[631] accession may be considered to be the act by which a State or an international organization that has not participated in the negotiation of the treaty, or in any case signed its text, expresses its final consent to be bound. This is only conceivable in the case of multilateral treaties; bilateral treaties cannot be negotiated and signed by a single State!

461. Thirdly, and lastly, article 20 of the 1978 Vienna Convention does not contemplate the possibility of a newly independent State formulating a reservation when notifying a succession except in the case of multilateral treaties; however part III, section 3, of that Convention makes no such provision in the case of bilateral treaties.[632] This is normal, since the principle here is one of rupture: the treaty remains in force only if the two States expressly or implicitly so agree.[633] Thus it is highly questionable whether a newly independent State can formulate a "reservation" to a bilateral treaty on such an occasion: the unilateral statement that it might make to exclude or modify the legal effect of certain provisions of the treaty would have an effect only if the other party accepted it in other words, if the treaty was ultimately amended.

462. This last observation, however, does not apply to any "reservations" that a predecessor State may formulate upon notification of its succession. This is the fundamental character of all "reservations" to bilateral treaties, regardless of when they are formulated, and which distinguishes them from reservations to multilateral treaties as they are defined by the three Vienna Conventions.

(b) *"Reservations" to bilateral treaties do not purport "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to their author*

463. The definition of reservations set out in the Vienna Conventions was carefully weighed; each word is significant and, notwithstanding the criticisms that have been levelled at it, it appropriately describes the phenomenon of reservations, even if it leaves some uncertainties which the Guide to Practice seeks to dispel.

464. One of the fundamental elements of this definition is the teleological element, the objective pursued by the State or international organization making the reservation. By its unilateral statement, the author "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization" (art. 2 (*d*) of the 1986 Vienna Convention). This wording is not entirely applicable to reservations to bilateral treaties, or at least if it is, it is misleading, for it overlooks one of their principle characteristics.

465. There is no doubt that with a "reservation", one of the contracting parties to a bilateral treaty intends to modify the legal effect of the provisions of the original treaty. But while a reservation does not affect the provisions of the instrument in the case of a multilateral treaty, a "reservation" to a bilateral treaty seeks to modify it: if the reservation produces the effects sought by its author, it is not the "legal effect" of the provisions in question that will be modified or excluded "*in their application*"* to the author; it is the provisions themselves that will be modified. A reservation to a multilateral treaty has a subjective effect: if it is accepted, the legal effect of the provisions in question is modified vis-à-vis the State or the international organization that formulated it. A reservation to a bilateral treaty has an objective effect: if it is accepted by the other State, it is the treaty itself that is amended.

466. It is important to state this clearly: a reservation to a multilateral treaty produces effects only if it is accepted, in one way or another, expressly or implicitly, by at least one of the other contracting States or international organizations.[634] The same is true for a reservation to a bilateral treaty: the co-contracting State or international organization must accept the "reservation", or else the treaty will not enter into force. Thus the difference does not have to do with the need for acceptance, which is present in both cases, in order for the reservation to produce its effects, but with the consequences of acceptance:

(*a*) In the case of a multilateral treaty, an objection does not prevent the instrument from entering into force,[635] even, at times, between the objecting State or internation-

[630] See article 12, paragraph 2 (*b*), of the 1969 and 1986 Vienna Conventions.

[631] The "definition" set out in article 2, paragraph 1 (*b*), of the 1969 Vienna Convention and article 2, paragraph 1 (*b ter*), of the 1986 Vienna Convention is entirely tautological and useless.

[632] See paragraph 434 above.

[633] See articles 24 and 28.

[634] Article 20 of the 1969 and 1986 Vienna Conventions states that a reservation can have been accepted in advance by all the signatory States and be expressly authorized by the treaty (para. 1), or it can be expressly accepted (paras. 2–4), or it can be "considered to have been accepted" if no objection is raised within 12 months (para. 5).

[635] Subject to the separate question of determining whether an objection can have an effect on the number of States required for entry into force of the treaty; this problem will be considered in the report on the effects of reservations.

al organization and the author of the reservation,[636] and its provisions remain intact;

(*b*) In the case of a bilateral treaty, the absence of acceptance by the co-contracting State or international organization prevents the entry into force of the treaty; acceptance involves its modification.

(c) *"Reservations" to bilateral treaties are proposals to amend*

467. "Reservations" to bilateral treaties, then, do not produce an effect if they are not accepted, and it is hardly conceivable that this fundamental point not be mentioned in their definition: while a reservation to a multilateral treaty paralyses, to the extent indicated by its author, the treaty's legal effect, a reservation to a bilateral treaty is, in reality, nothing more than a proposal to amend the treaty or an offer to renegotiate it.

468. This analysis corresponds to the prevailing views in doctrine. Some authors have concluded that a reservation to a bilateral treaty is purely and simply inconceivable. According to Rousseau:

> *Bilateral treaties* ... are true synallagmatic conventions which impose specific obligations on the contracting parties and in which the signing by one of the parties is the natural complement to the signing by the other co-contractor.[637] Consequently, a ratification with reservations attached is inconceivable, since it can only be interpreted ... as a refusal to ratify accompanied by a new offer to negotiate. It has no value unless the other co-contractor expressly accepts it ....[638]

469. The need for acceptance of any "reservation" to a bilateral treaty is virtually unanimously endorsed in doctrine and consistent with the teachings of practice. Owen, after citing a great many examples of such reservations and the results thereof, concluded in 1929: "From these examples, it seems reasonably clear that neither party has doubted the right of the other to introduce reservations at the time of ratification: the only restriction upon this liberty is that the other signatory shall consent to such reservations".[639]

470. This is also consistent with the position taken back in 1919 by Miller, long an officer with the United States Department of State and Legal Adviser to the United States delegation to the 1919 Paris Peace Conference:

> One conclusion supported by *all* of the foregoing precedents is that the declaration, whether in the nature of an explanation, an understanding, an interpretation, or reservation of any kind, *must be agreed to by the other Party to the treaty*. In default of such acceptance, the treaty fails ...
>
> Accordingly, in a treaty between two Powers only, the difference between a reservation of any nature and an amendment, is purely one of form. In an agreement between two Powers there can be only *one* contract. The whole contract is to be sought in all the papers, and whether an explanation or interpretation or any other kind of a declaration relating to the terms of the treaty is found in the treaty as signed or in the instruments of ratification is wholly immaterial. There are only two contracting Parties and each has contracted only with the other and each has accepted an identic[al] instrument of ratification from the other, which together with the signed treaty constitute one agreement.[640]

471. This is also the view of Bishop Jr. (who quotes Miller):[641] "Bilateral treaties invited the analogy of ordinary bilateral contract doctrines of offer and acceptance, with a reservation being treated as a counter-offer which must be accepted by the other party if it were to be any contract between the parties."[642]

472. This idea of a "counter-offer"[643] does in fact highlight the contractual nature of the phenomenon of reservations to bilateral treaties: whereas reservations to multilateral treaties do not lend themselves to a contractual approach,[644] reservations to bilateral treaties demand such an approach. The "reservation" only has meaning, only produces an effect, only exists if the "counter-proposal" which it constitutes is accepted by the other State.[645]

473. Thus, as is clear from practice, a "reservation" to a bilateral treaty is actually a request to renegotiate the treaty.[646] If this request is refused, either the State that made the proposal abandons it and the treaty enters into force as signed, or else the treaty itself is simply abandoned. If, on the other hand, the other State agrees to the request, it can do so quite simply and the treaty enters into force with the modification desired by the State that formulated the proposal or it can in turn put forward a "counter-counter-proposal",[647] and the final text will be the one produced by the new negotiations between the two States.

474. There has been some question as to whether acceptance of the new offer constituted by the "reservation" must be express or may be tacit.[648] In practice, it seems that it is always express;[649] the United States in particular includes both its own reservations and their acceptance by the other State in its instruments of ratification.[650] This is also consistent with a theoretical requirement: acceptance of a "reservation" to a bilateral treaty ultimately leads in

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[636] See article 20, paragraph 4 (*b*), of the 1969 and 1986 Vienna Conventions.

[637] Scelle concedes that a bilateral treaty may have the character of a "treaty-law", which leads him to acknowledge the possibility of reservations to such treaties, although he excludes them in the case of "treaty-contracts" (op. cit., p. 474).

[638] Rousseau, *Droit international public*, p. 122; similarly, Maresca, op. cit., pp. 281–282.

[639] Owen, loc. cit., pp. 1093–1094.

[640] Miller, op. cit., pp. 76–77.

[641] Bishop Jr., loc. cit., p. 271, footnote 14.

[642] Ibid., p. 267. See also page 269.

[643] Owen (loc. cit., p. 1091) traces this idea of a "counter-offer" back to Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, para. 519. The expression also appears in *Restatement of the Law Third: The Foreign Relations Law of the United States* (footnote 154 above); see also the position of Mr. Ago and Mr. Yasseen (para. 428 above), and that of Reuter (footnote 589 above).

[644] See paragraphs 120–126 above.

[645] In support of this contractual analysis, apart from Bishop Jr. (footnote 641 above), see in particular Henkin, loc. cit., pp. 1164–1169, and Horn, op. cit., p. 23.

[646] This is in fact apparent from the Commission's commentary, cited in paragraph 422 above. See also footnote 563 above and the replies of Germany, Italy and the United Kingdom to the questionnaire on reservations to treaties, cited in paragraphs 447–448 above. See also Jennings and Watts, op. cit., p. 1242, and Sinclair, op. cit., p. 54.

[647] See paragraph 440 above.

[648] See Horn, op. cit., pp. 4 and 126.

[649] See Whiteman, op. cit., p. 138.

[650] See, however, the somewhat strange case cited by Owen (loc. cit., p. 1093) of the Treaty of Commerce between the United States and Germany of 19 March 1925, to which the United States Senate made "reservations" that were accepted by Germany "notwithstanding serious fundamental objections".

reality to amendment of the treaty; otherwise a State cannot be presumed to be bound by it.

475. Here, too, the problem is stated differently for reservations to multilateral treaties, which do not entail modification of the treaty; the treaty's application is simply "neutralized" in the relations between the author of the reservation and the party or parties that accept it. In the case of "reservations" to a bilateral treaty, the treaty itself is modified to the advantage of the author of the reservation and to the detriment of the other party. Here one does not go back to general international law or to international law "minus the treaty";[651] rather, new treaty obligations[652] are created. A treaty cannot be concluded implicitly, which means that the rules set out in paragraphs 2 and 5 of article 20 of the 1969 and 1986 Vienna Conventions cannot and must not be extended to bilateral treaties.

476. In fact, saying that acceptance of a "reservation" to a bilateral treaty is equivalent to amending the treaty does not make the reservation an amendment: it is simply a unilateral proposal to amend, prior to the treaty's entry into force, while the amendment itself is conventional in nature, is the result of an agreement between the parties[653] and is incorporated into the negotiated text, even if it can be contained in one or more separate instruments.

477. At the international level, the distinction between "reservations" and "amendments" in the domestic practice of the United States is devoid of meaning: regardless of the term used or of the fact that Congress imposes conditions under different names, they are always just offers to amend the treaty.

478. According to Edwards Jr.,"[r]eservations and treaty amendments are not the same things. An amendment may lessen or expand obligations under a treaty, while a reservation normally seeks to reduce the burdens imposed by a treaty on the reserving party".[654] While this may be the case domestically, it is certainly not the case at the international level: in both cases, the Senate makes its consent to modify the treaty conditional. The same holds true for all conditions it places thereon, with the exception of interpretative declarations, which raise problems that differ in some aspects.[655]

[651] See paragraph 219 above.

[652] See the draft article proposed by Sir Humphrey Waldock in 1962 (footnote 571 above).

[653] See article 39 of the 1969 and 1986 Vienna Conventions.

[654] Edwards Jr., loc. cit., p. 380.

[655] See paragraphs 483–510 below. Kennedy has identified 12 different categories of conditions set by the United States Senate for ratification of treaties (bilateral and multilateral), but notes that four of these account for 90 per cent of all cases: "understandings", "reservations", "amendments" and "declarations". However, the relative share of each varies over time, as the following table shows:

Type of condition	*1845–1895*	*1896–1945*	*1946–1990*
Amendments	36	22	3
Declarations	0	3	14
Reservations	1	17	44
Understandings	1	38	32

(Kennedy, loc. cit., p. 100)

479. As the Solicitor for the Department of State noted in a memorandum dated 18 April 1921:

> The action of the Senate when it undertakes to make so-called "reservations" to a treaty is evidently the same in effect as when it makes so-called "amendments", whenever such reservations and amendments in any substantial way affect the terms of the treaty. The so-called reservations which the Senate has been making from time to time are really not reservations as that term has generally been understood in international practice up to recent times.[656]

480. Thus, while this is not a conclusive argument, it is interesting to note that neither the United States members of the Commission during the preparation of the draft articles on the law of treaties, nor the United States delegates to the United Nations conferences which adopted the 1969, 1978 and 1986 Vienna Conventions stressed, or apparently even mentioned, "reservations" to bilateral treaties during the debate on reservations. This would seem to reflect their awareness that this institution, the permissibility of which under international law can hardly be contested,[657] was based on a different logic and could not be assimilated to what are called "reservations" in international law. These texts are in fact "conditional ratifications"; they also exist in respect of multilateral treaties,[658] which are governed by a legal regime that is very different from the regime of reservations in the sense of the Vienna Conventions.

481. This, then, is the conclusion which the Special Rapporteur proposes that the Commission draw from the foregoing analysis:

(*a*) It may happen that a State or an international organization formulates, after signing a bilateral treaty but prior to the treaty's entry into force, a unilateral statement by which it purports to obtain from the other contracting party a modification of the provisions of the treaty, to which it subordinates the expression of its consent to be bound;

(*b*) Whatever it is called, and even if it is called a "reservation", such a statement does not constitute a reservation in the sense of the Vienna Conventions or, more broadly, the law of treaties; it is thus not subject to the legal regime applicable to reservations to treaties;

(*c*) The statement constitutes an offer to renegotiate the treaty and, if this offer is accepted by the other party, it becomes an amendment to the treaty, whose new text is binding on both parties once they have expressed their final consent to be bound in accordance with the modalities stipulated in the law of treaties.

482. In this spirit, the Commission might wish to adopt the following draft guideline:

Guide to Practice:

"1.1.9 A unilateral statement formulated by a State or by an international organization after signing a bilateral treaty but prior to its entry into force, by which that State or that organization purports to obtain from the other

[656] Quoted by Hackworth, op. cit., p. 112; along the same lines, see the position of Miller (para. 470 above).

[657] See paragraph 455 above.

[658] See paragraph 164 above.

party a modification of the provisions of the treaty to which it subordinates the expression of its final consent to be bound by the treaty, does not constitute a reservation, however phrased or named.

"The express acceptance of the contents of this statement by the other party results in an amendment to the treaty whose new text is binding on both parties once they have expressed their final consent to be bound."

B. Interpretative declarations made in respect of bilateral treaties

483. The silence of the Vienna Conventions extends *a fortiori* to interpretative declarations made in respect of bilateral treaties: the Conventions do not mention interpretative declarations in general[659] and are quite cautious insofar as the rules applicable to bilateral treaties are concerned.[660]

484. In fact, such interpretative declarations do not pose any real problems vis-à-vis those made in respect of multilateral treaties, although it seems that they are invariably conditional.[661] This is the only outstanding feature that can be observed from a review of relatively extensive practice.

1. The practice of interpretative declarations made in respect of bilateral treaties

485. Apparently more recent than the practice of reservations to bilateral treaties, the practice of interpretative declarations to such treaties is less geographically limited and does not seem to give rise to objections where principles are concerned.

486. The oldest example cited by Kennedy, author of an exhaustive survey of conditional approvals of treaties (in general) by the United States Senate, dates back to the "understandings" which the United States set as a condition for its acceptance of the Treaty of Peace, Amity, Commerce and Navigation with Korea in 1883.[662] Earlier examples can be found: Bishop Jr. notes a declaration attached by Spain to its instrument of ratification of the Treaty of Friendship, Cession of the Floridas, and Boundaries, signed in Washington on 22 February 1819, by which it ceded Florida,[663] and Rousseau mentions "the approval [sic] by the [French] Parliament of the Franco-Tunisian Convention of 8 June 1878, voted with an interpretative reservation to article 2, paragraph 3, concerning the regulation of loans issued by Tunisia".[664]

487. The situation at present, as reflected in the replies to the questionnaires on reservations, is as follows:

(*a*) Of 22 States that answered question 3.3,[665] four said that they had formulated interpretative declarations in respect of bilateral treaties;

(*b*) One international organization, ILO, wrote that it had done so in one situation, while noting that the statement was in reality a corrigendum, made in order not to delay signature.[666]

488. These results may seem "meagre"; they are significant nevertheless:

(*a*) While only the United States claimed to make "reservations" to bilateral treaties,[667] it is joined here by Panama, Slovakia and the United Kingdom[668] and by one international organization;[669]

(*b*) While several States criticized the very principle of "reservations" to bilateral treaties,[670] none of them showed any hesitation concerning the formulation of interpretative declarations in respect of such treaties;

(*c*) Furthermore, the replies to the questionnaires, interesting though they might be, provide an incomplete picture of the situation: many States and international organizations, unfortunately, have not yet replied, and the information requested relates only to the past 20 years.

489. It thus appears that the practice of interpretative declarations to bilateral treaties is well established and fairly general. Here again, the United States is one of the "main sources" of the practice.[671] In just the period

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[659] See paragraphs 342–349 above.

[660] See footnote 565 above.

[661] See paragraphs 306–327 above and draft guideline 1.2.4 (para. 339 below).

[662] Kennedy, op. cit., p. 118.

[663] Bishop Jr., loc. cit., p. 316; and *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776–1909*, William M. Malloy, ed. (Washington, Government Printing Office, 1910), vol. II, p. 1651.

[664] Rousseau, *Droit international public*, p. 120.

[665] "Has the State attached any interpretative declarations to the expression of its consent to be bound by bilateral treaties?" (see footnote 616 above).

[666] See the letter from the ILO Director-General to the Minister of Public Service, Labour and Social Welfare of Zimbabwe which accompanied signature of the Agreement concerning the establishment of a sub-regional office at Harare, signed at Geneva on 8 February 1990 (United Nations, *Treaty Series*, vol. 1563, p. 267):

> "This letter is to confirm the following understandings of the International Labour Organization: that 'employed in the service of the Harare Office' [in article 4, paragraph (*e*), of the Agreement] is understood within the meaning of Article 4, paragraph 1, and that 'the right to transfer out of the Republic of Zimbabwe, without any restriction or limitation, provided that the officials concerned can show good cause for their lawful possession of such funds' means 'the right to transfer the same out of the Republic of Zimbabwe, without any restriction or limitation, provided that the officials concerned can show good cause for the lawful possession thereof;'.
>
> "The Office further understands the word 'telephone' in Article 9, paragraph 1 of the Agreement, to mean 'telecommunications'."

(Ibid., vol. 1762, p. 252)

[667] See paragraph 445 above.

[668] However, the example cited by the United Kingdom concerns its own interpretation of the understandings in the United States instrument of ratification of the Treaty concerning the Cayman Islands relating to mutual legal assistance in criminal matters, signed at Grand Cayman on 3 July 1986 (United Nations, *Treaty Series*, vol. 1648, p. 179); see paragraphs 489 and 494 below.

[669] In addition, Sweden said that it might have happened, although very rarely, that Sweden had made interpretative declarations, properly speaking, with regard to bilateral treaties, and that declarations of a purely informative nature of course existed.

[670] See paragraphs 447–448 above.

[671] See, however, the observation in paragraph 450 above concerning reservations to bilateral treaties, which is applicable to interpretative declarations.

covered by that country's response to the questionnaire (1975–1995), it mentions 28 bilateral treaties to which it attached interpretative declarations upon expressing its consent to be bound. These include:

(*a*) The two aforementioned treaties concerning the Panama Canal,[672] which, at the request of the United States Senate, were both made subject to "reservations" (called "amendments", "conditions" and "reservations") and interpretations ("understandings") that were included in the instruments of ratification together with an interpretative declaration by Panama;[673]

(*b*) The 1977 Agreement on the implementation of IAEA safeguards, which constitutes a bilateral treaty between a State and an international organization;[674]

(*c*) The 1980 and 1989 conventions on fiscal matters with the Federal Republic of Germany,[675] which gave rise, in the case of the former, to a "memorandum of understanding" followed by a request for explanations by Germany regarding the scope of the understanding to which the Senate had subordinated its consent and, in the case of the second, an exchange of interpretative notes, apparently originated by Germany;

(*d*) The 1985 Treaty on Mutual Legal Assistance in Criminal Matters with Canada, to which the United States attached an interpretative declaration; Canada stated that it considered that the declaration did not in any way alter the obligations of the United States under that Treaty;[676]

(*e*) The 1986 Treaty concerning the Cayman Islands relating to mutual legal assistance in criminal matters between the United States and the United Kingdom;[677]

(*f*) The 1993 Convention with Slovakia, on avoidance of double taxation and prevention of tax evasion,[678] which was also the subject of an "understanding" on the part of the Senate. Slovakia noted that the understanding had been prompted by an inadvertent error in the drafting of the English-language text of the treaty and had the effect of correcting the English-language text to bring it into conformity with the Slovak-language text.

490. The extent and consistency of the practice of interpretative declarations in respect of bilateral treaties leaves little doubt as to how this institution is viewed in international law: it is clearly a "general practice accepted as law".

491. United States practice alone is particularly extensive and clear, and goes well beyond the period covered by the country's reply to the questionnaires on reservations;[679] moreover, far from diminishing, as seems to be the case with "reservations",[680] this practice appears to be becoming entrenched and growing stronger.[681] Secondly, and without prejudice to the ambiguous position of the United Kingdom quoted below,[682] the partners of the United States have occasionally contested that country's interpretations, but not its right to formulate them. Thirdly, these States have occasionally made their own interpretative declarations, concerning the very provisions interpreted by the United States and others as well (as, for example, Panama's "reservations" to the aforementioned 1977 Panama Canal Treaty, which the United States considered as being "in fact understandings that did not change the United States interpretation").[683] Lastly, even though it happens less frequently, a sizeable number of States besides the United States have taken the initiative of attaching interpretative declarations to the expression of their consent to be bound, in treaties with the United States and with other States.

492. A list of examples, while admittedly not exhaustive, would include:

(*a*) Interpretative declarations made by Spain and France to treaties going back to 1819 and 1878, respectively;[684]

(*b*) The "explanations" which the Dominican Republic attached at the request of its parliament to its approval of a customs convention with the United States in 1907;[685]

(*c*) An exchange of notes (done at signature) between the United States and the United Kingdom at the initiative of the latter, interpreting the 1908 convention for arbitration between the two countries;[686]

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[672] See paragraph 444 and footnote 613 above.

[673] In its reply to the questionnaire, Panama did not mention that example, but in the Understandings and declarations made upon ratification by the Government of Panama in the Treaty concerning the permanent neutrality and operation of the Panama Canal (footnote 613 above), it states: "It is also the understanding of the Republic of Panama" (p. 201); see also paragraph 491 below.

[674] Agreement between the United States of America and the International Atomic Energy Agency for the application of safeguards in the United States of America (Vienna, 18 November 1977), United Nations, *Treaty Series*, vol. 1261, p. 371.

[675] Convention between the United States of America and the Federal Republic of Germany for the avoidance of double taxation with respect to taxes on estates, inheritances, and gifts (Bonn, 3 December 1980), United Nations, *Treaty Series*, vol. 2120, p. 283; and Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital and to certain other taxes (with protocol and exchange of notes and with related note dated 3 November 1989) (Bonn, 29 August 1989), ibid., vol. 1708, p. 3.

[676] Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters (Quebec City, 18 March 1985), ILM, vol. XXIV, No. 4 (July 1985), p. 1092. Similarly, see the reaction of Thailand to the United States "understandings" concerning the Treaty on mutual assistance in criminal matters, with attachments (Bangkok, 19 March 1986), *Treaties and Other International Acts Series*, and the reaction of Mexico to the statement by the United States concerning the Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance (Mexico City, 9 December 1987), ILM, vol. XXVII, No. 2 (March 1988), p. 447.

[677] See footnote 668 above and the reaction of the United Kingdom to the interpretative declaration made by the United States (para. 494 below).

[678] Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital (Bratislava, 8 October 1993), United States Department of State, *Treaties and Other International Acts Series.*

[679] See in particular the many examples cited by Hackworth, loc. cit., pp. 116–124, and by Whiteman, op. cit., pp. 164–170.

[680] See paragraph 444 above.

[681] See footnote 655 above.

[682] See paragraph 494 below.

[683] *Restatement of the Law Third: The Foreign Relations Law of the United States* (footnote 154 above), p. 189, para. 314.

[684] See paragraph 486 above.

[685] Quoted by Hackworth, op. cit., pp. 124–125.

[686] Ibid., pp. 151–152.

(*d*) The "interpretative preamble" adopted by the German Parliament in respect of the treaty concerning Franco-German cooperation of 22 January 1963;[687]

(*e*) The interpretative declarations made by the Panamanian Parliament, conditioning the country's ratification of two treaties, one concluded with Colombia in 1979 and the other with the United States in 1982, which are cited in Panama's reply to the questionnaire on reservations;

(*f*) Slovakia's interpretative declaration, likewise mentioned in its reply, which it intended to attach to its instrument of ratification of the Treaty on good-neighbourliness and friendly cooperation concluded with Hungary on 19 March 1995.

2. Features of interpretative declarations made in respect of bilateral treaties

493. The first conclusion that can be drawn from this brief outline of State practice with regard to interpretative declarations is that it is not contested in principle.

494. The United Kingdom did, however, note, with regard to the declarations which the United States included with its instrument of ratification of the Treaty concerning the Cayman Islands relating to mutual legal assistance in criminal matters between the United States and the United Kingdom:[688]

> With reference to the understandings included in the United States instrument of ratification, Her Majesty's Government wish formally to endorse the remarks by the leader of the British delegation at the discussions in Washington on 31 October–3 November 1989. They regard it as unacceptable for one party to seek to introduce new understandings after negotiation and signature of a bilateral treaty.
>
> So far as this particular case is concerned, Her Majesty's Government, while reserving entirely their rights under the treaty, note that during the debate in the Senate on 24 October 1989, an "understanding" was described as "an interpretive statement for the purpose of clarifying or elaborating rather than changing an obligation under the agreement". Her Majesty's Government do not accept that unilateral "understandings" are capable of modifying the terms of a treaty and have proceeded with ratification on the assumption that the United States will not seek to assert that the present "understandings" modify the obligations of the United States under the treaty.
>
> Her Majesty's Government reserve the right to revert separately on the general issue of the attachment of understandings and reservations to bilateral and multilateral treaties.

495. Within this ambiguous statement of position one can read a condemnation of interpretative declarations made after a bilateral treaty is signed. However, the statement must also be interpreted in the light of the replies from the United Kingdom to the questionnaire on reservations, which indicate that while the country categorically rejects the possibility of making reservations to bilateral treaties,[689] it answered "yes" to the question on interpretative declarations.[690] It would therefore seem that what the United Kingdom is rejecting here is the possibility of modifying a bilateral treaty under the guise of interpretation (by means of "understandings" which are really "reservations").

496. This does not pose any particular problem, but here one again encounters the general problem of distinguishing between reservations and interpretative declarations considered earlier;[691] however, the fact that a treaty is bilateral in nature in no way modifies the conclusions reached in that exercise. In particular, there is no doubt that a unilateral statement presented as an interpretative declaration must be considered to be a "reservation"[692] if it actually results in a modification of one or more provisions of the treaty.[693]

497. Speaking more broadly, whereas the word "reservation" certainly does not have the same meaning when it is applied to a unilateral statement made in respect of a bilateral treaty as it does when it concerns a multilateral instrument, the same is not true in the case of interpretative declarations: in both cases, they are unilateral statements, "however phrased or named, made by a State or by an international organization, whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions".[694] Thus, it may be said that the draft guidelines concerning the definition of interpretative declarations[695] are applicable to declarations which interpret bilateral as well as multilateral treaties.

498. Since the definition is the same, the consequences are also identical. More specifically:

(*a*) The nature of a unilateral statement made in respect of a bilateral treaty depends not on its phrasing or name, but on its effect;[696]

(*b*) In the event that it is difficult to determine this nature, the same rules are applicable;[697]

(*c*) A general statement of policy made by a State or an international organization when signing or expressing its final consent to be bound by a bilateral treaty does not constitute an interpretative declaration;[698]

(*d*) Likewise, an "informative declaration", whereby the author provides the other party with indications of

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[687] Rousseau, "Chronique des faits internationaux", pp. 875–878 and *Droit international public*, p. 120.

[688] See paragraph 489 above.

[689] See paragraphs 447–448 above.

[690] See paragraph 488 above.

[691] See chapter I, particularly paras. 252–259 and 275–294.

[692] "Reservation" in a very specific sense, since bilateral treaties are involved; the term should really be "proposal to amend" (see paragraphs 467–482 above).

[693] See the "understanding" in respect of the treaty of 9 January 1909 with Panama in which the United States Senate refused to submit to arbitration questions affecting the country's vital interests when the treaty made no provision for such an exception. The "Solicitor for the Department of State expressed the view that the resolution was in effect an amendment of the treaty" (Hackworth, op. cit., p. 116).

[694] Draft guideline 1.2 (para. 354 above).

[695] In particular, draft guideline 1.2, which defines interpretative declarations (ibid.).

[696] See draft guideline 1.2.2 (para. 291 above).

[697] See draft guideline 1.3.1 (para. 406 above).

[698] See draft guideline 1.2.5 (para. 367 above). The declaration adopted on 26 March 1996 by the Slovak National Council for attachment to Slovakia's instrument of ratification of the 1995 Treaty on good-neighbourliness and friendly cooperation with Hungary (see paragraph 492 above) is partly of this nature.

the manner in which it intends to implement the treaty domestically is not an interpretative declaration.[699]

499. Declarations of this type are in fact quite common, at least in the practice of the United States, where bilateral treaties are concerned. The many examples include:

(*a*) The declaration by the United States Senate regarding the commercial treaty signed with Korea on 22 May 1882;[700]

(*b*) The United States "understandings" with regard to the treaties on friendly relations concluded in 1921 with Austria, Germany and Hungary;[701]

(*c*) The famous "Niagara reservation"[702] which the United States formulated in respect of the Treaty Relating to the Uses of the Waters of the Niagara River:

> The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress.[703]

500. In this last case, Canada said that it accepted "the above-mentioned reservation because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada's rights or obligations under the Treaty".[704] And, in the wake of an internal dispute in the United States, the Court of Appeals for the District of Columbia held that the problem was a purely domestic one which did not affect the treaty relations between the parties:

> The reservation, therefore, made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent. It was not a counter-offer requiring Canadian acceptance before the treaty could become effective. That Canada did "accept" the reservation does not change its character. The Canadian acceptance, moreover, was not so much an acceptance as a disclaimer of interest.[705]

501. In this case, the uselessness of the other party's acceptance of a declaration is explained by the fact that the statement was not really a reservation or an interpretative declaration.[706] It may be wondered, however, what happens when the statement is a genuine interpretative declaration.

502. Here again, the main source of information available to the Special Rapporteur relates to the practice of the United States, which tends to indicate that "in the case of a bilateral treaty it is the invariable practice, prior to the making of arrangements for the exchange of ratifications and sometimes even prior to ratification of the treaty, for the government making the statement or declaration to notify the other government thereof in order that the latter may have an opportunity to accept, reject, or otherwise express its views with respect thereto".[707]

503. And once the declaration has been approved, it becomes an integral part of the treaty:

> [W]here one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument ... and the treaty is afterwards ratified by the other party with the declaration attached to it, and their ratifications duly exchanged—the declaration thus annexed is part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged.[708]

504. It is difficult to argue with this reasoning, but it leads to two complementary questions:

(*a*) Must interpretative declarations which are made in respect of bilateral treaties, just like "reservations" to such treaties,[709] necessarily be accepted by the other party?

(*b*) If the answer to the first question is no, does the existence of an acceptance modify the legal nature of the interpretative declaration?

505. The answer to the first question is difficult. In practice, it seems that all interpretative declarations made by States prior to ratification of a bilateral treaty[710] have been accepted by the other contracting State.[711] However, this does not imply that their acceptance is required.[712]

506. In reality, this does not seem to be the case: in (virtually?) all cases, interpretative declarations made in respect of bilateral treaties have been accepted because

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[699] See draft guideline 1.2.6 (para. 377 above).

[700] Treaty of Peace, Amity, Commerce and Navigation (Chosen, 22 May 1882), *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776–1909* (footnote 663 above), p. 334. See also Bishop Jr., loc. cit., p. 312.

[701] 1921 Treaty Establishing Friendly Relations between the United States and Austria; Treaty Restoring Friendly Relations with Germany; and Treaty Establishing Friendly Relations with Hungary, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1910–1923* (Washington, Government Printing Office, 1923), vol. III, pp. 2493, 2596 and 2693, respectively. See also Bishop Jr., loc. cit., pp. 312–313, and Hackworth, op. cit., pp. 120–121. Concerning the treaty with Austria, the United States Secretary of State told the Austrian Chancellor: "The terms of the Resolution with respect to participation of the United Stales in any agency or commission under the treaty of course relate merely to matters of domestic policy and procedure which are of no concern to the Austrian Government" (ibid., p. 120).

[702] See paragraph 374 above and the doctrinal commentary quoted in footnote 523.

[703] Quoted by Bishop Jr., loc. cit., p. 318. See also footnote 519 above.

[704] Ibid, p. 319. Compare this with the reaction cited earlier (para. 494) of the United Kingdom to the United States declaration on the 1986 Treaty concerning the Cayman Islands.

[705] Ibid., p. 321, *Power Authority of the State of New York* v. *Federal Power Commission*, 247 F.(2d) 538 (1957), opinion delivered by Circuit Judge Bazelon.

[706] See paragraphs 376–377 above.

[707] Whiteman, op. cit, pp. 188–189.

[708] Judgement of the United States Supreme Court concerning the Spanish declaration made in respect of the treaty of 22 February 1819 (see paragraph 486 above), *Doe* v. *Braden*, 16 How. 635, 656 (U.S. 1853), cited by Bishop Jr., loc. cit, p. 316.

[709] See paragraphs 463–485 above.

[710] For examples of interpretative declarations made when signing a bilateral treaty, see Hackworth, op. cit., pp. 150–151, and Rousseau, *Droit international public*, p. 120.

[711] See, however, the "serious fundamental objections" of Germany to the "reservations and understandings" of the United States concerning the 1925 Treaty of Commerce between the United States and Germany, mentioned in footnote 650 above.

[712] And the documentation available to the Special Rapporteur may well be incomplete.

the formulating State[713] requested it, but one can easily imagine that it might not make such a request. Indeed, the logic which leads one to distinguish between interpretative declarations which are conditional and those which are not[714] would seem to be easily transposed to the case of bilateral treaties: everything depends on the author's intention. It may be the condition sine qua non of the author's consent to the treaty, in which case it is a conditional interpretative declaration, identical in nature to those made in respect of multilateral treaties and consistent with the definition proposed in draft guideline 1.2.4 (para. 512 below). But it may also be simply intended to inform the partner of the meaning and scope which the author attributes to the provisions of the treaty without, however, seeking to impose that interpretation on him, and in this case it is a "mere interpretative declaration", which, like those made in respect of multilateral treaties,[715] may actually be made at any time.

507. The fact remains that, when an interpretative declaration made in respect of a bilateral treaty is accepted by the other party,[716] it becomes an integral part of the treaty and constitutes the authentic interpretation thereof. As PCIJ noted, "the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it".[717] Yet in the case of a bilateral treaty this power belongs to both parties. Accordingly, if they agree on an interpretation, that interpretation prevails and itself takes on the nature of a treaty, regardless of its form,[718] exactly as "reservations" to bilateral treaties do once they have been accepted by the co-contracting State or international organization.[719] It becomes an agreement collateral to the treaty which forms part of its context in the sense of article 31, paragraphs 2 and 3 (*a*), of the 1969 and 1986 Vienna Conventions; as such, it must be taken into consideration in interpreting the treaty.[720] And this analysis is consistent with that of the United States Supreme Court in the *Doe* v. *Braden* case.[721]

508. While the Special Rapporteur is aware that considering this phenomenon in the first part of the Guide to Practice exceeds the scope of that part, which is devoted to the definition, and not the legal regime, of reservations and interpretative declarations,[722] he suggests to the Commission that it be mentioned in a draft guideline. The Special Rapporteur does not in fact intend to return to the highly specific question of "reservations" and interpretative declarations in respect of bilateral treaties. If the Commission endorses this intention, there may not be another occasion on which to include such a reference.[723]

509. Bearing this in mind, it is suggested that the Commission adopt the following draft guideline:

"*1.2.8 The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to that treaty and accepted by the other party constitutes the authentic interpretation of the treaty.*"

510. In the meantime, it would seem unnecessary to adopt specific draft guidelines on interpretative declarations in respect of bilateral treaties, since these are governed by the same rules and the same criteria as interpretative declarations in respect of multilateral treaties.[724] The only exceptions are draft guidelines 1.2.1, on the joint formulation of interpretative declarations, and 1.2.3, on the formulation of an interpretative declaration when reservations are prohibited by the treaty, rules which cannot, obviously, be transposed to the case of bilateral treaties. It would therefore seem to suffice to state in the Guide to Practice:

"*1.2.7 Guidelines 1.2, 1.2.2, 1.2.4, 1.2.5 and 1.2.6 are applicable to unilateral statements made in respect of bilateral treaties.*"

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[713] ILO did not specify whether or not that was the case with its interpretation of the 1990 Agreement with Zimbabwe (see footnote 666 above).

[714] See paragraphs 306–327 above.

[715] See paragraphs 306–341 above.

[716] And one can imagine that this would be the case even when an interpretative declaration is not conditional.

[717] *Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8*, p. 37.

[718] Exchange of letters, protocol, simple verbal agreement, etc.

[719] See paragraph 475 above and draft guideline 1.1.9, second paragraph (para. 489).

[720] Article 31 reads:

"2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

"(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

"(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

"3. There shall be taken into account, together with the context:

"(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions …"

[721] See paragraph 503 above.

[722] See draft guideline 1.4 (para. 411 above).

[723] If necessary, the draft guideline could later be moved to a part of the Guide to Practice that would seem more appropriate.

[724] See in particular paragraphs 497–498 and 506 above.

Chapter III

Alternatives to reservations

511. In view of the length of the present report, the Special Rapporteur finds himself compelled to postpone this chapter to his fourth report. In it he proposes to present a brief account of the various procedures other than reservations by which States and international organizations may achieve the same objective as those pursued when making reservations, namely exclusion or modification of the legal effect of certain provisions of a treaty in their application to one or more of the parties to the treaty.

512. The following recapitulates the draft guidelines proposed by the Special Rapporteur in the context of the Guide to Practice in respect of reservations. The titles of the individual guidelines are proposed on a provisional basis.

Guide to Practice

I. DEFINITIONS

1.1 Definition of reservations

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 Joint formulation of a reservation

The unilateral nature of reservations is not an obstacle to the joint formulation of a reservation by several States or international organizations.

1.1.2 Moment when a reservation is formulated

A reservation may be formulated by a State or an international organization when that State or that organization expresses its consent to be bound in accordance with article 11 of the 1969 and 1986 Vienna Conventions on the Law of Treaties.

1.1.3 Reservations formulated when notifying territorial application

A unilateral statement which is made by a State at the time of the notification of the territorial application of a treaty and by which that State purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the territory in question constitutes a reservation.

1.1.4 Object of reservations

A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which the State or the international organization intends to implement the treaty as a whole.

1.1.5 Statements designed to increase the obligations of their author

A unilateral statement made by a State or an international organization by which that State or that organization undertakes commitments going beyond the obligations imposed on it by a treaty does not constitute a reservation [and is governed by the rules applicable to unilateral legal acts], even if such a statement is made at the time of the expression by that State or that organization of its consent to be bound by the treaty.

1.1.6 Statements designed to limit the obligations of their author

A unilateral statement made by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty and by which its author intends to limit the obligations imposed on it by the treaty and the rights which the treaty creates for the other parties constitutes a reservation, unless it adds a new provision to the treaty.

1.1.7 Reservations relating to non-recognition

A unilateral statement by which a State purports to exclude the application of a treaty between itself and one or more other States which it does not recognize constitutes a reservation, regardless of the date on which it is made.

1.1.8 Reservations having territorial scope

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation, regardless of the date on which it is made.

1.1.9 "Reservations" to bilateral treaties

A unilateral statement formulated by a State or an international organization after signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty in respect of which it is subordinating the expression of its final consent to be bound, does not constitute a reservation, however phrased or named.

The express acceptance of the content of that statement by the other party takes the form of an amendment to the treaty, and both parties are bound by the new text once they have expressed their final consent to be bound.

1.2 Definition of interpretative declarations

"Interpretative declaration" means a unilateral declaration, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions.

1.2.1 Joint formulation of interpretative declarations

The unilateral nature of interpretative declarations is not an obstacle to the joint formulation of an interpretative declaration by several States or international organizations.

1.2.2 Phrasing and name

It is not the phrasing or name of a unilateral declaration that determines its legal nature but the legal effect it seeks to produce. However, the phrasing or name given to the declaration by the State or international organization formulating it provides an indication of the desired objective. This is the case in particular when a State or an international organization formulates several unilateral declarations in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.2.3 Formulation of an interpretative declaration when a reservation is prohibited

When a treaty prohibits reservations to all or some of its provisions, a unilateral declaration formulated in respect thereof by a State or an international organization shall be considered to constitute an interpretative declaration and not a reservation. If, however, the declaration seeks to exclude or modify the legal effect of certain provisions of the treaty in their application to its author, the declaration must be considered an impermissible reservation.

1.2.4 Conditional interpretative declarations

A unilateral declaration formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subordinates its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration [which has legal consequences distinct from those deriving from simple interpretative declarations].

1.2.5 General declarations of policy

A unilateral statement made by a State or by an international organization whereby that State or that organization expresses its views on the treaty or on the subject area covered by the treaty without purporting to exclude or to modify the legal effect of its provisions, or to interpret it, constitutes neither a reservation nor an interpretative declaration [and is not subject to application of the law of treaties].

1.2.6 Informative declarations

A unilateral declaration formulated by a State or an international organization in which the State or international organization indicates the manner in which it intends to discharge its obligations at the internal level but which does not affect the rights and obligations of the other contracting parties is neither a reservation nor an interpretative declaration.

1.2.7 Interpretative declarations in respect of bilateral treaties

Guidelines 1.2, 1.2.2, 1.2.4, 1.2.5 and 1.2.6 are applicable to unilateral declarations made in respect of bilateral treaties.

1.2.8 Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.3 Distinction between reservations and interpretative declarations

[1.3.0 Criterion of reservations

The classification of a unilateral declaration as a reservation depends solely on the determination as to whether it purports to exclude or to modify the legal effect of the provisions of the treaty in their application to the State or international organization that formulated it.]

[1.3.0 *bis* Criterion of interpretative declarations

The classification of a unilateral declaration as an interpretative declaration depends solely on the determination as to whether it purports to clarify the meaning or the scope that the declarant attributes to the treaty or to certain of its provisions.]

[1.3.0 *ter* Criterion of conditional interpretative declarations

The classification of an interpretative declaration as a conditional interpretative declaration depends solely on the determination as to whether the declarant intended to subordinate its consent to be bound by the treaty to the interpretation that is the subject of the declaration.]

1.3.1 Method of distinguishing between reservations and interpretative declarations

To determine the legal nature of a unilateral declaration formulated by a State or an international organization in respect of a treaty, it is appropriate to apply the general rule of interpretation of treaties set out in article 31 of the Vienna Convention on the Law of Treaties.

Recourse may be had to the supplementary means of interpretation contemplated in article 32 of the Convention in order to confirm the determination made in accordance with the preceding paragraph, or to remove any remaining doubts or ambiguities.

1.4 Scope of definitions

Defining a unilateral declaration as a reservation or an interpretative declaration is without prejudice to its permissibility under the rules relating to reservations and interpretative declarations, whose implementation they condition.

NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

[Agenda item 5]

DOCUMENT A/CN.4/489

Fourth report on nationality in relation to the succession of States, by Mr. Václav Mikulka, Special Rapporteur

[*Original: English*]
[*23 April 1998*]

CONTENTS

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Introduction

1. The nationality of legal persons in relation to the succession of States is part of the topic that the Commission decided to include in its agenda at its forty-fifth session, in 1993, and which was initially entitled "State succession and its impact on the nationality of natural and legal persons".[1] In 1996 the Commission changed the title to "Nationality in relation to the succession of States", which continues to cover both the nationality of individuals and that of legal persons.[2]

2. In paragraph 8 of its resolution 51/160 of 16 December 1996, the General Assembly, having taken note of the completion of the preliminary study of the topic by the Commission, requested it to undertake the substantive study of the topic. It endorsed the Commission's intention to separate the consideration of the question of the nationality of natural persons from that of the nationality of legal persons and to give priority to the former.[3]

3. In paragraph 5 of its resolution 52/156 of 15 December 1997, the General Assembly "invite[d] Governments to submit comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons in order to assist the International Law Commission in deciding on its future work on this portion of the topic".

4. Since 1993, the General Assembly, when considering the part of the Commission's report relating to this topic, repeatedly invited Governments to submit materials including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.[4] The documentation provided thus far, however, covers mainly the problem of the nationality of individuals.

[1] *Yearbook … 1993*, vol. II (Part Two), p. 96, para. 427.

[2] *Yearbook … 1996*, vol. II (Part Two), p. 76, para. 88.

[3] The division of the topic into two parts was suggested by the Special Rapporteur in his first report (*Yearbook … 1995*, vol. II (Part One), document A/CN.4/467, p. 167, para. 50), and again in his second report (*Yearbook … 1996*, vol. II (Part One), document A/CN.4/474, pp. 151–152, paras. 169–172). It was also recommended by the Working Group (established at the forty-seventh session of the Commission) during the forty-eighth session of the Commission (see *Yearbook …1996*, vol. II (Part Two), p. 75, para. 80). When considering the recommendations by the Working Group, the Commission undertook, *inter alia*, to take "[t]he decision on how to proceed with respect to the question of the nationality of legal persons … upon completion of the work on the nationality of natural persons and in light of the comments that the General Assembly may invite States to submit on the practical problems raised in this field by a succession of States" (ibid., p. 76, para. 88 (*d*)).

[4] See General Assembly resolutions 48/31 of 9 December 1993, para. 7; 49/51 of 9 December 1994, para. 6; and 50/45 of 11 December 1995, para. 4.

CHAPTER I

History of the consideration of the nationality of legal persons in relation to the succession of States

A. Forty-seventh to forty-ninth sessions of the Commission

5. At its forty-seventh to forty-ninth sessions (1995–1997), the Commission focused on the nationality of natural persons, while the nationality of legal persons was at the margin of its attention.[5] There had, however, been some discussion concerning the nationality of legal persons during the preliminary study of the whole topic, when the Commission considered the first and the second reports of the Special Rapporteur.

6. The first report[6] addressed the question of the nationality of legal persons. Two main points were underlined by the Special Rapporteur: first that *there existed no rigid notion of nationality with respect to legal persons*, and secondly, that *there was a limit to the analogy that could be drawn between nationality of individuals and the nationality of legal persons*.

7. Concerning the first point, the report stressed that, even in the legal regimes in which the concept of nationality of legal persons is recognized, different tests of nationality are used for different purposes. In many cases the traditional criterion of the place of incorporation and the place where a corporation has a registered office establishes only a prima facie presumption of the bond of nationality between the corporation and the State. It is a usual practice of States to provide expressly, in a treaty or in their domestic laws, which legal persons may enjoy the benefits of treaty provisions reserved to "nationals" or to define as "nationals" corporations for the purposes of application of national laws in specific fields (fiscal law, labour law, etc.).[7]

8. As regards the second point, the Special Rapporteur recalled the warning by most authors that, while sometimes convenient, the analogy between the nationality of natural persons and that of legal persons might be misleading.[8]

9. In the second report, the problems of the nationality of legal persons were considered in chapter II.[9] The main purpose of that chapter was to illustrate briefly the purposes for which the determination of the nationality of legal persons might be needed. Four areas had been identified in which the problem of the nationality of legal persons might arise: conflicts of laws, diplomatic protection, treatment of aliens and State responsibility.[10]

10. A number of rules under *private international law* are designed to connect a legal person to the laws of a State. The nationality of the legal person is one such criterion for connection.[11] But to be used as such, the nationality itself has first to be determined. The nationality is usually established by reference to one or more elements such as incorporation or formation, registered office, centre of operations or actual place of management, and, sometimes, control or dominant interest. Despite their common characteristics, the various legislations are far from uniform. The criteria are sometimes combined, particularly in many treaties on establishment and trade.[12] International conventions, however, frequently refer to the nationality of commercial corporations without regulating how that nationality is to be determined.

11. As in the case of an individual, nationality is a prerequisite for the exercise, by a State, of *diplomatic protection* of a legal person.[13] In the *Barcelona Traction* case, ICJ observed that:

> The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist.[14]

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[5] This work resulted in the adoption, on first reading, of the draft articles on nationality of natural persons in relation to the succession of States (see *Yearbook …1997*, vol. II (Part Two), pp. 13–14, para. 41).

[6] *Yearbook … 1995*, vol. II (Part One), document A/CN.4/467, pp. 166–167, paras. 46–50.

[7] Ibid., p. 167, para. 49.

[8] According to *Oppenheim's International Law*, "those rules of international law which are based upon the nationality of individuals are not always to be applied without modification in relation to corporations. Various considerations militate against attributing to the nationality of corporations the same consequences as attach to the nationality of individuals: these include the manner in which corporations are created, operate and are brought to an end, their development as legal entities distinct from their shareholders, the inapplicability to companies of the essentially personal conception of allegiance which underlies the development of much of the present law regarding nationality, the general absence in relation to companies of any nationality legislation to provide a basis in municipal law for the operation of rules of international law, the great variety of forms of company organization and the possibilities for contriving an artificial and purely formal relationship with the state of 'nationality'" (Jennings and Watts, eds., pp. 860–861).

[9] *Yearbook … 1996*, vol. II (Part One), document A/CN.4/474, pp. 147–151, paras. 140–167.

[10] Ibid., p. 148, para. 142.

[11] Under Anglo-American law, the norms relating to the legal status of commercial corporations do not include nationality as a criterion for connection with the domestic law, but go directly to incorporation or formation. See Caflisch, "La nationalité des sociétés commerciales en droit international privé", pp. 130–142.

[12] For examples of such treaties, see *Yearbook … 1996*, vol. II (Part One), document A/CN.4/474, para. 145, footnote 222.

[13] "As international law grants to each State the right to proffer diplomatic protection to its nationals, a corporation, in order to obtain diplomatic protection would have to prove that it possessed the nationality of the State concerned." (Seidl-Hohenveldern, *Corporations in and under International Law*, p. 7.)

[14] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 43.

12. According to some authors, for determining the nationality of a legal person in the context of diplomatic protection, the criterion of substantial interest or control becomes much more relevant than in private international law. Other authors, however, warn against the "lifting of the corporate veil" to which acceptance of the "control test" would lead and consider it quite inappropriate even in the area of diplomatic protection.[15]

13. The concept of the nationality of legal persons also seems to be generally accepted in the sphere of the *law of aliens*.[16] The nationality of legal persons acquires particular importance in time of hostilities. Its determination, however, differs from that under private international law. To categorize foreign corporations as "nationals" of enemy States, criteria such as that of control by enemy nationals have often been used. This was, for example, the case of the United States Executive Order No. 8389 of 10 April 1940 which defined the term "national" of Norway or Denmark.[17] It has, however, been observed by some authors that the question was not so much of determining nationality as of establishing the "enemy nature" of the corporation.[18]

14. In the field of the *responsibility of States* under international law for certain acts or activities of their nationals, the nationality of legal persons is usually based on the control of the corporation or on the notion of "*intérêt substantiel*".[19] The problem of the nationality of legal persons may also occur in relation to the application of Security Council resolutions concerning sanctions against certain States.

15. Thus, for example, in paragraph 3 of its resolution 883 (1993), the Security Council, acting under Chapter VII of the Charter of the United Nations, decided that all States should freeze funds and financial resources "owned or controlled, directly or indirectly, by:

(*a*) The Government or public authorities of Libya; or

(*b*) Any Libyan undertaking".[20]

16. The Committee established by the Security Council pursuant to resolution 748 (1992) concerning the Libyan Arab Jamahiriya[21] recognized that "States may face difficulties in deciding about the entities within their jurisdiction to be subject to measures imposed through Security Council resolution 883 (1993)". It therefore offered its advice to the States and indicated, at the same time, that:

– Entities in which the Government or public authorities of Libya, or any Libyan undertaking as defined in Security Council resolution 883 (1993), is a majority shareholder, should be considered to be Libyan entities subject to the assets freeze (paras. 3 and 4);

– Entities in which the Government or public authorities of Libya, or any Libyan undertaking as defined in the resolution, is a minority shareholder, but exercises effective control, may be considered a Libyan entity subject to the assets freeze (paras. 3 and 4) of the resolution.[22]

17. The question arises, however, as to whether the determination of Libyan entities may be considered as equal to the determination of their Libyan nationality. While both notions may to a certain extent overlap, they are not interchangeable.[23]

18. Owing to their character (embargo), the measures against Serbia and Montenegro adopted by the Security Council in its resolution 757 (1992) prohibited supplies or remitting of funds "to any commercial, industrial or public utility undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro)"or "to persons or bodies within the Federal Republic of Yugoslavia"[24] irrespective of their nationality. On the other hand, the resolution obliged

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[15] Seidl-Hohenveldern stresses that "[i]n the *Barcelona Traction* case the International Court of Justice, while admitting that the corporate veil may be lifted under certain circumstances, refused to do so in the case before it. The Court would have accepted the *jus standi* of the shareholders' home State had the corporation ceased to exist. On the demise of a corporation its shareholders become the owners of its assets on a *pro rata* basis" (*Corporations ...*, p. 9).

[16] Under English law and American law, the nationality of legal persons is dependent on the criterion of incorporation or formation. French law determines it by reference to relevant criteria in the area of conflicts of laws ~~the~~ the actual place of management or sometimes incorporation or formation ~~while~~ while under German law it is generally determined on the basis of the registered office (Caflisch, loc. cit., pp. 130, 133 and 137).

[17] According to the Order "[t]he term 'national' of Norway or Denmark shall include ... any partnership, association, or other organization, including any corporation organized under the laws of, or which on April 8, 1940, had its principal place of business in Norway or Denmark or which on or after such date has been controlled by, or a substantial part of the stock, shares, bonds, debentures, or other securities of which has been owned or controlled by, directly or indirectly, one or more persons, who have been, or who there is reasonable cause to believe have been, domiciled in, or the subjects, citizens or residents of Norway or Denmark at any time on or since April 8, 1940, and all persons acting or purporting to act directly or indirectly for the benefit or on behalf of the foregoing" (5 Fed. Reg. 1400, 1940).

[18] See Dominicé, *La notion du caractère ennemi des biens privés dans la guerre sur terre*, pp. 55 et seq., 66–68 et seq. and 98 et seq.

[19] See Caflisch, loc. cit., p. 125.

[20] The resolution further stipulates that, for its purposes, "Libyan undertaking ... means any commercial, industrial or public utility undertaking which is owned or controlled, directly or indirectly, by:

(i) The Government or public authorities of Libya,

(ii) Any entity, wherever located or organized, owned or controlled by the Government or public authorities of Libya, or

(iii) Any person identified by States as acting on behalf of the Government or public authorities of Libya or by any entity, wherever located or organized, owned or controlled by the Government or public authorities of Libya for the purposes of the present resolution".

[21] The mandate of the Committee is defined in paragraph 9 of Security Council resolution 748 (1992) and paragraphs 9 and 10 of Council resolution 883 (1993).

[22] The Committee further stated that "[s]uch cases must be examined on a case-by-case basis, taking into account, *inter alia*:

– The extent of Libyan ownership of the entity;

– The spread of ownership of the remaining shares, in particular, if Libyan persons or entities constitute the single largest block of shareholders, and other shareholding is diffuse;

– Representation of the Libyan Government and other Libyan undertakings on the board, or in the management of the entity and their capability to name directors or managers or otherwise influence business decisions".

(New consolidated guidelines of the Committee for the conduct of its work (S/AC.28/1994/CRP.2/Rev.3), para. 7.)

[23] The same resolution, on the other hand, uses the concept of nationality in order to define subjects of States other than the Libyan Arab Jamahiriya, affected by the obligation under the resolution (see paragraphs 3, 5 and 6).

[24] Security Council resolution 757 (1992), para. 5.

the States to prohibit such dealing by their "nationals"[25] or from their territories. This language was also used in Security Council resolution 1160 (1998) on Kosovo.[26]

19. The questions raised in the second report of the Special Rapporteur and summarized in the previous paragraphs do not represent the core issues of the present topic. They are, however, intrinsic to any analysis of the problem of the impact of the succession of States on the nationality of legal persons. Their discussion under the present topic, therefore, cannot be avoided.

20. In his first report, the Special Rapporteur wondered whether the study of problems of the nationality of legal persons had the same degree of urgency as the study of problems concerning the nationality of natural persons.[27]

21. Some members of the Commission were of the view that the question deserved prompt consideration. They stressed that rules concerning the nationality of legal persons might be more common in State practice and customary law, thus lending themselves more easily to systematization, in contrast to the striking absence of specific provisions on the nationality of natural persons in the context of State succession in the legislation of the majority of States.

22. The majority of the members of the Commission took the view that the question of the nationality of legal persons was highly specific. They therefore suggested that it should only be considered after the completion of the work on the nationality of natural persons.[28]

23. The Working Group established at the forty-seventh session of the Commission did not examine the question of the nationality of legal persons because of the laconic character of the relevant paragraphs of the first report devoted to the problem. However, it considered it necessary to underline that the lack of progress on this part of the topic should not be interpreted as reflecting unawareness of the importance of the question on its part.[29] In his second report, the Special Rapporteur suggested that, in order to provide some guidance for the future work of the Commission on this part of the topic, the Working Group should devote some time, during the forty-eighth session of the Commission, to the consideration of the problems mentioned in paragraphs 169–172 of his second report.[30] The Working Group, however, spent its time mainly on the problems of the nationality of natural persons and did not have time to consider legal persons.

24. Taking into account that, during its fifty-first session in 1999, the Commission might be able to complete the second reading and consequently its work on the nationality of natural persons, the Special Rapporteur considers that, during its fiftieth session, the Commission might wish to request the Working Group to devote some time to the study of the problem of the nationality of legal persons in relation to the succession of States. The Working Group could, in particular, discuss the general orientation to be given to the work on this part of the topic and identify the issues on which the Commission might encourage the Governments to concentrate when submitting their comments and observations in accordance with paragraph 5 of General Assembly resolution 52/156. The work of the Working Group would have a purely "preparatory" character and would in no way prejudice the recommendation that the Commission would address to the General Assembly concerning this part of the topic, when it has concluded its work on the nationality of natural persons.

B. Views expressed in the Sixth Committee during the fiftieth to fifty-second sessions of the General Assembly concerning the nationality of legal persons

25. During the fiftieth and fifty-first sessions of the General Assembly (1995–1996), several representatives in the Sixth Committee associated themselves with the view of the Commission that, despite the analogy between the nationality of natural persons and that of legal persons, the latter was particularly distinct from the former.

26. According to some representatives, this subject was important in practical terms and interesting from the legal standpoint. It was also observed that, contrary to the situation of natural persons who could, through a change of nationality, be affected in the exercise of fundamental civil and political rights and, to a certain extent, of economic and social rights, State succession had mainly economic or administrative consequences for legal persons.[31]

27. The point was also made that, because the practice of States with regard to the nationality of legal persons presented many common elements, the issue offered more fertile ground for codification in the traditional sense than that of the nationality of natural persons.[32]

28. During the fifty-second session of the General Assembly (1997), some delegations in the Sixth Committee once again stressed the importance of the Commission's future work on the nationality of legal persons in relation to the succession of States. It was observed, in particular, that the nationality of legal persons might also have consequences for individuals' property rights.[33]

C. Written comments by Governments

29. There have thus far been no written observations by Governments in response to the request contained in paragraph 5 of General Assembly resolution 52/156.

[25] Ibid., paras. 4 (*b*) and (*c*), 5 and 7 (*b*).

[26] Paragraph 8 of the resolution.

[27] *Yearbook … 1995*, vol. II (Part One), document A/CN.4/467, p. 167, para. 50.

[28] *Yearbook … 1995*, vol. II (Part Two), pp. 39–40, para. 205.

[29] Ibid., p. 39, para. 200, comments of the Special Rapporteur.

[30] *Yearbook … 1996*, vol. II (Part One), p. 121, document A/CN.4/474.

[31] "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session" (A/CN.4/472/Add.1), para. 12.

[32] Ibid.

[33] "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-second session" (A/CN.4/483), para. 60.

Chapter II

Orientation to be given to the work on this part of the topic

30. Before the Commission takes a decision on how to proceed with the question of the nationality of legal persons, it should re-establish a working group. The task of the working group should be to consider any possible approach to this part of the topic. Such a preliminary examination would facilitate a decision by the Commission. The present chapter offers several issues for consideration by the working group.

A. Should the nationality of legal persons be considered only in the context of the succession of States?

31. From the title of the topic, it appears that the Commission has not set itself the task of considering the problem of the nationality of legal persons as such. It has limited the problem to the effect on the nationality of legal persons in case of succession of States. Such succession affects certain elements that are used as criteria for determining the nationality of a legal person and, accordingly, may lead to a change of nationality.

32. It has to be recalled that, contrary to the question of the nationality of natural persons, which the Commission first addressed to some extent when it considered the problem of statelessness[34] and then in relation to the succession of States, the problem of the nationality of legal persons as such has never been studied by the Commission. The Commission should therefore consider the possibility of expanding the study of the second part of the topic, i.e. the question of the nationality of legal persons, beyond succession of States. The risk of such an enlargement of the present topic would be the possible overlapping with the topic of diplomatic protection.

B. Should the study be limited to the problems of the impact of the succession of States on the nationality of legal persons in international law?

33. Should the Commission prefer to keep the study of the question of the nationality of legal persons limited to the situation of the succession of States, one of the first questions to be answered would be whether legal persons are affected as to their existence by the succession of States.

34. There are many reasons to believe that, regardless of the succession of States, the legal personality of legal persons continues to exist. Despite the fact that they are creations of the law of the State which itself may cease to exist, they would not disappear together with such State or its legal order.[35] What may be affected, however, is their legal status, including nationality.

35. But unless the predecessor State ceases to exist, it is not obvious which legal persons are those whose status is so affected. On the basis of what criteria are they defined and distinguished from those legal persons whose nationality remains unaffected? Does it depend on the location of their seat in one of the States concerned? Or is it due to the fact that they have been "registered" with the authorities which are now located in one of the States concerned? Or, still, is it due to the fact that the majority of shareholders have become nationals of one of the States concerned? In the event of the succession of States, one or more States concerned, i.e. two or more successor States, or a predecessor and a successor State, may consider a legal person that was, on the date of the succession of States, a national of the predecessor State as their national. But it may also occur that a legal person is not considered by either of these States as its national. As in the case of individuals, the succession of States can give rise to conflicts that are negative (statelessness) or positive (dual nationality or multiple nationality), and these problems are not merely academic.[36]

36. The effects of the succession of States on the nationality of legal persons may be seen in the legislation of the States concerned, that is, the predecessor or successor States. The activities of the legal person, after the date of the succession of States, may be governed by the laws and provisions applicable to "foreign" legal persons, although prior to the succession of States, under the laws and regulations of the predecessor State, such legal persons had not been treated as "foreign" legal persons. This kind of distinction between legal persons may occur even if the concept of "nationality" of legal persons is not expressly defined by the legislation of the State concerned.

37. During the debate in the Commission, the view was expressed that, although certain legal systems did not regulate the nationality of corporations, international law attributed a nationality to those legal persons for its own purposes, and that such nationality could be affected by State succession.[37]

38. It is generally accepted that, as in the case of natural persons, international law imposes certain limits on the

[34] For the history of the Commission's work on nationality, see *Yearbook … 1995*, vol. II (Part One), document A/CN.4/467, p. 160, paras. 8–12; see also *The Work of the International Law Commission* (United Nations publication, Sales No. E.95.V.6), pp. 41–44.

[35] The Special Rapporteur shares the view according to which the legal offer of the new State has "original" character, even if its content is mostly identical with the legal order of the predecessor State.

[36] Caflisch, loc. cit., pp. 150–151. This author notes, on the one hand, that, while cases of statelessness may arise, they are actually rare. On the other hand, he concludes that the theory of international private law generally allows that a company can have two or more nationalities. In order to resolve positive conflicts of nationality, State courts will give preference, as in the case of individuals, to the nationality which is the most effective.

[37] See *Yearbook … 1995*, vol. I, 2388th meeting, statement by Mr. Crawford, p. 60, para. 41.

right of a State to bestow its nationality on legal persons. As one author stresses: "[The State] may do so only if the corporation is either established under its law, or has its seat, centre of management or exploitation there, or is controlled by shareholders who are nationals of the State concerned."[38] It may be assumed that similar limitations apply as well in the event of a succession of States. There are also undoubtedly some presumptions on which the determination of the nationality of legal persons may be based. These questions should, in the Special Rapporteur's view, be in the centre of the Commission's interest.

C. Which categories of "legal persons" should the Commission consider?

39. Contrary to natural persons, legal persons can assume various forms. The attempt to cover all such forms or categories of legal persons could make the whole exercise abortive. The Commission should define the type of legal persons on which it will focus.

40. Some authors underline the difference between two types of commercial corporations: those which have been incorporated *intuitu personae* and which are deemed to be primarily associations of individuals (*sociétés de personnes*), and those which have been established *intuitu pecuniae* and for which capital is a significant consideration (*sociétés de capitaux*). The latter have a more distinct legal personality than the former.[39]

41. From another perspective, a distinction is often drawn between private corporations and State-owned corporations.

42. But there may be still other types of legal persons. During its previous work on other topics, the Commission, when considering the notion of the "State", concluded that:

> the Government is often composed of State organs and departments or ministries that act on its behalf. Such organs of State and departments of government can be, and are often, constituted as *separate legal entities** within the internal legal system of the State. Lacking as they do international legal personality as a sovereign entity, they could nevertheless represent the State or act on behalf of the central Government of the State, which they in fact constitute integral parts thereof.[40]

43. Similarly, the United States Foreign Sovereign Immunities Act of 1976[41] defines "agency or instrumentality of a foreign state" as an entity

> (1) which is a separate legal person, …
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332 (*c*) and (*d*) of this title, nor created under the laws of any third country.

44. Transnational corporations constitute yet another category of legal persons.[42]

45. The Commission should consider on which type of legal persons its study should focus. To cover all types of legal persons might be a difficult and even useless task.

D. To which legal relations should the study be limited?

46. It has been stressed during previous debates in the Commission that, unlike natural persons, legal persons do not necessarily have the same nationality in all their legal relations.[43] The Commission should therefore decide to which legal relations the study should be limited.

E. Should the study concentrate on the "nationality" or rather on the "status" of legal persons in relation to the succession of States or, eventually, also cover other questions related to activities of such legal persons?

47. Peace treaties concluded after the First World War contained special provisions concerning the nationality of legal persons.[44] Some treaties covered a broader spectrum of problems concerning legal persons.[45] Some treaties

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[38] Seidl-Hohenveldern, *Corporations …*, p. 8; see also the same author in *Völkerrecht*, p. 280.

[39] Caflisch, loc. cit., p. 119, footnote 1. According to this author, the term commercial corporations means groups of persons incorporated in accordance with the law who have a profit-making goal and aim to carry out commercial or industrial activity under private law.

[40] *Yearbook … 1991*, vol. II (Part Two), draft articles on jurisdictional immunities of States and their property, p. 15, para. (10) of the commentary to article 2.

[41] Text reproduced in *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10), pp. 55 et seq.

[42] During earlier discussions, for example, one view was expressed that inasmuch as multinational corporations had the means to take care of their own interests this question did not need to be dealt with by the Commission (*Yearbook …1995*, vol. II (Part Two), pp. 39–40, para. 205).

[43] See *Yearbook … 1995*, vol. I, 2387th meeting, statement by Mr. Tomuschat, p. 53, para. 12; in the same vein see also Kegel, *Internationales Privatrecht*, p. 413.

[44] Thus, for example, according to article 54, para. 3, of the Treaty of Versailles: "Such juridical persons will also have the status of Alsace-Lorrainers as shall have been recognised as possessing this quality, whether by the French administrative authorities or by a judicial decision." Similarly, according to article 75 of the Peace Treaty of Saint-Germain-en-Laye: "Juridical persons established in the territories transferred to Italy shall be considered Italian if they are recognised as such either by the Italian administrative authorities or by an Italian judicial decision."

[45] For example, article 75, para. 1, of the Treaty of Versailles provided that:

> "Notwithstanding the stipulations of Section V of part X (Economic Clauses) of the present Treaty, all contracts made before the date of the promulgation in Alsace-Lorraine of the French decree of November 30, 1918, between Alsace-Lorrainers (whether individuals or juridical persons) or others resident in Alsace-Lorraine on the one part, and the German Empire or German States and their nationals resident in Germany on the other part, the execution of which has been suspended by the armistice or by subsequent French legislation, shall be maintained."

The Convention relating to Manufacture and Transport Undertakings, forming Annex C to the Commercial Convention between Austria and Poland of 25 September 1922 (League of Nations, *Treaty Series*, vol. LIX, p. 307) granted Austrian companies which had undertakings in the territories ceded to Poland the right to transfer their seat of business and register their statutes in Poland; similarly, the Agreement

(*Continued on next page.*)

seem to be concerned rather with the recognition of the legal status and rights attached to it than with the nationality of legal persons. Thus, for example, the Agreement between India and France for the settlement of the question of the future of the French Establishments in India of 21 October 1954 provided that: "The Government of India agrees to recognise as legal corporate bodies, with all due rights attached to such a qualification, ..."[46]

48. If the Commission decides to retain the existing limitation of the topic to the succession of States, it should consider going beyond the study of nationality to include the status of legal persons and conditions of their operations following succession of States. By the "status" of legal persons the Special Rapporteur understands including, in addition to the nationality, rights and obligations inherent to the legal capacity of the legal person, those determining the type of a legal person.

F. What could be the possible outcome of the work of the Commission on this part of the topic?

49. As in the case of the nationality of individuals, the Commission should also consider the question of the possible outcome of its work on this part of the topic and the form it could take. The consideration of this problem, however, would currently be premature.

Conclusion

50. As has been mentioned above (para. 3), the General Assembly during its regular fifty-second session (1997), once again invited Governments to submit comments on the practical problems raised by the succession of States affecting the nationality of legal persons in order to assist the Commission in deciding on its future work on this portion of the topic.[47] No such comments have been received by the Special Rapporteur thus far. The views of the Governments are, however, of particular importance at the current stage of work on this part of the topic.

51. In order to encourage comments by Governments, the Commission might wish to indicate in its report more precisely "those specific issues ... on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work".[48]

52. In addition to the questions that the working group could suggest to the Commission for inclusion in its report, in order to ascertain the views of Governments on issues discussed in chapter II, it would also be useful to encourage States to describe briefly their practice in this field, by requesting States having the experience with the succession of States to indicate how the nationality of legal persons was determined, what kind of treatment was granted to the legal persons which, as a result of the succession of States, became "foreign" legal persons, etc.

(*Footnote 45 continued.*)
regarding Companies, namely Legal Persons, incorporated Commercial and other Associations, other than Banks and Insurance Companies, signed on 16 July 1923 between Austria and Italy (ibid., vol. XXVII, p. 383) granted Italy the right to request that companies engaged in production or transport in territory ceded to Italy should transfer their headquarters to the territory of Italy, register in Italy and remove their names from the Austrian commercial registers.

[46] United Nations, *Materials on Succession of States in Respect of Matters Other than Treaties* (ST/LEG/SER.B/17) (Sales No. E/F.77.V.9), p. 81.

[47] General Assembly resolution 52/156, para. 5.

[48] Ibid., para. 12.

DIPLOMATIC PROTECTION

[Agenda item 6]

DOCUMENT A/CN.4/484

Preliminary report on diplomatic protection, by Mr. Mohamed Bennouna, Special Rapporteur

[*Original: French*]
[*4 February 1998*]

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Introduction

1. The discussions to which the report of the Working Group on diplomatic protection gave rise, both in the Commission and during the debate in the Sixth Committee of the General Assembly,[1] have highlighted the two defining aspects of the topic, which will need to be considered on a preliminary basis so that the Commission can give the Special Rapporteur the guidance he needs to continue the study entrusted to him.

2. First there is the legal nature of diplomatic protection, i.e. of the holder of the underlying right. It has been argued that owing to the development of the rights of the individual, who is increasingly recognized as a subject of international law, the Commission should reconsider classic law in this regard, as was forcefully stated by PCIJ in the *Mavrommatis Palestine Concessions* case.[2]

3. Secondly, it has been said that the Working Group's proposal to limit the topic to the codification of secondary rules could give rise to difficulties when certain issues are taken up, such as "the 'clean hands' rule which was really on the borderline between primary and secondary rules".[3]

4. Accordingly, after a review of the historical development of the institution of diplomatic protection, the present report analyses the relevant rules.

5. The topic under consideration chiefly involves codification; its customary origins are established, as was stressed by the Working Group, referring to the *Mavrommatis Palestine Concessions* judgement, which states: "*It is an elementary principle of international law** that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels."[4]

6. This "principle" was contemplated very early on since reference is often made to the first theoreticians of international law, particularly Vattel, who said: "Anyone who mistreats a citizen directly offends the State. The sovereign of that State must avenge its injury, and if it can, force the aggressor to make full reparation or punish him, since otherwise the citizen would simply not obtain the main goal of civil association, namely, security."[5]

7. This can be seen as either a relic of feudal law under which the lord's protection was given in return for the allegiance of his subjects (nationality), or one of the extensions of the "social contract" theories which were in vogue at the time to legitimize the State, which linked social peace and the recognition of sovereign authority.

8. The quotation from Vattel, however, foreshadows one of the main criticisms of the institution, namely, that it is in essence discriminatory because only powerful States are able to use it against weaker States. According to this view, it is therefore profoundly inegalitarian, since the possibility of the individual having his cause internationalized depends on the State to which he is linked by nationality. Moreover, diplomatic protection has served as a pretext for intervention in the affairs of certain countries. Judge Padilla Nervo denounced this situation in these terms:

> The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded.[6]

9. The Latin American countries, which were the first to suffer the damaging effects of this corruption of diplomatic protection, attempted a legal response known as the Calvo doctrine, named after an Argentine statesman (1824–1906), whereby the alien contractually declines diplomatic protection from his State of origin. Discussions which this doctrine has engendered will be reverted to below.

10. At all events, diplomatic protection has been regarded from the outset as the corollary of the personal jurisdiction of the State over its population, when elements of that population, while in foreign territory, have suffered injury in violation of international law.[7] It is indeed a mechanism or a procedure for invoking the international responsibility of the host State, and some authors have felt that the study of that responsibility should include diplomatic protection.[8] However, the State-to-State relationship is distinctive in this case because it arises from the injury suffered by the nationals of one State in the territory of another State. In order to reconcile the personal and territorial jurisdictions involved, priority is accorded to the latter State to repair the harm (under the principle of exhaustion of local remedies) before the first State brings an international claim on behalf of its national.

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[1] For the debate at the forty-ninth session of the Commission, see *Yearbook … 1997*, vol. I, 2513th meeting, p. 272, para. 1. For the debate in the General Assembly, see *Official Records of the General Assembly, Sixth Committee, Fifty-second Session*, 16th–25th meetings (A/C.6/52/SR.16–25), and corrigenda.

[2] *Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*. See, in particular, the statements by Messrs Lukashuk and Pellet in the Commission (*Yearbook … 1997*, vol. I, 2513th meeting, p. 273, para. 7, and p. 275, para. 27 respectively).

[3] Statement by Mr. Simma at the forty-ninth session of the Commission (*Yearbook … 1997*, vol. I, 2513th meeting, p. 274, para. 21).

[4] *Mavrommatis Palestine Concessions* case (footnote 2 above), p. 12. See also the report of the Working Group on diplomatic protection established by the Commission at its forty-ninth session (*Yearbook … 1997*, vol. II (Part Two), p. 60).

[5] Vattel, *Le droit des gens, ou Principes de la loi naturelle* (*The Law of Nations or the Principles of Natural Law*), book II, chap. VI.

[6] *Barcelona Traction, Light and Power Company, Limited*, *Second Phase, Judgment, I.C.J. Reports 1970*, p. 246, separate opinion of Judge Padilla Nervo. For his part, De Visscher felt that "nineteenth century imperialism kept private enterprise and diplomacy in step" (*Theory and Reality in Public International Law*, p. 269).

[7] "When the citizen leaves the national territory he enters the domain of international law ... By receiving the alien upon its territory, the state of residence admits the sovereignty of his national country and recognizes the bond which attaches him to it." (Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, p. 26.)

[8] See Jessup, *A Modern Law of Nations: An Introduction*, pp. 97–98; and Briggs, "La protection des individus en droit international: la nationalité des réclamations", p. 9.

11. The State retains, in principle, the choice of means of action to defend its nationals, while respecting its international commitments and the peremptory norms of international law. In particular, it may not resort to the threat or use of force in the exercise of diplomatic protection.

12. However, as noted by the Working Group, diplomatic protection sensu stricto is very different from the diplomatic mission or consular functions exercised by the sending State in order to assist its nationals or protect their interests in the receiving country,[9] especially when these actions consist of obtaining certain concessions in respect of access to contracts or markets, guaranteeing nationals the right to defence, or facilitating certain procedures for them. In such cases there is no question of a claim against another State following a violation of international law.

13. While, in the actual exercise of diplomatic protection, the State retains the choice of means, it still needs to be determined on which right the State's action is based, its own right or that of the individual. The answer to this question determines the legal nature of diplomatic protection (see chapter I below). Then in chapter II consideration will need to be given to the nature of the rules involved in diplomatic protection, as they pertain to the status of aliens under international law (primary rules) and to mechanisms for protecting that status in inter-State relations (secondary rules).

[9] Article 3 of the Vienna Convention on Diplomatic Relations lists the "functions of a diplomatic mission". Article 5 of the Vienna Convention on Consular Relations defines "consular functions".

Chapter I

The legal nature of diplomatic protection

14. The traditional view of diplomatic protection will be presented first, as well as criticisms of it, and then the question will be asked whether they give rise to new proposals in conjunction with the development of human rights and the strengthening of individual prerogatives at the international level, while bearing in mind domestic law.

A. The traditional view

15. This view was clearly described by PCIJ in the *Mavrommatis Palestine Concessions* case:

> By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.
>
> The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.[10]

16. At the outset there is clearly a dispute between the host State and a foreign national whose rights have been denied and who ultimately suffered a denial of justice when he sought reparation for material and/or moral injury. If this individual is unable to internationalize the dispute and take it out of the sphere of local law, his State of nationality, by contrast, can espouse his claim by having him, and the dispute, undergo a veritable "transformation". Indeed, since only a State can invoke the responsibility of another State (since the individual is denied the status of subject of international law), the espousal of the claim enables the claimant to claim respect for his own right on the basis of the nationality link.

17. On the basis of a dualist approach towards relations under international law and under domestic law, the traditional view thus emphasizes the State of nationality while eclipsing the claim of the individual which is at the origin of it. Thus the immediate injury to the State as such (its territory and its agents, for example) is set against the indirect injury which is caused to it through its nationals in foreign territory and engages its personal jurisdiction. Reuter asked as early as 1950 whether this distinction was still relevant, at a time when the property of nationals was often included in the national wealth of their State.[11] And that question is even more to the point now, at a time of rapid privatization of the means of production and "globalization". But the answer is not as simple as it appears because it raises the difficult problem of the link between property and a particular country, which will be taken up later in connection with the subject of the protection of legal persons and their shareholders.

18. In formulating the principle of exhaustion of local remedies[12] in its draft articles on State responsibility, the Commission took into account the doctrinal debate

[10] *Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12.

[11] Reuter, "Quelques remarques sur la situation juridique des particuliers en droit international public", pp. 540–541.

[12] Article 22 (Exhaustion of local remedies) of chapter III (The breach of an international obligation) of the draft articles on State responsibility reads as follows:

> "When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment."

between those who regard the principle as simply a procedural rule and those who regard it as a substantive rule. On the second hypothesis, adopted by the Commission, the responsibility of the host State arises only after local remedies have been exhausted by individuals. This is because the latter, as direct beneficiaries of the obligation of result relative to the treatment accorded to them under international law, enforce their own rights before local courts first. It is not clear from the Commission's commentaries, however, how such a right is transformed following local proceedings into a right of the State of nationality, so as to revert to the logic of diplomatic protection.

19. In the traditional view, the endorsement of a claim is a discretionary right of the State of nationality, which has complete latitude to accept or reject it "without being required to justify its decision in any way whatsoever, e.g., without having to rely on the unfounded nature of the claim or on its foreign policy needs".[13]

20. If the State of nationality decides to bring a claim, it has a choice of means of settlement of the dispute between it and the territorial State, including amiable composition, by accepting the latter's payment of a lump sum as reparation. When all is said and done, the manner in which the individual himself is ultimately compensated is of little importance from the standpoint of international law.

21. In fact, the traditional view is based largely on a fiction of law. If the State of nationality is deemed to be enforcing its "own right" at the international level (by reference to the celebrated "standard minimum" treatment accorded to aliens under international law), such a right is frequently modelled on the right accorded to the national concerned at the local level, as ICJ pointed out in the *Barcelona Traction* case:[14]

> In the present case it is therefore essential to establish whether the losses allegedly suffered by the Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality?

22. Moreover, it is the damage inflicted on the foreign national which serves to determine the responsibility of the host State and to assess the reparation due to the State of nationality. PCIJ explained this relationship in the following terms:

> The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure ... The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State.[15]

23. Here, indeed, is where the fiction resides: the Court feels obliged to proclaim, by begging the question, the lack of identity between the two kinds of damage, while recognizing that one (the damage suffered by an individual) will be used to calculate the other (which remains fictitious) and hence the reparation due to the State of nationality. Dubouis protested that the famous dictum consisting of the judgment rendered in the *Factory at Chorzow* case was nothing other than the skilful sleight of hand of a talented illusionist.[16]

24. Moreover, how can the need for continuity of nationality of an individual from the time when the damage occurs until the submission of the claim, or even the final decision, be justified in the traditional view? As De Visscher pointed out: "If the wrong inflicted upon the national of a State was in itself an injury to that State, the right to intervene acquired at that moment could not be lost owing to a subsequent change in the nationality of the injured individual."[17]

25. Likewise, the conduct of the individual is taken into account in determining the responsibility of the host State; the fault of the (real) victim may thus be invoked either to diminish such responsibility or to exonerate the State in question (the "clean hands" rule).

26. Scelle went so far as to describe diplomatic protection as a "fictitious innovation ... insubstantial and illusory", adding: "Not only does the *fictitious* personality of the State swallow up the *real* personality of the individual, but the result of this legerdemain is that the original and real subject of law is completely eliminated, and the initial *legal* relationship is replaced by a *political* relationship."[18]

27. Even though it takes as its starting point a concept of international law which rejects the subjective right of the State based on the nationality link and argues for an objective right of intervention by reference to the international community,[19] Scelle's criticism is nonetheless relevant, in that it reveals all the contrivances of the legal construction in question.

28. Latin American doctrine, in the wake of the Calvo doctrine, deemed it inadmissible that an individual "claimant entitled to assert the right or interest which has been injured"[20] could not of his own accord decline protection from his State of nationality. In so doing, the individual would agree to be bound by the principle of equality with

(*Yearbook … 1977*, vol. II (Part Two), p. 11. For the commentary to this article, see pages 30–50, ibid.)

[13] Berlia, "Contribution à l'étude de la nature de la protection diplomatique", pp. 63–64.

[14] *I.C.J. Reports 1970* (see footnote 6 above), pp. 32–33. The Convention on International Liability for Damage Caused by Space Objects provides in article XII that reparation in respect of damage shall be such "as will restore the person, natural or judicial ... to the condition which would have existed if the damage had not occurred". See Dupuy, *La responsabilité internationale des États pour les dommages d'origine technologique et industrielle*, pp. 51 and 55.

[15] *Factory at Chorzow, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 28.

[16] Dubouis, "La distinction entre le droit de l'État réclamant et le droit du ressortissant dans la protection diplomatique (à propos de l'arrêt rendu par la Cour de cassation le 14 juin 1977)", p. 624.

[17] De Visscher, op. cit., p. 273.

[18] Scelle, "Règles générales du droit de la paix", pp. 660–661.

[19] ICJ drew a distinction between "the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection" in the *Barcelona Traction* case, *I.C.J. Reports 1970* (see footnote 6 above), p. 32.

[20] *Yearbook ... 1956*, vol. II, document A/CN.4/96—International responsibility: report by F. V. García Amador, Special Rapporteur, p. 193, para. 106.

nationals who are subject to the sole jurisdiction of their courts. The debate, however, did not remain at the theoretical level, since the laws of some countries went so far as to make the aforesaid doctrine one of the requirements for the validity of contracts signed with aliens. In fact, the whole controversy surrounding the Calvo doctrine comes back to the central question of the nature of the right in question (and therefore of its claimant) in the exercise of diplomatic protection by the State.

29. To the extent that the objective is to limit abuses by powerful countries, which are also the major exporters of capital, it is not surprising that the Calvo doctrine should have reappeared in other guises and in a different formulation during the 1970s, in the demands of developing countries for a new international economic order. What was at issue was reserving controversies concerning the status of foreign property to the sole jurisdiction of the national courts of the host country concerned.[21]

30. It should be noted, however, that many States upheld this argument in international forums, while at the same time concluding investment promotion agreements which recognized the right of the State of nationality to take action, including before an arbitral body, to enforce the rights accorded by the treaty to its nationals and investors.

31. What is at issue, however, are agreements which are part of the overall framework of bilateral relations between the States concerned and which, as will be seen below, frequently provide for individuals themselves to have access to international arbitration.

32. In any event, diplomatic protection was saddled with a heavy emotional and political burden which rendered it suspect, as if it were merely a pretext for manipulating the property and actions of foreign nationals, who were relegated to the role of a Trojan Horse. It was, however, the fact of conferring a certain share of legal personality on the individual, as the direct beneficiary of international rules and claimant of the right to bring claims under them, that led to more clear-cut doctrinal queries concerning the relevance of the traditional view of diplomatic protection.

B. Recognition of the rights of the individual at the international level

33. Such recognition has been granted in certain areas where the national framework has proved to be inadequate, in that it no longer meets the needs of human societies, such as the inherent rights of the individual without distinction as to nationality, the rights of foreign investors and the settlement of certain international disputes.

Inherent rights of the individual

34. Since the adoption of the Charter of the United Nations and the Universal Declaration of Human Rights,[22] there has been a trend towards recognition of the rights of the individual through a number of large general multilateral treaties.[23] This has given rise to a number of legal consequences which are completely outside the framework of the traditional view of diplomatic protection.

35. The State can no longer claim to enclose the individual within its exclusive sphere of national competence, since the international order bestows rights on him directly and places all States under an obligation to ensure that those rights are respected. Under certain conditions, individuals can even obtain a hearing and defend their rights before international bodies or committees established by international human rights treaties (the right of petition). The dualist approach taken by the original promoters of diplomatic protection is therefore no longer appropriate in such cases; what is being witnessed, rather, is a continuity between international mechanisms and national legislation in the field of human rights.

36. Moreover, when the State intervenes on behalf of an individual, it is not necessarily motivated by a subjective interest based on the nationality link; it is deemed to be acting in the objective interest of the international legal order. In its *obiter dictum* in the *Barcelona Traction* case, ICJ held that "rules concerning the basic rights of the human person" are "obligations *erga omnes*", creating an interest in acting on the part of all States.[24]

37. As has been noted with regard to human rights treaty rules and the possibility open to States to demand absolute adherence to them: "The innovation which this procedure constitutes relative to traditional diplomatic procedure is measured at the theoretical level." Indeed, what is at stake here is the interest of the community in protecting "the common values which the system enshrines".[25] The individual joins in the proceeding instituted before the European Court of Human Rights, and is even given an opportunity henceforth to refer a matter directly to the Court.[26]

[21] Lillich, "The diplomatic protection of nationals abroad: an elementary principle of international law under attack", pp. 359–365. The author refers, in particular, to the Charter of Economic Rights and Duties of States, adopted on 12 December 1974 by the General Assembly in its resolution 3281 (XXIX), article 2, paragraph 2 (*c*), of which provided that:

> "… In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."

[22] See resolution 217 A (III) of 10 December 1948.

[23] Such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[24] *I.C.J. Reports 1970* (footnote 6 above), p. 32, paras. 33–34.

[25] Sudre, *Droit international et européen des droits de l'homme*, p. 74. Article 24 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) authorizes any State party to refer to the European Commission any alleged breach of the provisions of the Convention by another State party. According to the Commission, "a State which intervenes under article 24 'should not be regarded as acting to enforce its own rights, but rather as submitting to the Commission a question which involves public order in Europe'" (decision of 11 January 1961, *Austria* v. *Italy*, cited by Sudre, op. cit., p. 281).

[26] Protocol No. 9 to the European Convention on Human Rights.

Rights of foreign investors

38. Bilateral investment promotion and protection agreements have proliferated since the 1960s. Nearly 300 of them have now been concluded between capital-exporting countries and capital-importing countries on the basis of prototypes prepared generally by the first group (mainly France, Germany, the United Kingdom of Great Britain and Northern Ireland, and the United States of America).[27] According to Laviec, "these recent means of protection also appear as alternatives for avoiding the pitfalls of diplomatic protection, whose decline they reflect".[28]

39. Indeed, in these agreements investment per se is defined, as are the rights relating thereto which guarantee its security; customary law is clarified and supplemented (transfers of earnings and capital, compensation in the event of expropriation). A large number of these bilateral agreements provide that in the event of a dispute between an investor and a host State, either party may refer it for settlement to ICSID.[29] A foreign investor can thus have direct access to an arbitral tribunal in a dispute with the host State. Accordingly, in this context, he may be considered to have international legal personality.

40. In consenting to arbitration, the parties to a dispute waive all other remedies. In this way, both the demand of the host State that local remedies be exhausted and the exercise of diplomatic protection by the State of nationality are put aside. In other words, where the right of the individual is recognized directly under international law (the bilateral agreements referred to above), and the individual himself can enforce this right at the international level, the "fiction" no longer has any reason for being.

Settlement of international disputes

41. States have instituted ad hoc international tribunals for the settlement of disputes between one State and the nationals of another State. To begin with, in the nineteenth century, there were the mixed commissions, the first of which was established by the Anglo-American Treaty of 8 February 1853.[30] After the First World War, an agreement between the United States of America, Austria and Hungary provided for the selection of a commissioner who would give a verdict on all claims presented by the United States on behalf of its nationals who had suffered losses attributable to those countries during the First World War.

42. More recently, the Iran-United States Claims Tribunal was established by the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981.[31] Nearly 4,000 judgements have already been rendered by this Tribunal in cases mainly involving disputes between foreign nationals and one or another of the host countries. In these cases, too, local remedies and diplomatic protection are declined and individuals are authorized to enforce their rights directly before an international court.

43. Lastly, mention should be made of the manner in which the Security Council decided to regulate the consequences of Iraq's liability for "any direct ... injury to foreign Governments, nationals and corporations" directly attributable to its invasion and occupation of Kuwait.[32] The implementation of the decision concerning such liability was entrusted to the United Nations Compensation Fund and UNCC under the supervision of a Governing Council composed of the members of the Security Council and located at the United Nations Office at Geneva.[33] The procedure is a hybrid, nonetheless, since it includes judicial guarantees; tripartite commissions composed of independent commissioners are entrusted with studying the claims and making proposals to the Governing Council, which must approve them in every case.

44. Claims may be submitted to UNCC by States or international organizations on behalf of the individuals or corporations concerned, and the agreed compensation is then liquidated through them. In this instance, States are regarded to some extent as agents acting on behalf of individuals before the bodies charged with settling the dispute between them and the country liable for the damage. Some States even give their nationals advances pending settlement of the claims in question, "[c]onfirmation, if any was still needed, of the gap between the solutions adopted in this conflict and the traditional mechanisms of diplomatic protection".[34]

C. Domestic law and the legal nature of diplomatic protection

45. At this stage it is not a question of reviewing all legal systems as they relate to diplomatic protection but, rather, simply recalling their main features and trying to identify trends.

46. The discretionary power of the State to exercise diplomatic protection has been recognized under domestic law; accordingly, it has been concluded that decisions as to whether to bring a claim, choice of legal remedies, acceptance of lump-sum agreements, and arrangements for distributing settlements are not amenable to judicial review. However, with respect to the last-mentioned point, starting in the 1950s, a trend in practice was noted towards the establishment of judicial review of the transfer of the sum received by the State. For example, France, the Unit-

[27] A study carried out in 1988 by the United Nations Centre on Transnational Corporations, entitled *Bilateral Investment Treaties* (United Nations publication, Sales No. E.88.II.A.1), counted 265 of them.

[28] Laviec, *Protection et promotion des investissements: étude de droit international économique*, p. 5.

[29] ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, under the auspices of the World Bank.

[30] Rigaux, "Les situations juridiques individuelles dans un système de relativité générale: cours général de droit international privé", p. 120.

[31] ILM, vol. XX, No. 1 (January 1981), pp. 230–233.

[32] Resolution 687 (1991) of 3 April 1991, para. 16.

[33] Resolution 692 (1991) of 20 May 1991, para. 3.

[34] Cottereau, "Responsabilité de l'Iraq: aperçu sur les indemnisations urgentes des personnes physiques", p. 166. A total of 2.8 million claims have been submitted by individuals.

ed Kingdom and the United States set up judicial commissions to distribute lump sums received from certain Eastern European countries after the Second World War.

47. It would be premature to conclude from that practice that "discretionary" State jurisdiction has become "mandatory",[35] but this trend nonetheless demonstrates "how 'unsound' and unsatisfactory, if not archaic, 'diplomatic protection' is".[36]

48. Now, domestic legislation mostly allows recourse to the domestic courts in order to guarantee the transfer of the sum received by a Government and to review its distribution. However, it is rarely a question of the right of the individual to benefit from diplomatic protection from his State of nationality and, consequently, of an obligation or a duty incumbent on the State of nationality in that connection. Even if such obligation is referred to by some constitutional texts,[37] it is actually much more a moral duty than a legal obligation, since the intention of the State of nationality is clearly influenced by political considerations and the degree of appropriateness, depending on the nature of the diplomatic relations in question. The obligation must at least be in keeping with the overriding interests of the State of nationality.[38]

D. What are the rights involved in diplomatic protection?

49. It has certainly been established that the State has a "procedural" right to bring an international claim in order to protect its nationals when they have suffered injury as a result of a violation of international law. And the State may agree to limit that right or even to waive it in its treaty practice with other countries.

50. However, the question must still be asked, in keeping with the traditional view, whether in taking such an approach the State is enforcing its own right or whether it is simply the agent or representative of its national who has a legally protected interest at the national level and thus a right.[39] According to whether one opts for the right of States or for the right of the national, one is placing emphasis either on an extremely old custom, which gave sovereignty more than its due, even resorting to a fiction, or on progressive development and adoption of custom, taking account of reality by means of international recognition of human rights.

51. The choice to be made is of course not academic, since it will have an impact on the legal regime of diplomatic protection. When the State invokes a right of a national it is obliged, in one way or another, to involve the national at the level of procedure and of any transaction that takes place. It is also conceivable, in such a case, that the State cannot bring an international claim against the will of the national concerned. Accordingly, when a national declines diplomatic protection from his State of nationality, he is not infringing the rights of the State but, rather, merely availing himself of his own right.

52. The Special Rapporteur has shown how the attribution of rights to individuals by means of treaties may go so far as to allow individuals direct access to international machinery and courts to guarantee observance of such rights. But can individuals be regarded, from the perspective of general international law, as claimants of rights to which States can simply give effect by bringing international claims? This is what is at issue in the current legal debate on diplomatic protection, and the Special Rapporteur would appreciate guidance on this matter for the purpose of preparing future reports on the subject.

53. Thus, if one were to transpose the "Mavrommatis" proclamation,[40] one would say that when the State espouses its nationals' cause it is enforcing their right to fulfilment of international obligations regarding the treatment of foreign natural or legal persons. One might object to such a formulation, which is more in keeping with recent trends in international law, on the basis of international responsibility, where the breach of an international obligation by a State is linked to the existence of a subjective right benefiting another State. However, the Special Rapporteur is aware that it is increasingly accepted that a State can have obligations with respect to individuals who have rights recognized under international law. It is hard to see, in the circumstances, who would object to the State of nationality, which has a duty to protect its nationals, espousing their cause and bringing an international claim on their behalf. While acknowledging that "this issue should be given in-depth consideration", Dominicé adds that "there does not appear to be any obstacle in principle to such an argument".[41]

54. The Special Rapporteur would therefore appreciate it if the Commission could answer the following question: when bringing an international claim, is the State enforcing its own right or the right of its injured national?

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[35] Berlia, loc. cit., p. 66. The author cites the agreements concluded by the three countries in question with Yugoslavia and Czechoslovakia between 1948 and 1951.

[36] Carreau, *Droit international*, p. 467.

[37] For example, in the Constitution of the People's Republic of China and the Constitutions of the Russian Federation and some Eastern European countries.

[38] In their decisions, the German courts have recognized the duty to protect nationals, subject to that proviso. See Bernhardt, ed., "Diplomatic protection", p. 1052.

[39] As ICJ put it in the *Barcelona Traction* case, *I.C.J Reports 1970* (see footnote 6 above), p. 32, para. 35.

[40] See footnote 2 above.

[41] Dominicé, "La réparation non contentieuse", p. 221. The author refers to lump-sum agreements "dealing with the issue of claims of nationals of the State that obtains the settlement instead of the State that undertakes to pay it". The responsibility of the State would then be entailed with respect to the individual claimant under international law.

Chapter II

The nature of the rules governing diplomatic protection

55. Should the exercise in question be confined, as recommended by the Commission's working group, to codification of relevant secondary rules? At the initiative of Mr. Roberto Ago, such a limitation won acceptance in the case of the preparation of the draft articles on State responsibility and made it possible to remove the obstacles to progress on the draft.[42] However, the distinction between obligations of States in particular areas of their relations (primary rules) and obligations of States that arise from the breach of primary rules, such as the right to reparation (secondary rules), is not as rigid as it might seem. The Commission felt the need to divide primary obligations into obligations of conduct and obligations of result, and even obligations to ensure a particular type of treatment for foreign individuals, in order to draw a number of conclusions regarding State responsibility, although in that particular instance it confined itself to general categories and avoided considering the content of the material law in question. That approach was not disavowed throughout the work in question:

> [F]or the reasons repeatedly mentioned by the Commission, consideration in the draft of the principle of the exhaustion of local remedies and its various aspects must at all costs stop short of an examination of the content of "primary" rules of international law, such as those relating to the treatment of aliens, efforts to define which proved fatal to earlier attempts at codification of the topic of international responsibility.[43]

56. The Commission in fact decided, during consideration of the topic of international responsibility, to start by codifying the aspect that it regarded as lending itself best to such an exercise: "Responsibility of States for damage done in their territories to the person or property of foreigners."[44]

57. The Special Rapporteur, Mr. V. F. García Amador, did indeed choose to deal first of all with primary rules, namely "principles and rules of a *substantive* nature, i.e. only with *acts and omissions* which give rise to the international responsibility of the State for injuries caused to aliens", initially leaving aside all principles and rules (secondary rules) of a procedural or adjective character:

> [R]ules governing the exhaustion of local remedies, the waiver of diplomatic protection by the foreign individual concerned or his national State, modes and procedures of settlement (including the principle of the nationality of the claim and the rules concerning the capacity to bring an international claim), prescription and other exonerating, extenuating or aggravating circumstances and the form and measure of reparation.[45]

58. It is precisely in view of this initial experience that the Working Group proposed that the codification of diplomatic protection should not cover secondary rules, which were dealt with in the second part of the plan proposed by the Special Rapporteur, without prejudice to elements relevant to the draft articles on the law of international responsibility. In fact, the more comprehensive approach taken by the Special Rapporteur led to an impasse, since he proposed codification of entire areas of international law, beyond the sphere of responsibility sensu stricto, including the conduct of State organs, human rights, public debts, expropriation acts, contracts between States and individuals, and acquired rights.

59. It can therefore be agreed that it is entirely appropriate, when dealing with the topic of diplomatic protection, to limit ourselves to "secondary rules", in order to avoid the inevitable "spilling-over" that occurs as a result of any review of issues relating to international responsibility.[46]

60. Once the Commission has taken that precaution it should be able to discuss "primary rules" in the context of general categories and, where necessary, with a view to appropriate codification of "secondary rules" that are of direct relevance to the topic. In particular, this would be the case where the aim is to define the nationality link of natural or legal persons, which permits the bringing of an international claim or grounds for exoneration from responsibility on the basis of the conduct of individuals. The "primary rule" would not be under consideration as such but only to the extent that it relates to the "secondary rule". Accordingly, it would not be the granting of nationality that is being considered in this case, but its applicability to another State; similarly, it would not be the individual's compliance with the host country's legislation that would be under consideration, but the circumstances in which the individual's conduct constitutes a ground for exonerating the host country.

61. This relationship between primary and secondary rules was emphasized by Brownlie, who, after quoting the decision rendered by the Iran-United States Claims Tribunal in case A/18 ("In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim"), adds: "This proviso clearly refers to situations in which reliance upon the other nationality would involve elements of fraud, or estoppel, or fundamental considerations of equity, such as the principle of clean hands."[47] Here there are opportunities to consider primary rules in order to establish to what extent a State has the right to bring a claim for the protection of its nationals, as well as to assess the State's responsibility.

62. The Special Rapporteur therefore believes that the time for watertight compartments and Manichaean

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[42] Pellet, "Remarques sur une révolution inachevée: le projet d'articles de la CDI sur la responsabilité des Etats", p. 8.

[43] *Yearbook ... 1977*, vol. II (Part Two), p. 48, para. (52) of the commentary to article 22 (Exhaustion of local remedies).

[44] *Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 1, p. 221.

[45] *Yearbook ... 1957*, vol. II, document A/CN.4/106, p. 105, para. 3.

[46] Bennouna, "Le règlement des différends peut-il limiter le 'droit' de se faire justice à soi-même?", pp. 63–64.

[47] Brownlie, "International law at the fiftieth anniversary of the United Nations: general course on public international law", pp. 109–110. For case A/18, see *International Law Reports*, vol. 75 (1987), pp. 176–194.

approaches to international law is past. What is now being dealt with is continuity, both in a local and international context and as between States and the community,[48] with the emphasis varying according to the particular field in question.

63. Here, too, the Special Rapporteur would appreciate guidance from the Commission on confining consideration of the topic of diplomatic protection to secondary rules of international law. Does confining consideration of the topic to secondary rules mean that only secondary rules should be discussed, or chiefly secondary rules?

[48] Simma, "From bilateralism to community interest in international law".

64. If the second alternative is chosen, there is no question of reverting to the approach initially proposed to the Commission by Mr. García Amador; since neither the status of foreigners nor investment law is to be codified. However, the Commission may well need to consider a number of primary rules, as general categories, in order to define the nationality of physical and legal persons and its applicability, and to assess the conduct of physical and legal persons in respect of the host country, with a view to determining the extent of that country's responsibility.

65. The question is therefore whether the Commission is going to take a rigorous or a flexible approach to secondary rules as they relate to the topic of diplomatic protection.

UNILATERAL ACTS OF STATES

[Agenda item 7]

DOCUMENT A/CN.4/486

First report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur

[*Original: Spanish*]
[*5 March 1998*]

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Introduction

1. The topic of unilateral acts was specifically taken up by the Commission at its forty-eighth session in 1996, when it considered its long-term programme of work. On that occasion the Commission concluded that one of the topics that was "appropriate for codification and progressive development" was "unilateral acts of States".[1]

2. The General Assembly subsequently invited the Commission "further to examine the topics 'Diplomatic protection' and 'Unilateral acts of States' and to indicate the scope and the content of the topics in the light of the comments and observations made during the debate in the Sixth Committee on the report of the Commission and any written comments that Governments may wish to submit".[2]

3. At its forty-ninth session in 1997, the Commission set up a Working Group chaired by Mr. Enrique Candioti,[3] which submitted a report that took into account the document prepared by the Commission the previous year.[4] In its 1997 report, the Commission put forward a number of reasons for considering such acts:

> (*a*) In their conduct in the international sphere, States frequently carry out unilateral acts with the intent to produce legal effects. The significance of such unilateral acts is constantly growing as a result of the rapid political, economic and technological changes taking place in the international community at the present time and, in particular, the great advances in the means for expressing and transmitting the attitudes and conduct of States;
>
> (*b*) State practice in relation to unilateral legal acts is manifested in many forms and circumstances, has been a subject of study in many legal writings and has been touched upon in some judgments of ICJ and other international courts; there is thus sufficient material for the Commission to analyse and systematize;
>
> (*c*) In the interest of legal security and to help bring certainty, predictability and stability to international relations and thus strengthen the rule of law, an attempt should be made to clarify the functioning of this kind of acts and what the legal consequences are, with a clear statement of the applicable law.[5]

4. In the preparation of the present report account has been taken of an extensive and not always consistent doctrine relating to international unilateral acts and conduct and international engagements and obligations, with special reference to those of States.

5. Similarly, where appropriate, account has been taken of the background of the topic in the Commission and other international bodies, as well as of the extensive jurisprudence of international judicial bodies that deals in some way or other with the unilateral acts or conduct of a State, whether or not those acts or that conduct belong to the specific category of acts which are of concern.

6. When the articles on the law of treaties were being drafted, it was decided not to include consideration of unilateral acts in the corresponding report. Thus, the Special Rapporteur for the topic, Mr. James Brierly, stated in his introductory note in 1950 that:

> wholly unilateral engagements, engagements to the creation of which only one international legal person is a party, are not within the scope of the present draft. This is not to say that a bi- or multilateral character is thought to be inherent in an international legal obligation *ex contractu*. It is not thought that the doctrine of consideration plays any part in international law. But it is considered that the line between the analogues of the contract and the gift of municipal law, the latter of which is but notionally bilateral, must be drawn somewhere, and that at that line the law of treaties must be taken to stop.[6]

7. When the Commission considered its future organization of work in 1967, reference was made during the relevant discussion to the topic of unilateral acts. In fact, one Commission member commenting on the issue of the sources of international law, stated that:

> it would be difficult to suggest another source of international law that was as wide in scope [as the law of treaties]. A limited counterpart to the law of treaties could, however, be found in the topic of unilateral acts, concerning which ample research and practice were available and which greatly needed clarification and systematization. The topic covered recognition as a positive act acknowledging a given situation to be a legal situation and, conversely, protests rejecting changes in a legal situation. It also included the principle of estoppel applied by the International Court of Justice. Other unilateral acts which might possibly be dealt with in a systematic draft were proclamations, waivers and renunciations.[7]

8. It is also worth recalling the work of the United Nations Conference on International Organization, held in San Francisco, relating to the adoption of Article 102 of the Charter of the United Nations, particularly in connection with the terms "agreement" and "engagement".[8]

9. Generally speaking, the topic of unilateral acts is not new either doctrinally or in terms of international jurisprudence. Important doctrinal works have been published over many decades, but the works produced from the 1960s onwards—when the issue of the definition of an international legal act began to be the subject of more sustained or intense doctrinal study—are better known and more complete.[9] The lack of a theory of international uni-

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[1] *Yearbook …1996*, vol. II (Part Two), pp. 97–98, para. 248. For the Commission's invitation to Governments to express their views on possible future topics for consideration in its programme of work, see page 14, para. 29 (ibid.).

[2] General Assembly resolution 51/160 of 16 December 1996, para. 13.

[3] *Yearbook …1997*, vol. II (Part Two), p. 8, para. 8 (*c*), and p. 64, para. 193.

[4] *Yearbook … 1996*, vol. II (Part Two), annex II, addendum 3, pp. 141–143.

[5] *Yearbook …1997*, vol. II (Part Two), p. 64, para. 196.

[6] *Yearbook ... 1950*, vol. II, p. 225, para. 10.

[7] See the statement by Mr. Tammes, *Yearbook ... 1967*, vol. I, p. 179, para. 6.

[8] "In Article 102 of the Charter the term 'agreement' was expressly adopted 'in preference to the term "engagement" which may fall outside the strict meaning of the word "agreement"'.[4] Nevertheless, the meaning of the term 'agreement' as used in that Article is a wider one than is invariably conceded to the term 'treaty', being expressly declared by Committee IV/2 of the San Francisco Conference to include 'unilateral engagements of an international character which have been accepted by the State in whose favour such an engagement has been entered into'."

(*Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 226, para. 16.) Footnote 4 in the text quoted refers to U.N.C.I.O. Documents, vol. XIII, p. 705.

[9] See Anzilotti, *Cours de droit international*; Garner, "The international binding force of unilateral oral declarations"; Pfluger, *Die einseitigen Rechtsgeschäfte im Völkerrecht*; Biscottini, *Contributo alla teoria degli atti unilaterali nel diritto internazionale*; Guggenheim, "La validité et la nullité des actes juridiques internationaux"; Kiss, "Les actes unilatéraux dans la pratique française du droit international"; Suy, *Les actes juridiques unilatéraux en droit international public*; Ventu-

lateral acts of States is unquestionably a hindrance to any systematic study of the topic. The theory of unilateral acts is, in fact, very far from exhibiting the same consistency as the theory of treaty-based acts.[10]

A. Purpose of the report

10. The aim of the current exercise is, first of all, to identify, by means of consideration of the various acts and forms of conduct of States, the constituent elements of a definition of a unilateral legal act, with a view to drawing up a definition by way of a conclusion. In order to do this, it will be necessary to consider such acts and to endeavour to delimit them precisely so as to exclude those acts that belong to the sphere of the law of international agreements, which is governed by the law of treaties, as codified in the 1969 Vienna Convention on the Law of Treaties.

11. Consideration of unilateral acts of States in the strict sense involves choices that are of fundamental importance for the preparation of the current report, whose aim it is to determine whether a certain category of act exists in international law and, if so, whether the rules that govern those acts could be the subject of codification and progressive development.

12. The first question that arises with regard to the focus and the orientation of the current report is whether it is necessary to undertake an analysis of the various substantive unilateral acts which States may perform, in order to determine whether they fall within the treaty sphere or within the sphere of strictly unilateral acts, as defined below; or whether, on the other hand, the formal act, which in most cases comprises such a substantive act, should be analysed.

13. Consideration has been given at this preliminary stage to studying both types of act, that is, both the formal act (the declaration) and its contents, in order to develop a definition of a purely unilateral act and ascertain whether or not the applicable rules can be the subject of codification and progressive development.

14. Owing to the importance which is attached to the formal unilateral act, which may comprise various substantive legal acts (promise, recognition, waiver, protest), this report must consider formal unilateral acts comprehensively. The codification and development of rules on the subject dealt with in this report would appear to relate more to the process of creating legal rules, that is, to the formal legal act, though this should not detract from the importance which is to be accorded to the various substantive unilateral acts which a State may perform, as will be seen.

15. The outcome of the Commission's study necessarily remains uncertain. At the current stage, it cannot be determined what form its conclusions will take: that is, whether a doctrinal study, draft articles with commentaries, a set of guidelines or recommendations, or a combination of the above should be prepared on the topic. In any event, owing to the very nature of the subject in question, codification must be accompanied by the progressive development of international law (without the specifics of the two processes being entered into). Whatever the case, it is worth recalling the following statement by Mr. Gilberto Amado in the Sixth Committee of the General Assembly:

> In the present era of rapid changes, codifiers would have to stress the progressive side of their work. The work of codification tended more and more to become one of development.[11]

16. At this preliminary stage, it has been possible to consider State practice only insofar as it is reflected in the relevant jurisprudence and is commented on in major international doctrinal studies; it is to be hoped that comments on that practice will be forthcoming from States for the preparation of future reports. However, account has been taken of the remarks made in 1997 by the representatives of Governments in the Sixth Committee of the General Assembly.

17. It is important to note that there is an increasingly pronounced practice on the part of States of performing unilateral political or legal acts, which are often indeterminate, in their foreign relations, and that such acts, based on good faith and on the need to build mutual confidence, appear to be both useful and necessary at a time when international relations are becoming ever more dynamic.

B. Structure of the report

18. In chapter I a brief review is made of the sources of international law and obligations, with a view to drawing a distinction between the process of creating legal rules and the content of those rules, that is, the rules themselves, and focusing the study on consideration of unilateral declarations as a means of creating international obligations, before proceeding to the consideration (also in chapter I) of the various unilateral acts of States that fall within the treaty sphere and which are therefore beyond the scope of the current report.

19. In the law of international agreements, the treaty is the most common procedure for the creation of international legal norms, being based on an agreement, understood as a joining of wills. In the same way, as has been stated earlier, in the law of unilateral acts, the unilateral declaration is probably the means or procedure by which a State most often performs unilateral acts and assumes strictly unilateral obligations.

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rini, "La portée et les effets juridiques des attitudes et des actes unilatéraux des États"; Quadri, "Cours général de droit international public"; Cahier, "Le comportement des États comme source de droits et d'obligations"; Miaja de la Muela, "Los actos unilaterales en las relaciones internacionales"; Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public*, and "Acte et norme en droit international public"; De Visscher, "Remarques sur l'évolution de la jurisprudence de la Cour internationale de justice relative au fondement obligatoire de certains actes unilatéraux"; Dehaussy, "Les actes juridiques unilatéraux en droit international public: à propos d'une théorie restrictive"; Degan, "Unilateral act as a source of particular international law"; Barberis, "Los actos jurídicos unilaterales como fuente de derecho internacional público"; Charpentier, "Engagements unilatéraux et engagements conventionnels: différences et convergences"; Villagrán Kramer, "Les actes unilatéraux dans le cadre de la jurisprudence internationale"; and Skubiszewski, "Unilateral acts of States".

[10] See Virally, "Panorama du droit international contemporain", p. 194.

[11] *Official Records of the General Assembly, Sixteenth Session, Sixth Committee*, 721st meeting (A/C.6/SR.721), para. 21.

20. The majority of unilateral legal acts of States are in fact only apparently unilateral in nature. In reality, such acts belong to the realm of international agreements, and are therefore governed by existing rules of international law, in particular, the law of treaties, as codified in the 1969 Vienna Convention.

21. Chapter I reviews such acts, in particular those executed under the law of treaties: signature, ratification, reservations, accession, denunciation and acceptance, as well as interpretative declarations, which, although apparently endowed with greater autonomy, do not in fact enjoy any independent existence as unilateral acts—that is, they do not in and of themselves produce legal effects.

22. Chapter I also deals with acts which, although apparently unilateral, constitute a bilateral or multilateral treaty relationship, such as offer and acceptance, as well as those acts which, although formally unilateral, do not create a new legal relationship but are associated or linked with a pre-existing treaty or customary legal norm.

23. There follows a review of State acts relating to the formation of custom. Independently of whether or not custom has a consensual basis, such acts are not autonomous or isolated in their nature: that is, they do not have any existence of their own. As will be seen, acts which give rise to custom are generally, but not invariably, unilateral acts of States.

24. Chapter I continues with an examination of those acts by which States accept the jurisdiction of ICJ, pursuant to Article 36 of the Court's Statute, which acts constitute or give rise to a treaty relationship. It also examines statements made by State officials in the context of judicial proceedings or by the authorities of a State which is a party to such proceedings or which are made outside such proceedings but in relation to them, which acts, as will be seen, can be of a different nature.

25. Chapter I then deals with those unilateral acts whose origin is a treaty: that is, collateral agreements created by stipulations in favour of third parties. Such an act is a treaty act for the States which conclude it, but is a unilateral and heteronormative act from the standpoint of a third State or States for which rights or obligations may arise a question regulated in the 1969 Vienna Convention.

26. Lastly, chapter I looks at and excludes from the scope of this report all acts and conduct performed by States which permit a third State to invoke an estoppel, since such acts differ from purely unilateral acts (declarations).[12]

27. Chapter II reviews the criteria which appear to be fundamental in identifying a strictly unilateral act. The first criterion, which is formal in character, allows for the possibility of individual or collective acts on the basis of a single manifestation of will. The second, which concerns the autonomy of the act, must be looked at from two different standpoints, one relating to the absence of a connection with a pre-existing act or norm or other manifestation of will and the other relating to the autonomy of the obligation.

[12] Jacqué, "À propos de la promesse unilatérale", pp. 335–339.

28. Chapter II takes up the question of the basis of the obligatoriness of strictly unilateral acts. It then considers the necessity of providing for a norm on which that obligatoriness might be based.

C. Acts which are excluded from the scope of the study

29. It is necessary in this introduction to exclude from the scope of this study certain unilateral acts: the acts of other subjects of international law, especially those of international organizations, including judicial bodies (authoritative acts); acts which are outside the purview of international law (political acts); wrongful acts and acts which under international law may engage the international responsibility of States, a topic which the Commission is considering separately; and acts and conduct, such as silence and acquiescence, which, irrespective of whether they are legal acts or forms of expression of the will of States, are not purely unilateral in nature.

1. Unilateral legal acts of international organizations

30. Insofar as unilateral legal acts of international organizations are concerned—a subject which will have to be taken up separately owing to the importance of such acts in international life—it should be stated first of all that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights".[13]

31. It is true that the unilateral acts of States and of international organizations could be placed in the same category, as the Commission affirmed in 1971 when considering its long-term programme of work.[14]

32. It is important, however, to draw a distinction between unilateral acts in the context of relationships of coordination and unilateral acts in the context of relationships of association. Such a distinction is fundamental because relationships of coordination are based on the sovereignty and juridical equality of States. As will be seen below, this fact points to the conclusion that unilateral acts which are performed in this context cannot generate obligations for third States. The situation with respect to relationships of association is different. The decisions of an international body can produce legal effects insofar as the member States, in the exercise of their sovereignty, may have endowed that body with legal competence.

33. It is the prevailing view that the two categories of acts should be studied separately, and this on various grounds. As was pointed out by a representative in the Sixth Com-

[13] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 178.

[14] In 1971 the Commission, when considering its long-term programme of work, stated that, since the definition of a unilateral act included the unilateral acts of all subjects of international law, it might be deemed to include the performance of such acts not only by States but also by international organizations, possessed of a distinct legal personality (*Yearbook ... 1971*, vol. II (Part Two), p. 61, para. 282).

mittee, the study of unilateral acts of States necessarily implies the exclusion of acts performed by international organizations.[15] Acts performed by international organizations are also substantially different from the acts of States.[16] Although it is true that the acts of international organizations are of particular interest, they should be considered separately because of their differences, especially with regard to the means of their elaboration or formulation.[17]

34. In the case of States, the rules relating to the performance of such acts have their basis in the constitutional norms of the State concerned and in international law. In the case of international organizations, on the other hand, the rules which regulate this question appear to be contained in the basic texts of the organization and the instruments derived from those texts and, where applicable, in international law.

35. Although it is true that unilateral acts performed by an organ of an international organization or by an international organization as such may have legal force and hence may contain obligations for third parties, the rules which apply to those acts must be distinguished from those which may apply to unilateral acts of States.

36. Accordingly, the Commission might consider, as suggested in the discussion in the Sixth Committee in 1997, the possibility of carrying out a further specific study which could perhaps complement the proposed study on unilateral acts of States.[18]

37. Although important differences exist between them, the acts of international organizations should be taken to include authoritative acts, in particular, those emanating from judicial bodies, which acts, though they are unilateral in form and heteronormative in their effects, do not belong to the category of strictly unilateral acts.[19] Part of the legal literature considers that they are not legal acts at all inasmuch as the will which underlies them does not belong to a subject of international law. Today, on the other hand, a substantial body of opinion maintains that the acts of international tribunals are indeed legal acts inasmuch as such tribunals are international bodies empowered by international law to settle legal disputes.[20]

38. In all such cases, the unilateral acts concerned are performed as a result of the competence which States themselves have conferred on the body and of which they may become the object. Unilateral authoritative acts, which continue to be important in international law, are regulated by the law peculiar to each international organization or body. The rules applicable to the treaties which authorize such bodies to perform such acts are regulated, of course, by the law of international agreements, in particular, the law of treaties.

2. Political acts and legal acts of States

39. It is moreover desirable in this introduction to separate the legal acts of States from their political acts.

40. A representative speaking in the Sixth Committee at the fifty-second session of the General Assembly stated that the Commission should distinguish unilateral acts of States which are intended to produce legal effects opposable under international law from other such acts. Noting that the effect of the former was to create, recognize, safeguard or modify rights, obligations or legal situations, he asked what the point was of the latter.[21]

41. In point of fact, a State can perform acts of either a political or a legal nature—a difficult and complex distinction which defies any clear-cut classification. A formally political act adopted in a formally political context may be purely political; that is to say, it may contain intentions or desires in relation to another State in a purely political context. But nothing in international law appears to preclude an act of this nature from producing legal effects at the international level and hence from being regulated by international law.

42. A legal act differs from a political act by its very nature: that is, by virtue of its scope, its effects and the mechanism for ensuring compliance by the States which are bound by it.

43. A political act can be defined as an act which a State performs with the intention of creating a political relationship with another State and which exists outside the legal sphere. The basis of its obligatoriness appears to reside in morality and politics, rather than in international law. Its performance and the sanction for non-compliance therefore depend entirely on the political will of the State which performs it. As regards the obligation to comply with the engagement to which such an act gives rise, good faith has a role to play as a basis of its obligatoriness. However, as this question is not of direct concern to the topic under consideration, it will not be dealt with here. Of course, such acts have to be looked at in a different light. As Virally rightly says, "it seems that purely political agreements very often involve an extension—which can be considerable compared to what is acceptable in international law—of the application of the *clausula rebus sic stantibus* and of the doctrine of state of necessity".[22] In addition, the performance of the obligations to which these acts give rise and the sanction for failure to perform those obligations would not appear to be regulated by international law. One of the important consequences

[15] *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 19th meeting (A/C.6/52/SR.19), statement by France, para. 60.

[16] Ibid., 23rd meeting (A/C.6/52/SR.23), statement by Austria, para. 44.

[17] Ibid., 21st meeting (A/C.6/52/SR.21), statement by Venezuela, para. 39.

[18] Ibid., 23rd meeting (A/C.6/52/SR.23), statement by China, para. 9.

[19] See Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public*, pp. 345–417.

[20] See Salvioli, "Les règles générales de la paix", p. 82, and Jacqué, op. cit., p. 374.

[21] *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 19th meeting (A/C.6/52/SR.19), statement by France, para. 59.

[22] "La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes émanant des organisations internationales) ", p. 236, para. 167.

of the distinction between the political engagement and the legal engagement is the hypothesis of their non-performance. At this critical moment, as Virally notes, the separation of types becomes necessary: the State complaining of the situation may certainly act in the political sphere if a political agreement has been breached but cannot do so in the legal sphere. If the breach pertains to a legal commitment, on the other hand, both options are available.[23]

44. The intention of the State which formulates or issues a declaration is what really must determine its legal or political character: in other words, whether that State intends to enter into a legal engagement or a political engagement. State practice appears to indicate that in their international relations States formulate purely political unilateral or bilateral declarations without any intention of entering into legal engagements. In such cases it may be said that the acts performed are not without their social effect.

45. Admittedly, the political act produces important effects in the sphere of international relations. By making engagements on this level States may assume political obligations which, although they are outside the realm of international law, are nonetheless of fundamental importance in relations between States. As State practice bears out, the obligatoriness of a political engagement is at times far more effective and consequential than that of a legal engagement.

46. Such acts have a paralegal importance, to which part of the literature has accorded a fundamental value as a source for regulating the conduct of States in their international relations. However, they are of no importance to the topic under consideration, except insofar as an act of this nature may contain legal elements which can be translated into legal norms, especially into obligations for the issuing State.

3. Acts relating to the international responsibility of States

47. This introduction must also exclude acts contrary to international law and acts which, although in conformity with international law, may engage the international responsibility of a State, since the Commission is already dealing with these topics separately.

4. Acts and conduct which do not constitute international legal acts in the strict sense of the term

48. A State may engage in conduct and perform a series of acts of various kinds which define its participation in the international sphere. Such conduct and such acts are not always clear-cut and unambiguous in nature and are far from being capable of classification in a convenient and definitive form. Accordingly, assessing them and determining the rules which apply to them give rise to serious difficulties.

49. By its inaction, a State may acquire rights and assume obligations. In particular, through silence which for some writers is not strictly speaking a legal act but is rather a form of expression of will—a State may acquire rights and assume obligations in specific cases. A State may accept an offer through silence: *qui tacet consentire videtur*. The mere manner in which a State conducts itself, including in specific circumstances its silence, may indicate the will to recognize as legitimate a particular state of affairs.[24] The State may also express by its silence its opposition to a de facto or *de jure* situation: *qui tacet negat*.

50. According to much of the literature, silence, as a reactive behaviour and a unilateral form of expression of will, cannot be considered a legal act. Aside from this argument, however, silence, in spite of being unilateral, is not an act or an autonomous manifestation of will, and it certainly cannot constitute a formal unilateral legal act in the sense that is of interest to this report. It seems difficult to equate silence with a formal declaration and to apply to it specific rules different from those established in relation to the law of treaties.

51. Moreover, silence and acquiescence bear a close relationship to estoppel, as will be seen later when the question of declarations which in one way or another oblige the State to maintain a specific pattern of conduct is considered.

52. There appears to be no need to mention notification, though it is a unilateral act. Despite its unilateral character from the formal point of view, notification, irrespective of whether or not it is a legal act, does not produce effects per se, being connected to a pre-existing act; that is to say, it is not an autonomous act in the sense that is of concern here.

53. Notification is an act of will by which a third party is made aware of a fact, a situation, an action or a document capable of producing legal effects and therefore to be considered as legally known by the party to which it was addressed.[25]

54. At times obligatory, notification is not a legal act in the strict sense, since it creates neither rights nor obligations except insofar as it relates to the fulfilment of a previously assumed obligation, as, for instance, in the case of the mandatory notification provided for in the General Act of the Berlin Conference of 26 February 1885, the Declaration concerning the Laws of Naval War of 26 February 1909, and the Antarctic Treaty of 1 December 1959.

55. Lastly, it is desirable to separate out various forms of State conduct which, although not formulated with the intention of producing legal effects, may nevertheless engage or commit a State. International jurisprudence has on various occasions considered conduct of this kind, which is not intended to create specific legal effects.[26] The basis

[23] Ibid., pp. 230–233, paras. 151–159.

[24] Anzilotti, op. cit., p. 344.

[25] Rousseau, *Droit international public*, p. 421.

[26] See the *Shufeldt Claim* (1930), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1079; *Affaire de l'indemnité russe* (1912), ibid., vol. XI (Sales No. 61.V.4), p. 421; and *Kunkel* et al. c. *État polonais* (1925), *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix*, vol. VI (Paris, Sirey, 1927), p. 974. See also Venturini, loc. cit. and Cahier, loc. cit.

of such conduct, it should be stated, is not the unequivocal intention to engage or commit oneself. Legal acts, on the other hand, have as their basis the clear-cut and unequivocal intention to produce specific legal effects and hence can be excluded from the purview of this report.

56. This first report is admittedly of limited scope. However, it is the view of the Special Rapporteur that, without a definition based on a strict delimitation of unilateral acts, it is impossible to undertake the study of rules which might be the subject of codification and progressive development, especially those relating to the elaboration, validity, interpretation and effects of unilateral acts (following to an extent the methodology adopted by the Commission in its consideration of the topic of the law of treaties).

57. The importance of the content of the act, that is, the substantive act, should not be overlooked. However, the formal legal act which is the basis of this report and which would be the focus of any effort to codify and develop applicable rules, is the declaration, by which a State may assume strictly unilateral legal obligations.

58. The present report is necessarily of a preliminary nature. Its main purpose is to stimulate discussion on the topic within the Commission.

Chapter I

The existence of unilateral acts of States

59. A State can, in accordance with international law, assume engagements and acquire legal obligations at the international level through the expression of its will. Just as a State can undertake international engagements and acquire rights and obligations at that level under treaties, it can also act and undertake engagements unilaterally, in exercise of the power of auto-limitation which is conferred on it by international law. That a State can, over and above its treaty obligations, commit itself unilaterally, is well recognized today, both in the case law (*Nuclear Tests* cases)[27] and in the doctrine (Suy, Venturini, Rubin, Jacqué and Sicault).[28]

60. As indicated above, there is no doubt that formal unilateral acts of States exist in international law. As also indicated, the majority of such acts fall within the sphere of treaty relations. Others, however, may be understood to fall outside that sphere and so require specific rules to govern their operation.

61. There is no doubt that the international social environment is constantly changing, which means that international law is also constantly developing in order to adapt to these changes and, in a more progressive light, to facilitate necessary changes in the social environment. The rise of new types of relationships, and of instruments to create them makes it necessary to refer, at least in a summary way, to the new sources of international law and obligations. These new phenomena should accordingly be studied and clarified with a view to regulating the conduct of the subjects of international law and helping to promote stability and security in the relationships between them by continually developing the international legal system.

62. Section A of this chapter examines the sources of international law and the sources of international obligations, in an effort to isolate and examine more closely the unilateral declaration as a formal act and as a source of international obligations. Next, various unilateral acts of States are examined in an effort to determine whether they should be placed within the realm of treaty relations or whether, alternatively, they can be included within the sphere of the law of unilateral acts.

A. Sources of international law and sources of international obligations

63. In an effort to systematize the study of unilateral acts of States and to undertake the study of the rules applicable to their operation, the Special Rapporteur has come to the conclusion that the most important legal act is the strictly unilateral declaration embodying unilateral obligations. As stated above, this does not preclude study of the content of such obligations, which may be either a promise, renunciation or recognition and which may not always necessarily be unilateral in the strict sense dealt with here.

64. However, it is first of all necessary to refer, if only briefly, to the sources of international law and international obligations. This is without doubt a necessary prerequisite for determining the existence of strictly unilateral acts.

65. Formal sources of international law are methods or procedures for elaborating international law and international norms. A clear distinction should be drawn between such procedures and methods and the content of the resulting instrument. Hence, in the field of treaties, it is important to distinguish between the *procedure* for elaborating a treaty and the *agreement* which is concluded and which is reflected in the instrument, which can embody legal norms, that is, rights and obligations for the States participating in their elaboration. In the same way, in the context of unilateral acts of States in general, it is important to distinguish between the *declaration*, as a *procedure* for creating legal norms, and its *content* or *substance*.

66. Article 38 of the ICJ Statute—an illustrative, non-restrictive provision—sets out the main formal sources of international law (international treaties and custom),

[27] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, and *Nuclear Tests (New Zealand* v. *France)*, ibid.

[28] See Charpentier, loc. cit.

subsidiary sources (general principles of law), auxiliary sources (doctrine and case law) and an additional source, equity *ex aequo et bono*, if the parties to a trial before the Court agree to its use.

67. However, there are or can be other sources. The fact that they are not mentioned in Article 38 cannot in itself preclude their treatment as such. Two other sources are frequently utilized: unilateral acts and the resolutions of international organizations.[29]

68. It is well known that Article 38, which sets forth the law applicable by the Court, may rightly be criticized, both for what it says, because of its flawed drafting and its ambiguous content, and for what it does not say,[30] failing, as it does, to mention, *inter alia*, unilateral acts and resolutions of international organizations (the latter also being unilateral acts, although on this the doctrine is not unanimous).

69. Legal acts, that is, acts performed with the intent to produce effects in international law, are the main source of obligations in international law.[31] A State can incur obligations through formal acts which are not necessarily sources of international law, within the meaning referred to in Article 38 of the ICJ Statute, already discussed briefly here.

70. Article 38 of the Court's Statute does not mention unilateral acts of States among the sources of law that it lists. That, however, does not mean that such acts cannot give rise to international legal norms.[32]

71. Differentiating formal sources from sources of obligations could help to distinguish acts which are unilateral in their form from those which are unilateral in their effects. Not all formal unilateral acts fall within the realm of treaties. Some of them, albeit not very many, can, as the doctrine by and large indicates, be classified as strictly unilateral acts.

B. Declarations as procedures for creating legal norms and as a source of international obligations

72. Generally speaking, there seems to be no doubt that, by means of a declaration, a State can perform an act on the international plane with the intent to produce legal effects. Practice bears witness to unilateral declarations which, independently of their form or of whether or not they fall within the realm of treaties, may contain a renunciation, recognition, protest or promise.

73. The most common formal unilateral act of a State is a declaration.[33] It is difficult in practice to find substantive unilateral acts that are not expressed or embodied in a declaration. It is therefore necessary to examine this act, by which a State may attempt to create or produce legal effects in the international sphere, without, of course, ruling out the possibility that a State might perform a substantive act through some other type of formal act, as would be the case, for example, with an act of recognition accomplished through a series of conclusive acts.[34]

74. The distinction between an act and a norm, and the distinction, within the latter, between rights and obligations, seems useful for the purposes of this first report. These distinctions are not just theoretical. The difference between a treaty mechanism or operation and a unilateral mechanism (declaration) makes it possible to differentiate an act from its result, that is, from the norm it embodies.[35]

75. The difference between a treaty and a norm that derives from that treaty becomes apparent, at least in practice, in the context of the application (with their consent) of treaties to third parties which have not participated in their elaboration, likewise in any consideration of the question of nullity, which differs depending on whether it is a matter of the nullity of the formal act (defects of consent etc.) or of the norm which it contains (where that norm is contrary, for example, to a norm of peremptory law). The importance of such a distinction is thus clear.

76. From the formal viewpoint, a declaration can be a unilateral act by a State which can have a legal content. A declaration can therefore be a way of creating legal norms on the international plane whose content and likewise whose effects can be varied.

77. A declaration, considered in a purely legal context, can be written or oral; it can be unilateral, bilateral or multilateral.

78. Among the many written declarations which occur in international practice are the following: declarations whereby a State protests against, renounces or recognizes a right or a situation of fact or promises to conduct itself in a certain way in the future; declarations whereby a State undertakes a commitment to one or more other States or to the international community as a whole; written declarations addressed by States to the Secretary-General of the United Nations accepting the jurisdiction of ICJ on the basis of Article 36, paragraph 2, of its Statute; unilateral declarations deposited by Member States pursuant to General Assembly resolutions or resolutions of other international bodies;[36] declarations made by States in other contexts;[37]and written declarations annexed to international instruments.[38] This diversity of content com-

[29] Abi-Saab, "Les sources du droit international: un essai de déconstruction", p. 36.

[30] Ibid., p. 33.

[31] Reuter, "Principes de droit international public", p. 531.

[32] Virally, "The sources of international law", p. 154.

[33] Skubiszewski, loc. cit., p. 224.

[34] A State can implicitly recognize another State by concluding a treaty with that State, which it had hitherto not recognized.

[35] Reuter, *Introduction to the Law of Treaties*, pp. 21–23.

[36] For example, in accordance with General Assembly resolution 32/64 of 8 December 1977, entitled "Unilateral declarations by Member States against torture and other cruel, inhuman or degrading treatment or punishment".

[37] For example, the Declaration made by the Government of Egypt on the Suez Canal and the arrangements for its operation (Cairo, 24 April 1957) (United Nations, *Treaty Series*, vol. 265, p. 299), whereby the Government of Egypt undertook to respect the obligations flowing from the 1888 Convention respecting the Free Navigation of the Suez Maritime Canal.

[38] Such as the one examined by PCIJ, namely, the Declaration of the Russian Delegation with regard to the autonomy of Eastern Carelia, annexed to the Treaty of Tartu (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, pp. 20–22).

plicates study of the subject but at the same time demonstrates that, rather than substance, it is the declaration as a formal legal act that should be the subject of consideration, particularly in the context of the codification and development of the law on the operation of unilateral acts.

79. Although they may be more relevant to treaty law, contemporary practice reveals an ever greater abundance of joint declarations which are issued at the conclusion of official visits at the highest level. These even occur within the framework of international organizations, an example being the statement of the President of the Security Council on behalf of the States members of the Council on the occasion of its meeting held at the level of Heads of State and Government, on 31 January 1992.[39] While they are bilateral or multilateral in form and are often of a political nature, these declarations could be relevant to the acts which are the subject of the current study, inasmuch as they can produce unilateral legal effects in relation to third States, that is, when such declarations have a heteronormative character.

80. First, it must be seen whether, from the formal point of view, declarations as formal unilateral acts can or cannot constitute a source of international law, that is, whether they can or cannot be considered an autonomous source of law.

81. Much of the doctrine concludes that unilateral acts of States do not constitute a source of law. That does not mean, however, that a State cannot create international law through its unilateral acts. Some of these acts can give rise to rights, duties or legal relationships, but they do not, because of that fact, constitute a source of international law.[40] Unilateral acts are sources of international obligations.[41]

82. International tribunals have not taken a position on the question of whether unilateral acts are a source of international law; they have confined themselves to specifying that such acts are a source of international obligations.[42] ICJ, in its decisions of 20 December 1974 in the *Nuclear Tests* cases, stated that "[it] is well recognized that declarations made by way of unilateral acts ... may have the effect of creating legal obligations".[43] This would appear to confirm that the Court, without pronouncing on the existence of a source of international law, effectively concluded that unilateral acts formulated by means of a declaration may constitute a source of international obligations.

83. In this context, note may be made of joint declarations which establish a unilateral relationship with another State or States and which, although they are adopted in a political context and do not have a clearly legal form, contain unilateral obligations which are binding upon the States which are parties to them. This is the case, for example, with the joint declaration by the Presidents of Venezuela and Mexico,[44] in which they agreed on an energy cooperation programme for the countries of Central America and the Caribbean, assuming certain obligations, which could be regarded as legal in nature, for the benefit of third States which had not participated in the formulation of the declaration. The legal nature of the obligations in question may be inferred from the fact that they were subsequently carried out by the two countries and were later reaffirmed by means of declarations with the same content.[45]

84. In addition to written declarations, practice demonstrates the existence and importance of oral declarations, regardless of whether they have legal force or fall within the treaty sphere.

85. The form of a declaration does not seem to be a determining factor in establishing its validity. In his dissenting opinion in the *Legal Status of Eastern Greenland* case, Judge Anzilotti said, "there does not seem to be any rule of international law requiring that agreements of this kind must necessarily be in writing, in order to be valid".[46] In the *Nuclear Tests* cases, ICJ indicated in this respect that:

> With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive. As the Court said in its Judgment on the preliminary objections in the case concerning the *Temple of Preah Vihear*:
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> > "Where ... as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it." (*I.C.J. Reports 1961*, p. 31)
>
> The Court further stated in the same case: "... the sole relevant question is whether the language employed in any given declaration does reveal a clear intention ..." (*ibid*., p. 32).[47]

The form, as Sørensen notes, is of interest only to prove the declaration of intent.[48]

86. Unilateral declarations in general can be legally binding on a State, if that is the intention of the State and if the declaration is formulated in accordance with international law. This was not accepted in the jurisprudence prior to the *Legal Status of Eastern Greenland* case,[49] as is borne out by the decision of 10 January 1927 of the Romanian-Hungarian mixed arbitral tribunal, in the *Kulin* case.[50] In the *Island of Lamu* case, it should be added that

[39] See S/23500.

[40] Skubiszewski, loc. cit., pp. 221–222.

[41] Bos, *A Methodology of International Law*, p. 89.

[42] Villagrán Kramer, loc. cit., p. 139.

[43] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974,* p. 267, para. 43.

[44] Agreement on Energy Cooperation Program for the Countries of Central America and the Caribbean, done at San José on 3 August 1980 (ILM, vol. XIX, No. 5 (September 1980), p. 1126).

[45] *Libro Amarillo de la República de Venezuela* (Caracas, Ministry of Foreign Affairs, 1983).

[46] *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 91.

[47] *I.C.J. Reports 1974* (see footnote 43 above), pp. 267–268, para. 45.

[48] Sørensen, "Principes de droit international public: cours général", p. 55.

[49] See footnote 46 above.

[50] *Emeric Kulin père* c. *État roumain*, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix*, vol. VII (Paris, Sirey, 1928), p. 138.

the arbitrator considered the oral declarations of the Sultan of Zanzibar and, while recognizing the existence of a promise, concluded that the declarations were not binding because they had not been accepted by the other party, that is to say, because they did not form part of a treaty-based relationship.[51]

87. The binding nature of oral declarations was subsequently confirmed by PCIJ and ICJ.[52]

88. In the case of the celebrated Ihlen declaration, which was oral in nature, though confirmed in writing, PCIJ recognized that there had been an engagement and that Norway was therefore legally bound although, it must be admitted, it also recognized that the declaration concerned fell within the treaty sphere.[53] The Court considered that "it [was] beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government ... is binding upon the country to which the Minister belongs".[54] From the foregoing it may be concluded that the declaration by the Minister for Foreign Affairs of Norway constituted an international engagement comprising an obligation that was binding on the declarant State, regardless of whether it formed part of a treaty-based relationship or had an independent existence, and that it produced legal effects by and of itself a point on which there exist various positions among the authors.

89. In the *Nuclear Tests* cases, after considering the oral declarations which were made to the media (press and television) by the French authorities (the President of the Republic and the Minister of Defence), ICJ recognized that these declarations could have the effect of creating legal obligations, if that had been the intention of the State, and that this was "to be ascertained by interpretation of the act"[55] A declaration may be a source of obligation, depending on the intention of the State formulating it and on its content.

90. However, declarations, especially legal declarations, may be valid only if they are formulated in accordance with certain rules governing their formulation. Although it is not appropriate to elaborate on the point here, these rules to a large extent exhibit significant parallels with the rules of the law of treaties.

91. Declarations vary in their content, as has already been indicated. A declaration which contains a renunciation, a recognition, or a promise is undoubtedly a unilateral act from the point of view of form. With regard to its effects, the act concerned may be treaty-based, if the declaration relates to a treaty or a pre-existing norm or if it depends on the existence of another act; or it may be unilateral, if it has independent existence, that is, if it can produce effects in and of itself. In the latter case it is possible to identify the non-treaty-based promise which a strictly unilateral legal act of a State may be, if it is considered that the declaration by which it is formulated is autonomous in the sense that will be seen below, when the criteria for the identification of strictly unilateral acts are considered.

92. There is no doubt that it is difficult to determine whether a declaration which contains one of the substantive acts already mentioned is an act which falls within the treaty sphere or within the realm of strictly unilateral acts of a State.

93. At the practical level, what is of interest is the interpretation which may be given to a declaration in terms of specifying the point at which it becomes binding upon the declarant State, that is, whether that occurs when a third State accepts the obligation undertaken by the declarant State or at the time when that latter State performs the act or makes the declaration; this is fundamental for determining the applicable law. In the first case, as will be seen, the judge will have to consider the act or conduct of the third State, while, in the second, he or she will have to approach the declaration as an act which is creative of a new legal relationship, particularly of obligations binding on the declarant State.

C. The various substantive unilateral legal acts of States

94. This section is concerned with a category of unilateral acts of States which fall within the treaty sphere, putting to one side for the moment typical unilateral acts of States of a substantive nature, such as recognition, promise, renunciation or protest, which do not necessarily fall within that domain and which, consequently, are relevant to the study of strictly unilateral acts.

95. No reference is made in this context to legal acts deriving from actions such as occupation, which, while it may be regarded as an action which produces legal effects, is not formulated by means of a legal act as such, although a later declaration, which would fall within another category of acts, such as notification, may be made by the State which carried out the action.

96. States carry out a number of acts which may be regarded as falling within the treaty sphere, such as: (*a*) acts linked to the law of treaties; (*b*) acts related to the formation of custom; (*c*) acts which constitute the exercise of a power granted by a provision of a treaty or by a rule of customary law; (*d*) acts of domestic scope which do not have effects at the international level; (*e*) acts which form part of a treaty-based relationship, such as offer and acceptance; (*f*) acts relating to the recognition of the compulsory jurisdiction of ICJ, in accordance with Article 36 of its Statute; (*g*) acts which are of treaty origin but which are unilateral in form in relation to third States; and (*h*) acts performed in connection with proceedings before an

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[51] Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, p. 4940.

[52] *Mavrommatis Jerusalem Concessions, Judgment No. 5, 1925, P.C.I.J., Series A, No. 5*, p. 37; case concerning *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 13; *Legal Status of Eastern Greenland* (footnote 46 above), p. 71; case of the *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, pp. 170-172; and the *Nuclear Tests* cases (footnote 27 above).

[53] Legal theory, however, is not unanimous in this respect. Guggenheim regarded the declaration as treaty-based (*Traité de droit international public: avec mention de la pratique internationale et suisse*, p. 138), while Rousseau regarded it as unilateral (op. cit., p. 419).

[54] *Legal Status of Eastern Greenland* (footnote 46 above), p. 71.

[55] *I.C.J. Reports 1974* (footnote 43 above), p. 267, para. 44.

international judicial body and acts which may enable a State to invoke an estoppel in a trial.

97. Acts of signature, ratification and deposit of an instrument of ratification, denunciation, suspension, termination and accession, and acts by means of which a State formulates a reservation are legal acts which are unilateral in form but in respect of which it may be affirmed without difficulty and without the need for further comment, that they fall within the sphere of the law of treaties as such.

98. The signing of a treaty is a formal unilateral act by means of which a State consents to accept the negotiated text in whose formulation it participated. Its legal effect is undeniable since the State accepts the engagements which have been undertaken and which it may later ratify (except in the case of treaties of immediate implementation, which do not require confirmation by the State—a question which is governed by the Constitution of the signatory State). Ratification is an act envisaged in a pre-existing text, whereby a State confirms its intention of being bound by that text, as negotiated and signed. The deposit of the instrument of ratification is not a legal act per se; it is similar to notification in that it involves an act which does not create a legal relationship but forms part of the process whereby a State makes an engagement at the international level. The same comment may be made about accession, denunciation and the formulation of reservations, whether expressly or tacitly permitted by the treaty.

99. With regard to interpretative declarations, the situation might be thought to be different, since such declarations are formulated regardless of whether they are permitted by the treaty, either expressly or tacitly. For some, these declarations may be considered to belong to an intermediate area,[56] between reservations and unilateral acts. Although this issue is important, it may be concluded that such declarations cannot be regarded as autonomous either, that is, they do not have a separate existence and do not produce effects in and of themselves, and should therefore be regarded as forming part of a treaty-based relationship.

100. Secondly, consideration should be given to acts and conduct which contribute to the formation of international custom. It is well known that the customary process is not complete unless two elements are brought together: the repeated performance of acts known as precedents (the material element or *consuetudo*) and the feeling or belief of subjects of law that the performance of such acts is obligatory because the law requires it—hence the concept of a psychological element or recourse to the Latin formula *opinio juris sive necessitatis*.[57]

101. There would seem to be no doubt about the importance of unilateral acts of States in the formation of custom. This may be seen in the case of acts related to the law of the sea performed since the eighteenth century which later made possible the codification of international rules on the subject.[58]

102. The State, through its acts or conduct, can participate in or hamper the formation of a customary rule. Recognition express of tacit (that is, silence or lack of protest, which is tantamount to tacit or implied consent), and protest or rejection play a determining role in the formation of custom. What is involved, from the formal standpoint, are unilateral acts, or, in any case, expressions of will which are connected with the belief that a practice is law. It is worth pointing out, however, that custom, as acknowledged by a part of international doctrine[59] and jurisprudence,[60] can have its origins in various acts such as treaties, that is, in legal acts of a treaty nature, as the Commission pointed out in 1950,[61] although such acts might be unilateral from the point of view of the process of custom formation.

103. As one author indicates, unilateral acts are never initial acts in the formation of custom. They are, rather, responses to some other, pre-existing act. The primary importance of such acts resides more in the fact that they constitute evidence of the subjective element of acceptance or rejection than in any strictly material function as precedent.[62]

104. The acts—not to mention behaviour, attitudes and conduct—of a State in relation to custom may be excluded from the category of strictly unilateral acts, since their effects amount to a kind of tacit international agreement. Although in addition to being unilateral in form only, they may appear to be autonomous, these acts generally produce effects when they coincide with other acts of a similar nature and so contribute to the formation of a customary rule. It should be noted, however, that an act forming part of the process of the creation of international custom is not necessarily excluded from the category of strictly unilateral acts if the act, independently of this function as a source of custom, reflects an autonomous substantive unilateral act creating a new juridical relationship; these are the basic conditions for classifying an act as strictly unilateral, as will be seen below.

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[56] See *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 23rd meeting (A/C.6/52/SR.23), statement by Slovenia, para. 19.

[57] Nguyen Quoc, Daillier and Pellet, *Droit international public*, pp. 323–324.

[58] Degan, *Sources of International Law*, p. 253.

[59] Guggenheim, op. cit., p. 111. Rousseau cites various treaties which can serve as precedents, or constituent elements, of custom, op. cit., pp. 334–337.

[60] See the following cases, among others: *S. S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, pp. 25–28 (practice emanating from the international conventions on the Suez and Panama canals); case relating to the *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27 (reference to the Act of the Congress of Vienna of 1815); *Asylum, Judgment, I.C.J. Reports 1950*, p. 277 (reference to extradition treaties and the Montevideo Conventions of 1889, 1933 and 1939); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14.

[61] In 1950, the Commission, under article 24 of its statute, considered the following sources of customary international law: texts of international instruments, decisions of national courts, decisions of international courts, national legislation, diplomatic correspondence, opinions of national legal advisers and the practice of international organizations (*Yearbook ... 1950*, vol. II, pp. 367–374).

[62] Suy, op. cit., p. 245.

105. Consideration also needs to be given to acts which constitute the exercise of a power granted by the provisions of a treaty or by a rule of customary law. An illustration would be the legal acts of a State concerning territorial questions, such as those adopted in relation to the delimitation of the exclusive economic zone or the limits of territorial waters, which are formal unilateral legal acts of internal origin which may produce effects at the international level. ICJ, in the *Fisheries* case, stated that "[a]lthough it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law".[63]

106. These acts, although they appear to be strictly unilateral, are linked to a pre-existing international agreement or customary rule. Such acts do not produce legal effects except by virtue of a general rule of international law which establishes their conditions and modalities; the unilateral act is (in these cases) the condition for the application of a status or regime of international law.[64]

107. These acts, which create rights for the State which performs them, appear to create new obligations for third States, a situation that would be incompatible with the well-established principle of international law reflected in article 34 of the 1969 Vienna Convention. In accordance with that article, treaties may not create obligations for a third State unless that State, as stipulated in article 35 of the Convention, expressly accepts the obligation in writing, reflecting the principle *pacta tertiis nec nocent nec prosunt*.

108. The obligation of the third State, which seems to flow from the right which the author of the unilateral act establishes, actually exists prior to the formulation of that act. These are therefore declarative acts which reflect the existence of pre-existing norms, whether under international agreements or under customary law, as in the case of the rules for the establishment of the exclusive economic zone, which, while being of customary origin, are contained in international instruments.

109. Reference to internal legal acts of States which have international effects leads us on to the consideration of internal legal acts which do not produce international effects and which therefore cannot be regarded as unilateral acts of States, even less as purely unilateral acts.

110. A State may, in exercise of its public functions, formulate internal unilateral legal acts which may have only an internal legal effect and never, except where they are in accordance with international law, international legal effects, such as those referred to above on the establishment of the exclusive economic zone of the State.

111. The exclusion of these acts from the scope of this report does not mean that they may not be quite significant in international law, especially in terms of its formation. "Legislative acts relating to international matters—'internationally important internal law', in Triepel's terms—... indicate the course of conduct to be adopted by the State vis-à-vis other States."[65]

112. National laws, such as those concerning nationality and maritime delimitation, may have an impact in the international sphere, in addition to their importance in relation to the formation of customary rules, as mentioned above.

113. State practice[66] and doctrine reflect an almost unanimous rejection of the extraterritorial application of internal legislation for the purpose of creating obligations for third States. On the other hand, it is not inadmissible for a State, through its internal legislation, to grant certain rights to another State or States. This would be consistent with an entirely voluntaristic approach which would not prevent a State from contracting an international obligation within the limitations imposed by international law.

114. In addition, there should be excluded from the scope of the current study those unilateral acts which produce legal effects only once the addressee State(s) accept the offer which is made to them through those acts. Simultaneous or successive unilateral declarations made with the intention of creating a legal act are covered by the law of treaties.

115. Another category of acts should be regarded in a similar way, namely, unilateral declarations formulated under Article 36 of the ICJ Statute, which are formal unilateral acts attributable to a single subject of international law.

116. These declarations, although they take the form of unilateral acts, give rise to a treaty relationship. The declaration provided for in Article 36, paragraph 2, of the ICJ Statute produces effects only if a corresponding act has been performed. In such cases the unilateral engagement seems to be a substitute for an engagement under the law of international agreements. Rather than hold out the hope of combining in a single multilateral instrument all the potential claimants, the author State prefers to accept the Court's jurisdiction via an indeterminate number of unilateral engagements.[67] The legal relations stemming from an acceptance are contractual in nature. However,

[63] *Fisheries, Judgment, I.C.J. Reports 1951*, p. 132.

[64] Reuter, loc. cit., p. 576.

[65] Rousseau, op. cit., p. 331.

[66] The Heads of State of the Permanent Mechanism for Consultation and Concerted Political Action—the Rio Group—meeting in Asunción on 23 and 24 August 1997, adopted a Declaration on Unilateral Measures, in which they stated that:

> "We reject once again the unilateral and extraterritorial application of national laws as actions which violate the legal equality of States and the principles of respect for and dignity of national sovereignty and non-intervention in the internal affairs of other States, and which threaten coexistence between States ... Such measures as the Helms-Burton Act and recent efforts to broaden its scope, assessments of human rights situations, certification processes in combating drug trafficking, environmental criteria and attempts to make cooperation conditional on the voting patterns of countries in international bodies erode the relations of friendship and cooperation among States."

(A/52/347, annex IV, para. 2).

See also the opinion of the Inter-American Juridical Committee in fulfilment of resolution AG/doc.3375/96 of the General Assembly of the Organization of American States, entitled "Freedom of trade and investment in the hemisphere" (A/51/394, annex).

[67] Charpentier, loc. cit., p. 369.

the methods used by States to accept the competence of the Court at times appear, because of their highly individualized character, to be intended to avoid a meeting of wills rather than to bring one about.[68]

117. ICJ has concluded that such declarations are unilateral acts. In the *Phosphates in Morocco* case, it indicated that "[t]he declaration, of which the ratification was deposited by the French Government ... is a unilateral act".[69] It also took this position in the *Certain Norwegian Loans* case; however, while recognizing that the act in question was a unilateral act, it said in this case that it had jurisdiction only to the extent to which the declarations coincided in conferring such jurisdiction.[70] This indicates that the declarations in question should be looked at in the context of treaty law, a position which is not shared in all the doctrine.[71]

118. In his dissenting opinion in the *Barcelona Traction* case, Judge Armand-Ugón stated that:

> It is true that the declarations were unilateral undertakings. But as those undertakings were addressed to other States, which had accepted the same obligation, they gave rise to agreements of a treaty character concerning jurisdiction which were legally equivalent to the jurisdictional clause embodied in a treaty or convention. The Court confirmed this view in the *Right of Passage* case:
>
> > "The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established '*ipso facto* and without special agreement'."
>
> These declarations could not be modified without the consent of the parties ... They had the same force and the same legal content as a provision in a treaty.[72]

119. As ICJ noted in the *Military and Paramilitary Activities in and against Nicaragua* case, these declarations, even though they are unilateral acts, establish bilateral engagements with other States which accept the same obligation of compulsory jurisdiction.[73] In this case, one of the parties, the United States of America, maintained that declarations under Article 36 were *sui generis* and that they were not treaties, neither were they governed by the law of treaties. In this same decision, the Court stated that:

> Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make ... [T]he unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases.[74]

120. Another category of acts which needs to be considered is that which is made up of unilateral acts of collective origin which are performed in respect of a third State and which confer benefits or impose obligations on that State if that State accepts them—something which it may do in any manner in the first case, but which, in the second case, it must do in written form, in accordance with the 1969 Vienna Convention.

121. An act of this type is a contractual act as between the States which are parties to it—that is, an "autonormative" act—but it is unilateral vis-à-vis a third party which did not participate in its formulation—that is, it is a heteronormative act insofar as that party is concerned.

122. It is well known that a third State cannot obtain rights or incur obligations under an agreement without its consent (*pacta tertiis nec nocent nec prosunt*), as is clearly stipulated in article 34 of the 1969 Vienna Convention. This had already been noted earlier in the jurisprudence. Thus, for example, in its decision in the case concerning *Certain German Interests in Polish Upper Silesia*, PCIJ declared that a treaty only created law as between the States which were parties to it.[75] Similarly, in the award of the single arbitrator, Max Huber, in the *Island of Palmas* case, it was stated that the treaties which had been concluded between Spain and certain third States could not be binding upon the Netherlands, which was not party to them;[76] and, in the case of the *Free Zones of Upper Savoy and the District of Gex*, PCIJ stated that "Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it".[77]

123. The stipulation in favour of third parties (*stipulation pour autrui*) is a technique of domestic contract law whereby the parties to an agreement make a promise whose beneficiary is a third party.[78] It is an act which is contractual in origin, unilateral in form, but requires the acceptance of the beneficiary third State in order to be valid or to be revoked or modified.

124. Collateral agreements by means of which a legal relationship is established with a third State fall within the domain of treaties, both insofar as concerns the primary relationship which they create and when it comes to the relationship which they create with a third State. The difference between a unilateral legal act emanating from a contractual relationship and a purely unilateral act is that in the first case the acceptance of the third State is required, while in the second case such acceptance is not required. A stipulation in favour of a third party, as Jacqué notes, irrevocably binds its authors only after its acceptance by the beneficiary and its binding force derives from the principle *pacta sunt servanda*. In the second case, however, once it is clearly established that the parties intended to confer a right on a third party, acceptance by that third party ceases to be necessary.[79]

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[68] Reuter, loc. cit., p. 575.

[69] *Phosphates in Morocco, Judgment, 1938*, *P.C.I.J., Series A/B, No. 74*, p. 23.

[70] *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, pp. 23–24.

[71] Villagrán Kramer notes that "the coincidence of declarations does not establish an agreement between two States which have made unilateral declarations" (loc. cit., p. 141).

[72] *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 135.

[73] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para. 60.

[74] Ibid., para. 59. The contractual nature of declarations under Article 36 of the Statute is also reflected in the Court's decision in the case of the *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 103.

[75] *Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 29.

[76] *Island of Palmas*, UNRIAA (Sales No. 1949.V.1), vol. II, p. 850. See also pages 842 and 870.

[77] *Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 141.

[78] Nguyen Quoc, Daillier and Pellet, op. cit., p. 243.

[79] Jacqué, "À propos de la promesse unilatérale", p. 332.

125. Another category of acts which is relevant to this report is that relating to declarations made by the agents of a State in the course of proceedings before an international tribunal. There is general agreement that such declarations are binding on the State in whose name they are made,[80] even if, from the point of view of its domestic law, they are *ultra vires* the executive arm of government.[81]

126. In the case of declarations made by agents of a State during the course of judicial proceedings, it might be maintained that, in addition to being binding, they are unilateral from the point of view of their form. However, these declarations do not seem to be truly autonomous, even though they may contain a promise, a waiver or a recognition; rather they should be placed within the context of the treaty which founds the jurisdiction of the tribunal concerned. Moreover, the obligations which a State may assume through such a declaration are related to the claim or legal position of the other State party to the proceedings, which makes it difficult to classify them as autonomous from this point of view.

127. Declarations made outside the framework of judicial proceedings but in relation to them are not similar to declarations formulated by agents of a State within that context. An example of such a declaration would be those made by the French authorities in the *Nuclear Tests* cases.[82] Such declarations may or may not be strictly unilateral, depending on the intention of the State which formulates them.

128. Lastly, a comment should be made about declarations by a State (forgetting for the moment its conduct) which may enable another State to invoke an estoppel. There are undoubtedly important differences between unilateral acts or conduct which found an estoppel and strictly unilateral declarations. ICJ has considered estoppel on various occasions and, although it has on the whole recognized its existence in international law, it has attributed a different character to the acts which found it.

129. An act whereby a State creates an expectation in another State or States, on the basis of which that State or States take action to their detriment, is indeed a unilateral act of the State which performs it. Unlike a promise, however, whose obligatoriness, as shall be seen, is based on the intention of the declarant State or the State which makes the promise, an act of this kind becomes binding upon the State which performs it, and so prevents it from acting in a different manner, when the third State takes action to its own detriment. As is well known, what is required is a situation which is created by the attitude of the State which is stopped: namely, conduct which follows on from and is directly based on its prior attitude. In such cases the State which has followed a certain course of conduct is not able to deny it or subsequently to express a contrary view.[83]

130. At various times, as has been noted, there have been cases in international jurisprudence of the invocation of an estoppel, as in the following cases: *Serbian Loans* (in which the doctrine was explicitly mentioned, although it was declared not to apply on the facts);[84] *Legal Status of Eastern Greenland*;[85] *Nottebohm*;[86] *Military and Paramilitary Activities in and against Nicaragua*;[87] and *Delimitation of the Maritime Boundary in the Gulf of Maine Area*.[88]

131. The binding nature of the primary declaration of a State, which obliges it to follow a certain course of conduct, is not based, as in the case of a promise, on the actual declaration of intention by the State which formulates it, but on the secondary actions of a third State and on the detrimental consequences which would flow for that State from any change of attitude on the part of the declarant State, which generated an expectation in that other, third State. There is therefore a clear difference between declarations which may found an estoppel and declarations of a strictly unilateral nature.[89]

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[80] See Rubin, "The international legal effects of unilateral declarations". See also the following cases: *Certain German Interests in Polish Upper Silesia*; *Mavrommatis Jerusalem Concessions*; and *Free Zones of Upper Savoy and the District of Gex* (footnote 52 above).

[81] Case of the *Free Zones of Upper Savoy and the District of Gex* (footnote 52 above), p. 170.

[82] See footnote 27 above.

[83] Pecourt García, "El principio del 'estoppel' en derecho internacional público", p. 103.

[84] *Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 37–39.

[85] *Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 54–62.

[86] *Second Phase, Judgment, I.C.J. Reports 1955*, pp. 17–20.

[87] *I.C.J. Reports 1984* (see footnote 73 above), pp. 413–414, paras. 48–51.

[88] *Judgment, I.C.J. Reports 1984*, pp. 303–312, paras. 126–154.

[89] Jacqué, "À propos de la promesse unilatérale", pp. 335–339.

Chapter II

Strictly unilateral acts of States: criteria for their identification and legal basis for their binding character

A. Criteria for determining the strictly unilateral nature of international legal acts of States

132. Chapter II will consider both the formal act which is the unilateral declaration and its content with a view to arriving at a definition of a specific category of international legal acts. The criteria that would seem to be useful in determining the strictly unilateral nature of this category of acts could be based on their form, on the one hand, or their content and effects, on the other.

1. In terms of form: a single expression of will

133. As accepted in most of the doctrine, a unilateral act should be understood as an act which is attributable to one or more States and which creates a new legal relationship with a third State which did not participate in its elaboration. More precisely, a unilateral act is an expression of will which is attributable to one or more subjects of international law, which is intended to produce legal effects and which does not depend for its effectiveness on any other legal act.[90]

134. The attribution of the act to the State or States which formulated it is of course governed by international law. It is understood, although this will be the subject of later reports, that only those representatives of a State who are capable of committing it at the international level may formulate a unilateral act that will be attributable and opposable to the State they represent. Not all officials of a State may commit the State, as is well recognized by international doctrine and jurisprudence.[91]

135. With regard to form, the doctrine generally considers that what is involved is a single expression of will on the part of one or more States. Unilateral acts may accordingly be classified as individual or collective. The fact that the act is a single expression of will does not mean that the subject of law that performs it is also single. To think otherwise would preclude recognition of the variety of strictly unilateral acts.[92] The fact that there is a single expression of will means that the author or authors are placed on the same side of the legal relationship to which the act gives rise. It also means that the elaboration of the act is attributable to them.

[90] Jacqué, op. cit., p. 384.

[91] In the case of the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ did not recognize the written statements of an official of the United States of America who did not have the necessary authority to commit that State (footnote 88 above), pp. 307–308, para. 139. On the other hand, in the *Nuclear Tests* cases, the statements made by the President of the French Republic, the Minister for Foreign Affairs and the Minister of Defence were taken into account by the Court (footnote 27 above), pp. 265–270, paras. 35–44, 49, 51 and 53.

[92] Sicault, "Du caractère obligatoire des engagements unilatéraux en droit international public", p. 640.

2. In terms of the autonomy of the act and of the obligation

136. However, the above-mentioned formal criterion is insufficient. The autonomy of the act is crucial to arriving at a definition of these specific legal acts in international law.

137. Some authors consider that the requirement of autonomy is no longer a necessary criterion for the delimitation of unilateral acts. They reject this criterion as being too imprecise, because its proponents do not agree among themselves on the list of unilateral acts which meet the requirement of autonomy.[93] The autonomy of the act, however, appears to be accepted by most authors as the determining criterion for identifying unilateral acts of States. The secretariat appears to have shared this opinion when in its survey of international law of 1971, it suggested the advisability of drawing a distinction between dependent and independent acts.[94]

138. The autonomy of the act, however, should be looked at from two points of view, first in terms of the relationship of that act with another legal act or another expression of will, whether prior, simultaneous or subsequent. This criterion makes it possible to separate out and exclude the acts dealt with in the previous chapter. In such cases, as can be seen, what is involved is a treaty relationship, to which the existing rules of the law of treaties apply.

139. Secondly, the autonomy of the act should also be looked at from the point of view of the obligation to which it gives rise. As will be seen, this perspective is reflected in part of the doctrine and in the 1974 ICJ decisions in the *Nuclear Tests* cases.[95]

140. Review of the form and content of unilateral acts reveals the existence of a unilateral act and a unilateral obligation, in other words, the procedure or technique for establishing an international norm and the international legal norm itself, which, in this case, is an international obligation.

141. Although it is rare for a State to commit itself and to assume obligations without any quid pro quo, this is possible under international law, in accordance with the generally accepted principle that a State may, in the exercise of its free will and of the power of auto-limitation conferred on it by international law, contract unilateral obligations,[96] just as in internal law the promise of recompense is recognized in some legal systems.

[93] Nguyen Quoc, Daillier and Pellet, op. cit., p. 355.

[94] *Yearbook ... 1971*, vol. II (Part Two), p. 61, para. 282.

[95] See footnote 27 above.

[96] PCIJ, in the *S. S. "Wimbledon"* case (footnote 60 above), noted that "the right of entering into international engagements is an attribute of State sovereignty", p. 25.

142. The doctrine also accepts such a possibility. Thus, Guggenheim notes that use is made of the procedure for establishing juridical norms not just to create reciprocal obligations, but also to found unilateral international commitments.[97]

143. Insofar as its content is concerned, the unilateral act, in general, is a heteronormative act, that is, if the norm is distinguished from the formal act, the author State creates a new legal relationship with a third State which does not participate in the elaboration of the act.

144. Strictly unilateral legal acts, however, can create obligations only for the States which perform them.

145. There is no reason to deny that a unilateral promise may create an obligation for its author when it is manifestly made with that intention, although it is difficult, because of tacit acceptance, not to fall back into an explanation based on the assumption of an agreement resulting from acquiescence.[98] However, as some of the doctrine indicates, there appears to be no doubt that a State may assume international obligations vis-à-vis another State by making a public declaration which is not dependent for its validity upon any reciprocal undertaking or quid pro quo or upon any subsequent conduct implying its acceptance.[99]

146. A State which formulates a strictly unilateral legal promise certainly creates rights for a third State, reflecting the usual structure of a juridical norm. If the unilateral nature of the act is seen from this point of view, it is difficult to arrive at a definition of a strictly unilateral act, since there will always be one State which elaborates the act and (in most cases) contracts obligations, and another which, without participating in its elaboration, acquires consequential rights.

147. In this connection it should be pointed out that the autonomy of the obligation is a possibility, as pointed out in a large part of the doctrine and international jurisprudence, especially in the above-mentioned ICJ decisions in the *Nuclear Tests* cases. A State may, then, according to this criterion, contract international obligations without any need for a third State to accept them or to act in a manner that might imply their acceptance as a condition of their legal validity. The Court is clear in this sense when it points out that:

> [N]othing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.[100]

148. The unilateral obligation contracted by the State depends, in addition, on its conformity with international law and the intention of the State carrying out the act. A strictly unilateral legal act may exist when the State has the intention of formulating it as such. ICJ, in its decisions in the *Nuclear Tests* cases, noted that:

> When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.[101]

149. However, the question arises as to whether, by a declaration which contains a substantive act other than an undertaking, a State may contract unilateral obligations under conditions which are the same as those noted above and which apply to the case of an undertaking: that is, whether subsequent acceptance is not necessary for them to be effective either.

150. Renunciation and recognition, for example, formulated in a declaration, may contain autonomous obligations. Recognition may be based on an international agreement, involving a reply or an acceptance, but international law also grants it legal effects on its own account inasmuch as a State which has recognized a given claim or a given state of affairs cannot thereafter contest its legitimacy.

151. Without a doubt, qualifying the content of an act as strictly unilateral, that is, as containing an autonomous obligation, is a complex matter, as already mentioned. Here once again substantive unilateral acts give rise to problems. However, this should not affect the consideration of the declaration as a means or procedure for establishing norms, in particular unilateral obligations, nor should it affect the effort to codify the rules applicable to it.

B. Legal basis for the binding nature of strictly unilateral acts of States: development of a specific norm

152. Having accepted the existence of unilateral declarations and of strictly unilateral legal acts of States, an attempt at establishing the legal basis for their binding nature will now be made.

153. Just as, in the law of international agreements, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith", as stipulated in article 26 of the 1969 Vienna Convention, so a unilateral declaration is binding upon the State which formulates it by virtue of the same principle.

154. The principle *pacta sunt servanda*, which is the legal basis for the binding nature of treaties, is also at the basis of the international legal system. As some authors also remark, its existence is enshrined in the principles recognized by nations in their internal law.

155. In the case of unilateral acts in a broader sense, and having admitted that a declaration is the most usual procedure by which a State may create juridical norms, the possibility needs to be considered of developing a norm on which their binding nature might be based although in the Sixth Committee debate in 1997, doubts were expressed as to whether the principle of good faith might

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[97] Op. cit., pp. 273–274.

[98] Reuter, *Droit international public*, p. 92.

[99] Brownlie, *Principles of Public International Law*, p. 638.

[100] *I.C.J. Reports 1974* (see footnote 43 above).

[101] Ibid.

serve to explain the juridical effects of unilateral acts or as a basis for the regime to which they are subject.[102]

156. Recognition of the principle of respect for promises, known as *pacta sunt servanda* in the law of treaties, is also applicable in the case of unilateral acts, although some authors, who place such acts in the context of the law of international agreements, consider that that fundamental norm would also apply to unilateral acts. In the *Nuclear Tests* cases, ICJ noted that "[j]ust as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration",[103] thus establishing an important parallelism between the law of treaties and the law of unilateral acts (in this case involving that form of substantive act which is a unilateral promise by a State, producing international legal effects).

157. When it considered the topic in 1996, the Commission alluded, in a reference to good faith, to the principle *acta sunt servanda*[104] which could serve as a basis for the development of a more specific norm, such as *declaratio est servanda*. It is true that such a criterion might not be applicable to all unilateral declarations of States. As for promise, renunciation or recognition, there do not appear to be any major problems. However, the development of such a norm could raise doubts as to other substantive unilateral acts, such as protest. This, however, should not affect the possibility of developing such a norm, for it is not necessary for that norm to justify all unilateral acts. In this connection, it should be recalled that when the law of treaties was elaborated, not all international agreements were included, since the study was limited to treaties.

158. The decisions of 20 December 1974 in the *Nuclear Tests* cases are of considerable importance from the doctrinal point of view, because of their contribution to the general theory of sources and, more particularly, to the role of the general principle of good faith as a basis for the binding nature of certain unilateral acts.[105] Reference to this rule is not new as a specific principle of international law. The basic justification for the promise may also be good faith, as Venturini[106] and Reuter[107] maintain, that concept being understood as a spirit of loyalty, respect for law and faithfulness to commitments on the part of the author of the action in question.[108] ICJ, in the *Nuclear Tests* cases, stated clearly that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith".[109]

159. Without doubt, there exists a rule based on customary law which prescribes the obligation to keep promises:[110] "[T]he unilateral promise is an international commitment ... [which] should be honoured by virtue of the principle of good faith.[111]

160. The State which formulates the declaration is bound to fulfil the obligation which it assumes, not because of the potential juridical interest of the addressee but because of the intention of the State making the declaration. If it becomes necessary to determine whether an international obligation has been fulfilled, the judge will, rather than considering the acceptance of a third State, have recourse to the intention of the State which formulated the unilateral act, since therein lies the source of the obligation which, in such cases, as has been said, is unilateral, and which makes a formal unilateral act a strictly unilateral act.

161. The need to create greater confidence in international relations is another justification for the binding nature of unilateral declarations.

162. Necessary confidence in the relationships and expectations which are created by a State which formulates a declaration and assumes an engagement also found or justify the binding nature of that declaration. The binding nature of the unilateral obligation contracted through a declaration, based on the above-mentioned rules, allows the addressee State(s) to require its performance by the author State. The third State has placed its trust in the conduct or in the declaration constituting the unilateral act and in the author of that act not attempting to go back on its word. A more specific formulation of the general rule of good faith *contra factum proprium non concedit venire* should therefore determine the opposability of the unilateral act vis-à-vis its author.

Conclusion

163. A conclusion—at least a brief one—seems needed at the end of this first preliminary report on unilateral acts of States.

164. There is certainly an abundance of practice, doctrine and jurisprudence on the acts and conduct of States, although, as noted at the beginning of this report, they are not always consistent.

165. Most unilateral acts may be understood to fall within the realm of the law of international agreements. Others, though, may be understood to fall outside that sphere, so making necessary an effort at codifying and progressively developing the rules that govern their operation. Doubts are constantly raised as to the category of

[102] *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 23rd meeting (A/C.6/52/SR.23), statement by the Czech Republic, para. 69.

[103] *I.C.J. Reports 1974* (see footnote 43 above), para. 46.

[104] See *Yearbook … 1996*, vol. II (Part Two), annex II, addendum 3, sect. 2 (*a*) (ii), p. 142.

[105] De Visscher, loc. cit., p. 461.

[106] Venturini, referring to good faith and the security of international relations, says that from that point of view, the binding nature of the unilateral promise is justified (loc. cit., p. 403).

[107] Reuter, *Droit international public*, p. 92.

[108] "Bonne foi. Bona fides" (Basdevant, ed., *Dictionnaire de la terminologie du droit international*, p. 91).

[109] See footnote 103 above.

[110] Venturini, loc. cit., p. 404. Note that some classical authors refer to the promise in general. The binding nature of the promise is not unknown in international law. Grotius, in his text *De jure belli ac pacis, libri tres* (book II, chap. XI, para. XIV), says that "*Ut ... promissio jus transferat, acceptatio ... requiritur*". Pufendorf also states, in *Elementorum Jurisprudentiae Universalis Libri Duo* (vol. I, definition XII, p. 92, para. 10), that: "*Requiritur porro ad promissum perfectum non solum voluntas promittentis, sed etiam eius cui fit promissio*."

[111] Guggenheim, op. cit., p. 280.

acts that might be the subject of this effort, as was indicated by some representatives in the Sixth Committee in 1997.[112]

166. It may be deduced from a review of international practice, doctrine and jurisprudence that substantive unilateral acts are diverse in their nature and that they may be understood to fall within several categories at the same time, though it is also sometimes difficult to pin them down and place them in a specific category. Promise, renunciation, recognition and protest may be typical unilateral acts, but that does not mean that a determinate category of legal acts is being dealt with.

167. In the case of promise, in particular, it can be seen for example that a strictly unilateral promise should be distinguished from a promise made by a State in response to the request of another State; from a promise whose purpose is to obtain its acceptance by another State; and from a promise made on condition of reciprocity. In all these cases the promise ceases to be autonomous and becomes situated within a relationship based on the law of international agreements,[113] a possibility which ICJ did not deny in its decisions in the *Nuclear Tests* cases, when it added "even though not made within the context of international negotiations".[114] Also, as indicated above, recognition and renunciation may be included in a relationship based on an international agreement.

168. To develop rules on substantive acts seems to be a difficult and uncertain exercise. On the other hand, the rules relating to a formal unilateral act which is performed with the intention of producing legal effects could apparently be the object of an attempt at codification and progressive development.

169. A unilateral declaration, in turn, cannot be considered in isolation; rather, its content should be examined thoroughly to determine if it really is a strictly unilateral act.

170. A strictly unilateral declaration may then be regarded as an autonomous expression of clear and unequivocal will, explicitly and publicly issued by a State, for the purpose of creating a juridical relationship in particular, to create international obligations between itself and a third State which did not participate in its elaboration, without it being necessary for this third State to accept it or subsequently behave in such a way as to signify such acceptance.

171. If it is concluded from the preceding review that it is possible to arrive at a definition of a unilateral declaration—which, as noted above, represents a process for the creation of legal norms, in the same way as is the treaty in the context of the law of international agreements—a future attempt could be made to codify the rules that would be applicable to it, without at the same time losing sight of the importance of an approach based on the progressive development of those rules.

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[112] See *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 19th meeting (A/C.6/52/SR.19), statement by the United Kingdom, para. 50; 23rd meeting (A/C.6/52/SR.23), statements by Austria, para. 44, and the Czech Republic, para. 68; and 24th meeting (A/C.6/52/SR.24), statement by Israel, para. 49. Austria raised the question of whether the categories of acts enumerated in chapter III of the outline reformulated by the Working Group established by the Commission at its forty-ninth session (*Yearbook …1997*, vol. II (Part Two), pp. 65–66, para. 210) had enough elements in common to enable them to be treated alike or to be the object of the same legal regime.

[113] Skubiszweski, loc. cit., pp. 228–229, paras. 37–38.

[114] *I.C.J. Reports 1974* (see footnote 43 above), p. 267, para. 43, and p. 268, para. 46.

CHECKLIST OF DOCUMENTS OF THE FIFTIETH SESSION

Document	*Title*	*Observations and references*
A/CN.4/483	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-second session of the General Assembly	Mimeographed.
A/CN.4/484	Preliminary report on diplomatic protection, by Mr. Mohamed Bennouna, Special Rapporteur	Reproduced in the present volume.
A/CN.4/485 [and Corr.1]	Provisional agenda	Mimeographed. For agenda as adopted, see *Yearbook … 1998*, vol. II (Part Two), p. 14, para. 10.
A/CN.4/486	First report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	Reproduced in the present volume.
A/CN.4/487 and Add.1	First report on prevention of transboundary damage from hazardous activities, by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur	*Idem*.
A/CN.4/488 and Add.1–3	State responsibility: comments and observations received from Governments	*Idem.*
A/CN.4/489	Fourth report on nationality in relation to the succession of States, by Mr. Václav Mikulka, Special Rapporteur	*Idem.*
A/CN.4/490 and Add.1–2 [and Add.2/Corr.1], Add.3–4 [and Add.4/Corr.1] and Add.5–7 [and Add.7/Corr.1]	First report on State responsibility, by Mr. James Crawford, Special Rapporteur	*Idem*.
A/CN.4/491 [and Corr.1] and Add.1–2 [and Add.2/Corr.1], Add.3–4 [and Add.4/Corr.1], Add.5–6 [and Add.6/Corr.1]	Third report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	*Idem.*
A/CN.4/L.552 and Add.1	Draft report of the International Law Commission on the work of its fiftieth session: chapter IV (Diplomatic protection)	Mimeographed. For the adopted text, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10). The final text appears in *Yearbook … 1998*, vol. II (Part Two), p. 43.
A/CN.4/L.553	Report of the Working Group on diplomatic protection	Mimeographed.
A/CN.4/L.554 [and Corr.1 and 2] and Add.1[and Add.1/Corr.1 and 2] and Add.2 [and Add.2/Corr.1]	Draft report of the International Law Commission on the work of its fiftieth session: chapter VI (International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities))	*Idem.* For the adopted text see *Official Records of the General Assembly, Fifty-third session, Supplement No. 10* (A/53/10). The final text appears in *Yearbook ... 1998*, vol. II (Part Two).
A/CN.4/L.555 and Add.1	*Idem*: chapter V (Unilateral acts of States)	*Idem.*
A/CN.4/L.556	International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities): Proposal by the Special Rapporteur	Mimeographed.
A/CN.4/L.557 [and Corr.1]	Report of the Working Group on nationality in relation to the succession of States	*Idem.*
A/CN.4/L.558	Report of the Working Group on unilateral acts of States	*Idem.*

Document	*Title*	*Observations and references*
A/CN.4/L.559 [and Corr.1]	Draft report of the International Law Commission on the work of its fiftieth session: chapter VIII (Nationality in relation to the succession of States)	*Idem*. For the adopted text, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10). The final text appears in *Yearbook … 1998*, vol. II (Part Two), p. 88.
A/CN.4/L.560	Recommendations of the Planning Group to the Commission	Mimeographed.
A/CN.4/L.561 and Add.1–6	Draft report of the International Law Commission on the work of its fiftieth session: chapter VII (State responsibility)	*Idem*. For the adopted text, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10). The final text appears in *Yearbook … 1998*, vol. II (Part Two), p. 60.
A/CN.4/L.562 [and Corr.1] and Add.1–2	*Idem*: chapter IX (Reservations to treaties)	*Idem*, p. 90.
A/CN.4/L.563 [and Corr.1]	Reservations to treaties. Titles and texts of draft guidelines of the Guide to Practice proposed by the Drafting Committee at the fiftieth session of the Commission	Mimeographed.
A/CN.4/L.564 [and Corr.1]	Draft report of the International Law Commission on the work of its fiftieth session: chapter IX (Reservations to treaties. Texts of the draft guidelines of the Guide to Practice in respect of reservations to treaties, with accompanying commentary)	*Idem*. For the adopted text, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10). The final text appears in *Yearbook … 1998*, vol. II (Part Two), p. 99.
A/CN.4/L.565	State responsibility. Draft articles provisionally adopted by the Drafting Committee: articles 1, 2 [3] and 3 [4] (Part One, chapter I)	Mimeographed.
A/CN.4/L.566	Draft report of the International Law Commission on the work of its fiftieth session: chapter I (Organization of the session)	*Idem*. For the adopted text, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10). The final text appears in *Yearbook … 1998*, vol. II (Part Two), p. 64.
A/CN.4/L.567	*Idem*: chapter X (Other decisions and conclusions of the Commission)	*Idem*, p. 109.
A/CN.4/L.568	International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities). Titles and texts proposed by the Drafting Committee: draft articles 1 to 17	Mimeographed.
A/CN.4/L.569	State responsibility. Draft articles provisionally adopted by the Drafting Committee: articles 1, 3, 4 (Part One, chapter I), 5, 7, 8, 8 bis, 9, 10, 15, 15 bis and A (chapter II)	Text reproduced in *Yearbook … 1998*, vol. I, summary record of the 2562nd meeting (para. 72).
A/CN.4/L.570	Draft report of the International Law Commission on the work of its fiftieth session: chapter III (Specific issues on which comments would be of particular interest to the Commission)	Mimeographed. For the adopted text, see *Official Records of the General Assembly, Fifth-third Session, Supplement No. 10* (A/53/10). The final text appears in *Yearbook … 1998*, vol. II (Part Two), p. 17.
A/CN.4/L.571	*Idem*: chapter II (Summary of the work of the Commission at its fiftieth session)	*Idem*, p. 15.
A/CN.4/SR.2519–A/CN.4/SR.2564	Provisional summary records of the 2519th to 2564th meetings	Mimeographed. The final text appears in *Yearbook … 1998*, vol. I.