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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 ... 1998*).

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 fifty-first 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.

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CONTENTS

	<i>Page</i>
Abbreviations	iv
Note concerning quotations	iv
Filling of casual vacancies (article 11 of the statute) (agenda item 1)	
<i>Document A/CN.4/494</i> . Note by the Secretariat	1
State responsibility (agenda item 3)	
<i>Document A/CN.4/498 and Add.1–4</i> . Second report on State responsibility, by Mr. James Crawford, Special Rapporteur.....	3
<i>Document A/CN.4/492</i> . Comments and observations received from Governments	101
International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (agenda item 4)	
<i>Document A/CN.4/501</i> . Second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur	111
Reservations to treaties (agenda item 5)	
<i>Document A/CN.4/499</i> . Fourth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur.....	127
<i>Document A/CN.4/4/478/Rev.1</i> . Annex: Bibliography.....	139
Nationality in relation to the succession of States (agenda item 6)	
<i>Document A/CN.4/493</i> . Comments and observations received from Governments	151
<i>Document A/CN.4/497</i> . Memorandum by the Secretariat.....	177
Unilateral acts of States (agenda item 8)	
<i>Document A/CN.4/500 and Add.1</i> . Second report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	195
Checklist of documents of the fifty-first session	213

ABBREVIATIONS

AALCC	Asian-African Legal Consultative Committee
CAHDI	Ad Hoc Committee of Legal Advisers on Public International Law
CMEA	Council for Mutual Economic Assistance
EEC	European Economic Community
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IMO	International Maritime Organization
ISO	International Organization for Standardization
ITU	International Telecommunication Union
IUCN	International Union for Conservation of Nature and Natural Resources
OAS	Organization of American States
OAU	Organization of African Unity (now African Union (AU))
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
UNCCD	United Nations Convention to Combat Desertification
UNEP	United Nations Environment Programme
UNIDROIT	International Institute for the Unification of Private Law
WHO	World Health Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

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<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
LGDJ	Librairie générale de droit et de jurisprudence
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40–80: beginning in 1931)
<i>P.C.I.J., Series C</i>	PCIJ, <i>Pleadings, Oral Statements and Documents</i> (Nos. 5288: from 1931)
RGDIP	<i>Revue générale de droit international public</i> (Paris)
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

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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.

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The Internet address of the International Law Commission is www.un.org/law/ilc/index.htm.

**FILLING OF CASUAL VACANCIES
(ARTICLE 11 OF THE STATUTE)**

[Agenda item 1]

DOCUMENT A/CN.4/494

Note by the Secretariat

[Original: English]
[26 January 1999]

1. Following the election in April 1998 of Mr. Luigi Ferraro Bravo as a judge of the European Court of Human Rights, the election in October 1998 of Mr. Mohamed Bennouna as a judge of the International Tribunal for the Former Yugoslavia and the appointment in January 1999 of Mr. Václav Mikulka as Director of the Codification Division, three seats have become vacant in the International Law Commission.

2. In this case, article 11 of the statute of the Commission is applicable. It prescribes that:

In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this statute.

Article 2 reads:

1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.
2. No two members of the Commission shall be nationals of the same State.
3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

3. The terms of the three members to be elected by the Commission will expire at the end of 2001.

STATE RESPONSIBILITY

[Agenda item 3]

DOCUMENT A/CN.4/498 and Add.1-4

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

[Original: English/French]
[17 March, 1 and 30 April, 19 July 1999]

CONTENTS

		<i>Page</i>
Multilateral instruments cited in the present report.....		4
Works cited in the present report.....		6
	<i>Paragraphs</i>	
SCOPE OF THE PRESENT REPORT.....	1	9
REVIEW OF DRAFT ARTICLES IN PART ONE.....	2-158	9
A. Part one, chapter III. Breach of an international obligation.....	2-158	9
1. Introduction.....	2-4	9
(a) Overview.....	2-3	9
(b) Comments of Governments on chapter III as a whole.....	4	10
2. Review of specific articles in chapter III.....	5-150	10
(a) Article 16. Existence of a breach of an international obligation.....	5-15	10
(b) Article 17. Irrelevance of the origin of the international obligation breached.....	16-26	13
(c) Article 19, paragraph 1. Irrelevance of the subject matter of the obligation breached.....	27-34	15
(d) Article 18, paragraphs 1-2. Requirement that the international obligation be in force for the State.....	35-51	16
(e) Articles 20-21. Obligations of conduct and obligations of result.....	52-80	20
(f) Article 23. Breach of an international obligation to prevent a given event.....	81-92	27
(g) Articles 18, paragraphs 3-5, and 24-26. Completed and continuing wrongful acts ...	93-137	29
(h) Article 22. Exhaustion of local remedies.....	138-150	39
3. Other issues relating to breach of an international obligation.....	151-155	41
(a) The spatial effect of international obligations and questions of breach.....	152-155	41
(b) Possible distinctions between breaches by reference to their gravity.....	156-157	43
4. Summary of proposals concerning chapter III.....	158	43
B. Part one, chapter IV. Implication of a State in the internationally wrongful act of another State....	159-214	45
1. Introduction.....	159-167	45
(a) The scope of chapter IV.....	159-160	45
(b) Accessory responsibility and cognate concepts.....	161-165	45
(c) Chapter IV as a statement of secondary rules?.....	166-167	47
2. Review of specific articles.....	168-210	47
(a) Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act.....	168-188	47
(b) Article 28. Responsibility of a State for an internationally wrongful act of another State.....	189-210	52
3. Conclusions as to chapter IV.....	211-214	55
C. Part one, chapter V. Circumstances precluding wrongfulness.....	215-358	57
1. Introduction.....	215-222	57
(a) Overview.....	215-216	57
(b) The evolution of chapter V.....	217	57
(c) Comments of Governments on chapter V as a whole.....	218-222	58

	<i>Paragraphs</i>	<i>Page</i>
2. The concept of “circumstances precluding wrongfulness”	223–231	58
(a) Some preliminary distinctions	225–229	59
(b) Circumstances precluding wrongfulness or responsibility?	230–231	60
3. Review of specific articles	232–305	60
(a) Article 29. Consent	232–243	60
(b) Article 30. Countermeasures in respect of an internationally wrongful act	244–251	64
(c) Article 31. Force majeure and fortuitous event	252–265	64
(d) Article 32. Distress.....	266–276	67
(e) Article 33. State of necessity	277–293	69
(f) Article 34. Self-defence	294–304	74
(g) Article 35. Reservation as to compensation for damage.....	305	76
4. Possible justifications or excuses not included in chapter V	306–336	76
(a) Performance in conflict with a peremptory norm (<i>jus cogens</i>)	308–315	76
(b) The “ <i>exceptio inadimplenti non est adimplendum</i> ”	316–331	78
(c) The so-called “clean hands” doctrine.....	332–336	82
5. Procedural and other incidents of invoking circumstances precluding wrongfulness.....	337–354	83
(a) Compensation for losses in cases where chapter V is invoked.....	338–349	83
(b) Temporal effect of invoking circumstances precluding wrongfulness.....	350	85
(c) Onus of proof.....	351	85
(d) Loss of the right to invoke responsibility.....	352	86
(e) Dispute settlement in relation to circumstances precluding wrongfulness.....	353–354	86
6. Conclusions as to chapter V	355–358	86
D. Countermeasures as provided for in part one, chapter V and part two, chapter III	359–394	89
1. Reflections on the treatment of countermeasures in part two	375–390	92
(a) Comments of Governments	376–381	92
(b) Developments in the law and practice relating to countermeasures	382–384	93
(c) Particular issues raised by articles 47–50	385–390	94
(i) Dispute settlement and the form of the draft articles.....	386–389	94
(ii) The balance between “injured” and “target” States	390	95
2. General conclusions.....	391–394	95
(a) Options for the Commission	391–393	95
(b) The formulation of article 30.....	394	96
<i>Annex.</i> Interference with contractual rights: a brief review of the comparative law experience		97

Multilateral instruments cited in the present report

	<i>Source</i>
Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919)	<i>British and Foreign State Papers, 1919</i> , vol. CXII (London, HM Stationery Office, 1922), p. 1.
Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye) (Saint-Germain-en-Laye, 10 September 1919)	<i>Ibid.</i> , p. 317.
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, <i>Treaty Series</i> , vol. 55, No. 814, p. 187.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	<i>Ibid.</i> , vol. 78, No. 1021, p. 277.
Geneva Conventions for the Protection of War Victims (Geneva, 12 August 1949)	<i>Ibid.</i> , vol. 75, Nos. 970–973, pp. 31 et seq.
Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	<i>Ibid.</i> , p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	<i>Ibid.</i> , p. 85.

	<i>Source</i>
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) (Geneva, 8 June 1977)	Ibid., vol. 1125, No. 17512, p. 3.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	Ibid., vol. 213, No. 2889, p. 221.
Protocol to the above-mentioned Convention (Paris, 20 March 1952)	Ibid.
Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	Ibid., vol. 516, No. 7477, p. 205.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	Ibid., vol. 500, No. 7310, p. 95.
Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, D.C., 18 March 1965)	Ibid., vol. 575, No. 8359, p. 159.
Convention on Transit Trade of Land-locked States (New York, 8 July 1965)	Ibid., vol. 597, No. 8641, p. 42.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	Ibid., vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, No. 18232, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	Ibid., vol. 1144, No. 17955, p. 123.
International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels, 29 November 1969)	Ibid., vol. 970, No. 14049, p. 211.
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)	Ibid., vol. 974, No. 14118, p. 178.
Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976)	Ibid., vol. 1108, No. 17119, p. 151.
United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)	Ibid., vol. 1489, No. 25567, p. 3.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	Ibid., vol. 1833, No. 31363, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Statute of the International Tribunal for the Former Yugoslavia (New York, 25 May 1993)	United Nations, <i>Basic Documents</i> (Sales No. E/F.98.III.P.1).
Statute of the International Tribunal for Rwanda (New York, 8 November 1994)	ICTR(093)/D637/No. 1 (August 1999).
United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	<i>Official Records of the General Assembly, Fifty-first Session, Supplement No. 49, resolution 51/229, annex.</i>
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, <i>Treaty Series</i> , vol. 2187, No. 38544, p. 90.

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Scope of the present report¹

1. The present report continues the task, begun in 1998,² of systematically considering the draft articles in the light

¹ The Special Rapporteur would like to thank Mr. Pierre Bodeau, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge, for his substantial assistance in the preparation of this report, and the Leverhulme Trust for its financial support. A group of younger scholars (with financial assistance from the Humanities Research Board of the British Academy) provided assistance with the literature on State responsibility in various languages: they were Mr. Andrea Bianchi, University of Siena; Mr. Carlos Esposito, Autonomous University of Madrid; Mr. Yuji Iwasawa, University of Tokyo; Ms. Nina Jorgensen, Inns of Court School of Law, London; Ms. Yumi Nishimura, Sophia University; and Mr. Stephan Wittich, University of Vienna.

² See the first report on State responsibility, *Yearbook ... 1998*, vol. II (Part One), p. 1, document A/CN.4/490 and Add.1–7.

of the comments of Governments and developments in State practice, judicial decisions and in the literature. In later parts of the report it is also proposed to deal with certain general issues raised by parts two and three of the draft articles, and to begin considering the articles in part two.³

³ Since the first report (see footnote 2 above), further Government comments have been received: see *Yearbook ... 1998*, p. 81, document A/CN.4/488 and Add.1–3, and A/CN.4/492, reproduced in the present volume. So far as these relate to articles 16 et seq., they are taken into account in what follows. It is proposed to reserve discussion of further comments on draft articles 1–15 until all the draft articles have been dealt with, at which point they will have to be looked at again in their ensemble.

Review of draft articles in part one

A. Part one, chapter III. Breach of an international obligation

1. INTRODUCTION

(a) Overview

2. Chapter III of part one consists of 11 articles dealing with the general subject of “breach of an international obligation”. The matters dealt with in chapter III on analysis fall into five groups:⁴

(a) Articles 16, 17 and 19, paragraph 1,⁵ deal with the notion of breach itself, emphasizing the irrelevance of the source of the obligation or its subject matter;

(b) Article 18, paragraphs 1 and 2, deals with the requirement that the obligation be in force for the State at the time of its breach;

(c) Articles 20–21 elaborate upon the distinction between obligations of conduct and obligations of result, and in similar vein article 23 deals with obligations of prevention;

(d) Articles 24–26 deal with the moment and duration of breach, and in particular with the distinction between continuing wrongful acts and those not extending in time. They also develop a further distinction between composite and complex wrongful acts. Article 18, paragraphs 3–5, seeks to specify when continuing, composite and complex wrongful acts have occurred, and deals with issues of inter-temporal law in relation to such acts;

(e) Article 22 deals with an aspect of the exhaustion of local remedies rule, which is analysed within the specific framework of obligations of result.

For reasons that will emerge, it is proposed to deal with the articles in this order.

3. Taken together, the articles in chapter III seek to analyse further the requirement, already laid down in principle by article 3 (b), that in every case of State responsibility there must be a breach of an international obligation of a State by that State. But there is a difficulty in taking this analysis much further without transgressing the

⁴ For the *travaux* on chapter III see:

Fifth report: *Yearbook ... 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2;

Sixth report: *Yearbook ... 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1–3;

Seventh report: *Yearbook ... 1978*, vol. II (Part One), p. 31, document A/CN.4/307 and Add.1 and 2;

Yearbook ... 1978, vol. I, pp. 232–237 (plenary debate); and pp. 269–270 (report of the Drafting Committee);

Yearbook ... 1978, vol. II (Part Two), pp. 76–78 (summary of the *travaux*);

Yearbook ... 1976, vol. II (Part Two), pp. 75–122;

Yearbook ... 1977, vol. II (Part Two), pp. 11–50;

Yearbook ... 1978, vol. II (Part Two), pp. 79–98 (text of the draft articles and commentaries thereto).

⁵ Article 19, paragraphs 2–4, deals with the definition of international crimes of States. The issues it raises are addressed in the context of the discussion on the distinction between “criminal” and “delictual”

responsibility (see, for example, the Special Rapporteur’s first report (footnote 2 above), paras. 43–60).

distinction between primary and secondary rules, on which the draft articles as a whole are founded. In determining whether there has been a breach of an obligation, consideration must be given above all to the substantive obligation itself, its precise formulation and meaning, all of which fall clearly within the scope of the primary rules. However the principles and distinctions elaborated in chapter III are intended to provide a framework for that consideration, and to the extent that they do so, chapter III can have a useful function.⁶

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

4. No comments call into question the need for chapter III as a whole. But the United Kingdom of Great Britain and Northern Ireland expresses concern that “the fineness of the distinctions drawn [in chapter III] between different categories of breach may exceed that which is necessary, or even helpful, in a statement of the fundamental principles of State responsibility”.⁷ Germany, summarizing its comments on individual articles, notes that (in addition to article 19) chapter III contains “a number of provisions that should be revised or redrafted”.⁸ Japan complains that the categorization of international obligations in chapter III contains “excessively abstract concepts . . . laid down in unclear language”; in its view the difficulty of drawing these distinctions “would be counterproductive to any effort to settle a dispute”.⁹

2. REVIEW OF SPECIFIC ARTICLES IN CHAPTER III

(a) *Article 16. Existence of a breach of an international obligation*

5. Article 16 provides as follows:

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.

6. Article 16 repeats within the framework of chapter III, but in slightly different language, the element already expressed in article 3 (b). Under article 3 (b), an internationally wrongful act occurs when conduct attributable to

⁶ There is almost no systematic treatment in the literature of the subject of breach of international obligations as such. Breach of treaty has been studied to some extent: see, in particular, Sir Gerald Fitzmaurice's fourth report on the law of treaties, *Yearbook . . . 1959*, vol. II, document A/CN.4/120, pp. 37–81, which dealt with the effects of treaties. That report was never debated by the Commission, and although certain aspects of it were subsumed by his successor, Sir Humphrey Waldock, and are now included in the 1969 Vienna Convention on the Law of Treaties, those relating to non-performance of obligations arising from treaties were left to be dealt with in the framework of State responsibility. On breach of treaties see also Rosenne, *Breach of Treaty*; Reuter, *Introduction to the Law of Treaties*, chap. 4, p. 163 (who nevertheless conflates breach and invalidity under the rather unhelpful title of “Non-application of treaties”).

⁷ *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/488 and Add.1–3, p. 110.

⁸ *Ibid.*

⁹ A/CN.4/492 (reproduced in the present volume). See also the comments made by some Governments (Austria, Byelorussian Soviet Socialist Republic, Canada, Chile, Mali, the Netherlands, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics and Yugoslavia in *Yearbook . . . 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, pp. 87–106; Bulgaria, Czechoslovakia, Federal Republic of Germany, Mongolia and Sweden in *Yearbook . . . 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, pp. 71–78) when chapter III was first adopted.

a State “constitutes a breach of an international obligation of [that] State”. But article 16 specifies the element of breach a little further, identifying as a breach (and thus as wrongful) all conduct which “is not in conformity with what is required of” the State by the obligation in question. This element is sometimes described as the “objective” element of State responsibility, as compared with the requirement of attribution which is described as the “subjective” element. The notion of State responsibility as focusing on the right (*le droit subjectif*) of the injured State is discussed further in the context of article 40 and its definition of “injured State”. But there are other difficulties in the dichotomy between “subjective” and “objective”. After all, attribution is a legal process, and is in that sense “objective”.¹⁰ In addition, the existence of a breach of international law may depend on the knowledge or state of mind of the actor(s) for whose conduct the State is responsible. In such cases some mental element is attributed to the State as a basis for its responsibility,¹¹ which is thus, in one sense at least, “subjective”, although still in principle governed by international law. Moreover, the same act may be a breach of a treaty vis-à-vis one State but lawful, or even required, under a treaty with another State:¹² in such cases the notion of “breach” has an inter-subjective element which is missing in relation to attribution. For these reasons, the terminology of “subjective” and “objective” elements of responsibility is confusing and is best avoided.

7. The commentary to article 16 justifies the use of the term “not in conformity with”, noting that “it expresses more accurately the idea that a breach may exist even if the act of the State is only partially in contradiction with an international obligation incumbent upon it”.¹³ It goes on to distinguish breach of an international obligation from a breach of comity,¹⁴ or of a contract between a State and a private person or corporation,¹⁵ or generally of “legal obligations governed by a legal order other than the international legal order”.¹⁶ It notes the need for compliance with other articles of chapter III in order to establish a breach, but says nothing about the relationship between chapters III and V.

8. There have been only a few Government comments on article 16. France raises the question of breach of an international obligation which is overridden by “an obligation considered to be superior”, citing as an example Article 103 of the Charter of the United Nations. It there-

¹⁰ The commentary to article 16, paragraph 2, stresses “the autonomy of international law” in relation to breach (*Yearbook . . . 1976*, vol. II (Part Two), p. 78, para. (2) of the commentary to article 16), but international law also determines the question of attribution: see the Special Rapporteur's first report (footnote 2 above), para. 154. It is true that in doing so it takes into account the provisions of internal law as to the status of persons acting on behalf of the State (*ibid.*, para. 163). But provisions of internal law are relevant in determining whether there has been a breach of an obligation. In both respects the dominant principle is that stated in article 4 (*ibid.*, paras. 136–139).

¹¹ As in *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 22.

¹² See paragraph 9 (c) and (d) below.

¹³ *Yearbook . . . 1976*, vol. II (Part Two), p. 78, para. (4) of the commentary to article 16.

¹⁴ *Ibid.*, para. (5) of the commentary to article 16.

¹⁵ *Ibid.*, pp. 78–79, paras. (6)–(7) of the commentary to article 16.

¹⁶ *Ibid.*, p. 79, para. (7) of the commentary to article 16.

fore proposes the addition of the words “under international law” at the end of article 16.¹⁷ The United Kingdom suggests that article 21 (obligations of result) be merged with article 16.¹⁸

(i) *Article 16 and the problem of conflicting international obligations*

9. France’s comment raises the general question of conflicting international obligations. So far as Article 103 of the Charter of the United Nations is concerned, the question might be thought sufficiently regulated by article 39 of the draft articles, on the assumption that that article will be expressed to apply to the draft articles as a whole.¹⁹ But the problem of potentially conflicting international obligations is a wider one:

(a) The first situation to be considered is where general international law resolves a contradiction between two or more international obligations which are, or have been, in force for a State, so that under international law, one of those obligations prevails over the other. For example, under the law of treaties, a later treaty between the same parties prevails over an earlier one to the extent of any inconsistency.²⁰ A later inconsistent rule of general international law normally prevails over an earlier rule. A peremptory norm of international law prevails over any inconsistent norm not having that character (i.e. any norm of *jus dispositivum*),²¹

(b) A second situation occurs where one treaty provision claims priority over another, as for example Article 103 of the Charter of the United Nations. All States Members have thereby agreed that in their mutual relations, Charter obligations prevail over other treaty obligations, even under later treaties. This was the basis for the Court’s decision in the *Lockerbie* cases, to the effect that the Libyan Arab Jamahiriya rights under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) not to extradite certain nationals were subordinated to its duty to do so under a Security Council resolution with which Libya was, *prima facie*, obliged to comply under article 25 of the Charter;²²

(c) These cases, however interesting they may be for other purposes, raise no special difficulties for article 16. In each case, one international obligation prevails, and no State has any right that the “subordinate”, “suppressed” or “repealed” provision should be complied with. But the rules referred to above cannot ensure complete consistency between the international obligations of a State, any more than national law can ensure completely against valid but inconsistent contractual obligations. Thus under article 30, paragraph 4, of the 1969 Vienna Convention, if any of the parties to two inconsistent treaties is different, both treaties are considered to remain in force, with the consequence that State A (a party to both) may have one set of obligations to one group of States and another set of obligations to another.²³ In *Costa Rica v. Nicaragua*,²⁴ the Central American Court of Justice held that Nicaragua was internationally responsible to Costa Rica for entering into a treaty with a third State²⁵ without first complying with the consultation requirements of an earlier treaty between Nicaragua and Costa Rica. The Court did not, however, declare the later treaty invalid, because it had no jurisdiction over the United States. In the *East Timor* case, ICJ was even more reticent. It was argued that Australia’s entry into a treaty with Indonesia which conflicted with the rights of Portugal under the Charter of the United Nations, as well as with the rights of the people of East Timor as represented by Portugal, gave rise to the international responsibility of Australia. Unlike Costa Rica, Portugal expressly did not seek a determination that the treaty with Indonesia was void, restricting itself to a claim of responsibility. The Court declined to decide the case at all, on the ground that it could not do so without first pronouncing on the illegality of the conduct of Indonesia, a State not a party to the proceeding.²⁶ In these circumstances, it was not competent to determine Portugal’s claim of responsibility against Australia;

(d) The 1969 Vienna Convention does not contemplate that a treaty will be void for inconsistency with

decisions taken under it by non-members: see Article 2, paragraph 6, of the Charter; and Vitzthum, “Article 2 (6)”, pp. 131–139.

²³ See *Yearbook ... 1966*, vol. II, p. 217, para. (11) of the commentary to that provision (art. 26 in the Commission’s final draft); and also document A/CN.4/186 and Add.1–7 (*ibid.*, p. 76).

²⁴ “Judicial decisions involving questions of international law”, *American Journal of International Law*, vol. 11 (1917), p. 181.

²⁵ *Viz.*, the Interoceanic Canal (Bryan-Chamorro Treaty) of 5 August 1914 between Nicaragua and the United States of America; text in Charles I. Bevans, ed., *Treaties and Other International Agreements of the United States of America, 1776–1949* (Washington, D.C., United States Government Printing Office, 1972), vol. 10, p. 379.

²⁶ *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 90, applying the principle of admissibility enunciated in *Monetary Gold Removed from Rome in 1943*, Judgment, *I.C.J. Reports 1954*, p. 32. Formally the decision may be distinguishable from *Costa Rica v. Nicaragua* (see footnote 24 above). In that case there was no question raised of any unlawful act on the part of the United States, even though it clearly had notice of the provisions of the earlier treaty. But it is slightly odd that a treaty should be considered void for a breach, by one party only, of another treaty with a third State, whereas a treaty arguably entered into in disregard of an *erga omnes* norm should escape judicial scrutiny. For discussions of the *East Timor* case see, for example, Chinkin, “The East Timor case (*Portugal v. Australia*)”, p. 712; Jouannet, “Le principe de l’ordre monétaire, à propos de l’arrêt du 30 juin 1995 dans l’affaire du Timor Oriental”, p. 673; Thouvenin, “L’arrêt de la CIJ du 30 juin 1995 rendu dans l’affaire du Timor oriental: *Portugal c. Australie*”, p. 328.

¹⁷ *Yearbook ... 1998* (see footnote 7 above).

¹⁸ *Ibid.* See also the comments by Chile (*Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 95), Yugoslavia (*ibid.*, p. 106) and the Federal Republic of Germany (*Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 74).

¹⁹ This was foreshadowed in the Special Rapporteur’s first report (see footnote 2 above), paras. 73–74.

²⁰ 1969 Vienna Convention, art. 30, para. 3, subject to article 41.

²¹ Other contingencies include the supersession of an earlier customary rule (not a rule of *jus cogens*) by a later treaty, and the desuetude of a treaty as a result of a new rule of general international law. On these and similar problems see, for example, Rosenne, *op. cit.*, pp. 85–95; Binder, *Treaty Conflict and Political Contradiction: The Dialectic of Duplicity*; Chinkin, *Third Parties in International Law*, pp. 69–80; Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*; and Reuter, *op. cit.*, pp. 129–147.

²² See *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. 3; and *ibid.* (*Libyan Arab Jamahiriya v. United States of America*), Provisional Measures, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 114. For the purposes of the applications, the validity of the Security Council resolution was presumed. Different questions arise in respect of compliance with the Charter of

another treaty.²⁷ Instead, it seeks to resolve the difficulties of conflicting treaty obligations by expressly reserving “any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty”.²⁸ Thus it is no excuse under international law for non-compliance with a subsisting treaty obligation to State A that the State was simultaneously complying with a treaty obligation to State B. So far as the law of responsibility is concerned, this raises questions about the possibility of cessation or restitution in cases where it is impossible for the State concerned to comply with both obligations. This may raise issues for part two of the draft articles, but not for the formulation of article 16.

(ii) *The relationship between disconformity with an obligation, wrongfulness and responsibility*

10. Article 16 identifies as a breach of an obligation any failure to “conform” with what is required of a State by that obligation. One difficulty with this idea is the identification of the “obligation” in question. It is normally said, for example, that States are under an obligation to protect diplomatic premises, or to allow innocent passage to foreign vessels in the territorial sea, the obligation being identified with the particular primary rule as found, respectively, in article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations, or in articles 17 et seq. of the United Nations Convention on the Law of the Sea, or their customary law equivalents. But these primary rules do not specify all of the conditions which have to be met in order for a breach of an obligation to be established. Within the system of the draft articles, and under general international law, certain other factors are relevant to the question whether there has been a breach, for example, the consent of the “victim” State, or the circumstances of self-defence or force majeure. It might be said that, properly understood, the primary rule actually contains in itself all the conditions, qualifications, justifications or excuses applicable to it, so that the notion of “conformity” with the obligation imposed by that rule entails that all these conditions or qualifications are met, and all possible justifications or excuses excluded. But it is clear that this is not the sense in which article 16 should be read. Otherwise it would be circular, saying nothing more than that the breach of an obligation occurs when that obligation is breached. Moreover, the circumstances precluding wrongfulness, dealt with in chapter V of the draft articles, are treated as secondary rules of a general character, and not as a presumptive part of every primary rule.

11. If this is so, then there is a difficulty with article 16, in that it appears to say that a breach of an international obligation occurs when an act attributable to a State does not conform with the obligation imposed on that State by a primary rule, notwithstanding that one of the circumstances precluding wrongfulness in chapter V may exist.

²⁷ See article 30, paragraphs 4–5. Articles 52, 53, 64, 69 and 71 expressly deal with cases where a treaty is void, and they were intended to be exclusive. See Reuter, *op. cit.*, p. 173, para. 251. Lauterpacht argued strenuously for the invalidity of later conflicting treaties, relying largely on municipal law analogies: see “The covenant as the ‘higher law’”, p. 326, and especially “Contracts to break a contract”, pp. 371–375.

²⁸ Art. 30, para. 5. Article 30 itself is stated to be “[s]ubject to Article 103 of the Charter of the United Nations” (art. 30, para. 1).

This might appear to create a kind of “wrongfulness in the abstract”, i.e. a breach for which no State is responsible, which the Commission in its commentary expressly disclaims.²⁹ Or it might appear to contradict article 3, which provides that attribution and breach are, taken together, sufficient conditions for wrongfulness.³⁰ How can there be wrongfulness in circumstances where wrongfulness is precluded?

12. In responsibility cases since article 16 was adopted, ICJ has approached this issue in rather different ways:

(a) In the *United States Diplomatic and Consular Staff in Tehran* case, the Court, having determined that the conduct in question was attributable to the Islamic Republic of Iran, concluded that on the facts Iran had failed to comply with its obligations under the relevant treaties and under general international law to protect the diplomatic and consular personnel and to respect and secure their inviolability. It concluded that there had been “successive and still continuing breaches by Iran of its obligations to the United States”, and added:

Before drawing from this finding the conclusions which flow from it, in terms of the international responsibility of the Iranian State vis-à-vis the United States of America, the Court considers that it should examine one further point. The Court cannot overlook the fact that on the Iranian side ... the idea has been put forward that the conduct of the Iranian Government ... might be justified by the existence of special circumstances.³¹

The Court went on to examine, and reject, a possible “defence” of Iran, not specifically pleaded (because Iran had not appeared), still less proved. The Court noted that even if it had been duly pleaded and proved, it would not have constituted “a justification of Iran’s conduct and thus a defence to the United States’ claims in the present case”.³² It was on this basis that the Court sustained the finding that Iran “has incurred responsibility towards the United States”.³³ Apparently the breach of the obligation occurred, as it were, prior to any determination as to the existence of any special justification or “defence”, whereas the determination of responsibility was only made *after* such a defence had been excluded. This may imply that responsibility has not two but three elements, attribution, breach and the absence of any “special” defence or justification—although too much should not be read into a judgement dealing with an egregious breach, in a case where the Respondent State did not appear and where the Court was apparently leaving no stone unturned in its analysis;

(b) In the *the Gabčíkovo-Nagymaros Project* case, the Court noted that:

when a State has committed an internationally wrongful act, its international responsibility is *likely to be involved* whatever the nature of the obligation it has failed to respect.³⁴

²⁹ See the Special Rapporteur’s first report (footnote 2 above), para. 121, and the discussion, *ibid.*, paras. 122–125.

³⁰ See *Yearbook ... 1973*, vol. II, pp. 182–184, paras. (11) and (12) of the commentary to article 3, as adopted on first reading.

³¹ *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 37.

³² *Ibid.*, p. 38; see also page 40.

³³ *Ibid.*, p. 41.

³⁴ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Order of 5 February 1997, I.C.J. Reports 1997*, p. 38, para. 47, citing *Interpreta-*

Further, the Court stressed that:

when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that, in 1989, it had acted *in accordance with** its obligations under the 1977 Treaty [on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System] or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.³⁵

But how can it be said that international responsibility is “likely” to be involved in the event of an internationally wrongful act if, according to article 3, there can be no such act without responsibility?

13. The Arbitral Tribunal in the *Rainbow Warrior* arbitration adopted yet another formula, referring to “the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent)”.³⁶ But in accordance with article 16, “[t]here 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”; the breach is not merely “apparent”.

14. The difficulty may be more semantic than real, but nonetheless there is a difficulty. On the one hand, it cannot be said that a State which has evidently not acted in the manner required by a treaty or customary obligation in force for it has nonetheless acted “in conformity with” or “in accordance with” that obligation. On the other hand, it is odd to say that a State has committed an internationally wrongful act when the circumstances are such as to preclude the wrongfulness of its act under international law. However, this problem is more appropriately discussed in the framework of chapter V (circumstances precluding wrongfulness). For the moment, a reservation needs to be entered to the language of article 16, depending on the analysis to be undertaken of the various concepts underlying chapter V. But France’s suggestion that the words “under international law” be added to article 16 seems a sensible one in any event, since it emphasizes the point that the existence and content of an international obligation are determined by the system of international law and not just by the literal terms of any particular text taken in isolation.

(iii) “[N]ot in conformity with what is required of it by that obligation”

15. Finally, it might be asked whether the words “not in conformity with what is required . . . by that obligation” are apt to cover the many different kinds of breach. In some cases, an international obligation may require

tion of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 228, and article 17 of the draft articles.

³⁵ *I.C.J. Reports 1997* (see footnote 34 above), p. 39, para. 48.

³⁶ *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), p. 251.*

precisely defined conduct from the State concerned (e.g. the enactment of a specified law). In others it may set a minimum standard of conduct above which the State concerned is free to go (e.g. most human rights obligations). Later articles attempt to encapsulate some of these differences by drawing distinctions between so-called obligations of conduct, obligations of prevention and obligations of result; these are discussed in due course. It can be argued that the phrase “is not in conformity with” is flexible enough to cover the many permutations of obligation, and that any doubts can be sufficiently covered in the commentary. On the other hand, it is slightly odd to talk of an act as not being “in conformity with” an obligation. The Drafting Committee may wish to consider alternative formulations in the various languages (e.g. “does not comply with”).

(b) *Article 17. Irrelevance of the origin of the international obligation breached*

16. Before reaching any conclusion on article 16, it is necessary to consider also articles 17 and 19, paragraph 1. Article 17 provides as follows:

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

17. The commentary to article 17 poses the important question whether international law has a single regime of responsibility for all breaches of obligation, i.e. whether it matters that the “origin” of an obligation is a bilateral or multilateral treaty, a unilateral act, a rule of general international law, a local custom or a general principle of law. It notes that:

[M]ost systems of internal law distinguish between two different régimes of civil liability, one of which applies to the breach of an obligation assumed by contract, the other to the breach of an obligation having its origin in another source.³⁷

The answer given, drawing on the implication already provided in articles 1 and 3, is: no. Unlike most systems of national law,³⁸ international law has a single regime of responsibility, or at least a single general regime. It is possible for special self-contained regimes of responsibility to be developed, in which case the general regime of responsibility will be excluded either by express provision or (more likely) by application of the *lex specialis* princi-

³⁷ *Yearbook . . . 1976*, vol. II (Part Two), p. 80, para. (3) of the commentary to article 17. The statement is something of an oversimplification, since some legal systems go beyond the basic distinction between liability *ex contractu* and liability *ex delicto*. For example, for historical reasons—limitations on contractual liability imposed by rules relating to consideration and privity, the lack of any general principle of tortious liability, the limitations imposed by the forms of action—the common law developed further categories of liability that were neither contractual nor tortious (quasi-contract, restitution . . .). See Cooke and Oughton, *The Common Law of Obligations*, pp. 5–6 and 52–59; Rogers, *Winfield and Jolowicz on Tort*, pp. 4–18. For an attempt to analyse State responsibility in terms of the “causes of action”, see Brownlie, *System of the Law of Nations: State Responsibility*, pp. 53–88.

³⁸ For a brief comparative review, see Tunc, *La responsabilité civile*, pp. 32–46, who admits the validity of the distinction in principle but calls for a unification of the regimes of contractual and delictual responsibility as far as possible, noting that this was first achieved by the Civil Code of Czechoslovakia in 1950.

ple, dealt with in article 37 of the draft articles.³⁹ But apart from that, there is, it is argued, no systematic distinction in international law between obligations arising from treaties and those arising in other ways (e.g. by unilateral act, under general international law).⁴⁰ While the absence of explicit authority on the point is noted, a review of case law and practice reveals that:

The customary, conventional or other origin of the obligation breached is not invoked to justify the choice of one form of reparation in preference to another for instance, or to determine what subject of law is authorized to invoke responsibility.⁴¹

Various reasons are given for the absence of any such distinction. In particular, “the same obligation is sometimes covered by a customary rule and by a rule codified conventionally”,⁴² and the same treaty often contains “contractual” and “law-making” provisions, so that the suggested distinction between *traités-lois* and *traités-contrats* is unreliable.⁴³

18. A second question, addressed by article 17, paragraph 2, is whether the origin of an international obligation may in some way affect the regime of responsibility for its breach. Here, a potentially relevant distinction is that between obligations owed to the international community of States as a whole and those owed to one or a few States. But nonetheless, the commentary asserts that “the pre-eminence of these obligations over others is determined by their content, not by the process by which they were created”.⁴⁴ The reason given is that “there is, in the international legal order, no special source of law for creating ‘constitutional’ or ‘fundamental’ principles”.⁴⁵ It concludes that there is no need for article 17 to refer to Article 103 of the Charter of the United Nations, or to peremptory rules of international law.⁴⁶

(i) *Government comments on article 17*

19. Switzerland notes that the clarification in article 17 “although absolutely correct, adds nothing new to the principle articulated in draft article 16”.⁴⁷ Greece remarks that paragraph 2 “would appear to be superfluous”.⁴⁸

(ii) *Article 17, paragraph 1: the “origin” of obligations (customary, conventional or other)*

20. In the *Rainbow Warrior* arbitration, New Zealand argued that issues of the performance of a treaty were primarily governed by the law of treaties, and that the law

³⁹ See *Yearbook ... 1976* (footnote 37 above), para. (5) of the commentary to article 17, and for the treatment of the *lex specialis* principle in the draft articles, see the Special Rapporteur’s first report (footnote 2 above), para. 27.

⁴⁰ See *Yearbook ... 1976* (footnote 37 above), p. 85, paras. (19)–(20) of the commentary to article 17.

⁴¹ *Ibid.*, p. 82, para. (11).

⁴² *Ibid.*, p. 85, para. (20).

⁴³ *Ibid.*

⁴⁴ *Ibid.*, para. (21).

⁴⁵ *Ibid.*, p. 86, para. (21).

⁴⁶ *Ibid.*, para. (23).

⁴⁷ A/CN.4/488 and Add.1–3 (see footnote 7 above), comment by Switzerland on article 16.

⁴⁸ A/CN.4/492 (reproduced in the present volume), comment by Greece on article 17.

of State responsibility had a merely supplementary role.⁴⁹ One corollary, according to New Zealand, was that the only excuses for failure to comply with a treaty obligation were those contained in the 1969 Vienna Convention (e.g. impossibility of performance, fundamental change of circumstances). The Tribunal disagreed. In its view:

[T]he legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness ... and the appropriate remedies for breach, are subjects that belong to the customary Law of State Responsibility.

The reason is that the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation. The particular treaty itself might of course limit or extend the general Law of State Responsibility, for instance by establishing a system of remedies for it.⁵⁰

21. In the *Gabčíkovo-Nagymaros Project* case, ICJ referred to article 17 in support of the proposition that it is “well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect”.⁵¹ This passage has already been discussed, but it does lend further support to the proposition contained in article 17, paragraph 1.⁵²

(iii) *Article 17, paragraph 2: “does not affect”*

22. According to the commentary, the language of article 17, paragraph 2, seeks only to convey that “there is no *raison d’être* in general international law for a distinction between different types of internationally wrongful act according to the origin of the obligation”.⁵³ In particular, it is said, the hierarchical superiority of one obligation over another (e.g. under Article 103 of the Charter of the United Nations, as between Member States) does not have any consequences for the regime of responsibility:

[T]he consequences of applying the principle stated in [Article 103] do not relate to international responsibility arising from a breach of international obligations, but rather to the validity of certain treaty obligations in the event of a conflict between them and the obligations contracted by Members of the United Nations by virtue of the Charter. As a result of the provision in Article 103, an obligation under an agreement in force between two States Members of the United Nations which is in conflict with an obligation under the Charter, becomes ineffective to the extent of the conflict: consequently, it cannot be the subject of a breach entailing international responsibility. And if an obligation in conflict with those laid down by the Charter binds a Member State to a non-member State, the problem created will be that which normally arises in the event of conflict between obligations contracted by one State with several other States: that is to say, unless the rule in the Charter estab-

⁴⁹ UNRIAA (see footnote 36 above), p. 249.

⁵⁰ *Ibid.*, p. 251. The Tribunal was unanimous on this point.

⁵¹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 38, para. 47.

⁵² In that case, Slovakia had reserved the right to argue (as New Zealand had done) that circumstances precluding wrongfulness were no excuse for a breach of an express treaty provision. Hungary disagreed. As the Tribunal had done in *Rainbow Warrior*, ICJ treated the circumstances precluding wrongfulness as relevant in principle to the question of breach of a treaty, but it went on to hold that the relevant circumstances did not justify non-compliance in fact, *I.C.J. Reports 1997* (see footnote 51 above), pp. 38, para. 47, and 63, para. 101.

⁵³ *Yearbook ... 1976* (see footnote 37 above), p. 87, para. (27) of the commentary to article 17.

lishing a certain obligation has meanwhile become a peremptory rule of general international law binding, as such, on all States. Thus there is no special problem of responsibility to be solved.⁵⁴

23. This passage calls for several comments. The first is that in part two of the draft articles, a number of distinctions are drawn between breaches of obligations of a special character (obligations *erga omnes*, peremptory norms), as compared, for example, with ordinary breaches of a bilateral treaty,⁵⁵ and it may well be that further such consequences should be elaborated. If there is to be a distinction between international crimes and international delicts, one would expect that distinction to have far-reaching effects.⁵⁶ For example, in the case of a rule whose main aim is the punishment of the guilty (i.e. in the context of criminal responsibility properly so-called), one would expect different and stricter rules of attribution than in the case of rules of delictual or civil responsibility whose main aim is cessation, restitution and reparation. Faced with these possibilities, it is odd to say that “there is no special problem of responsibility to be solved”.

24. Secondly, it is not the case that Article 103 relates “to the validity of certain treaty obligations in the event of a conflict between them and the obligations contracted by Members of the United Nations by virtue of the Charter”. Article 103 is expressly concerned to establish a priority as between two conflicting *obligations* in a given case. It provides only that Charter obligations prevail in the event of a conflict with obligations under other treaties, not that the other treaties are invalid.⁵⁷ Moreover, the possibility of a conflict between a peremptory norm and an obligation arising under a treaty can be envisaged, even if the treaty is in itself a perfectly proper one.⁵⁸ Thus it cannot be excluded that the “origin” of an obligation (for example, in the Charter, or in a peremptory norm) may “affect” international responsibility arising from the internationally wrongful act of a State. Certainly the *content* of an obligation may have a strong bearing on responsibility, and yet the “origin” of an obligation may have important implications for its content.⁵⁹

(iv) *Conclusions on article 17*

25. It may be that all paragraph 2 seeks to convey is that, where an internationally wrongful act has occurred, the origin of the obligation does not alter that fact. But that is a truism; a breach is a breach, whatever the source of the obligation. Moreover, that proposition is already clearly implied in articles 3 and 17, paragraph 1. For these

⁵⁴ *Ibid.*, p. 86, para. (23).

⁵⁵ See articles 40, paragraph 3, 43 (b), 50 (e) and 51–53.

⁵⁶ A/CN.4/490 and Add.1–7 (see footnote 2 above), paras. 51, 78–80 and 84–86.

⁵⁷ Article 103 says nothing about conflicts with obligations arising from other sources, e.g. general international law, although as a treaty the Charter would normally prevail as between its parties over any norm other than a norm of *jus cogens*.

⁵⁸ For example, the 1971 Montreal Convention, to which the Court applied Article 103 of the Charter in the *Lockerbie* case, *I.C.J. Reports 1992* (see footnote 22 above), p. 15, para. 39. See also paragraph 9 above.

⁵⁹ For example, an obligation arising from a unilateral act should be interpreted primarily in accordance with the intention of the individual actor, but this is not true of a treaty obligation (see *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, pp. 104–105).

reasons, paragraph 2 is unnecessary and confusing and should be deleted.

26. As to paragraph 1, the fact that it has been necessary for ICJ and other tribunals to rule on the matter suggests that the clarification it offers is useful. Moreover, the proposition that international law does not generally distinguish between the regime of responsibility for breaches of treaty and for breaches of other legal rules is an important one. As already noted, many legal systems take the distinction between contractual and delictual responsibility for granted.⁶⁰ For these reasons the substance of paragraph 1 should be retained. However, the Special Rapporteur agrees with the comment of Switzerland at least to the extent that the substance of paragraph 1 is really a clarification of article 16. It is recommended that article 16 should have added to it the phrase “regardless of the source (whether customary, conventional or other) of that obligation”.⁶¹

(c) *Article 19, paragraph 1. Irrelevance of the subject matter of the obligation breached*

27. Article 19 deals primarily with the “distinction” between international delicts and international crimes of State, which was discussed in detail in an earlier report.⁶² However, one aspect of article 19 requires discussion here. 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 further clarification of the general language of articles 3 and 16, not unlike that offered in article 17, paragraph 1.

28. The commentary to article 19, paragraph 1, notes that it “cannot give rise to any doubt even on a purely logical basis”,⁶³ and goes on to review the case law and doctrine. As is common with such elemental notions, there is very little discussion of the precise point in the sources mentioned, no doubt because it was taken for granted or was not in dispute.

(i) *Government comments on article 19, paragraph 1*

29. There has been more comment by Governments on article 19 than on any other of the draft articles. None of it, however, touches on (or for that matter, calls into question) the principle stated in paragraph 1, except that, for those Governments proposing the deletion of article 19,⁶⁴ one may assume that paragraph 1 contains little of value.⁶⁵

⁶⁰ See paragraph 17 above.

⁶¹ For the full text of article 16 as proposed, see paragraph 34 below.

⁶² See A/CN.4/490 and Add.1–7 (footnote 2 above), paras. 43–95; and *Yearbook ... 1998*, vol. II (Part Two), pp. 64–77, paras. 241–330.

⁶³ *Yearbook ... 1976* (see footnote 37 above), p. 96, para. (3) of the commentary to article 19.

⁶⁴ As, for example, Austria, France, the United Kingdom (A/CN.4/488 and Add.1–3) (see footnote 7 above); and Japan (A/CN.4/492 (reproduced in the present volume)).

⁶⁵ In earlier comments, Chile pointed out that provisions included in chapter I and articles 16 and 19 should be read together (*Yearbook ...* (Continued on next page.))

(ii) *The basic principle*

30. Curiously, the commentary does not cite the important statement of PCIJ in *S.S. "Wimbledon"*, where the Court affirmed that "the right of entering into international engagements [sc., on any subject whatever concerning that State] is an attribute of State sovereignty".⁶⁶ That proposition—viz., that there is no a priori limit to the subject matters on which States may assume international obligations—has often been affirmed, in one context or another.⁶⁷ For example, in the *Military and Paramilitary Activities in and against Nicaragua* case, ICJ said that it could not "discover, within the range of subjects open to international agreement, any obstacle . . . to hinder a State from making a commitment" on "a question of domestic policy, such as that relating to the holding of free elections on its territory".⁶⁸

31. In other words, it has been argued from time to time that a State *could* not, a priori, have entered into an obligation on a particular subject matter, and the consistent reply has been that the only question was whether the State *had* done so. Similarly, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same character or description. In the *Oil Platforms* case, the United States argued that a Treaty of Amity, Economic Relations and Consular Rights, taking the form of a traditional friendship, commerce and navigation treaty, could not in principle have been breached by conduct involving the use of armed force and taken in the framework of national security or defence; a "commercial treaty", so it was said, had to be breached "commercially", i.e. by conduct of a commercial rather than a military character. The consequence of the argument was that the Court lacked jurisdiction to entertain a case which did not involve commercial conduct. The Court dealt with the matter shortly:

The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the

(Footnote 65 continued.)

1980, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 95). The Federal Republic of Germany proposed the incorporation "in article 17 [of] the concept embodied in article 19, paragraph 1" (*Yearbook* . . . 1981, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 74).

⁶⁶ *S.S. "Wimbledon"*, *Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 25.

⁶⁷ In another case the Court noted that, while the domestic jurisdiction of States extended to matters which are not "in principle" regulated by international law, the extent of domestic jurisdiction was "an essentially relative question", *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, p. 24. See also the following cases: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, pp. 70–71; *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, pp. 20–21; *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 24; and *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 33.

⁶⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 131, para. 259.

reach of the Treaty of 1955. The arguments put forward on this point by the United States must therefore be rejected.⁶⁹

(iii) *The formulation of the principle: "regardless of the subject-matter"*

32. Thus the underlying principle is clear, whether it is raised at the level of jurisdiction (as in *Oil Platforms*) or of substance (as in the *Military and Paramilitary Activities in and against Nicaragua* case⁷⁰). However, the reference to "subject-matter" in paragraph 1 is both non-specific and raises a perhaps unnecessary question: what subject matters would there be that would make such a difference? After all, some subject matters may lend themselves more readily than others to the conclusion that an international obligation has been assumed. For these reasons, if paragraph 1 is to be retained it may be preferable to formulate it by reference to the "content" rather than the "subject-matter" of the obligation.

33. As to whether it should be retained, the fact of repeated reference to one or other version of the principle in decisions of the Court, including recent decisions, suggests that it should be. However, for similar reasons as those given in relation to article 17, paragraph 1, it is sufficient to include it as an element in the formulation of the basic principle in article 16. There is no need for a separate paragraph or article.

(iv) *Conclusions on articles 16, 17 and 19, paragraph 1*

34. For these reasons, it is proposed that articles 16, 17 and 19, paragraph 1, be merged into a single article, which might read as follows:

"Article 16. Existence of a breach of an international obligation

"There is a breach of an international obligation by a State when an act of that State does not comply with what is required of it under international law by that obligation, regardless of the source (whether customary, conventional or other) or the content of the obligation."

(d) *Article 18, paragraphs 1–2. Requirement that the international obligation be in force for the State*

35. Article 18 provides as follows:

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a preemptory norm of general international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character,

⁶⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 811–812, para. 21.

⁷⁰ See footnote 68 above.

there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

36. Article 18 is a complex provision. It deals globally with the basic postulate that an act of a State is only wrongful if it breached an international obligation in force at the time that act was performed. The basic rule is stated in paragraph 1, but it is immediately qualified by reference to a special case involving *jus cogens* norms in paragraph 2, and is then further developed and particularized in relation to different classifications of wrongful act in paragraphs 3–5. This is significant because these classifications reappear in article 25, and they are implicated in the overall treatment of different kinds of breaches in articles 24–26. Accordingly only paragraphs 1–2 of article 18 are considered here.

(i) *Government comments on article 18, paragraphs 1–2*

37. Government comments are largely directed to later paragraphs of article 18, and the basic principle in article 18, paragraph 1, appears uncontroversial.⁷¹ For Switzerland, however, that principle is “self-evident and does not need to be explained”.⁷²

(ii) *Article 18, paragraph 1: the basic principle*

38. Paragraph 1 states the basic principle that, for responsibility to exist, the breach must occur at a time when the obligation is in force for the State. This is but the application in the field of State responsibility of the general principle of the inter-temporal law, as stated by the arbitrator, Max Huber, in another context in the *Island of Palmas* case:

[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.⁷³

39. The commentary to paragraph 1 notes the many cases in which the principle has been applied by international tribunals. But it goes further: “As this is a general principle of law universally accepted and based on reasons which are valid for every legal system, it ought

⁷¹ See the comments of Canada (*Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 94); France, Germany, the United Kingdom and the United States (*Yearbook ... 1998* (footnote 7 above), pp. 111 et seq.). See also paragraph 91 below.

⁷² *Yearbook ... 1998* (see footnote 7 above), p. 111.

⁷³ *Island of Palmas* (Netherlands/United States of America), award of 4 April 1928 (UNRIIAA, vol. II (Sales No. 1949.V.1), p. 845, cited in *Yearbook ... 1976* (footnote 37 above), p. 88, para. (7) of the commentary to article 18. Generally on the inter-temporal law, see the resolution of the Institute of International Law, *Annuaire*, vol. 56 (Wiesbaden Session, 1975), pp. 536–539; for the debate, *ibid.*, pp. 339–374; for Sørensen’s reports, *ibid.*, vol. 55 (Centenary Session, 1973), pp. 1–116. See further, Karl, “The time factor in the law of State responsibility”.

necessarily to apply in international law also.”⁷⁴ Moreover, in international law, it is not merely a necessary but a *sufficient* basis for responsibility; in other words, once responsibility has accrued as a result of a wrongful act, that is not affected by the subsequent termination of the obligation (whether as a result of the termination of the treaty or a change in international law).⁷⁵

40. Both aspects of the principle are implicit in the ICJ decision in the case concerning *Certain Phosphate Lands in Nauru*. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947–1968) could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.⁷⁶ But it went on to say that:

[I]t will be for the Court, in due time, to ensure that Nauru’s delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.⁷⁷

Evidently the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. The gist of its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had terminated.⁷⁸ That principle, which was not questioned by Australia, has been applied in other cases⁷⁹ and is affirmed in the commentary.⁸⁰ But it is nowhere expressly set out in the draft articles. It is associated with the question of the loss of the right to invoke responsibility, and is discussed in reviewing the provisions of part two.

(iii) *The principle of non-retrospectivity and the interpretation of human rights obligations*

41. Although the basic principle is clearly correct, the question is whether it is subject to any qualifications or exceptions. One clear qualification relates to the question of continuing wrongful acts. It is dealt with in article 18,

⁷⁴ *Yearbook ... 1976* (see footnote 37 above), p. 90, para. (11) of the commentary to article 18.

⁷⁵ *Ibid.*, p. 89, para. (9). That proposition is expressly affirmed for treaty obligations in the 1969 Vienna Convention (art. 70).

⁷⁶ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, I.C.J. Reports 1992, pp. 253–255.

⁷⁷ *Ibid.*, p. 255. For comment, see Higgins, “Time and the law: international perspectives on an old problem”, p. 514.

⁷⁸ More difficult problems might have been raised in respect of Nauru’s claim against Australia in respect of the mining of phosphate lands under the period of the Mandate. See further Weeramantry, *Nauru: Environmental Damage under International Trusteeship*; and Reisman, “Reflections on State responsibility for violations of explicit protectorate, mandate, and trusteeship obligations”. The case was settled before the Court had the opportunity to consider these questions, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Order of 25 June 1993*, I.C.J. Reports 1993, p. 322; and for the Settlement Agreement of 10 August 1993, see *International Legal Materials* (Washington, D.C.), vol. XXXII, No. 6 (November 1993), p. 1471.

⁷⁹ For example, the *Rainbow Warrior* case (see footnote 36 above), pp. 265–266, where the Arbitral Tribunal held that, although the relevant treaty obligation had terminated with the passage of time, France’s responsibility for its earlier breach remained.

⁸⁰ *Yearbook ... 1976* (see footnote 37 above), p. 89, para. (9) of the commentary to article 18.

paragraph 3, which is discussed below.⁸¹ Another possible qualification relates to the issue of human rights obligations. It has been suggested that “the inter-temporal principle of international law, as it is commonly understood, does not apply in the interpretation of human rights obligations”,⁸² and reliance has been placed on a dictum of Judge Tanaka (dissenting) in the *South West Africa* case. That case concerned a mandate obligation assumed by South Africa in 1920. The majority proceeded on the basis that:

[I]n order to determine what the rights and obligations of the Parties relative to the Mandate were and are ... and in particular whether ... these include any right individually to call for the due execution of the “conduct” provisions, ... the Court must place itself at the point in time when the mandates system was being instituted, and when the instruments of mandate were being framed. The Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation ... Only on this basis can a correct appreciation of the legal rights of the Parties be arrived at.⁸³

By contrast, Judge Tanaka said that:

In the present case, the protection of the acquired rights of the Respondent is not the issue, but its obligations, because the main purposes of the mandate system are ethical and humanitarian. The Respondent has no right to behave in an inhuman way today as well as during these 40 years.⁸⁴

42. This “progressive” view of the obligations of a mandatory instrument was affirmed by the new majority of the Court in the *Namibia* case, in a well-known passage:

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant ... were not static, but were by definition evolutionary, as also, therefore, was the concept of the “sacred trust”. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years ... have brought important developments ... In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.⁸⁵

43. In the view of the Special Rapporteur, this statement does not qualify the principle stated in article 18, paragraph 1, still less does it create an exception to it. This is so for two reasons. First, the complaint against South Africa was not that it had violated the mandate in 1920 or 1930 but that it was doing so in 1966; in other words, it concerned continuing wrongful conduct in relation to an obligation assumed to continue in force. Secondly, the inter-temporal principle does not entail that treaty provisions

are to be interpreted as if frozen in time. The “progressive” or evolutionary interpretation of treaty provisions (including human rights treaties) is an established mode of interpretation,⁸⁶ although it is not the only such mode.⁸⁷ Interpretation of legal instruments over time is not an exact science, but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct.⁸⁸

(iv) *Conclusion as to article 18, paragraph 1*

44. For these reasons, the principle expressed in article 18, paragraph 1, should be retained. As to its formulation, it may be more in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility if it were expressed in the form “No act of a State shall be considered internationally wrongful unless ...”⁸⁹ The *lex specialis* principle (expressed in article 37 of the draft articles) is sufficient to deal with those rare cases where it is agreed or decided that responsibility will be assumed retrospectively.⁹⁰

(v) *Article 18, paragraph 2: emerging peremptory norms*

45. The only express qualification to the principle underlying article 18, paragraph 1, is that in paragraph 2. This contemplates that an act which was unlawful at the time it was committed will be considered lawful if that act is subsequently *required* by a peremptory norm of international law. In such cases the peremptory character of the norm extends, as it were, backwards in time, at least to the extent that it reverses the earlier characterization of the conduct as wrongful. This is described in the commentary as concerning certain “hypothetical cases which do not happen to have arisen in the past and are likely to arise only very rarely in the future, but which nevertheless cannot be ruled out”.⁹¹ The justification is stated in the following terms:

Where an act of the State appeared, at the time of its commission, to be wrongful from the formal legal point of view, but turns out to have been dictated by moral and humanitarian considerations which have since resulted in a veritable reversal of the relevant rule of law, it is difficult

⁸⁶ See, for example, the dictum of the European Court of Human Rights in the *Tyrrer* case (European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 26, *Judgment of 25 April 1978* (Council of Europe, Strasbourg, 1978), pp. 15–16.

⁸⁷ Reference to the *travaux préparatoires* of treaties, as permitted by article 32 of the 1969 Vienna Convention, necessarily points the interpreter to the understanding of the treaty provision at the time of its adoption, and thus stands in tension with progressive interpretation. But it is used for the interpretation of human rights treaties.

⁸⁸ Nor does the principle of the inter-temporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account. Take, for example, the obligation to ensure that persons accused are tried without undue delay (International Covenant on Civil and Political Rights, art. 14, para. 3 (c)). If, when that obligation enters into force for a State, accused persons have already been imprisoned awaiting trial for a long time, this could be relevant in deciding whether a breach had been committed, but no compensation could be awarded in respect of the period prior to the entry into force of the obligation: see Pauwelyn, “The concept of a ‘continuing violation’ of an international obligation: selected problems”, pp. 443–445.

⁸⁹ For the proposed language of article 18, see paragraph 158 below.

⁹⁰ As to the retroactive effect of the acknowledgement and adoption of a conduct by a State, see draft article 15 *bis* and *Yearbook ... 1998* (footnote 2 above), pp. 54–55, paras. 278–283.

⁹¹ *Yearbook ... 1976* (see footnote 37 above), p. 91, commentary to article 18, para. (14).

⁸¹ See paragraph 100 below.

⁸² Higgins, “Time and the law ...”, p. 517.

⁸³ *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 23, para. 16.

⁸⁴ *Ibid.*, pp. 293–294, cited with approval by Higgins, “Time and the law ...”, pp. 516–517.

⁸⁵ *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*, pp. 31–32, para. 53.

not to see retrospectively in that act the action or omission of a forerunner. And if the settlement of the dispute caused by that act comes after the change in the law has taken place, the authority responsible for the settlement will be loath to continue treating the earlier action or omission as internationally wrongful in spite of everything, and to attach international responsibility to it.⁹²

The commentary goes on to illustrate some possibilities. For example:

[I]t is not inconceivable that an international tribunal might now be called upon to settle a dispute concerning the international responsibility of a State which, being bound by a treaty to deliver arms to another State, had refused to fulfil its obligation, knowing that the arms were to be used for the perpetration of aggression or genocide or for maintaining by force a policy of *apartheid* and had done so before the rules of *jus cogens* outlawing genocide and aggression had been established, thus making the refusal not only lawful, but obligatory.⁹³

But it is stressed that the retrospective effect of a new peremptory norm is very limited: “the act of the State is not retroactively considered as lawful *ab initio*, but only as lawful from the time when the new rule of *jus cogens* came into force”, and it has no effect on decisions or agreed settlements already reached.⁹⁴ This limited effect is expressed by the words “ceases to be considered an internationally wrongful act” in paragraph 2.

(vi) *Comments by Governments on article 18, paragraph 2*

46. France disagrees with paragraph 2, on grounds related to its general reservations about peremptory norms; it also says that an obligation to act “has no place in an article on inter-temporal law”.⁹⁵ The Netherlands, in an earlier comment, suggested that article 18, paragraph 2, if it belongs at all in the draft articles, belongs in chapter V in the context of circumstances precluding wrongfulness.⁹⁶

(vii) *Is there a need for article 18, paragraph 2?*

47. The situation contemplated in paragraph 2 must be even less common than that contemplated in article 64 of the 1969 Vienna Convention, which deals with the continued validity of treaties when a new conflicting norm of *jus cogens* comes into existence. Article 18, paragraph 2, contemplates nothing less than that an act, specifically *prohibited* by international law on day one, should itself have become *compulsory* by virtue of a new norm of *jus cogens* on day two, or at least within such a period of time as to allow issues of responsibility arising on day one to remain live but unresolved. Not even the slavery cases provide an example of this situation.⁹⁷

48. Given the limited form of retrospectivity contemplated, and the extreme unlikelihood of such cases occurring, the question must be asked why these cases are not sufficiently dealt with by the combination of arti-

cle 37 (the *lex specialis* provision), article 43 (b) (excluding restitution contrary to a peremptory norm of international law) and, finally, the flexibility inherent in the assessment of compensation. For example, in the slavery cases, assuming a wrongful seizure of slaves at a time when the slave trade remained internationally lawful,⁹⁸ there could be no question either of restitution of the slaves or of compensation for their loss, since what was lost (ownership of human beings) had become incapable of valuation in international law. As to the examples of aggression and genocide, these have been recognized as peremptory, in substance, for the whole of the Charter period.⁹⁹ It is difficult if not impossible to think of any actual case which could turn on the illegality of former conduct now required by a peremptory norm; or even, for that matter, the legality of former conduct now prohibited by such a norm.

(viii) *Effect of new peremptory norms under the 1969 Vienna Convention*

49. A further point to note is that, while the 1969 Vienna Convention contemplates that new peremptory norms may come into existence, it does not give them any retrospective effect.¹⁰⁰ Article 64 provides that, if a new peremptory norm of general international law emerges, “any existing treaty which is in conflict with that norm becomes void and terminates”. Article 71, paragraph 2, provides that:

In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

This solution avoids outright retrospectivity, but at the same time respects the demands of the new peremptory norm in that rights (for example, the right to restitution arising from an earlier wrongful act) which cannot be maintained consistently with the new norm are abrogated. This consequence a new peremptory norm would have,

⁹⁸ The point of time at which a new rule of customary international law comes into existence can be a difficult question, as it was in the slavery cases: see, for example, *Le Louis* (1817), *The English Reports*, vol. CLXV (Edinburgh, Green, 1923), p. 1464; *The Antelope* (1825), Wheaton, *Reports of cases argued and adjudged in the Supreme Court of the United States*, p. 66. In practice, such rules are regarded as effective from an early date, and in this sense an element of “retrospectivity” is built into the law-determining process.

⁹⁹ The Nürnberg principles (see *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) criminalized the waging of aggressive war as of 1939, and those principles were affirmed by the General Assembly in 1948. ICJ in the *Reservations to the Convention on Genocide* case said that the principles underlying the Convention “are recognized by civilized nations as binding on States, even without any conventional obligation” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23).

¹⁰⁰ A point noted by Sweden in commenting on article 18, paragraph 2 (*Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 78).

⁹² *Ibid.*, para. (15).

⁹³ *Ibid.*, pp. 91–92, para. (17).

⁹⁴ *Ibid.*, p. 92, para. (18).

⁹⁵ *Yearbook ... 1998* (see footnote 7 above), p. 112.

⁹⁶ *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 103.

⁹⁷ As noted in *Yearbook ... 1976* (see footnote 37 above), p. 91, para. (16) of the commentary to article 18. The slavery cases did raise important issues of inter-temporal law: see the cases cited in paragraph (10) of the commentary (*ibid.*, pp. 89–90).

independently of the secondary rules of State responsibility.¹⁰¹

(ix) *Conclusion as to article 18, paragraph 2*

50. Ultimately, paragraph 2, as it is formulated, seems to relate more to the question of the response which a later authority (a court or tribunal) should make to a situation of responsibility arising at an earlier time, in the light of a later inconsistent peremptory rule, than it does to the question of responsibility at that earlier time. According to the commentary, the earlier conduct was actually a breach of an obligation.¹⁰² Nonetheless, the secondary relationship of responsibility thereby arising is negated by a later peremptory norm in certain particular cases.

51. Seen in this way, paragraph 2 raises two different issues, neither of which is properly located in an article which deals with the effect of the inter-temporal law on the origins of responsibility. The first is the consequence for an existing responsibility relationship of subsequent changes in the primary rules (especially where these involve new peremptory norms). That relates to part two of the draft articles, and has no place in part one. The second, more important issue is the relationship between the origins of responsibility and the overriding demands of peremptory norms, and that issue arises also, and in practice more often, with respect to existing peremptory norms. It will be discussed further in considering the circumstances precluding wrongfulness in chapter V of part one. For these reasons, paragraph 2 is unnecessary *as an aspect of article 18*, and can be deleted.

(e) *Articles 20–21. Obligations of conduct and obligations of result*

52. Articles 20–21 draw a distinction between obligations of conduct and obligations of result.¹⁰³ Because of the link between the two, the articles should be considered together. They provide as follows:

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

Article 21. Breach of an international obligation requiring the achievement of a specified result

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

¹⁰¹ It is also consistent with the well-known proviso to Max Huber's dictum in the *Island of Palmas* case (see footnote 73 above).

¹⁰² *Yearbook ... 1976* (see footnote 37 above), p. 92, para. (18) of the commentary to article 18.

¹⁰³ This has attracted a considerable literature. See, for example, Combacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse"; Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, paras. 139 and 473; Dupuy, "Le fait générateur de la responsabilité internationale des États", pp. 43–54; Brownlie, *op. cit.*, p. 241; Tomuschat, "What is a 'breach' of the European Convention on Human Rights"; and Wyler, *L'illicite et la condition des personnes privées*, pp. 17–43.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, 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 State also fails by its subsequent conduct to achieve the result required of it by that obligation.

53. The commentary to these articles notes that, while the distinction may be difficult to apply in specific cases, it is "of fundamental importance in determining how the breach of an international obligation is committed in any particular instance".¹⁰⁴ This is so because it affects both whether, and when, a breach of obligation may be judged to have occurred. In particular, "the conditions in which an international obligation is breached vary according to whether the obligation requires the State to take some particular action or *only** requires it to achieve a certain result, while leaving it free to choose the means of doing so".¹⁰⁵ The essential basis of the distinction is that obligations of conduct, while they will have some purpose or result in mind, determine with precision the means to be adopted; hence they are sometimes called obligations of means. By contrast, obligations of result do not do so, leaving it to the State party to determine the means to be used.¹⁰⁶ This does not mean that the State has a free choice of means. Its choice may be constrained, more or less. But it will have a degree of choice, and indeed in some cases, it may have a further choice, to remedy the situation if no irrevocable harm has been done by a failure of the means originally chosen.¹⁰⁷ For example, the adoption of a law, while it may appear inimical to the result to be achieved, will not actually constitute a breach; what matters is whether the legislation is actually applied. In such cases, the breach is not committed until the legislation is definitively applied in the particular case, producing the prohibited result.¹⁰⁸

54. The commentary accepts that the type of obligation which should be imposed in any case is not a matter for the draft articles but for the authors of the primary rule. Obligations of conduct (involving either acts or omissions) are more likely to be imposed in the context of direct State-to-State relations, whereas obligations of result predominate in the treatment of persons within the internal legal order of each State.¹⁰⁹ In this sense the distinction is implicated with a view of the State and of sovereignty: a choice of means is more likely to exist in internal than in international matters. But this is not a hard and fast rule. For example, a uniform law treaty is conceived as imposing an obligation of conduct, to make the provisions of the uniform law a part of the law of the State

¹⁰⁴ *Yearbook ... 1977*, vol. II (Part Two), p. 13, commentary to article 20, para. (4).

¹⁰⁵ *Ibid.*, para. (5).

¹⁰⁶ *Ibid.*, pp. 13–14, para. (8).

¹⁰⁷ *Ibid.*, pp. 12–13, paras. (2)–(4).

¹⁰⁸ *Ibid.*, pp. 24–26, paras. (18)–(22) of the commentary to article 21, citing the decision reached in 1933 by the United States-Panama General Claims Commission in the *Mariposa Development Company* case, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 340; *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19; and the decision of the European Court of Human Rights in the *De Becker* case, *Yearbook of the European Convention on Human Rights, 1962* (The Hague), vol. 5, 1963.

¹⁰⁹ *Yearbook ... 1977*, vol. II (Part Two), p. 13, commentary to article 20, para. (6).

concerned.¹¹⁰ Obligations in the field of human rights, on the other hand, involve obligations of result, since they do not prescribe precisely how the relevant rights are to be respected, and they are consistent with a diversity of laws and institutions.

55. Articles 20–21 thus take a distinction between different types of obligation established by the primary rules and seek to develop the consequences of that distinction in terms of responsibility.¹¹¹ According to the commentary, the principal consequence for the purposes of articles 20–21 is that:

The existence of a breach of an obligation of [result] is thus determined in international law in a completely different way from that followed in the case of an obligation “of conduct” or “of means” where ... the decisive criterion for concluding that the obligation has been fulfilled or breached is a comparison between the particular course of conduct required by the obligation and the conduct actually adopted by the State.¹¹²

(i) *Government comments on articles 20–21*

56. Those Governments that have commented on articles 20–21 are sceptical of the value of the distinction. Denmark (on behalf of the Nordic countries) notes that the distinctions developed in chapter III “do not appear to have any bearing on the consequences of their breach as developed in part two.”¹¹³ France notes that these provisions relate to “rules of substantive law, which classify primary obligations”; such provisions have “no place in a draft of this kind and should be deleted”.¹¹⁴ Germany states that:

[T]here 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.

...

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.¹¹⁵

The United Kingdom is concerned that “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 [and] that it may be difficult to determine the category into which a particular conduct falls”.¹¹⁶ As to article 21 in particular, while it regards the basic propositions as “uncontroversial”, it rejects the interpretation given to them in the commentary, especially as concerns

¹¹⁰ Ibid., pp. 13–14, para. (8). See Conforti, “Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme”.

¹¹¹ *Yearbook ... 1977*, vol. II (Part Two), p. 13, para. (5) of the commentary to article 20.

¹¹² Ibid., p. 29, para. (35) of the commentary to article 21.

¹¹³ *Yearbook ... 1998* (see footnote 7 above), p. 123.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid., p. 127.

obligations with respect to the treatment of foreigners and their property.¹¹⁷

(ii) *Relationship between the distinction as applied in national and international law*

57. The distinction between obligations of conduct and result derives from civil law systems. It is not known to the common law; hence, perhaps, the limited treatment of it in the English literature.¹¹⁸ The function of the distinction, for example in French law, is lucidly explained by Combacau:

It is ... the degree of probability of the achievement of the creditor's objective which controls the nature of the obligation imposed on the debtor: where its achievement is highly probable, the law or contract institutes obligations of result; where [the achievement of the objective] is essentially more unpredictable, [the law or contract] limits itself to reducing the risk and engaging only an obligation of means.¹¹⁹

In other words, in the civil law understanding, obligations of result involve in some measure a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations, obligations to do all in one's power to achieve a result, but without ultimate commitment. Thus a doctor has an obligation of conduct towards a patient, but not an obligation of result; the doctor must do everything reasonably possible to ensure that the patient recovers, but does not undertake that the patient *will* recover. Under this conception, it is clear that obligations of result are more onerous, and breach of such obligations correspondingly easier to prove, than in the case of obligations of conduct or means.

58. By contrast, in the form presented by articles 20–21 and explained in the commentary, the distinction is drawn on the basis of determinacy, not risk. An obligation of conduct is an obligation to engage in more or less determinate conduct. An obligation of result is one that gives the State a choice of means.¹²⁰ It is for this reason that obligations of result are treated in the commentary as in some way *less* onerous than obligations of conduct, where the State has little or no choice as to what it will do.¹²¹ In international law:

The root of the distinction lies henceforth in the degree of freedom allowed the obligated party in the choice of means by which it may fulfil the obligation, and no longer in the more or less unpredictable nature of the expected result.¹²²

The difference is worth noting. In adopting what was originally a civil law distinction, the draft articles have

¹¹⁷ Ibid., p. 124. Article 20, on the other hand, could in its view be merged with article 16, *ibid.*, p. 111.

¹¹⁸ See Brownlie, *op. cit.*, p. 241.

¹¹⁹ Combacau, *loc. cit.*, p. 196. See also Dupuy, *loc. cit.*, pp. 47–48. See generally Zweigert and Kötz, *An Introduction to Comparative Law*, p. 538.

¹²⁰ *Yearbook ... 1977*, vol. II (Part Two), p. 12, para. (2) of the commentary to article 20, and p. 19, para. (1) of the commentary to article 21. See also Nguyen Quoc Dinh, Daillier and Pellet, *op. cit.*, referring to the “permissiveness with regard to means” as the decisive criteria of the distinction (p. 746, para. 473).

¹²¹ Thus Stern, “Responsabilité internationale”, p. 10, para. 64, describing the obligation of conduct incumbent to a State as “more restrictive, since it has both the obligation to achieve a certain result and the obligation to use, in so doing, certain means established by international rules”.

¹²² Combacau, *loc. cit.*, pp. 201–202.

nearly reversed its effect. But of course it does not follow that a distinction which has a clear meaning and rationale in national legal systems will necessarily be applied in the same way in international law. It is necessary to treat the issue in the terms adopted by the draft articles, even if these are not those of any particular system of national law.

(iii) *The distinction between obligations of conduct and result in the legal literature*

59. Even those writers familiar with the distinction as it is drawn in civil law systems express serious doubts as to its usefulness in the draft articles. According to Tomuschat, for example, “[d]ifficult to apply, the distinction between obligations of conduct and obligations of result provides little help to those having to determine whether a breach of an international obligation has occurred.”¹²³ The impact that the distinction may have on the determination of the time factor in the commission of an internationally wrongful act has often been mentioned.¹²⁴ Most writers, however, consider the distinction to be of limited value. For example, it has been stressed that “there is not always a clear-cut line between the two types of obligations, in addition to the fact that they may be intertwined to such an extent that they lose their distinguishing features”.¹²⁵ Overall, there is little support in the literature for retaining this distinction, at least in the manner adopted on first reading. Even though Combacau believes the distinction to be “indispensable in principle”,¹²⁶ he concludes his study by questioning

the validity of notions such as means, conduct, result, objective ... being applied to rules in cases where what at first appears to be the result of a behaviour is itself a behaviour, and where each of the means offered to the party fulfilling the obligation still provides for a choice of means.¹²⁷

(iv) *The distinction between obligations of conduct and result in international case law*

60. Given this indifferent response to articles 20–21, the question must be whether courts and tribunals have nonetheless found the distinction useful in deciding actual cases. In practice those articles have only occasionally been referred to. The distinction between obligations of conduct and of result was not adverted to in the *United States Diplomatic and Consular Staff in Tehran* case,¹²⁸

¹²³ Tomuschat, “What is a ‘breach’ ...?”, p. 335. See also Dupuy, loc. cit., p. 47, and Lysén, for whom “it would seem that the proposals by the ILC do not provide any workable tools but rather contribute to confusion”, *State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles*, p. 63.

¹²⁴ For Nguyen Quoc Dinh, Daillier and Pellet, in the case of an obligation of result, “It is necessary to ... wait until the various stages of a ‘complex ... State act’ have run their course before a breach of an international obligation can be determined” (op. cit., p. 748, para. 473). See also Combacau, loc. cit., p. 184, and Dupuy, loc. cit., pp. 44–45.

¹²⁵ Lysén, op. cit., p. 62, who also refers to articles 194 and 204, paragraph 1, of the United Nations Convention on the Law of the Sea, previously analysed for the same purposes by Dupuy (loc. cit., pp. 49–50). Examining the criteria as defined in the commentaries to articles 20–21, Combacau states that “the obligations of result in article 21 come down to a single type, and they are not easily distinguishable from the obligations of conduct in article 20” (loc. cit., p. 190).

¹²⁶ Loc. cit., p. 184.

¹²⁷ Ibid., p. 204.

¹²⁸ See footnote 31 above.

for example. But three cases may be mentioned in which the distinction was used, to some extent at least.

61. In the *Colozza* case,¹²⁹ the European Court of Human Rights was concerned with the trial *in absentia* of the claimant, who had no actual notice of the trial, was sentenced to six years’ imprisonment and had not been allowed subsequently to contest his conviction. He claimed that he had not had a fair hearing, contrary to article 6, paragraph 1, of the European Convention on Human Rights. The Court noted that:

The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6 §1 in this field. The Court’s task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved ... For this to be so, the resources available under domestic law must be shown to be effective and a person “charged with a criminal offence” who is in a situation like that of Mr. Colozza must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*.¹³⁰

The Court thus held that the applicant’s case “was at the end of the day never heard, in his presence, by a ‘tribunal’ which was competent to determine all the aspects of the matter”.¹³¹ But, as Tomuschat points out, it reached this conclusion not simply by comparing the result required (the opportunity for a trial in the accused’s presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather the Court examined what more Italy could have done to make the applicant’s right “effective”.¹³² It is true that the obligation of result embodied in article 6, paragraph 1, might be expressed as an obligation to provide an effective right to be tried in one’s presence, but that simply reformulates the question to be decided. It is doubtful whether the distinction between obligations of conduct and result assisted the Court to decide that question.

62. Perhaps a more interesting example was the *ELSI* case,¹³³ decided by a Chamber of the Court including Judge Ago. The principal question there was whether the requisition of the *ELSI* plant by the Mayor of Palermo (which led to the *ELSI* bankruptcy and subsequent forced sale of assets at an undervaluation) was in breach of various provisions of a bilateral FCN Treaty and Supplemen-

¹²⁹ European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 89, *Case of Colozza and Rubinat* (Council of Europe, Strasbourg, 1985).

¹³⁰ Ibid., pp. 15–16, para. 30, citing *De Cubber*, *ibid.*, vol. 86, *Judgment of 26 October 1984*, p. 20, para. 35. Compare the case of *Plattform “Ärzte für das Leben”*, in which the Court gave the following interpretation of article 11:

“While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used ... In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved.”

(*Ibid.*, vol. 139, *Judgment of 21 June 1988* (Council of Europe, Strasbourg, 1988), p. 12, para. 34) In the *Colozza* case, by contrast, the Court used similar language but concluded that the obligation was an obligation of result.

¹³¹ Ibid., vol. 89 (see footnote 129 above), p. 16, para. 32.

¹³² Ibid., p. 14, para. 28.

¹³³ *Elektronica Sicula S.p.A. (ELSI)*, *Judgment*, *I.C.J. Reports 1989*, p. 15.

tary Agreement. The United States relied, *inter alia*, on article I of the Supplementary Agreement, which provided that:

The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: (a) preventing their effective control and management of enterprises ... or, (b) impairing their other legally acquired rights and interests in such enterprises ...¹³⁴

The requisition of the plant was subsequently held to be unlawful under Italian law and damages were awarded by the Italian courts. But the United States argued that, the requisition having been the actual trigger for the liquidation, those damages did not reflect the actual loss. Accordingly the requisition was an arbitrary measure contrary to article I.

63. In his dissenting opinion, Judge Schwebel supported this conclusion by reference to the distinction between obligations of conduct and result as embodied in articles 20 and 21. He classified article I as embodying an obligation of result, on the ground that:

The particular objects of the obligation not to subject such corporations to arbitrary or discriminatory measures are very specifically set out. But the particular means of achieving these objects are not. Thus ... the obligation of Article I would seem to be an obligation not of means but of result, as international treaty obligations concerning the protection of aliens and their interests normally are. Nevertheless, it does not follow ... that Italy is absolved of its arbitrary treatment of ELSI and the interests of its shareholders in ELSI by reason of the administrative and judicial proceedings which followed the requisition.

...

In the current case, Italy did not achieve the specified result, namely, relieving ELSI of the effects of the arbitrary measure of requisition. It did not achieve the specified result in general, or in respect of the very particular objects set out in subparagraphs (a) and (b) of Article I.

...

It may of course be maintained that, even in the absence of the requisition, ELSI would have gone bankrupt ... But this conclusion does not take account of the fact ... that, if the requisition had not been imposed when it was imposed, ELSI would have been enabled to realize materially more from its assets than in fact was realized ...

It accordingly follows that ELSI was not placed in the position it would have been in had there been no requisition. The equivalent result was not attained by Italian administrative and judicial processes, however estimable they were. Thus, in my view, those processes do not absolve Italy of having committed an arbitrary act within the meaning of the Treaty's Supplementary Agreement.¹³⁵

By contrast, the Chamber reached the opposite conclusion without any analysis of the distinction. It held, first, that, looking at the matter broadly and realistically, the loss of control over the assets of ELSI resulted from its insolvency and not from the requisition. Secondly, however, article I was to be read as a general prohibition of "arbitrary" or "discriminatory" measures, not limited to the specific purposes set out. The reason there had been no breach of article I, in the Chamber's view, was that the Mayor's decision, albeit unlawful under Italian law, was not "arbitrary" in the sense of article I.¹³⁶ Thus the majority did not need to decide whether the opportunity for appeal from that decision remedied the arbitrariness. Rather the fact that the decision "was consciously made in the

context of an operating system of law and of appropriate remedies of appeal" was a reason for not judging it to be arbitrary in the first place.¹³⁷

64. One can agree with Judge Schwebel that, if the requisition had been considered "arbitrary", and if it was the real cause of the ELSI loss, then the limited damages obtained some years later from the Italian courts would not have "cured" the breach. But how did it affect the outcome of the case to classify article I as an obligation not to produce the result of arbitrary treatment, as distinct from an obligation (of conduct or of means) not to engage in arbitrary conduct? There seems to have been a difference between the majority and the minority as to the interpretation of the term "arbitrary" in article I, and there was certainly a difference between them in the appreciation of the facts. But it does not seem that the distinction between obligations of conduct and result made any difference in either of these respects, or actually contributed to an analysis of the issues.

65. A third example is the recent decision of the Iran-United States Claims Tribunal in *Islamic Republic of Iran v. United States of America, cases Nos. A15(IV) and A24*.¹³⁸ The case involved an Iranian claim that the United States had breached its obligation, under General Principle B of the General Declaration contained in the Algiers Declarations of 19 January 1981, "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises ... and to bring about the termination of such claims through binding arbitration".¹³⁹ Rather than terminate cases pending before its courts, the United States acted to suspend them, the suspension to be lifted upon a decision of the Tribunal that it lacked jurisdiction over the claim.¹⁴⁰ The United States argued that this was the only practical method available to it, and that the linking of the termination of legal proceedings and of claims in General Principle B showed that its approach was reasonable. In other words (though neither party used the terminology of articles 20 and 21), it argued that General Principle B embodied an obligation of result—the result being the termination of pending proceedings—and that the means adopted within its own legal system were adequate to achieve that result in practice. This is reminiscent of the view, expressed in the commentary to article 21, that obligations of result are in some sense less onerous than obligations of conduct because of the element of discretion in achieving the result that is left to the State concerned.

66. The Tribunal held, on the interpretation of the General Declaration, that the obligation to terminate litigation applied only to cases falling within its own jurisdiction, but that the obligation to terminate cases that did fall within its jurisdiction was not satisfied by mere suspen-

¹³⁷ *Ibid.*, p. 77, para. 129.

¹³⁸ Award No. 590-A15(IV)/A24-FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45. This was a decision of the Full Tribunal (Skubiszewski (President); Broms, Arangio-Ruiz, Noori, Aldrich, Ameli, Allison, Aghahosseini, Duncan (Members)).

¹³⁹ *International Legal Materials* (Washington, D.C.), vol. 20, No. 1 (January 1981), p. 224.

¹⁴⁰ See *Dames & Moore v. Regan*, 453 US 654 (1981), p. 22.

¹³⁴ *Ibid.*, p. 72.

¹³⁵ *Ibid.*, pp. 117 and 121.

¹³⁶ *Ibid.*, pp. 72, para. 121, and 75–77, paras. 126–130.

sion. In reaching this conclusion, it was not enough to rely on the apparently clear language of the Declaration:

The Tribunal must analyze the matter further. Obligations under General Principle B are, generally speaking, obligations of “result”, rather than of “conduct” or “means”. Although it could be said that the United States, by suspending the litigation rather than terminating it, failed to comply with its obligations under the Algiers Declarations, the Tribunal cannot confine itself to a strictly literal or grammatical interpretation of those Declarations but must also test the method chosen by the United States ... against the object and purpose of those Declarations. The answer to the question whether suspension fulfilled the function of termination depends on practice. Thus, the test is in factual evidence.

Unless otherwise agreed by treaty, general international law permits a state to choose the means by which it implements its international obligations within its domestic jurisdiction ... Nonetheless, a state’s freedom with respect to the choice of the means for implementing an international obligation is not absolute. The means chosen must be adequate to satisfy the state’s international obligation, and they must be lawful.¹⁴¹

The Tribunal went on to hold that, “by adopting the suspension mechanism provided for in Executive Order 12294, the United States adhered to its obligations under the Algiers Declarations only if, in effect, the mechanism resulted in a termination of litigation as required by those Declarations”.¹⁴² The test of whether the litigation had been “in effect” terminated was whether the Islamic Republic of Iran was “reasonably compelled in the prudent defense of its interests to make appearances or file documents in United States courts subsequent to 19 July 1981” in respect of pending litigation within the jurisdiction of the Tribunal, or any other claims filed with the Tribunal until they were dismissed for want of jurisdiction.¹⁴³ The costs of such prudent defence, including the reasonable costs of monitoring suspended cases, would be recoverable in a second phase of the proceedings.

67. Pending the determination of these factual issues, the case is incomplete, and detailed comment on it would not be appropriate. Two points can be made, however. First, the Tribunal did apply the distinction between obligations of conduct and result, very much in the way envisaged in the commentary to articles 20–21 (though it made no reference to those articles). The effect of doing so was to give the United States some flexibility in the way it implemented General Principle B, though it was still required to produce the “result” of termination for cases within the jurisdiction of the Tribunal.¹⁴⁴ Secondly, the Tribunal reached its conclusions exclusively by the interpretation of the relevant agreements in their context and having regard to their object and purpose; in other words, at that stage of the proceedings it was not concerned with the secondary rules of responsibility at all. To that extent the decision confirms that the distinction between obligations of conduct and result concerns the classification of primary obligations, i.e. it concerns primary not secondary rules of responsibility. Thirdly, however, it is not apparent

¹⁴¹ Award No. 590-A15(IV)/A24-FT (see footnote 138 above), paras. 95–96.

¹⁴² *Ibid.*, para. 99.

¹⁴³ *Ibid.*, para. 101.

¹⁴⁴ Thus, the Tribunal held, for the United States to allow new cases to be filed solely for the purposes of tolling limitations was a breach of General Principle B: tolling limitations could have been lawfully achieved by means other than allowing the filing of suit, but General Principle B specifically prohibited “all further litigation” in claims within the Tribunal’s jurisdiction for any reason at all (*ibid.*, para. 131).

that the Tribunal’s decision would have been any different in substance, if not in form, had it classified the obligation as an obligation of conduct (the conduct of terminating the litigation) rather than an obligation of result (the result of the litigation being terminated). Presumably, the same considerations would have applied to the obligation in either case.

68. This brief review suggests that the distinction between obligations of conduct and result can be used as a means of the classification of obligations, but that it is not used with much consistency. In each case the question was one of interpretation of the relevant obligation, and the value of the distinction lies in its relevance to the measure of discretion left to the respondent State in carrying out the obligation. That discretion was necessarily constrained by the primary rule, and the crucial issue of appreciation was, to what extent? The distinction may help in some cases in expressing conclusions on this issue: whether it helps in arriving at them is another matter.

(v) *Human rights obligations as “obligations of result”*

69. The commentary to article 21 insists that standard obligations as to the treatment of persons by the State, whether in the field of human rights or diplomatic protection, involve what might be called “extended obligations of result”, and that they are covered by article 21, paragraph 2. The consequence is that these obligations are not breached by the enactment of legislation until that legislation is definitively given effect. In other words, it is the application of the legislation in the particular case, taken together with the subsequent failure of the State to remedy any resulting grievance, that constitutes the breach. Until then, the breach is merely apprehended. This view is graphically represented by Combacau in the following terms:

[W]hen the International Covenant on Civil and Political Rights provides, on the one hand, that “No one shall be subjected to arbitrary arrest or detention” ... and, on the other hand, that “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation” ... it lays down two rules that have as their counterpart in domestic law two State obligations, the one primary and the other subsidiary; however, with regard to international law, it establishes only one, which provides that the State cannot lawfully fail to comply successively with both of these domestic obligations, and which—admitting the somewhat unpleasant nature of this formulation—is ultimately interpretable as follows: “No State may arbitrarily arrest or detain an individual *without offering him or her compensation.*”¹⁴⁵

But human rights courts and committees do not treat these rights in this way, as the following brief and selective survey shows.

70. Under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), petitions may be lodged by “any person, non-governmental organization or group of individuals claiming to be the victim of a violation” of the rights in the Convention. In addition, inter-State cases may be referred to the Court in relation to “any alleged breach of

¹⁴⁵ Combacau, *loc. cit.*, p. 191. *Contra*, see for example Higgins, “International law and the avoidance, containment and resolution of disputes: general course on public international law”, pp. 203–204.

the provisions of the Convention” and Protocols.¹⁴⁶ Article 41 provides that:

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

This clearly implies that a violation of the Convention can be established prior to and independently of the question whether reparation for such a violation is available under the relevant internal law. And that proposition has never been doubted by the Convention organs. As the Court said in one case:

Article 25 [now 34] of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it ...¹⁴⁷

71. The International Covenant on Civil and Political Rights likewise distinguishes between individual and inter-State communications. Under article 1 of the Optional Protocol, individuals subject to the jurisdiction of a State party to the Protocol who “claim to be victims of a violation by that State Party” of rights set forth in the Covenant may present communications to the Human Rights Committee.¹⁴⁸ In considering those communications, the Committee has always required that the impact of State action be such that the person concerned is individually a “victim”, and it has refused to examine State legislation in the abstract. On the other hand, it does not require that a victim should necessarily have been prosecuted or otherwise penalized. In certain cases the mere existence of legislation may involve a breach of the Covenant; in other cases a sufficiently imminent and direct threat of action will justify treating a person as a victim. The test has been summarized in the following words:

[P]rovided each of the authors is a victim within the meaning of article 1 of the Optional Protocol, nothing precludes large numbers of persons from bringing a case under the Optional Protocol. The mere fact of large numbers of petitioners does not render their communication an *actio popularis* ...

For a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice.¹⁴⁹

These limitations derive from the provisions of the Optional Protocol, as interpreted by the Committee. Inter-

¹⁴⁶ European Convention on Human Rights (as amended by Protocol 11), arts. 33–34. Local remedies must be exhausted, and a petition must be brought “within a period of six months from the date on which the final decision was taken” (art. 35).

¹⁴⁷ *Norris case*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 142, *Judgment of 26 October 1988* (Council of Europe, Strasbourg, 1989), para. 31, citing the *Klass and Others case*, *ibid.*, vol. 28, *Judgment of 6 September 1978*, para. 33; the *Marckx case*, *ibid.*, vol. 31, *Judgment of 13 June 1979*, para. 27; and the *Johnston and Others case*, *ibid.*, vol. 112, *Judgment of 27 November 1986*, para. 42. See also, *inter alia*, the *Dudgeon case*, *ibid.*, vol. 45, *Judgment of 22 October 1981*, para. 41; and the case of *Modinos v. Cyprus*, *ibid.*, vol. 259, *Judgment of 22 April 1993*, para. 24.

¹⁴⁸ The exhaustion of local remedies rule applies (art. 5, para. 2 (b)).

¹⁴⁹ Human Rights Committee, Communication No. 429/1990, decision of 8 April 1993, *E. W. et al. v. The Netherlands* (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/48/40 (Part II))*, annex XIII.G), paras. 6.3–6.4. See also, *inter alia*, Human Rights Committee, Communication No. R.9/35, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius* (*ibid.*, *Thirty-*

State communications are subject to a different formula. Under article 41, paragraph 1, of the Covenant, such communications may be brought by a State Party which has accepted the procedure and which claims that another such State Party “is not fulfilling its obligations”.¹⁵⁰ So far this procedure has not been used, but it could conceivably involve a challenge to a law as such.

72. The Inter-American Court of Human Rights applies essentially the same principle in determining whether there has been a breach of the American Convention on Human Rights. In its advisory opinion on international responsibility for the promulgation and enforcement of laws in violation of the American Convention on Human Rights, the Inter-American Court was asked several general questions arising from a controversy about a draft law which, if enacted, would have clearly violated commitments of the State concerned under the Convention. On the question whether a mere law could of itself violate an obligation of result, the Court said:

[A] law that enters into force does not necessarily affect the legal sphere of specific individuals. The law may require subsequent normative measures, compliance with additional conditions, or, quite simply, implementation by state authorities before it can affect that sphere. It may also be, however, that the individuals subject to the jurisdiction of the norm in question are affected from the moment it enters into force ... Non-self-executing laws simply empower the authorities to adopt measures pursuant to them. They do not of themselves constitute a violation of human rights.

In the case of self-executing laws ... the violation of human rights, whether individual or collective, occurs upon their promulgation. Hence, a norm that deprives a portion of the population of some of its rights—for example, because of race—automatically injures all the members of that race.¹⁵¹

After analysing the specific provisions of the Convention, and referring with approval to the European jurisprudence, the Court concluded that:

The contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions. There is no provision in the Convention authorizing the Court, under its contentious jurisdiction, to determine whether a law that has

sixth Session, Supplement No. 40 (A/36/40), annex XIII), para. 9.2; Communication No. R.14/61, *Leo R. Hertzberg and Others v. Finland* (*ibid.*, *Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex XIV), para. 9.3; Communication No. 163/1984, *Disabled and handicapped persons in Italy v. Italy* (*ibid.*, *Thirty-ninth Session, Supplement No. 40 (A/39/40)*, annex XV), p. 198, para. 6.2; Communications Nos. 359/1989 and 385/1989, *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v. Canada* (*ibid.*, *Forty-eighth Session, Supplement No. 40 (A/48/40)*, annex XII.P), para. 10.4 (“where an individual is in a category of persons whose activities are, by virtue of the relevant legislation, regarded as contrary to law, they may have a claim as ‘victims’ within the meaning of article 1 of the Optional Protocol”); Communication No. 488/1992, *Nicholas Toonen v. Australia* (*ibid.*, *Forty-ninth Session, Supplement No. 40 (A/49/40)*, vol. II, annex IX.EE), para. 5.1; and Communication No. 645/1995, *Vaihere Bordes et al. v. France* (*A/51/40*), vol. II, annex IX.G, paras. 5.4–5.5.

¹⁵⁰ The requirement is stated slightly differently in article 41, paragraph 1 (a): “is not giving effect to the provisions of the present Covenant”. There is no requirement that the communication relate to any specified individual, but available local remedies must have been exhausted (art. 41, para. 1 (c)).

¹⁵¹ *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (arts. 1 and 2 of the American Convention on Human Rights)*, Inter-American Court of Human Rights Advisory Opinion OC–14/94 of 9 December 1994, Series A, No. 14, paras. 41–43.

not yet affected the guaranteed rights and freedoms of specific individuals is in violation of the Convention ...

The Court finds that the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the state in question.¹⁵²

The suggestion in this passage that international responsibility arises, following a manifest violation of the treaty, only “if such violation affects the guaranteed rights and liberties of specific individuals” requires some explanation. Read literally, it suggests that there can be a violation of a treaty without any responsibility, which is not in accordance with the conception of State responsibility contained in the draft articles.¹⁵³ It seems however that the Court was distinguishing here between State responsibility for violation of the treaty per se and international responsibility under the Convention’s procedures for direct violation of the rights of individuals, which alone falls within the Court’s contentious jurisdiction.

73. To summarize, this brief review shows a substantially common approach to the problem on the part of the various human rights bodies.¹⁵⁴ Legislation itself, provided that it is directly applicable to individuals or that its application is directly threatened, can constitute a breach of the convention concerned, although whether it does so in a given case requires an examination of the facts of that case. Subsequent processes within the State may provide reparation for such a breach, but they are not constitutive of it.¹⁵⁵

74. A review of the field of diplomatic protection would also, it is believed, reach the same general conclusion. The point was succinctly made by the United Kingdom:

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 in-

¹⁵² Ibid., paras. 49–50; also in *International Legal Materials*, vol. XXXIV, No. 5 (September 1995), pp. 1199–1201.

¹⁵³ Especially articles 3 and 16; see paragraph 11 above.

¹⁵⁴ Under the 1981 African Charter on Human and Peoples’ Rights, there is provision both for communications from States and for other communications (arts. 47 and 55) to the Commission. There has so far been no public indication of the Commission’s approach to the questions discussed here. Although similarities may be found in that respect in the context of European Union law (see, for example, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland*, case C-46/93, *Reports of Cases before the Court of Justice and the Court of First Instance* (Luxembourg, Office for Official Publications of the European Communities, 1996), p. I-1029, especially paras. 51 and 56), the specific character of European law limits the value of the comparison. For a general approach to State liability under European law see, for example, Craig and de Búrca, *EU Law: Texts, Cases, and Materials*, pp. 240–282.

¹⁵⁵ On the possibility that the enactment of a legislation may per se constitute a breach by a State of its obligations, provided it has a direct application on the individual, see, among others, Amerasinghe, *Local Remedies in International Law*, pp. 209–210; Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, pp. 201–206; and Diplá, *La responsabilidad de l’État pour violation des droits de l’homme: problèmes d’imputation*, pp. 20–22. *Contra*, see Cahier, “Changements et continuité du droit international: cours général de droit international public”, pp. 261–263.

ternational 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.¹⁵⁶

75. Of course, there may be specific contexts in which the State does have a right to affect the rights of individuals provided compensation is payable. This is, in general, the case with expropriation of property for a public purpose, and the reason is precisely because in that context the right of eminent domain is recognized. But there is no right of eminent domain in relation to the arbitrary treatment of persons. There are also cases where the obligation is to have a *system* of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act.¹⁵⁷ This is the example given by the United Kingdom in the passage quoted above. Systematic obligations have to be applied to the system as a whole. But many human rights obligations are not of this kind: for example, in cases of torture or arbitrary killing by State officials, the violation would be immediate and unqualified.¹⁵⁸

76. It may be (as the United Kingdom notes) that the problem which has been analysed here is more one of the commentary to article 21 than of the text itself.¹⁵⁹ But the analysis suggests a number of conclusions.

(vi) *The primacy of primary rules and of their interpretation*

77. First, while it may be possible accurately to classify certain obligations as obligations of conduct or result, and while that may illuminate the content or application of the norms in question, such a classification is no substitute for the interpretation and application of the norms themselves, taking into account their context and their object and purpose. The problem with articles 20–21 is that they imply the need for an intermediate process of classification of obligations before questions of breach can be resolved. But in the final analysis, whether there has been a breach of an obligation depends on the precise terms of the obligation, and on the facts of the case. For example, it makes a difference that the obligations of States in the field of humanitarian law are expressly “to ‘respect’”

¹⁵⁶ *Yearbook ... 1998* (see footnote 7 above), p. 124.

¹⁵⁷ Similarly, a temporary swamping of the system by litigation, causing unexpected delays, does not involve a breach “if the State takes appropriate remedial action with the requisite promptness” (*Union Alimentaria Sanders SA Case*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 157, *Judgment of 7 July 1989* (Council of Europe, Strasbourg, 1989), p. 15, para. 40.

¹⁵⁸ On further analysis it is probable that an obligation to provide a fair and efficient system of justice contains diverse elements, including certain obligations “of result” (e.g. the right to a judge) and others “of conduct”. In short, it is a hybrid. See Tomuschat, “What is a ‘breach’ ...?”, p. 328. Another clear example is the obligation of respect for family life: see the decision of the European Court of Human Rights as analysed in the *Marckx* case (footnote 147 above), and later decisions.

¹⁵⁹ The issue re-emerges, however, in the context of article 22 (Exhaustion of local remedies): see paragraphs 138–146 below.

and “to ensure respect” for the relevant norms.¹⁶⁰ In other contexts, where different language is used, the position may be different. Taxonomy may assist in the interpretation and application of primary rules, but is no substitute for it.

78. This conclusion follows also from the analysis of the obligation of States in relation to torture, given by the International Tribunal for the Former Yugoslavia in a recent case. The Tribunal said:

Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (*lato sensu*) only when such legislation is concretely applied. By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorizing or condoning torture or at any rate capable of bringing about this effect.¹⁶¹

In other words, whether the enactment of inconsistent legislation constitutes of itself a breach of international law depends on the content and importance of the primary rule.

(vii) *The diversity of primary rules*

79. Secondly, it is difficult to overstate the immense variety of primary rules and the very different ways in which they are formulated. The means for achieving a result can be stated with many degrees of specificity. The ends to be achieved may, depending on the circumstances, dictate the necessary means with precision. Means and ends can be combined in various ways.¹⁶² For example, take the common case of a “best efforts” obligation to achieve a particular result. This is quite precisely not an obligation of result, but rather, depending on its formulation, an obligation to take such steps as are reasonably required and available to the State concerned with a view to achieving the result specified. Provided the State takes some action to that end, not obviously inadequate or inappropriate, no issue of breach may arise. But if it becomes clear that the result is not likely to be achieved, and that there are further steps open to the State which would achieve it, then the incidence of the obligation in those circumstances may become more rigorous, and even tend towards an obligation of result.¹⁶³ Thus in practice, obligations of conduct and obligations of result present not a dichotomy but a spectrum.¹⁶⁴

¹⁶⁰ See *Military and Paramilitary Activities in and against Nicaragua* (footnote 68 above), p. 114, para. 220, referring to article 1 common to the four Geneva Conventions of 12 August 1949; see also Condorelli and Boisson de Chazournes, “Quelques remarques à propos de l’obligation des États de ‘respecter et faire respecter’ le droit international humanitaire en ‘toutes circonstances’”; and Levrat, “Les conséquences de l’engagement pris par les Hautes Parties contractantes de ‘faire respecter’ les Conventions humanitaires”.

¹⁶¹ *Prosecutor v. Anto Furundzija*, case No. IT-95-17/1-T, before Judges Mumba, Cassese and May, International Tribunal for the Former Yugoslavia, judgement of 10 December 1998, para. 150; see also paragraph 149 (*ibid.*).

¹⁶² A point made by Lysén, *op. cit.*, pp. 62–63.

¹⁶³ See paragraph 86 below.

¹⁶⁴ As pointed out in a number of Government comments (see paragraph 56 above).

(viii) *The particularity of the distinction between obligations of conduct and result*

80. Thirdly, not all obligations can be classified as either obligations of conduct or of result. There can be hybrids, for example, and the draft articles themselves distinguish a further “type”; obligations of prevention. Before reaching any conclusions on articles 20–21, it is useful to look at such obligations.

(f) *Article 23. Breach of an international obligation to prevent a given event*

81. Article 23 provides as follows:

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

82. Article 23 continues the analysis of the different kinds of obligations (obligations of conduct/obligations of result) covered by articles 20 and 21. The commentary deals with obligations of prevention in the following way:

The characteristic feature ... is precisely the notion of an event, i.e. an act of man or of nature which, as such, involves no action by the State ... [I]f the result which the obligation requires the State to ensure is that one or another event should not take place, the key indication of breach of the obligation is the occurrence of the event, just as the non-occurrence of the event is the key indication of fulfilment of the obligation ... [T]he non-occurrence of the event is the result that the State is required to ensure, and it is the occurrence of the event that determines that the result has not been achieved.¹⁶⁵

83. The commentary goes on to assert that in the cases of obligations of prevention, the mere failure to prevent is not a sufficient condition for responsibility, although it is a necessary one: “The State can obviously be required only to act in such a way that the possibility of the event is obstructed, i.e. to frustrate the occurrence of the event as far as lies within its power.”¹⁶⁶ Thus, obligations of prevention are inherently obligations to take all reasonable or necessary measures to ensure that the event does not occur. They are not warranties or guarantees that an event will not occur.¹⁶⁷

(i) *Government comments on article 23*

84. France remarks that “the somewhat obscurely worded draft article 23 ... relates to rules of substantive law, which classify primary obligations. It thus has no place in a draft of this kind”.¹⁶⁸ Germany agrees.¹⁶⁹ The United Kingdom regards article 23 as uncontroversial but also unnecessary; in its view it can be deleted or combined with article 21.¹⁷⁰

¹⁶⁵ *Yearbook ... 1978*, vol. II (Part Two), p. 82, commentary to article 23, para. (4).

¹⁶⁶ *Ibid.*, para. (6).

¹⁶⁷ On the other hand, neither are they “obligations of due diligence” in the ordinary sense. Such an obligation would be breached by a failure to exercise due diligence, even if the apprehended result did not occur (*ibid.*, para. (4), footnote 397).

¹⁶⁸ *Yearbook ... 1998* (see footnote 7 above), p. 126.

¹⁶⁹ *Ibid.*, p. 124.

¹⁷⁰ *Ibid.*, p. 126.

(ii) *The content of obligations of prevention*

85. It is tempting to analyse obligations of prevention as “negative” obligations of result. For such obligations, the result in question is not the occurrence of something but its non-occurrence. On the other hand, whether this is so depends on the interpretation of the particular primary rule. The commentary¹⁷¹ gives as an example of an obligation of prevention, article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations, which provides that:

The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

According to the commentary, this is an obligation “whose breach similarly takes place only if that result [i.e. intrusion, damage or disturbance] can be seen not to have been ensured”.¹⁷²

86. Although there are obligations of prevention in the sense explained in the commentary, it is clear that article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations is not such an obligation. If anything, it is an obligation of conduct. No doubt it does not involve a warranty or guarantee against intrusion; but it is a continuing obligation on the host State to take all appropriate steps to protect the mission, which becomes more demanding if for any reason the mission is invaded or disturbed. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, ICJ referred to these and other provisions of the Convention as imposing on the receiving State “the most categorical obligations ... to take appropriate steps to ensure the protection of the United States” missions and their personnel.¹⁷³ It went on to hold that, through its inaction in the face of various threats from the militants:

[T]he Iranian Government failed altogether to take any “appropriate steps” to protect the premises, staff and archives of the United States’ mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion ... [I]n the opinion of the Court ... the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.

...

This inaction of the Iranian Government by itself constituted clear and serious violation of Iran’s obligations to the United States under the provisions of Article 22, paragraph 2 ...¹⁷⁴

Moreover, the interpretation of article 22, paragraph 2, favoured in the commentary is an undesirable

¹⁷¹ *Yearbook ... 1978*, vol. II (Part Two), p. 81, para. (3), and pp. 84–85, para. (12), of the commentary to article 23. See also the comments by Denmark (on behalf of the Nordic countries), cited above, para. 56.

¹⁷² *Ibid.*, p. 82, para. (4). According to the commentary, diplomatic protests made at an earlier time are concerned with securing performance of the obligation and do not raise issues of responsibility (*ibid.*).

¹⁷³ *I.C.J. Reports 1980* (see footnote 31 above), p. 30, para. 61.

¹⁷⁴ *Ibid.*, pp. 31–32, paras. 63 and 67. The Court concluded that the Iranian conduct “clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises” (*ibid.*, pp. 35–36, para. 76). See also Rosenne, *op. cit.*, pp. 50 and 67. This point was also

one in principle; States should not be able to neglect that “special duty” on the basis that intrusion, damage or disturbance has not yet occurred and may never occur.

87. A better example of an obligation of prevention, also mentioned in the commentary,¹⁷⁵ is the principle enunciated in the *Trail Smelter* arbitration, that a State should use its best efforts to prevent cross-border damage by pollution to a neighbouring State. The commentary goes on to assert that, “[e]ven in the specific case of an obligation to prevent an event, the presence of damage is not an additional condition for the existence of an internationally wrongful act”.¹⁷⁶ This is true if the situation which has to be prevented is not defined in terms of the occurrence of damage, but it *may* be so defined. States can assume obligations to prevent damage to particular persons or to the territory of other States, and it may be that on the proper interpretation of the particular obligation it is the occurrence of the damage which triggers responsibility, rather than the failure to take steps to prevent it.

(iii) *Conclusions on articles 20, 21 and 23*

88. For the reasons given above,¹⁷⁷ the Special Rapporteur believes that article 21, paragraph 2, is an over-elaboration and a possible source of misunderstanding, and that it should be deleted. The essential difficulty lies in the notion of an obligation of result which, notwithstanding a *prima facie* breach, nonetheless “allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State”. No doubt primary rules can take manifold forms, and a primary rule might allow a State to rescue itself from a breach by remedial action which would have the effect not merely of providing reparation but of cancelling out the earlier breach entirely. But this is unusual.¹⁷⁸ If the breach of an obligation is merely threatened, preventive or remedial action may be called for, but the breach will by definition not yet have occurred. If it has occurred, subsequent conduct may mitigate its effects, or may (by providing an effective local remedy) eliminate the underlying grievance. But it is misleading in the latter case to suggest that there was never a breach.

89. Turning to the basic distinctions between obligations of conduct, result and prevention, as set out in articles 20, 21, paragraph 1, and 23, there is clearly a strong case for simply deleting them. They have been criticized by a number of Governments as over-refined.¹⁷⁹ They have been widely criticized in the literature.¹⁸⁰ Their relation-

made by Germany in its comments on article 20 (*Yearbook ... 1998* (see footnote 7 above), pp. 123–124).

¹⁷⁵ *Yearbook ... 1978*, vol. II (Part Two), p. 84, para. (11) of the commentary to article 23. For the decision in the *Trail Smelter* case, see UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.

¹⁷⁶ *Yearbook ... 1978*, vol. II (Part Two), p. 82, para. (5) of the commentary to article 23.

¹⁷⁷ See paragraphs 69–75 above.

¹⁷⁸ More usually, an obligation may specify alternative modes of compliance (e.g. the *aut dedere aut judicare* obligation in extradition law), in which case, even if one mode is precluded, the other remains. But human rights obligations do not take this form.

¹⁷⁹ See paragraphs 56 and 84 above.

¹⁸⁰ See paragraph 59 above.

ship to similar concepts under national law is obscure and even contradictory.¹⁸¹

90. Moreover, whatever their analytical value, the distinctions appear to relate to the content and meaning of the primary rules, and this may explain why, in a statement of secondary rules, they appear to be circular. For example, article 20 appears to say nothing more than that, when a State has assumed an obligation to engage in certain conduct, the obligation is breached if the State does not engage in that conduct. The position with respect to obligations of conduct and prevention may be different, because of the hidden significance of the phrase “by the conduct adopted” in articles 21, paragraph 1, and 23. As the commentary explains, this is intended to convey the idea that in the normal case of an obligation of prevention, two conditions are required for responsibility: the failure of the State to take all available steps to prevent the event in question occurring, and the occurrence of that event in circumstances such that, if the State had taken steps available to it, the event would not (or might well not) have occurred.¹⁸² But even here there is a difficulty, in that, while this may be the natural interpretation of an obligation of prevention, it is not the only possible interpretation. A State could, after all, give an undertaking that a certain result will not occur, save in situations of force majeure. Or it could give an unconditional guarantee; in other words, it could take the risk even of unforeseen events amounting to force majeure. The meaning of any particular obligation depends on the interpretation of the relevant primary rule, but this process of interpretation falls outside the scope of the draft articles. In other words, either articles 21, paragraph 1, and 23 are likewise circular (for primary rules of a certain content, this is their content), or they create a presumption of the interpretation of certain primary rules, which is not the function of the draft articles.

91. The case for deletion is a formidable one, but still there must be a hesitation, given the currency of the terms used,¹⁸³ their value in some cases, e.g. in determining when a breach has occurred, and the relative poverty of the conceptual framework of international law in matters relating to breach of obligation. Entities ought not to be unnecessarily multiplied, but there is something to be said for retaining existing concepts, even if those concepts are not comprehensive in their coverage. The task of explaining the concepts employed to describe international obligations has its own value; the commentaries to articles 20, 21 and, especially, 23 are useful, although they are in need of modification to accommodate the points made above.

92. The Commission is invited to express its view on whether to retain the distinction in the text of chapter III. To provide a focus for its debate, the Special Rapporteur proposes a single article embodying the substance of the distinction.¹⁸⁴ To express his own scepticism, however,

¹⁸¹ See paragraphs 57–58 above.

¹⁸² *Yearbook ... 1978*, vol. II (Part Two), pp. 82–83, para. (6) of the commentary to article 23.

¹⁸³ Not always in a very enlightening way: see the case concerning the *Gabčíkovo-Nagymaros Project* (footnote 51 above), p. 77, para. 135, where the Court referred to the parties having accepted “obligations of conduct, obligations of performance, and obligations of result”.

¹⁸⁴ For the purposes of determining whether there has been a breach (as distinct from the duration of a breach), it seems sufficient to treat

the Special Rapporteur has placed the article in square brackets.

(g) *Articles 18, paragraphs 3–5, and 24–26.*
Completed and continuing wrongful acts

93. The final three articles in chapter III deal with different aspects of the problem of wrongful acts continuing in time (referred to as the “Moment and duration of the breach of an international obligation”). They provide as follows:

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, 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.

Article 26. Moment and duration of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

As noted above, it is useful to consider in the same context the detailed provisions of article 18, paragraphs 3–5, which employs the same distinctions between continuing, composite and complex wrongful acts.¹⁸⁵

94. The commentary to these articles begins by noting that temporal questions apply both to “the determination of the moment when the existence of the breach of an international obligation is established and [to] the determination of the duration, or the continuance in time, of that breach”.¹⁸⁶ It notes the various consequences that

obligations of prevention in the same way as obligations of result. Whether the duration in time of breaches of obligations of prevention requires separate treatment is dealt with below (see paragraphs 132–134).

¹⁸⁵ For the text of article 18, see paragraph 35 above.

¹⁸⁶ *Yearbook ... 1978*, vol. II (Part Two), p. 86, commentary to article 24, para. (1).

can flow from such determinations, e.g. for the jurisdiction of tribunals, the nationality of claims or the application of the doctrine of extinctive prescription, stressing at the same time that these determinations have to be made by reference to legal rules and not only by reference to the facts.¹⁸⁷ In the case of “instantaneous acts” (e.g. the shooting down of a civilian airliner), their effects may last for a long time and may be relevant in judging the seriousness of the act. But the continuation of those effects has “no bearing on the duration of the State act that caused them—an act that will in any event remain an act that does not extend in time”.¹⁸⁸ For example, the commentary asserts that the PCIJ decision in *Phosphates in Morocco*¹⁸⁹ treated the relevant French decisions as instantaneous and not involving a continuing wrongful act.¹⁹⁰

95. As to the notion of a wrongful act extending in time, which is dealt with in article 25, the commentary introduces the distinction between continuing, composite and complex acts. A “continuing act” is one which “proceeds unchanged over a given period of time: in other words, an act which, after its occurrence, continues to exist as such and not merely in its effects and consequences”.¹⁹¹ The commentary notes that the notion of continuing wrongful acts (which is common to many national legal systems) owes its origins in international law to Triepel, and has frequently been applied by courts, especially the European Court of Human Rights.¹⁹²

96. A “composite” act is defined as “an act of the State composed of a series of individual acts of the State committed in connexion with different matters”.¹⁹³ According to the commentary, they “comprise a sequence of actions which, taken separately, may be lawful or unlawful, but which are interrelated by having the same intention, content and effects, although relating to different specific cases”.¹⁹⁴ Examples include a series of administrative decisions adversely affecting nationals of a particular State which establishes a pattern of discrimination, or a refusal to allow those nationals to participate in economic activity, contrary to an international obligation of the host State. Collectively such acts might be unlawful, whether or not the individual decisions are.¹⁹⁵ Some primary rules in terms require the repetition of conduct, e.g. systematic breaches of human rights. In such cases, the first act in the series does not suffice to establish that a wrongful act has been committed, but if it is followed by other similar acts, the wrongful conduct constituted by the series of acts will be regarded as commencing with the first.¹⁹⁶

¹⁸⁷ Ibid., pp. 86–87, para. (5).

¹⁸⁸ Ibid., p. 88, para. (7).

¹⁸⁹ *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10.

¹⁹⁰ *Yearbook ... 1978*, vol. II (Part Two), pp. 88–89, para. (10); see also the commentary to article 25 (ibid., pp. 86–87, para. (5)). For reasons explained below the Special Rapporteur does not agree with this view of the decision (see paragraph 146).

¹⁹¹ Ibid., p. 90, commentary to article 25, para. (2).

¹⁹² Ibid., pp. 90–92, paras. (4)–(7).

¹⁹³ Ibid., p. 90, para. (1).

¹⁹⁴ Ibid., p. 93, para. (9).

¹⁹⁵ Ibid., paras. (10)–(11).

¹⁹⁶ Ibid., para. (12).

97. Finally there is the concept of a “complex” act, which is defined as “an act of the State made up of a succession of actions or omissions in connexion with one and the same matter”.¹⁹⁷ A classic example is denial of justice to an alien. This is a complex act because it is not established by a single decision of an administrator or a lower court: “[T]he ‘complex’ internationally wrongful act is the collective outcome of all the actions or omissions by State organs at successive stages in a given case, each of which actions or omissions could have ensured the internationally required result but failed to do so.”¹⁹⁸ This likewise has consequences in terms of the duration of the wrongful act. In the case of a complex act, “[t]he time of commission of the breach must therefore be reckoned from the moment of occurrence of the first State action that created a situation not in conformity with the result required by the obligation, until the moment of the conduct that made that result definitively unattainable”.¹⁹⁹ In such a case, the breach is not established until the last act in the series, but the breach occurs from the beginning of the series, and thus has a certain retrospective effect.

98. This sequence of articles is concluded by article 26, dealing with the moment and duration of the breach of obligations of prevention. The commentary stresses the parallelism between article 26 and article 23. Since in the case of obligations of prevention the occurrence of the outcome in question is a necessary condition of breach, it follows that its occurrence “must also be the decisive factor for the determination of the moment and duration of the breach in that same case”.²⁰⁰ The idea that even a manifest and irreversible failure by the State to prevent the event occurring could itself amount to a breach is rejected. The breach cannot occur before the event itself occurs: “[L]ogic therefore precludes the idea that the moment of the breach could be any moment preceding the occurrence of the event.”²⁰¹ But the position after the prohibited event has occurred is different. If the event has a continuing character, then “it is logical to consider that the obligation to prevent [its] occurrence ... entails the obligation to ensure that it is terminated”.²⁰² Hence in the case of continuing events, the obligation of preventing them is itself a continuing obligation, and its breach extends for as long as the event continues.²⁰³

(i) *Government comments on articles 18, paragraphs 3–5, and 24–26*

99. Those Governments which have commented on these articles are somewhat divided. France favours the retention of the various classifications of breaches made in article 25 on the ground that they establish a useful “classification of breaches on the basis of how the breach is committed”, but suggests that a linkage be made to the

¹⁹⁷ Ibid., p. 90, para. (1).

¹⁹⁸ Ibid., p. 94, para. (15).

¹⁹⁹ Ibid., p. 95, para. (17). The commentary relies heavily on the Italian argument in the case concerning *Phosphates in Morocco* (as to which see footnote 189 above and paragraph 146 below) (ibid., pp. 95–96, para. (18)).

²⁰⁰ Ibid., p. 97, commentary to article 26, para. (1). For discussion of article 23 see paragraphs 85–87 above.

²⁰¹ Ibid., para. (2).

²⁰² Ibid., p. 98, para. (6).

²⁰³ Ibid., para. (7).

equivalent paragraphs of article 18.²⁰⁴ The United Kingdom, by contrast is:

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.²⁰⁵

Along similar lines, the United States criticizes article 18 and articles 24–26 for establishing:

a complex series of abstract rules governing the characterization of an act of a State as a continuing, composite, or complex act ... 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.

...

These provisions may serve to complicate rather than clarify determinations of responsibility.²⁰⁶

Germany makes an identical comment in relation to articles 24–26.²⁰⁷ Greece suggests that these provisions “should be worded more simply and more clearly”.²⁰⁸

(ii) Overview of the issues raised

100. The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently in practice and is the subject of a considerable jurisprudence.²⁰⁹ The issue in such cases is often not one of responsibility per se so much as the jurisdiction of a court or other body, or the admissibility of an application.²¹⁰ But there are also potential consequences in the field of responsibility proper, and indeed one very important consequence, relating to cessation of wrongful acts, is dealt with in article 41 of the draft articles. The existing provisions may be complex, but it seems that at least some provision dealing with these subjects is called for.

101. It is proposed first to consider the question of when an internationally wrongful act may be said to have occurred. Even if that act is of a continuing character, there

must be a point in time at which the wrongful act already exists. Secondly, there is the question of the distinction between completed acts (acts not extending in time) and continuing acts. Thirdly, there is the question of accommodating, within the basic framework established by those distinctions, the further refinements introduced by the notions of composite and complex wrongful acts. In each context it is necessary to consider how the principle of the inter-temporal law affects responsibility in the case of continuing, composite and complex acts. Thus article 18, paragraphs 3–5 will be considered as part of this review.

(iii) *When does a breach of obligation begin? Distinguishing apprehended, imminent or “anticipatory” breaches from existing breaches*

102. An initial question, common to all three articles, is when a breach of international law exists (as distinct from being merely apprehended or imminent). In other words, when does the wrongful act “occur” in the first place? In principle that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,²¹¹ incitement or attempt,²¹² in which case the threat, incitement or attempt is itself a wrongful act. Whether there are general secondary rules of international law in relation to such “ancillary” wrongful acts as incitement, complicity and such matters will be considered further in the context of chapter IV of part one of the draft articles. For present purposes, the question is when a wrongful act, defined by reference to the primary rule, can be said to have occurred.

103. That was an issue in the case concerning the *Gabčíkovo-Nagymaros Project*.²¹³ Following Hungary’s refusal to continue with the project, as provided for in a bilateral treaty of 1977, Czechoslovakia began actively planning for, and subsequently building, a unilateral substitute scheme (the so-called “Variant C”), using installations jointly constructed for the original project and some additional elements constructed on Czechoslovak territory. Variant C was actually implemented when the Danube was diverted by means of the new installations, in October 1992. The Court held that Variant C was unlawful for various reasons, notwithstanding the prior Hungarian breach of the 1977 Treaty. But the question was, at what point had the Czechoslovak breach occurred? This mattered, inter alia, because in May 1992 Hungary had purported to

²⁰⁴ *Yearbook... 1998* (see footnote 7 above), p. 127.

²⁰⁵ *Ibid.*, comments on article 18. See also paragraph 56 above.

²⁰⁶ *Ibid.*, citing Brownlie, *op. cit.*, pp. 197–198.

²⁰⁷ *Ibid.*, comments on article 24.

²⁰⁸ A/CN.4/492 (reproduced in this volume), comments on article 26. See also the general remarks of Governments on chapter III, summarized in paragraph 4 above.

²⁰⁹ See, for example, *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35; *Phosphates in Morocco* (see footnote 189 above), pp. 23–29; *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, pp. 80–82; and *Right of Passage over Indian Territory* (footnote 67 above), pp. 33–36. The issue has often been raised before the organs of the European Convention on Human Rights (see Pauwelyn, *loc. cit.*, pp. 430–440); see, for example, the decision of the European Commission of Human Rights in the *De Becker* case (footnote 108 above), pp. 234 and 244); judgments of the European Court of Human Rights in the *Ireland v. United Kingdom* case, *Series A: Judgments and Decisions*, vol. 25, *Judgment of 18 January 1978*, p. 64; the *Papamichalopoulos and Others v. Greece* case, *ibid.*, vol. 260–B, *Judgment of 24 June 1993*, para. 40; and the *Agrotexim and Others v. Greece* case, *ibid.*, vol. 330–A, *Judgment of 24 October 1995*, para. 58.

²¹⁰ See, inter alia, Pauwelyn, *loc. cit.*; Salmon, “Le fait étatique complexe: une notion contestable”; and Wyler, “Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite”.

²¹¹ Notably, Article 2, paragraph 4, of the Charter of the United Nations prohibits the “threat or use of force against the territorial integrity or political independence of any state”. For the question of what constitutes a threat of force, see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 246–247, paras. 47–48; see also Sadurska, “Threats of force”.

²¹² A particularly comprehensive formulation is that of article III of the Convention on the Prevention and Punishment of the Crime of Genocide, which prohibits, in addition to actual genocide, conspiracy, direct and public incitement, attempt and complicity. Article III is of course primarily directed at individual criminal responsibility, but in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ noted that “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” (*Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 616, para. 32). This implies that States may be directly responsible themselves for incitement, conspiracy, complicity and attempt.

²¹³ *I.C.J. Reports 1997* (see footnote 51 above), p. 7.

terminate the Treaty, relying on Czechoslovakia's insistence on the construction of Variant C. Hungary pointed out that article 60 of the 1969 Vienna Convention does not preclude a party which is itself in breach of a treaty from terminating on the ground of the other party's breach, and it argued that, at least by April 1992, Czechoslovakia's determination to proceed with the illegal diversion of the Danube amounted to an existing breach, or alternatively a repudiation of the Treaty, entitling Hungary to terminate it.²¹⁴

104. The Court rejected this argument, holding (by a majority of 9 to 6) that the breach had not occurred until the actual diversion of the Danube in October. It noted:

that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" ...²¹⁵

Accordingly the Court held that "Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992".²¹⁶ But since Hungary had purported to terminate the Treaty in May 1992, before it had been breached by Czechoslovakia and before Hungary had suffered any loss as a result of Czechoslovakia's conduct, the purported termination was "premature" and ineffective.²¹⁷

105. In any event, according to the Court, Hungary had prejudiced its right to rely on Czechoslovakia's breach, since it was itself responsible for an earlier and related breach of the same Treaty.²¹⁸ This aspect of the case involves the so-called *exceptio inadimpleti contractus*,

²¹⁴ In some legal systems, the notion of "anticipatory breach" is used to deal with the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance. Confronted with an anticipatory breach, the party concerned is entitled to terminate the contract and sue for damages. See *Frost v. Knight* (1872) LR 7 Ex. 111; *White & Carter (Councils) Ltd. v. McGregor* (1962) AC 413; and Zweigert and Kötz, *op. cit.*, pp. 543–544. Other systems achieve similar results without using this concept, for example by construing a refusal to perform in advance of the time for performance as a "positive breach of contract" (*ibid.*, p. 531 (German law)). There appears to be no equivalent in international law, but article 60, paragraph 3 (a) of the 1969 Vienna Convention defines a material breach as including "a repudiation . . . not sanctioned by the present Convention", and it is clear that such a repudiation could occur in advance of the time for performance.

²¹⁵ *I.C.J. Reports 1997* (see footnote 51 above), p. 54, para. 79, citing the commentary to draft article 41. On this point six judges (President Schwebel; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek) dissented.

²¹⁶ *Ibid.*, p. 57, para. 88.

²¹⁷ *Ibid.*, pp. 66–67, paras. 108–109.

²¹⁸ *Ibid.*, p. 67, para. 110.

and will be dealt with in the context of chapter V of part one.

106. Thus the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Such conduct does not itself amount to a breach if it does not "predetermine the final decision to be taken".²¹⁹ But whether that is so in any given case will depend on the precise facts and on the content of the primary rule. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The term "occurs" used in draft articles 24–26 seems as good as any for this purpose.

(iv) *When does a breach of obligation continue? The distinction between continuing and completed wrongful acts*

107. The second question relates to the distinction between wrongful acts extending in time and those not so extending. On closer analysis, there may be two separate distinctions here. The first is the distinction between wrongful acts which occur, and are completed, at a particular moment in time, and those which take some period of time to perform. The second is the distinction between wrongful acts which have been completed (even though their effects may continue) and wrongful acts which are of a continuing character. The draft articles, especially articles 24–25, seem to telescope the two ideas.

108. It is no doubt possible for a wrongful act to be committed in an instant, the instant at which property is confiscated by operation of law, for example, or legislation comes into force. This is the lawyer's *punctum temporis* at which property is transferred from one person to another, or some other "act in law" is performed. In the contemplation of the law such acts may be instantaneous, but it is rare for acts not to extend at least for some period of time. It is, however, not clear that the distinction between an act that occurs in an instant of time and one that (even if it took five seconds, five minutes or five hours) is now complete, is ever likely to matter for the purposes of State responsibility. For practical purposes the distinction between completed and continuing wrongful acts seems more important. But that distinction is a relative one: a continuing wrongful act is one that has not been completed *yet*, i.e. at the relevant time.

109. This is not intended to diminish the importance of the distinction between continuing and completed wrongful acts, but rather to place it in its proper context. That the distinction is important and has legal consequences can be seen from the following non-exhaustive review:

(a) The *Rainbow Warrior* arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand for the settlement of the *Rainbow Warrior* incident. The Arbitral Tribunal referred with approval to articles 24 and 25, paragraph 1, of the draft articles and to the distinction between instantaneous and continuing wrongful acts,²²⁰ and said:

²¹⁹ *Ibid.*, p. 54, para. 79.

²²⁰ UNRIAA (see footnote 36 above), p. 264, para. 101.

Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach.

And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.²²¹

Indeed the Tribunal went on to draw further legal consequences from the distinction, in terms of the duration of French obligations under the agreement:

The characterization of the breach as one extending or continuing in time, in accordance with Article 25 of the draft on State Responsibility ... confirms the previous conclusion concerning the duration of the relevant obligations by France under the First Agreement ... France committed a continuous breach of its obligations, without any interruption or suspension, during the whole period when the two agents remained in Paris in breach of the Agreement.

If the breach was a continuous one ... that means that the violated obligation also had to be running continuously and without interruption. The "time of commission of the breach" constituted an uninterrupted period, which was not and could not be intermittent ... Since it had begun on 22 July 1986, it has to end on 22 July 1989, at the expiry of the three years stipulated.

Thus, while France continues to be liable for the breaches which occurred before 22 July 1989, it cannot be said today that France is *now* in breach of its international obligations.²²²

(b) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases (as noted in the commentary). The issue arises because the Court's jurisdiction may be limited to events occurring after the respondent State became a party to the European Convention on Human Rights or the relevant Protocol and accepted the right of individual petition. Thus in *Papamichalopoulos and Others v. Greece*, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court's competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of the Protocol, and therefore upheld its jurisdiction over the claim.²²³

(c) In *Loizidou v. Turkey*, similar reasoning was applied by the European Court of Human Rights to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant was denied access to her property in northern Cyprus. Turkey relied on the fact that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus (TRNC) of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The Court held that, in accordance with international law and having regard to the relevant Security Council resolutions, it could not attribute legal effect to the 1985 TRNC Constitution, so that the expropriation was not completed at that time and the property continued to belong to the Applicant. The conduct of the TRNC and of Turkish troops in denying the applicant access to her property continued after Turkey's acceptance of the Court's jurisdiction, and constituted a breach of

article 1 of the Protocol to the European Convention on Human Rights.²²⁴ But Judge Bernhardt, in a dissenting opinion shared in substance with some other members of the Court, took a different approach to the distinction between completed and continuing breach. He said:

The Convention organs have accepted the notion of "continuing violations" ... I entirely agree with this concept, but its field of application and its limits must be appreciated. If a person is kept in prison before and after the critical date ... [t]he essential fact ... is the actual behaviour of State organs which is incompatible with the commitments under the European Convention ...

The factual and legal situation is ... different when certain historical events have given rise to a situation such as the closing of a border with automatic consequences in a great number of cases. In the present case, the decisive events date back to the year 1974. Since that time, Mrs Loizidou has not been able to visit her property in northern Cyprus. This situation continued to exist before and after the adoption of the Constitution of the so-called "Turkish Republic of Northern Cyprus" ... Turkey has recognised the jurisdiction of the Court only "in respect of facts ... which have occurred subsequent to the date of deposit of the present declaration"; the closing of the borderline in 1974 is in my view the material fact and the ensuing situation up to the present time should not be brought under the notion of "continuing violation".²²⁵

(d) The Human Rights Committee has also endorsed the idea of continuing wrongful acts. For example, in *Sandra Lovelace v. Canada*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a band member, although the loss had occurred at the time of her marriage in 1970, and Canada only accepted the Committee's jurisdiction in 1976. The Committee noted that it was:

not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol ... In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status ... at the time of her marriage in 1970.

The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date.²²⁶

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, were sufficient to constitute a breach of article 27 of the International Covenant on Civil and Political Rights after that date. Here the notion of a continuing breach was relevant not only to the Committee's jurisdiction but also to the selection of article 27 as the most directly relevant provision of the Covenant so far as the applicant was concerned.

(e) In the case concerning the *Gabčíkovo-Nagyymaros Project*,²²⁷ both Hungary's refusal to continue with the

²²¹ Ibid.

²²² Ibid., pp. 265–266. But see the dissenting opinion of Sir Kenneth Keith (ibid., pp. 279–284).

²²³ See footnote 209 above.

²²⁴ *Loizidou v. Turkey*, European Court of Human Rights, *Judgment of 18 December 1996 (Merits)*, *Reports of Judgments and Decisions* 1996–VI (Council of Europe, Strasbourg, 1996), pp. 12–14, paras. 41–47, and pp. 19–20, paras. 63–64. See also *Loizidou v. Turkey*, *ibid.*, *Series A: Judgments and Decisions*, vol. 310 (*Preliminary Objections*), *Judgment of 23 March 1995* (Council of Europe, Strasbourg, 1995), pp. 33–34, paras. 102–105.

²²⁵ *Judgment of 18 December 1996* (see footnote 224 above), pp. 24–25, para. 2. Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed.

²²⁶ Human Rights Committee, Communication No. R.6/24, *Sandra Lovelace v. Canada*, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40)*, annex XVIII, p. 172, paras. 10–11.

²²⁷ See footnote 51 above.

project and Czechoslovakia's implementation and operation of Variant C were continuing wrongful acts, and this had consequences in various ways. For example, when Variant C was put into operation, this was done in the context of a continuing wrongful act by Hungary, and this had various consequences in terms of the survival of the 1977 Treaty.²²⁸ When Slovakia came into existence on 1 January 1993, it was confronted with the continuing wrongful conduct of both parties to the Treaty: the situation was accordingly different from that which might have applied had Slovakia been, as it were, the accidental inheritor of the consequences or effects of unlawful acts committed and completed earlier.²²⁹

110. As these cases show, conduct having commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including purposes within the realm of State responsibility. For example, the obligation of cessation contained in article 41 applies only to continuing wrongful acts. This is a sufficient basis to include the distinction between completed and continuing wrongful acts as an element of chapter III.

111. It may, however, be objected that the notion of a continuing wrongful act cannot be defined, or can only be defined in relation to the relevant primary rule. Certainly, no attempt at a definition is made in article 25, which refers only to "an act of the State having a continuing character". Both the primary rule and the circumstances of the given case will be relevant in deciding whether a wrongful act has a continuing character, and, again, it is probably the case that a detailed definition cannot be offered in the abstract. On the other hand, guidance can be offered in the commentary, and the difficulty of applying a valid distinction in particular cases is no reason to abandon the distinction.

112. This being so, it is not necessary for the Commission to take a position on the substantive issues which gave rise to a division of opinion in some of the cases outlined above.²³⁰ For example, in the *Rainbow Warrior* case, the Tribunal relied on article 25, paragraph 1, as a basis for holding that

²²⁸ See paragraphs 103–108 above.

²²⁹ See paragraph 104 above.

²³⁰ Nor is it necessary for the Commission to take a categorical position on a question on which two previous special rapporteurs have disagreed, viz. whether expropriation is a completed or continuing wrongful act. See *Yearbook ... 1988*, vol. II (Part One), document A/CN.4/416 and Add.1, p. 14, with references to earlier Commission work. To some extent that too depends on the content of the primary norm said to have been violated, and it certainly depends on the facts. In the view of the present Special Rapporteur, where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred under the *lex loci* and the property is actually taken, the expropriation itself will then be a completed act. The position with a de facto, "creeping" or disguised occupation, however, may well be different: see *Papamichalopoulos and Others v. Greece*, discussed above (para. 109 (b)). Exceptionally (as in *Loizidou v. Turkey* (para. 109 (c) above)), a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act. The example shows the complexity of individual cases, and the unwisdom of attempting to define such issues of interpretation and application in detail in the draft articles.

France's obligation to detain the two officers on the island of Hao had terminated in 1989. Normally, an obligation to do something by a certain date would be interpreted as involving two distinct obligations—to do the thing, and to do it timely—with the result that the failure to do the thing by a certain day (whether or not that failure is excusable) does not terminate the obligation. On the contrary, the State concerned would normally be in continuing breach of the main obligation after the due date for its performance.²³¹ It is true that, as France argued in that case, "there is no rule of international law extending the length of an obligation by reason of its breach".²³² But this is because the question is one of the interpretation of the relevant primary rule. One would not normally regard an obligation to maintain a situation for a specified period as "completed" if it had been breached for the whole of that period. But whatever the better interpretation of the primary rule may be, the secondary rules of State responsibility have nothing to say on the question.²³³

113. To summarize, in the Special Rapporteur's view, the importance of the concept of continuing wrongful acts clearly justifies the retention of provisions along the lines of articles 24 and 25, paragraph 1. Given that they relate to a single operative distinction, those provisions could perhaps be combined in a single article.²³⁴

(v) *The inter-temporal principle in relation to continuing wrongful acts: article 18, paragraph 3, in relation to article 25, paragraph 1*

114. It remains to consider how the inter-temporal principle applies to acts of a continuing character. According to article 18, paragraph 3, an act of a continuing character is only breached "in respect of the period during which the act continues while the obligation is in force for that State". This is plainly correct as to the aftermath of a continuing act. If the obligation ceases to exist, there can be no question of any new or continuing breach thereafter.²³⁵ Thus in the *Rainbow Warrior* arbitration, the disagreement related to the question whether the obligation had expired after the three-year period, not as to the legal consequences if it had expired.²³⁶

115. The position in respect of periods prior to the entry into force of the obligation is also clear. In accordance with the principle stated in article 18, paragraph 1, the conduct of a State is internationally wrongful only if the rule in question was in force for that State at the time of the conduct.²³⁷ In the several cases discussed above, either

²³¹ The position might be different if the conduct required was of no value to the obligee after the due date, e.g. an obligation to inform another State of the intention to do something, prior to doing it.

²³² UNRIAA (see footnote 36 above), p. 265.

²³³ In the case concerning the *Gabčíkovo-Nagyymaros Project* (see footnote 51 above), Hungary did not argue (and plainly could not have done so) that its obligation to construct installations had lapsed because the time for doing so had passed. The impact of circumstances precluding wrongfulness on the time for performance of the obligation is discussed under chapter V.

²³⁴ For the text proposed, see paragraph 158 below.

²³⁵ On the other hand, questions of restitution can still arise, and the distinction between cessation and restitution is not always easy to draw. The matter is considered in the context of article 41.

²³⁶ UNRIAA (see footnote 36 above), p. 266. See also the dissenting opinion of Sir Kenneth Keith, pp. 279–284.

²³⁷ See paragraphs 38–44 above.

the rule in question was not in force for the State at the time the wrongful conduct commenced, or the court had no jurisdiction over the State in respect of that time, and was therefore in no position to decide on its responsibility then. Article 25, paragraph 1, however, fails to refer to this case. It provides that a continuing breach “occurs at the moment when that act begins”, which is not true if the rule in question was not then in force.²³⁸ Article 25, paragraph 1, needs to be qualified accordingly, and the point can be further explained in the commentary. If this is done, it seems that the language of article 25, paragraph 1 (“and remains not in conformity with the international obligation”), is adequate to deal with the inter-temporal problem for continuing wrongful acts, in which case article 18, paragraph 3, can be deleted as unnecessary.

(vi) *The distinction between composite and complex acts: article 18, paragraphs 4–5; article 25, paragraphs 2–3*

116. Whether the further distinction in article 25, paragraphs 2–3, between composite and complex acts (and the related provisions of article 18, paragraphs 4–5, dealing with inter-temporal issues) needs to be retained is another question. As discussed above, a composite act is defined as “an act of the State, composed of a series of actions or omissions in respect of separate cases” (art. 25, para. 2). It is contrasted with a “complex act”, which is “a succession of actions or omissions by the same or different organs of the State in respect of the same case” (art. 25, para. 3). An example of a composite act would be the adoption of a policy of apartheid, which involves systematic governmental conduct towards a racial group, taking the form of conduct in a whole series of cases. This may be compared with an act of racial discrimination against one individual. This might well be a complex act because of collusion between different organs or conduct against the individual over a period of time, but it will have involved the “same” case throughout. It should be stressed that some of the most serious wrongful acts under international law are defined in terms of their composite character. This is true not only of genocide and apartheid but of crimes against humanity generally.²³⁹

117. This analysis shows that it is possible to draw a distinction between composite and complex acts; it also shows that in order to make such a distinction it is essential to focus on the relevant primary rule. But the problem is, of course, that the draft articles are not concerned, as such, to elaborate upon the primary rules. Different classifications of primary rules may have value, but they have a place in the draft articles only to the extent that they have *consequences* within the realm of responsibility. Moreover, as formulated, the distinction between composite and complex acts is a distinction unrelated to the content of the primary rule. It is concerned with the classification of acts in breach of any rule whatsoever. That was true also for the distinction between continuing and completed

wrongful acts, but as has been seen, that is a useful and now accepted distinction for the purposes of responsibility. Is this also true for composite or complex acts?

118. Before answering that question, it is necessary to draw a distinction between the necessary *elements* of a wrongful act and what might be required by way of evidence or proof that such an act has occurred. For example, an individual act of racial discrimination is unlawful, but it may be necessary to adduce evidence of a series of acts by State officials (involving the same person or other persons similarly situated) in order to show that any one of those acts was discriminatory rather than actuated by legitimate grounds. In other words, in its essence such discrimination is not a composite or even, necessarily, a complex act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act. Thus a clear and consistent distinction between complex and composite acts is difficult to draw in practice, and this difficulty is exacerbated by the language of article 25, paragraph 2, which refers to the accomplishment of the act or omission “which establishes the existence of the composite act”; the word “established” (French: “*établi*”) might be confused with “proved”, which was evidently not intended.

(vii) *The treatment of composite acts in articles 18, paragraph 4, and 25, paragraph 2*

119. Three propositions are affirmed in the draft articles in relation to “composite acts”:

(a) According to article 25, paragraph 2, a composite act “occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act”. For the reasons explained, this might be better formulated in the following terms: “when that action or omission of the series occurs which, taken with its predecessors, is sufficient to constitute the composite act”;

(b) Nevertheless, “the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act ... [for] so long as such actions or omissions are repeated” (art. 25, para. 2);

(c) According to article 18, paragraph 4, in such a case “there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State”.

120. It is not entirely easy to reconcile these propositions. If the act only “occurs” when that aspect of the “series” occurs which establishes the composite act, must the composite act necessarily be held to have commenced at an earlier date? (The position would no doubt be different if the word “establishes” meant “establishes as a matter of evidence”, but for the reasons already given, this would be a confusion.) In particular, does it not depend on the formulation and purpose of the primary rule, not only whether a composite act may be considered to have been constituted by the first or the fifth or the *n*th act in a series (a matter which is rightly left open by the draft articles),

²³⁸ Evidently this is drafting oversight: the commentary to article 25 makes the point clearly (*Yearbook ... 1978*, vol. II (Part Two), p. 90, para. (3), footnote 435).

²³⁹ The better view is that apartheid is a special case of crimes against humanity: see the Rome Statute of the International Criminal Court, art. 7, paras. 1 (*j*) and 2 (*h*).

but whether, so constituted, the period of the breach relates back to the first of these acts or omissions?

121. It is useful to examine these questions by reference to some concrete examples. The difficulty here is that virtually all the discussion of composite acts has been based on examples of primary rules which define systematic wrongs. A systematic primary rule is one which defines acts as wrongful in terms of their composite or systematic character (the prohibition against genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, etc.). But as noted above, article 25, paragraph 2, is not limited to breaches of obligations created by such rules. Thus it is necessary to take examples both of systematic and non-systematic primary rules in order to test the idea of a “composite wrongful act”.

122. The prohibition against genocide, formulated in identical terms in the Convention on the Prevention and Punishment of the Crime of Genocide and in later instruments,²⁴⁰ is a good example of a “systematic” primary rule, in the sense that it implies, if it does not actually require, that the responsible entity (including a Government) will have adopted a systematic policy or practice, and that the individual acts of murder etc., which together constitute genocide, would not or might not do so taken individually. According to article II (a) of the Convention, the prime case of “genocide” is “[k]illing members of [a national, ethnical, racial or religious] group” with the intent to destroy that group as such, in whole or in part. Both limbs of the definition contain systematic elements. Killing one person, whatever the motive, is not genocide; the killing has to be multiple.²⁴¹ And it has to be carried out with the relevant intention, aimed at physically eliminating the group as such. In that context, the idea of a composite wrongful act elaborated in articles 18, paragraph 4, and 25, paragraph 2, seems entirely appropriate. Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. But once that threshold is crossed, it is reasonable to say that the time of commission extends over the whole period during which any of the acts was committed. Assuming that the inter-temporal law applies to genocide, it is also reasonable to say that genocide is committed if the acts committed during the period when the Convention was in force were sufficient to constitute genocide.²⁴²

²⁴⁰ See, for example, the Statute of the International Tribunal for the Former Yugoslavia, art. 4; the Statute of the International Tribunal for Rwanda, art. 2; and the Rome Statute of the International Criminal Court, art. 6.

²⁴¹ As Judge Lauterpacht acknowledged in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Counter-claims)*, *Order of 17 December 1997*, *I.C.J. Reports 1997*, p. 282. This does not mean that a camp guard who participated in genocidal acts but was personally responsible for killing only one member of the group would necessarily be innocent: such conduct committed with the necessary intent would clearly involve complicity in genocide contrary to article III (e) of the Convention.

²⁴² It is, however, very doubtful that the inter-temporal law applies to the Convention on the Prevention and Punishment of the Crime of Genocide *as such*, since according to article I of the Convention it is declaratory, and it is therefore probable that the obligation to prosecute relates to genocide whenever committed. ICJ clearly acted on this basis in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 212 above),

123. Take, on the other hand, a simple obligation in a bilateral boundary waters agreement that each party will take no more than a specified volume of water from a boundary river in a calendar year. Assume that one of the parties authorizes different users to take each month volumes of water that (while not themselves unlawful under the agreement) make it likely that over the year the total taken will exceed the quota. The conduct of the State concerned amounts to a composite act as defined in article 25, paragraph 2, but is the whole series of acts to be treated as unlawful? The approach of the majority in the case concerning the *Gabčíkovo-Nagymaros Project*²⁴³ suggests that at least until the act occurs which predetermines the final decision to exceed the quota, no wrongful act will have been committed. Indeed, it might be that no wrongful act is committed until the quota is actually exceeded, however clear it may be that this result is going to occur. Assuming that it does occur, is it then said that the commission of the breach began with the first taking of water in January? Perhaps if the State set out with the deliberate intention to violate the treaty and gave monthly permits accordingly, it might be said that the breach began in January. But the definition of a composite act in article 25, paragraph 2, does not require such a prior intent; it is satisfied if there is “a series of actions or omissions in respect of separate cases”, and in the example given, a breach might occur fortuitously, because different regional water authorities did not coordinate their licensing policies, or for some other reason. Of course, there is a breach when the annual quota is exceeded, but is there any reason to define in advance, in the secondary rules of State responsibility, that the breach began with the first act in the series? Does it not depend on the formulation and purpose of the primary rule?

124. These examples suggest that, if composite acts are to be dealt with, a distinction needs to be drawn between simple and composite or systematic obligations. Just because a simple obligation is breached by a composite act seems no reason for treating the breach as different in kind. No doubt composite acts are more likely to give rise to continuing breaches, but simple acts can cause continuing breaches as well (e.g. the detention of a diplomat). The position is different, however, where the obligation itself (and thus the underlying primary rule) fixes on the cumulative character of the conduct as constituting the essence of the wrongful act. Thus apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically motivated killing.

125. Such a distinction was drawn by the European Court of Human Rights in *Ireland v. United Kingdom*. There Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland, which it said amounted to torture or inhuman or degrading treatment, and the case

p. 617, para. 34. Note also that, even in the case of a new substantive obligation, conduct committed prior to the entry into force of the obligation might be relevant *as facts*, e.g. for the purposes of determining intent. This is true, a fortiori, where the objection *ratione temporis* relates only to the jurisdiction of the court or tribunal, not the content of the applicable law: see, for example, *Zana v. Turkey*, European Court of Human Rights, *Judgment of 25 November 1997*, *Reports of Judgments and Decisions* (Council of Europe, Strasbourg, 1997). See also footnote 88 above.

²⁴³ Para. 106 above.

was held to be admissible on that basis. This had various procedural and remedial consequences. In particular, the exhaustion of local remedies rule did not have to be complied with in relation to each of the incidents cited as part of the practice. But the Court denied that there was any separate wrongful act of a systematic kind involved. It was simply that Ireland was entitled to complain of a practice made up by a series of breaches of article 7 of the European Convention on Human Rights, and to call for its cessation. As the Court said:

A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; *a practice does not of itself constitute a violation separate from such breaches.**

...

The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in Article 26 of the Convention, applies to State applications ... in the same way as it does to "individual" applications ... On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.²⁴⁴

By contrast, in the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed.

126. For these reasons, the Special Rapporteur is provisionally in favour of retaining the notion of "composite wrongful acts", as spelled out in articles 18, paragraph 4, and 25, paragraph 2, but of limiting it to what might be termed "systematic obligations". These are obligations arising under primary rules which define the wrongful conduct in composite or systematic terms (as in the case of genocide or crimes against humanity). Such systematic obligations are important enough in international law to justify special treatment, both in terms of the time of their commission and the application of the inter-temporal law. As to obligations under other primary rules, these issues can be adequately dealt with through the interpretation and application of the particular rule.

(viii) *The treatment of complex acts in articles 18, paragraph 5, and 25, paragraph 3*²⁴⁵

127. Complex acts are defined in articles 18, paragraph 5, and 25, paragraph 3, as acts "constituted by actions or omissions by the same or different organs of the State in respect of the same case". The treatment of complex acts in articles 18, paragraph 5, and 25, paragraph 3, is strongly influenced by the approach taken by the Special Rapporteur, Mr. Roberto Ago, to the question of exhaustion of local remedies (art. 22), which is discussed below. According to this approach, the failure of a local remedy is itself part of the complex act of State, with the consequence that, in cases where the exhaustion of local remedies rule applies, the wrong is constituted by

the failure of the local remedy, and prior to that point is merely apprehended.²⁴⁶

128. However, the notion of a complex act is not dependent for its validity on accepting this view of the local remedies rule, and there are examples of complex acts in the sense of article 25, paragraph 3, which do not involve the exhaustion of local remedies. For example, the guarantee against discrimination under article XIII, paragraph 1, of GATT could easily be breached by a complex act of the importing State. Similarly, in the case of a denial of justice, where the original wrong to the individual concerned was not itself attributable to the State,²⁴⁷ it may be the successive failure of the police, the lower courts and any available appellate courts collectively to redress the grievance that amounts to a denial of justice. Such a "complex act" of the State, if it falls short of the relevant international standard, will involve a breach of international law.

129. According to article 25, paragraph 3, in such cases the breach only occurs "at the moment when the last constituent element of that complex act is accomplished". However, the "time of commission of the breach extends over the entire period" of the complex act, and under article 18, paragraph 5, the principle of the inter-temporal law is satisfied if the first act in the series occurred when the obligation was in force for the State, even if the obligation then lapses.

130. These propositions may be tested against the facts of the *Gabčíkovo-Nagymaros Project* case. Czechoslovakia's conduct in implementing Variant C was clearly a complex act. It involved a series of actions by different organs of the State, and by a private company acting as the constructor and operator of the project. The Court held that the wrongful act was not committed until the Danube was actually diverted in October 1992.²⁴⁸ It is clear that in doing so it applied the law in force at that time, and not at any earlier time. If Hungary's argument based on termination in May 1992 (e.g. on grounds of fundamental change of circumstances) had succeeded, the law in force in October would have been different.²⁴⁹ Thus rather than treating the whole period from October 1991 onwards as the time of commission of the breach, the Court ascertained the time at which the breach was essentially accomplished, despite earlier preparations, and applied the law in force at that time to the breach.

131. Another hypothetical example suggests the same conclusion. Assume that State A agrees in a bilateral investment treaty that for a period of three years it will not expropriate a particular property and that thereafter it will pay a specified amount of compensation for any expropriation. Assume further that, two and a half years later, it begins to impose restrictions on the use of the property, and that, after the initial three-year period, a number of limitations have the effect of rendering the

²⁴⁶ See paragraphs 140–141 below.

²⁴⁷ Among many examples, see the *Janes* case, decision of 16 November 1925 (UNRIIA, vol. IV (Sales No. 1951.V.1)), p. 82, where the original murder of Janes was a purely private act.

²⁴⁸ See footnote 51 and paragraph 104 above.

²⁴⁹ A Boundary Waters Convention of 1976 would have governed the issue, but for the *lex specialis* of the 1977 Treaty.

²⁴⁴ European Court of Human Rights (see footnote 209 above), para. 159; see also page 63, para. 157.

²⁴⁵ See especially Salmon, "Le fait étatique complexe ...", pp. 709–738; and Wyler, *op. cit.*, pp. 74–81.

property valueless, followed some months later by a formal taking. This process of expropriation is clearly a “complex act”, but of the three propositions contained in the draft articles, two at least do not apply to it. First of all, there is no reason to say that the last act in the series constitutes the time of the breach; on these facts it may very well be that the expropriation should be considered as completed at an earlier date. Secondly, however, if the restrictions imposed during the three-year period did not themselves amount to an expropriation,²⁵⁰ there would be no basis for applying the law in force during those three years to the later conduct of the State, and the remedy for expropriation would be the payment of the specified amount.

132. The treatment of “complex acts” in the draft articles is vulnerable in other respects as well. For example, a sharp distinction is drawn between composite and complex acts. In the case of composite acts, one looks for the first act in the series which, taken with the earlier ones, is sufficient to constitute the breach (call it the “culminating act”). In the case of complex acts, one looks to the last act in the series. Why such a difference should exist is not explained. At the time the culminating act is performed, it may not be clear that further acts are to follow and that the series is not complete. Yet if up to that point the injured State is justified in holding that a wrong has been committed, why should it not be able to act on that basis at that time? A similar objection can be made by reference to the inter-temporal law as provided in article 18, paragraph 5. Until the series is complete, one may not know precisely how to characterize the wrongful act: for example, in *Foremost Tehran, Inc v. Islamic Republic of Iran*, whether it is a case of discrimination against foreign shareholders or a de facto expropriation.²⁵¹ Yet the application of the law in force at the time the first act in the series occurs may depend on how the whole series is to be characterized. The issue of inter-temporal law is thus made uncertain and to some extent subjective. This is exacerbated in that the distinction between composite and complex acts depends on what is identified as the relevant “case”, yet this can be done in different ways. As in *Ireland v. United Kingdom*,²⁵² for example, the applicant may focus on a “practice” of which individual incidents are merely examples. Is the practice then the “case”, or is it the individual incidents which are adduced, non-exhaustively, to prove the practice?²⁵³ The distinction between complex and composite acts depends on the unspecified notion of a “case”, yet important consequences in terms of the inter-temporal law turn on the distinction. Issues of such importance should not depend on the way in which the injured State chooses to formulate the claim. In any event, it is far from clear why, in principle, the law in force at

²⁵⁰ See *Foremost Tehran Inc. v. Islamic Republic of Iran*, case No. 37, Award No. 220–37/231–1, 10 April 1986, where the Iran-United States Claims Tribunal held that the acts in question did not constitute an expropriation by the terminal date of the Tribunal’s jurisdiction (*Iran-United States Claims Tribunal Reports*, vol. 10 (Cambridge, Grotius, 1987), p. 228.

²⁵¹ *Ibid.*

²⁵² See footnote 209 above.

²⁵³ See also the United States counter-claim in the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Counter-Claim, Order of 10 March 1998, *I.C.J. Reports 1998*, p. 190, which likewise focuses on a general situation rather than specific instances.

the time of the first act in a series should apply to the whole series. Either the individual acts are to be assessed individually, in which case the law in force at the time each was committed should be applied, or they are to be assessed as a series, in which case the rule applicable to composite acts seems equally appropriate. On neither alternative is there any reason to freeze the applicable law as it was on the date when the complex act began.²⁵⁴

133. For these reasons, it is recommended that articles 18, paragraph 5, and 25, paragraph 3, be deleted and with them the notion of the “complex act”.²⁵⁵ International courts and tribunals seem to have had no difficulty in dealing with such acts, whether in terms of the time of their commission or the inter-temporal law, and no special provision for them seems to be required in the draft articles.

(ix) *The temporal classification of obligations of prevention: article 26*

134. Article 26 relates closely to article 23, and the comments made already with respect to article 23 apply here as well. It is true that there are “pure” obligations of prevention, of the kind described in the commentary. They are true obligations of prevention in the sense that unless the apprehended event occurs there is no breach. At the same time, the State has not warranted that the event will not occur; it has undertaken an obligation in the nature of best efforts to prevent it from occurring, the content and rigour of that obligation depending on the primary rule. As noted above, however, not all obligations directed towards preventing an event from occurring are of this kind, and it is not the function of the draft articles to force all such obligations into a single form.

135. There is a further difficulty with the formulation of article 26, in that it assumes that the occurrence of an event which has a continuing character will involve a continuing breach by the State which has wrongfully failed to prevent it. This may well be the case—for example, with the obligation to prevent transboundary damage by air pollution, articulated in the *Trail Smelter* arbitration,²⁵⁶ or the obligation to prevent intrusions onto diplomatic premises.²⁵⁷ But again, circumstances can be imagined where this is not so, e.g. where the event, once it has occurred, is irreversible, or its continuance causes no further injury to the injured State. An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation

²⁵⁴ One unstated reason for the retrospective element in article 18, paragraph 5, was that this was necessary in order to defend article 22. According to that article, the exhaustion of local remedies is part of the breach and not only a condition to the admissibility of a diplomatic claim, and it involves a complex act. In such cases, however, it is clear that one looks to the law in force at the time when the injury occurred, not to the law in force when the local remedy was exhausted. See paragraphs 145–146 below.

²⁵⁵ Apart from the comments of Governments (reviewed in paragraph 99 above), this conclusion is strongly supported in the literature. Thus, Salmon, “Le fait étatique complexe ...”, p. 738, finds the notion of complex acts “[c]onfusing ... [d]angerous ... [and] useless”. Pauwelyn, *loc. cit.*, p. 428, describes article 25, paragraph 3, as “highly debatable”. See also Karl, *op. cit.*, p. 102; Wyler, *op. cit.*, p. 89; and Brownlie, *op. cit.*, p. 197 (“of doubtful value”).

²⁵⁶ See footnote 175 above.

²⁵⁷ See *I.C.J. Reports 1980* (footnote 31 above), pp. 35–36.

will not necessarily be of a continuing character, since it may be that once the information is published, the whole point of the obligation is defeated. It is thus necessary to qualify article 26 by the addition of the same phrase as is contained in article 25, paragraph 1, (“and remains not in conformity with the international obligation”).

136. Subject to this proviso, article 26 is a useful additional qualification to the proposed article dealing with completed and continuing wrongful acts. It is useful to emphasize that, in the case of obligations of prevention, the occurrence of the event in question will normally give rise to a continuing wrongful act (i.e. unless the event itself ceases, or the obligation ceases to apply to it). Indeed, in such cases the wrongful act may be progressively aggravated by the failure to suppress it. On this basis, it seems sensible to include this provision as a further paragraph in the proposed article dealing with the distinction between completed and continuing wrongful acts.

(x) *Conclusions on articles 18, paragraphs 3–5, and 24–26*

137. For these reasons, it is recommended that articles 18, paragraphs 3–5, and 24–26 be replaced by two articles, one dealing with the distinction between completed and continuing wrongful acts, the other dealing with breach of certain obligations of a systematic or composite character.²⁵⁸

(h) *Article 22. Exhaustion of local remedies*

138. Article 22 provides 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.

139. According to its title, article 22 deals with the well-known principle of exhaustion of local remedies (“the treatment to be accorded to aliens, whether natural or juridical persons”). These are analysed within the framework of “complex” obligations of result, as dealt with in article 21, paragraph 2.

140. The lengthy commentary to article 22 emphasizes this point. In the case of obligations in the field of diplomatic protection:

If the [injured foreigners] take no action, the situation created by the initial conduct of the State running counter to the internationally desired result cannot be rectified by subsequent action of the State capable of replacing that situation by one in conformity with the result required by the obligation ... The case here is quite different from that in which, despite the necessary initiative having been taken by the individuals concerned to obtain redress, the situation created by the initial conduct

is confirmed by a new course of conduct of the State, which is likewise incompatible with the internationally required result.²⁵⁹

But this implies that the refusal of a local remedy will itself be internationally wrongful. This may be so, as where the local court discriminates against the foreigner, or acts arbitrarily, contrary to the applicable standards of treatment. But in other cases, the exhaustion of local remedies will not involve any new or continuing wrongful conduct. It will simply confirm that, in accordance with the internal laws and procedures of the respondent State, no further local remedy is available.²⁶⁰ In such cases the local remedy is a failed cure, not part of the illness itself.

141. The commentary goes on to argue that:

If, so long as the condition of exhaustion of local remedies has not been satisfied, the injured State has no faculty to claim reparation for an internationally wrongful act allegedly committed to its detriment in the person or property of its national, it is because for the time being its new right to reparation of an injury suffered by it has not yet been created. In other words, a breach of the obligation imposed by the treaty has not yet occurred or, at least, has not yet definitively occurred.²⁶¹

But the fact that the third State may not be able to espouse the claim in terms of reparation for injury to its nationals until local remedies have been exhausted does not mean that that State has no legal interest to protect at an earlier time.²⁶² For example, it may have a strong interest in the cessation of the wrongful act.

(i) *Government comments on article 22*

142. France suggests that it should be made clear that the exhaustion of local remedies “is limited to diplomatic protection”.²⁶³ Germany queries both the location of and the need for article 22, and notes that it should “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 [their] human rights”.²⁶⁴ The United Kingdom goes further, arguing carefully for a “procedural” view of the exhaustion of local remedies rule.²⁶⁵ At the same time it suggests that the rule should be held to apply to injuries occurring outside the respondent State’s territory, except perhaps in cases of egregious breach.²⁶⁶

(ii) *The scope of the local remedies rule*

143. The local remedies rule was described by a Chamber of the Court in the *ELSI* case as “an important principle of customary international law”.²⁶⁷ In the context of a claim brought on behalf of a national (including a corporation)

²⁵⁹ *Yearbook ... 1977*, vol. II (Part Two), p. 30, para. (3) of the commentary to article 22.

²⁶⁰ See the local remedies considered in the *ELSI* case (footnote 133 above).

²⁶¹ *Yearbook ... 1977*, vol. II (Part Two), p. 35, para. (15) of the commentary to article 22.

²⁶² See *Phosphates in Morocco* (footnote 189 above), p. 28. See, however, *Yearbook ... 1977*, vol. II (Part Two), p. 50, para. (59) of the commentary to article 22.

²⁶³ *Yearbook ... 1998* (see footnote 7 above), p. 124.

²⁶⁴ *Ibid.*, p. 125.

²⁶⁵ *Ibid.* The same point was made by the Federal Republic of Germany in its comments of 1981 (*Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, pp. 75–76).

²⁶⁶ *Yearbook ... 1998* (see footnote 7 above), pp. 125–126.

²⁶⁷ *I.C.J. Reports 1989* (see footnote 133 above), p. 42, para. 50. See also the *Interhandel* case (footnote 67 above), p. 27.

²⁵⁸ See paragraph 158 below for the proposed text.

of the claimant State, the Chamber defined the rule succinctly in the following terms:

[F]or an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.²⁶⁸

The Chamber thus treated the rule as one relating to the admissibility of claims within the field of diplomatic protection. It treated the exhaustion of local remedies as being distinct, in principle, from “the merits of the case”.²⁶⁹ This is the orthodox understanding of the rule.

144. By contrast, article 22 conceives the exhaustion of local remedies within the framework of article 21, paragraph 2, in the following terms: “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 ... but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State”. In such cases, according to article 22 the breach of obligation occurs only if, and when, the effective local remedies are exhausted. As to this, several points need to be made.

145. However, most of the situations covered by the exhaustion of local remedies rule are not of this character.²⁷⁰ For example, there is a general international obligation on all States not to discriminate arbitrarily against aliens. The precise content of this obligation need not be of concern here. The point is that it is clear (a) that the exhaustion of local remedies rule applies to claims for breach of this obligation; and (b) that, nonetheless, this is not a case where the State has a choice of discriminating against aliens, on condition that it offers them compensation.²⁷¹ It is obliged not to discriminate in the first place. In such cases, the breach of international law occurs at the time when the treatment occurs. The breach is not postponed to a later date when local remedies are exhausted, or when some equivalent redress is offered. In such cases, the breach of international law having already occurred, the exhaustion of local remedies is a standard procedural condition to the admissibility of the claim.²⁷²

146. It is true that there are cases where “the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State” (art. 22). An example is provided by the common provision

²⁶⁸ *I.C.J. Reports 1989* (see footnote 133 above), p. 46, para. 59.

²⁶⁹ *Ibid.*, p. 48, para. 63.

²⁷⁰ See paragraph 74 above.

²⁷¹ See paragraphs 62–63 above.

²⁷² Thus the exhaustion of local remedies rule can be waived, as the Chamber in the *ELSI* case noted (*I.C.J. Reports 1989* (footnote 133 above), p. 42, para. 50). See also the resolution on the exhaustion of local remedies rule, adopted in 1956 by the Institute of International Law, according to which “the rule does not apply ... in cases where its application has been waived by agreement of the States concerned” (*Annuaire de l'Institut de Droit International*, vol. 46 (Basel, 1956), p. 358). But if there is no breach, there would be no international claim in the first place. The same point might be made by reference to those cases where it was held that a State was estopped from raising the exhaustion of local remedies, by its failure to raise it at a preliminary stage, for example, *Aydin v. Turkey*, European Court of Human Rights, *Judgment of 25 September 1997*. See also the *Ireland v. United Kingdom* case (footnote 209 above), cited in paragraph 125 above.

in many bilateral investment protection treaties, to the effect that investments may not be expropriated “except for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and upon payment of compensation”.²⁷³ In a case where a non-discriminatory but uncompensated expropriation occurs, it is the failure to compensate which constitutes the gist of the breach, and this failure may be judged to have occurred at a time subsequent to the taking. Nonetheless, the failure is still analytically distinct from the exhaustion of local judicial remedies, and the breach in such a case would occur at the time the failure to compensate definitively occurred, whatever form that failure took.²⁷⁴

147. There may also be cases where the failure to provide an adequate local remedy is itself the relevant internationally wrongful act. This is so, for example, where the injury to the alien is caused by conduct not attributable to the State,²⁷⁵ or where the violation involves a breach of due process standards, laid down in a treaty or by general international law, which occurs at the time of seeking the remedy.²⁷⁶ But this is clearly not the situation to which article 22 is directed, since in such cases the basis of the claim brought to the State court is not itself a “situation not in conformity with the result required of [the State] by an international obligation”. Rather, that situation occurs subsequently, when the court’s own action conflicts with the State’s obligation.

(iii) *When is a breach of international law involving the treatment of aliens committed?*

148. The formulation in article 22 is strongly reminiscent of the Italian argument in the *Phosphates in Morocco* case.²⁷⁷ In that case France had only accepted the jurisdiction of PCIJ with respect to “situations or facts subsequent to” 1931. Part of Italy’s claim related to the dispossession of certain Italian nationals arising from a

²⁷³ See, for example, the Agreement between the Government of the People’s Republic of China and the Government of the French Republic concerning the Reciprocal Encouragement and Protection of Investments, art. 4, para. 2 (*International Legal Materials*, vol. XXIV, No. 3 (May 1985), p. 553).

²⁷⁴ For example, the enactment of a law expropriating property and expressly excluding any compensation would constitute a breach of such a treaty provision, but the exhaustion of local remedies rule would be a prerequisite to the admissibility of an international claim on behalf of any person so expropriated. Thus, for example, the affected owner might need to challenge the constitutionality of the law, if such a challenge were available. See, for example, the judgement of the European Court of Human Rights in the case of *Lithgow and Others*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 102, *Judgment of 8 July 1986* (Council of Europe, Strasbourg, 1987), p. 74, para. 206; and the decision of the European Commission of Human Rights, No. 27/55 of 31 May 1956, *Documents and Decisions, 1955–1956–1957* (The Hague, Martinus Nijhoff, 1959), pp. 138–139.

²⁷⁵ See the decisions of the Mexico/United States of America General Claims Commission in *L. F. H. Neer and Pauline Neer (U.S.A) v. United Mexican States*, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 60–66, and the *Janes* case, *ibid.*, pp. 82–98.

²⁷⁶ See, for example, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; article 2, paragraph 3, of the International Covenant on Civil and Political Rights; article 13 of the European Convention on Human Rights; and article 25 of the American Convention on Human Rights.

²⁷⁷ See footnote 189 above. For discussion of the case, see *Yearbook ... 1977*, vol. II (Part Two), pp. 38–40, paras. (25)–(28) of the commentary to article 22.

decision of the Mines Department of Morocco in 1925. It was argued that the decision of 1925 “only became definitive as a result of certain acts subsequent to the crucial date and of the final refusal to remedy in any way the situation created in 1925”, and that this refusal only occurred after 1931.²⁷⁸ The Court rejected this argument (by 11 votes to 1). In its view, the 1925 decision was the unlawful act, and the subsequent refusal to alter that decision merely marked “a phase in the discussion which had arisen” following the decision of 1925, and was not an independent source of complaint:

[I]t is in this decision that we should look for the violation of international law—a definitive act which would, by itself, directly involve international responsibility. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States. In these circumstances the alleged denial of justice ... merely results in allowing the unlawful act to subsist.²⁷⁹

As this language implies, the Court was not concerned with the question whether the allegedly unlawful conduct of France on behalf of Morocco involved a continuing unlawful act; indeed the Court implied that there was such an act.²⁸⁰ The question was whether the alleged illegality arose prior to 1931 for the purposes of applying France’s Optional Clause reservation, and the Court held that it did. This holding (although concerned with the Court’s jurisdiction rather than the substance of State responsibility) directly contradicts the language of article 22.²⁸¹

(iv) *Conclusions on article 22*

149. For these reasons (in addition to those given in relation to articles 21 and 25, paragraph 3), article 22 cannot stand. The question is whether it should simply be deleted or replaced by some other provision dealing with the exhaustion of local remedies. There is a case for simple deletion, since it is not in general the function of the draft articles to deal with questions of the admissibility of international claims. Moreover, the satisfactory formulation of the local remedies rule would require more than a single article. Issues to be considered include the definition of “local remedies” and of their exhaustion,²⁸² the distinction between “direct” State-

to-State claims (to which the rule does not apply) and “indirect” claims to diplomatic protection (to which it does apply),²⁸³ the application of the local remedies rule to other cases, e.g. those involving breaches of human rights irrespective of nationality,²⁸⁴ the application of the rule to injuries occurring outside the territory of the respondent State,²⁸⁵ whether there should be an exception to the rule for cases of egregious breach, or for mass violations,²⁸⁶ and the issue of waiver.²⁸⁷ These questions will be considered further by the Commission in its work on the topic of diplomatic protection.²⁸⁸ On the other hand, claims on behalf of aliens have historically been a major basis for State responsibility, and the exhaustion of local remedies rule does constrain claims for the breach of an international obligation, which is the subject matter of chapter III. A satisfactory balance would be achieved if article 22 were reformulated as a “without prejudice” clause, leaving its detailed operation to be dealt with by the Commission in its work on diplomatic protection.²⁸⁹

150. As to the placement of the proposed article, there is a case for including it in part two of the draft articles, since it relates to the implementation of responsibility more than to its origins. For the time being, however, the article can remain part of chapter III. The question of its placement can be reconsidered once the content of part two is determined.

3. OTHER ISSUES RELATING TO BREACH OF AN INTERNATIONAL OBLIGATION

151. Two further issues need to be considered within the framework of chapter III.

(a) *The spatial effect of international obligations and questions of breach*

152. The first concerns the potential relevance of considerations *ratione loci* for the breach of an

²⁷⁸ *Phosphates in Morocco* (see footnote 189 above), pp. 24 and 27.

²⁷⁹ *Ibid.*, p. 28.

²⁸⁰ On this point Judge van Eysinga agreed. His dissent turned on the interpretation of the French declaration (*ibid.*, pp. 34–35). Judge Cheng Tien-Hsi stressed that “[t]he monopoly, though instituted by the dahir of 1920, is still existing to-day ... If it is wrongful, it is wrongful not merely in its creation but in its continuance” (*ibid.*, p. 36). This was no doubt correct, but it fails to address the point at issue. The French reservation was in the following terms: “... any disputes which may arise after* the ratification of the present declaration with regard to situations or facts subsequent to such ratification” (*ibid.*, p. 34). The Court, adopting a restrictive interpretation of the French reservation, held that the dispute both related to and arose from situations or facts prior to the critical date (*ibid.*, pp. 24 and 26–27). For the Court, it was not relevant that those situations or facts gave rise to a continuing wrongful act extending in time after the critical date. No new dispute arose after that date, but only the continuation of an existing dispute.

²⁸¹ See also the *Claim of Finnish Shipowners against Great Britain in respect of the use of certain Finnish vessels during the war*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1484; and *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 4.

²⁸² Briefly discussed in *Yearbook ... 1977*, vol. II (Part Two), pp. 47–48, commentary to article 22, paras. (47)–(51).

²⁸³ An associated question is whether the exhaustion of local remedies rule applies to injuries to State organs, agents and corporations (*ibid.*, pp. 45–46, paras. (43)–(45)).

²⁸⁴ The Commission decided that it was premature to express a view on this issue, noting that the human rights treaties contained an express stipulation to that effect (*ibid.*, p. 46, para. (46)). On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, among others, Amerasinghe, “The rule of exhaustion of domestic remedies in the framework of international systems for the protection of human rights”, p. 257; Cançado Trindade, *op. cit.*; Guinand, “La règle de l’épuisement des voies de recours internes dans le cadre des systèmes internationaux de protection des droits de l’homme”, p. 471; Sulliger, *L’épuisement des voies de recours internes en droit international général et dans la Convention européenne des droits de l’homme*; and Wyler, *op. cit.*, pp. 65–89.

²⁸⁵ This is discussed in detail in *Yearbook ... 1977*, vol. II (Part Two), pp. 43–45, paras. (38)–(42) of the commentary to article 22.

²⁸⁶ *Ireland v. United Kingdom* (see footnote 209 above).

²⁸⁷ On the exhaustion of local remedies rule generally, see further Amerasinghe, *op. cit.*; Cançado Trindade, “The birth of State responsibility and the nature of the local remedies rule”; Chappetz, *La règle de l’épuisement des voies de recours internes*; Doehring, “Local remedies, exhaustion of”; and Perrin, “La naissance de la responsabilité internationale et l’épuisement des voies de recours internes dans le projet d’articles de la Commission de droit international”.

²⁸⁸ See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/484, especially pp. 312–313, para. 18, and p. 317, para. 55.

²⁸⁹ For the text of the proposed provisions, see paragraph 158 below.

international obligation. Articles 12–13 (as adopted on first reading) dealt with the conduct of a third State or organization on the territory of a State. They provided that the location of such conduct was not, as such, a ground for it to be attributed to the host State. But there is no article in part three that deals with “the spatial dimension of wrongfulness”.²⁹⁰ This is slightly paradoxical. It is difficult to conceive of location as decisive for attribution (either conduct is that of the State or it is not),²⁹¹ whereas there is no doubt that where an act has occurred (within the territory of a State, or at least on territory within its jurisdiction or control) can be very relevant to the question whether there has been a breach of an obligation. The link between the two found its classical expression in the dictum of Arbitrator Max Huber in *British Claims in the Spanish Zone of Morocco*, where he said that “State responsibility, in certain conditions, vis-à-vis another State with regard to nationals of the latter State seems to have always been understood as being limited to events taking place within the territory of the responsible State. Responsibility and territorial sovereignty are interdependent”.²⁹² A more recent formulation is that of ICJ in the *Namibia* case, when it said 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”.²⁹³ Many primary rules are formulated by reference to the territoriality of the conduct: for example, the rule invoked by the Court in the *Corfu Channel* case that every State has an obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States”.²⁹⁴

153. Support for the inclusion of a provision on this issue might be sought from article 29 of the 1969 Vienna Convention, which deals with the territorial scope of treaties. It provides that:

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.

Article 29 might be taken to imply, *a contrario*, that treaties are prima facie not binding on their parties in respect of conduct occurring outside their territory. But this is certainly not the case. Whether a treaty covers conduct of a State party abroad depends on the interpretation of the treaty, and there does not appear to be any presumption one way or the other. In some cases (e.g. uniform law

treaties, or rules with respect to the treatment of foreign investment), it will be clear from the treaty or from its object and purpose that the only conduct expected of the State is conduct in its own territory. But in many other cases, the State will have assumed responsibility with respect to its conduct wherever occurring. For example, the obligations on States not to commit genocide or torture apply to their conduct anywhere in the world.²⁹⁵ On the other hand, it is true that the *incidence* of certain obligations may be different in respect of the territory of a State than in respect of its conduct abroad; for example, there is a broader range of situations in which a State can use armed force on its own territory as compared with a use of force on the territory of a foreign State or on the high seas.

154. Thus, rather than dealing with the general question of the scope of treaty obligations *ratione loci* (as it might appear to do), article 29 of the 1969 Vienna Convention is really concerned with the question of whether a State is bound by a treaty with respect to all its component territories (including component units of a federal State, overseas territories, etc.). This is a matter expressly addressed in many treaties, but unless it is addressed, the treaty applies to the whole territory of each State party. Thus a State cannot claim an exemption from compliance with a treaty in respect of conduct occurring, for example, within a component colony or province. Article 29 does not address the question whether the treaty obligation only applies in respect of particular territory or whether it applies to conduct of the State wherever occurring.²⁹⁶

155. Article 29, like specific territorial application clauses in treaties, is concerned with the scope of the obligation and not with issues relating to its breach. The draft articles take as they find them the primary rules of international law giving rise to obligations. They are not concerned with questions of the territorial scope of primary rules any more than with other questions of their content or interpretation. It is true that developments in the past 15 years—for example, the *Soering* case,²⁹⁷ the *Loizidou* case²⁹⁸ and the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case²⁹⁹—have shown the potential scope *ratione loci* of many primary rules which may have been thought to apply

²⁹⁰ To use the description of Wyler, in one of the few treatments of the problem, *op. cit.*, pp. 92–119.

²⁹¹ It was partly for that reason that the deletion of articles 12–13 was recommended and provisionally accepted by the Commission in 1998 (*Yearbook ... 1998* (footnote 2 above), pp. 49–51, paras. 249–259).

²⁹² UNRIAA, vol. II (Sales No. 1949.V.1), p. 636. At issue was the responsibility of Spain for the conduct of its nationals in the international zone of Tangier. Subsequently, in Claim No. XXVIII, the Arbitrator held that:

“Since the harm was caused in the international zone, responsibility may be attributed to the authorities in the Spanish zone in only two cases: either where they have tolerated the organization on their territory of gangs of bandits who have penetrated the international zone, or where they have failed in their duties concerning the prosecution of offences committed by persons located in the zone under their administration.”

(*Ibid.*, pp. 699–700. See, further, pages 707–710.)

²⁹³ *I.C.J. Reports 1971* (see footnote 85 above), p. 54, para. 118, and see the discussion in *Yearbook ... 1998* (footnote 2 above), pp. 49–50, paras. 250–251.

²⁹⁴ *I.C.J. Reports 1949* (footnote 11 above).

²⁹⁵ As the Court held in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 212 above), p. 616, para. 31.

²⁹⁶ In its commentary to that provision (art. 25 in the 1966 draft, *Yearbook ... 1966*, vol. II, p. 180), which read: “Unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party”, the Commission mentioned proposals made by Governments to cover in the article the issue of the extraterritorial application of treaties. But it added that “[t]he article was intended ... to deal only with the limited topic of the application of a treaty to the territory of the respective parties ... In its view, the law regarding the extra-territorial application of treaties could not be stated simply in terms of the intention of the parties or of a presumption as to their intention; and it considered that to attempt to deal with all the delicate problems of extra-territorial competence in the present article would be inappropriate and inadvisable” (*ibid.*, pp. 213–214, para. (5)).

²⁹⁷ European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 161, *Judgment of 7 July 1989* (Council of Europe, Strasbourg, 1989), pp. 35–36, para. 91.

²⁹⁸ *Loizidou v. Turkey* (see footnote 224 above), paras. 52 and 62 respectively.

²⁹⁹ *I.C.J. Reports 1996* (see footnote 212 above), p. 595.

exclusively to the territory of the State itself. In each case, however, it was a question of the content or interpretation of the relevant primary rule that was at stake, and not any secondary rule of responsibility. These developments might usefully be mentioned in the commentary to article 16, but there does not seem to be any basis to formulate any article (parallel to article 29 of the 1969 Vienna Convention) dealing with the question of responsibility *ratione loci* for the breach of an obligation.

(b) *Possible distinctions between breaches by reference to their gravity*

156. Secondly, many legal systems draw distinctions for various purposes between more and less serious breaches of obligation, and international law is no exception. Thus only a “material breach” gives a right to terminate a bilateral treaty,³⁰⁰ and under part two of the draft articles the seriousness of a breach is relevant for various purposes, including the extent and form of reparation and the proportionality of possible countermeasures. In State responsibility cases more generally, courts and tribunals sometimes take the opportunity to stigmatize a breach as particularly serious,³⁰¹ or, less often, to mention possibly mitigating factors.³⁰² This is quite apart from cases where the primary rule is defined in terms of a certain level of seriousness,³⁰³ or where more serious breaches are singled out for additional consequences.³⁰⁴

157. However, there does not appear to be any basis for distinguishing between different degrees of breach, at least for the purposes of chapter III. The jurisprudence of claims tribunals, of the Iran-United States Claims Tribunal

³⁰⁰ 1969 Vienna Convention, art. 60, para. 1. Material breach is defined as an unlawful repudiation, or a violation of any “provision essential to the accomplishment of the object or purpose of the treaty” (ibid., art. 60, para. 3 (b)). The focus is on the significance of the provision, not of the violation, which seems slightly odd. Under most national legal systems, the materiality of a breach would require consideration of both factors. But see the commentary to this provision (art. 57 in the 1966 draft), in which it is said that “the right to terminate or suspend must be limited to cases where the breach is of a serious character” (Yearbook ... 1966, vol. II, p. 255, para. (9)).

³⁰¹ See, for example, the case concerning *United States Diplomatic and Consular Staff in Tehran* (footnote 31 above), p. 42, para. 91, in which the Court notes that “what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised”.

³⁰² In the case concerning the *Gabčíkovo-Nagymaros Project*, the Court began its examination of Slovakia’s responsibility by referring to “the serious problems with which Czechoslovakia was confronted as a result of Hungary’s decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty” (*I.C.J. Reports 1997* (see footnote 34 above), p. 52). But the Court concluded that Slovakia’s responsibility was nonetheless engaged by its conduct after the suspension and withdrawal of its consent by Hungary.

³⁰³ See, for example, article 7 (Obligation not to cause significant harm) of the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses.

³⁰⁴ See, for example, the notion of “grave breaches” referred to in the four Geneva Conventions of 12 August 1949 (art. 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; art. 51 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; art. 130 of the Geneva Convention relative to the Treatment of Prisoners of War; art. 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War).

and of human rights courts and committees suggests that there is no systematic distinction between more and less serious breaches in terms of the existence (as distinct from the consequences) of a breach. In part two of the draft articles, different distinctions are drawn between the degrees of seriousness of breaches for different purposes,³⁰⁵ and further distinctions may be needed. But no systematic distinction between more and less serious breaches seems to be necessary in chapter III itself.

4. SUMMARY OF PROPOSALS CONCERNING
CHAPTER III

158. For the reasons given, the Special Rapporteur proposes the following articles in chapter III. The notes appended to each article explain very briefly the changes that are proposed.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 16. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State does not comply with what is required of it under international law by that obligation, regardless of the source (whether customary, conventional or other) or the content of the obligation.

Note

1. Article 16 embodies the substance and most of the language of article 16 as adopted on first reading, with the addition of elements from articles 17 and 19, paragraph 1. See paragraphs 5–34 above.

2. Rather than the term “not in conformity with”, the term “does not comply with” is preferred, on the ground that it is more comprehensive and more apt to cover breaches both of obligations of specific conduct and obligations of result. The term “under international law” has been added, following the suggestion of one Government, to indicate that the content of obligations is a systematic question under international law, and not only the result of a given primary rule taken in isolation. Further consideration may have to be given to whether the language of article 16 is consistent with the provisions of part five dealing with circumstances precluding wrongfulness.

Article 17. Irrelevance of the origin of the international obligation breached

Note

Article 17 as adopted on first reading was not a distinct rule but rather an explanation of article 16. Its substance is included in article 16. See paragraphs 16–26 above.

Article 18. Requirement that the international obligation be in force for the State

No act of a State shall be considered internationally wrongful unless it was performed, or continued to be performed, at a time when the obligation in question was in force for that State.

Note

1. Article 18 is a reformulated version of article 18, paragraph 1, as adopted on first reading. It states the basic principle of the inter-

³⁰⁵ See articles 45, paragraph 2 (c), and 49.

temporal law as it applies to State responsibility. It is not concerned with ancillary questions such as jurisdiction to determine a breach, but only with the substantive question whether the obligation was in force at the relevant time. See paragraphs 38–44 above.

2. Article 18, paragraph 2, dealt with the impact of peremptory norms on State responsibility. Those issues will be considered elsewhere, especially in relation to chapter V of part one, and part two. See paragraphs 45–51 above.

3. Article 18, paragraphs 3–5, dealt with inter-temporal issues associated with continuing composite and complex acts and have been transferred, as far as necessary, to the articles dealing with those concepts. See articles 24–25 below.

Article 19. International crimes and international delicts

Note

The substance of article 19, paragraph 1, as adopted on first reading has been incorporated in article 16. Article 19, paragraphs 2–3, relating to the distinction between international crimes and international delicts, has been set aside pending further clarification. See paragraphs 27–33 above.

[Article 20. Obligations of conduct and obligations of result

1. An international obligation requiring a State to adopt a particular course of conduct is breached if that State does not adopt that course of conduct.

2. An international obligation requiring a State to achieve, or prevent, a particular result by means of its own choice is breached if, by the means adopted, the State does not achieve, or prevent, that result.]

Note

1. This article replaces former articles 20–21, concerned with the distinction between obligations of conduct and of result. See paragraphs 52–91 above. Paragraph 2 treats obligations of prevention in the same way as obligations of result, thereby allowing the deletion of former article 23.

2. Whether a particular obligation is one of conduct or result depends on the interpretation of the relevant primary rule. The statement of the distinction between such obligations does not exclude the possibility that a particular primary rule may give rise to obligations both of conduct and of result.

3. Article 20 is placed in square brackets at this stage because it may be thought to relate to the classification of primary rules, and because it is unclear what further consequences the distinction has within the framework of the draft articles. See paragraph 92 above.

Article 21. Breach of an international obligation requiring the achievement of a specified result

Note

The substance of article 21, paragraph 1, has been incorporated in article 20, paragraph 2. Former article 21, paragraph 2, has been deleted, for reasons explained in the report. See paragraphs 69–76 above.

Article 22. Exhaustion of local remedies

Note

Article 22 has been reformulated and relocated as article 26 *bis* below.

Article 23. Breach of an international obligation to prevent a given event

Note

The breach of obligations of prevention, dealt with in former article 23, is now covered in article 20, paragraph 2, on the basis that obligations of prevention are a form of obligation of result. See paragraphs

81–87 above. The inter-temporal aspect of obligations of prevention is addressed in article 24, paragraph 3.

Article 24. Completed and continuing wrongful acts

1. The breach of an international obligation by an act of the State not having a continuing character occurs when that act is performed, even if its effects continue subsequently.

2. Subject to article 18, the breach of an international obligation by an act of the State having a continuing character extends from the time the act is first accomplished and continues over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and its continuance remains not in conformity with the international obligation.

Note

1. Article 24 combines the essential elements of former articles 24, 25, paragraph 1, and 26, together with article 18, paragraph 3. See paragraphs 93–115 above.

2. The proposed articles avoid the use of the word “moment”. So-called “instantaneous” acts are rarely momentary, and it will rarely be necessary to date them to a precise moment. The essential distinction is between continuing wrongful acts and acts which, though their effects may continue, were completed at, or by, a particular time past.

3. In accordance with paragraph 3, corresponding to former article 26, breach of an obligation of prevention will normally be a continuing wrongful act, unless the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), or the obligation in question has ceased. Both qualifications are intended to be covered by the phrase “and its continuance remains not in conformity with the international obligation”.

Article 25. Breaches involving composite acts of a State

1. The breach of an international obligation by a composite act of the State (that is to say, a series of actions or omissions specified collectively as wrongful in the obligation concerned) occurs when that action or omission of the series occurs which, taken with its predecessors, is sufficient to constitute the composite act.

2. Subject to article 18, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act and for so long as such actions or omissions are repeated and remain not in conformity with the international obligation.

Note

1. Article 25 incorporates the substance of former articles 25, paragraph 2, and 18, paragraph 4, dealing with “composite acts”. However, for the reasons explained in the report, the notion of composite acts is limited to composite acts defined as such in the relevant primary norm. See paragraphs 116–126 above.

2. The proviso “Subject to article 18” is intended to cover the case where the relevant obligation was not in force at the beginning of the course of conduct involved in the composite acts but came into force thereafter. In such case the “first” of the acts or omissions in the series, for the purposes of State responsibility, is the first occurring after the obligation came into force. But this need not prevent a court taking into account earlier acts or omissions for other purposes (e.g. in order to

establish a factual basis for the later breaches). See paragraph 123 above.

3. The notion of “complex acts”, formulated in articles 18, paragraph 5, and 25, paragraph 3, does not seem necessary, and these provisions are accordingly deleted. See paragraphs 127–133 above.

Article 26. *Moment and duration of the breach of an international obligation to prevent a given event*

Note

Former article 26 has been incorporated as article 24, paragraph 3.

Article 26 bis. *Exhaustion of local remedies*

These articles are without prejudice to the requirement that, in the case of an international obligation concerning the treatment to be accorded by a State to foreign nationals or corporations, those nationals or corporations should have exhausted any effective local remedies available to them in that State.

Note

1. Article 22 as adopted on first reading dealt with the exhaustion of local remedies in the framework of the concept of “complex acts”. In all cases where the exhaustion of local remedies applied, the wrongful act was taken to include the failure of the local remedy. Although there may be cases where the wrongful act is constituted by the failure of the local remedy, there are other cases (e.g. torture) where this is not so, and for this and other reasons the notion of a “complex act” has been deleted. See paragraphs 138–150 above.

2. Nonetheless it is desirable to make it clear in chapter III that the occurrence of a breach of obligation is without prejudice to any requirement to exhaust local remedies that may exist under general international law. The more precise formulation of the local remedies rule can be left to be dealt with by the Commission under the topic of diplomatic protection.

3. The placement of article 26 bis may need to be reconsidered in the light of further work on the implementation of international responsibility, in chapter III of part two.

B. Part one, chapter IV. Implication of a State in the internationally wrongful act of another State

1. INTRODUCTION

(a) *The scope of chapter IV*

159. In accordance with the general principle stated in article 3, State responsibility arises when conduct attributable to a State breaches an international obligation of that State. But there may be cases where conduct of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of part one seeks to define the exceptional cases where this is so.

160. Three situations are covered in chapter IV. Article 27 deals with what in national law would be termed “complicity”, i.e. where one State provides aid or assistance to another State, thereby facilitating the commission of a wrongful act by the latter. Article 28, paragraph 1, deals with cases where one State is responsible for the internationally wrongful act of another State because it has assumed powers of direction or control over the latter, e.g. by treaty, or as a result of belligerent occupation of the

latter’s territory. Article 28, paragraph 2, deals with the extreme case where one State deliberately coerces another into committing an act which is or (but for the coercion) would be an internationally wrongful act on the part of the coerced State.³⁰⁶ In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is (or but for the coercion, would be³⁰⁷) a breach of that State’s international obligations. The “implication” of the second State in that breach arises from the special circumstance of its willing assistance in, its direction or control over, or its coercion of, the conduct of the acting State. But there are also important differences between the three cases. Under article 27, the primary wrongdoer is the acting State and the assisting State has a supporting role. By contrast, in the case of coercion under article 28, paragraph 2, the coercing State is the *fons et origo* of the conduct, and the coerced State is its instrument. As formulated, article 28, paragraph 1, deals with a spectrum of cases, ranging from those where direction or control has actually been exercised by the dominant State, with the subordinate State merely following orders, to cases where the initiative has been taken by the latter and the responsibility of the dominant State derives merely from the failure to exercise a “power of direction or control”.

(b) *Accessory responsibility and cognate concepts*

161. In his seventh report on State responsibility, Mr. Ago settled on two cases to be dealt with in the chapter. The first was participation by one State in the wrongful act of another. The second was “indirect responsibility” based on the relationship between a State which directs or compels a wrongful act and the State which performs it.³⁰⁸ No general justification was, however, offered for dealing with these two cases as compared with others that might be envisaged, and the commentary is largely silent on the point. But it is useful to place the specific situations currently dealt with in chapter IV in the broader context of cooperation between several States in the commission of internationally wrongful conduct. At least the following might be envisaged:

(a) *Joint conduct.* State A combines with State B in carrying out together an internationally wrongful act. For example, if two States combine to carry out a cer-

³⁰⁶ For the *travaux* of article 27, see *Yearbook ... 1978*, vol. II (Part One), document A/CN.4/307 and Add.1 and 2, pp. 52–60; *ibid.*, vol. I, 1518th meeting, pp. 232–237 (plenary debate) and pp. 269–270 (report of the Drafting Committee). For the *travaux* of article 28, *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/318 and Add.1–4, pp. 4–27; *ibid.*, vol. I, 1532nd meeting, pp. 4–31 (plenary debate), and 1567th meeting, pp. 169–174 (report of the Drafting Committee). For discussions of the problem, see Padelletti, *Pluralità di stati nel fatto illecito internazionale*; Brownlie, *op. cit.*, pp. 189–192; Quigley, “Complicity in international law: a new direction in the law of State responsibility”; Noyes and Smith, “State responsibility and the principle of joint and several liability”; and Graefrath, “Complicity in the law of international responsibility” (which is especially useful). Earlier discussions of State “complicity” in the literature and the case law were concerned rather with problems of attribution or of the substantive standard of responsibility for the acts of private persons: see, for example, Brierly, “The theory of implied State complicity in international claims”.

³⁰⁷ This qualification is necessary because, if a State has really been coerced, the wrongfulness of its act may be precluded by force majeure: see article 31 (para. 252) and paragraph 204 below.

³⁰⁸ *Yearbook ... 1978*, vol. II (Part One), document A/CN.4/307 and Add.1 and 2, pp. 52–53, paras. 52–53.

tain operation, they may be described as acting jointly in respect of the operation as a whole, although terms such as “joint”, “joint and several”, “solidary”, derived from national legal systems, must be used with care;

(b) *Action via a common organ.* States A and B act together through a common organ in performing an act. In such a case,³⁰⁹ the organ is at the same time an organ of both States, in accordance with article 5 of the draft articles, and the conduct is attributable to both;

(c) *Agency.* State A acts on behalf of or as agent for State B in carrying out internationally wrongful conduct, but nonetheless retains its own role and responsibility for the conduct of its own organs.³¹⁰ For example, State B may request State A to perform certain acts on its behalf in the exercise of the right of collective self-defence. If the acts in question exceed what is permitted by Article 51 of the Charter of the United Nations, it may be that both the requesting and the acting State are responsible;³¹¹

(d) *Independently wrongful conduct involving another State.* State A engages in conduct, contrary to its own international obligations, in a situation where another State is involved, and the conduct of the other State is relevant or even decisive in assessing whether State A has breached its own international obligations. For example, in the *Soering* case, the European Court of Human Rights held that the United Kingdom was responsible for extraditing a person to a State not a party to the European Convention, where he would suffer inhuman or degrading treatment or punishment.³¹² Thus a State may be internationally responsible for its own conduct in allowing someone to be subjected to harmful treatment, even if the harmful treatment is inflicted on its own account by another State.³¹³ Or a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct.³¹⁴

(e) *Voluntary assistance in the commission of a wrongful act.* State A in some way assists State B in carrying out conduct which violates State B's international obliga-

tions, for example by knowingly providing an essential facility, or by financing the activity in question. This is the situation addressed by article 27. It differs from the *Soering*-type situation in that here the reason why State A's conduct is wrongful is its relationship to the wrongful conduct of State B;³¹⁵

(f) *Incitement of wrongful conduct.* State A incites or encourages State B to carry out internationally wrongful conduct, but without materially assisting it to do so;³¹⁶

(g) *Direction, compulsion or coercion.* State A compels or coerces State B to carry out internationally wrongful conduct, or State B acts under the direction and control of State A in carrying out such conduct. These cases are addressed by article 28. So too is the case of a failure to prevent wrongful conduct by State B in a field in which State A had the power to direct or control State B;

(h) *Assistance given after the wrongful conduct.* State A assists State B in escaping responsibility for internationally wrongful conduct, or in maintaining the benefits of such conduct, but without having had any involvement in the wrongful conduct itself. This is known as an “accessory after the fact” in common-law terminology;

(i) *Conduct of several States separately causing aspects of the same harm or injury.* A further possibility is that parallel wrongful conduct of several States can contribute to causing loss which, if only one of those States had acted, might not have occurred. For example, several States might contribute to polluting a river by pollutants which are much more significant, collectively and in combination, than they would have been if only one of those States had engaged in the conduct.

162. These situations are not mutually exclusive but can combine in different ways. For example, the case concerning *Certain Phosphate Lands in Nauru* concerned the responsibility of Australia towards Nauru for acts performed by it on the “joint behalf” of the three States (Australia, New Zealand, United Kingdom) which together constituted the Administering Authority for the Trust Territory of Nauru.³¹⁷ This was both a case of “joint” conduct (situation (a) above) and a case where in terms of day-to-day administration one of the States acted on behalf of the other two States as well as on its own behalf (situation (c) above).

³⁰⁹ Referred to by Mr. Ago, *ibid.*, p. 54, para. 58.

³¹⁰ If the relevant organ of State A is “placed at the disposal” of State B, in the sense provided for in article 9 of the draft articles, then only State B will be responsible for the act in question. See *Yearbook ... 1998* (footnote 2 above), p. 46, para. 230. But there are many cases where the organs of State A retain some control over the acts they perform as agent for another State, and are not merely acting ministerially. This was true, for example, of Australia in the case concerning *Certain Phosphate Lands in Nauru* (see footnote 76 above), p. 240.

³¹¹ See the case concerning *Military and Paramilitary Activities in and against Nicaragua* (footnote 68 above); and *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility*, *I.C.J. Reports 1988*, p. 69.

³¹² European Court of Human Rights (see footnote 297 above), pp. 33–36.

³¹³ The *Soering* principle has been applied by the Court in subsequent cases, although with some care: see, for example, *Cruz Varas and Others v. Sweden*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 201, *Judgment of 20 March 1991* (Council of Europe, Strasbourg, 1991); and *Vilvarajah v. the United Kingdom*, *ibid.*, vol. 215, *Judgment of 30 October 1991* (Council of Europe, Strasbourg, 1992).

³¹⁴ Thus the basis of Albania's responsibility in the *Corfu Channel* case was its failure to warn of the presence of mines in its waters which had been laid by a third State. See *I.C.J. Reports 1949* (footnote 11 above), p. 4.

³¹⁵ In the *Soering* case (footnote 297 above), the Court stressed that the conditions in the receiving country were considered as a question of fact. It said (p. 36): “[T]here is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.” Indeed it may be that, so far as the receiving State is concerned, the treatment in question is internationally lawful.

³¹⁶ See *Yearbook ... 1978* (footnote 308 above), pp. 54–56, paras. 61–65, arguing against mere incitement as a basis for responsibility. There are specific treaty obligations on States to prohibit incitement in certain contexts, e.g. Convention on the Prevention and Punishment of the Crime of Genocide, art. III (e); International Convention on the Elimination of All Forms of Racial Discrimination, art. 4 (incitement to racial hatred or discrimination).

³¹⁷ *I.C.J. Reports 1992* (see footnote 76 above), p. 240.

163. A special kind of “collective” conduct occurs where several States cooperate in establishing and maintaining an international organization to act on their behalf or, conversely, where one or more States acts on behalf of an international organization for some purpose of the organization. This raises questions of the extent to which the States concerned may be responsible either for the acts of the organization, or for the acts of individual member States carried out with its authority. For reasons explained above, however, the draft articles should not deal with cases of the responsibility of international organizations, or of member States for the acts of international organizations (including what may be termed “secondary responsibility”).³¹⁸ Thus it is not necessary to consider such questions as who is responsible for the performance of mixed agreements of the European Union, where both the European Community and its member States are parties to the agreement and issues of the division of competence arise.³¹⁹

164. Setting to one side issues of the responsibility of or for the acts of international organizations, the question is which of the cases surveyed above should be dealt with in the draft articles, and specifically in chapter IV. According to articles 1 and 3, each State is responsible for its own conduct, i.e. for conduct, attributable to it under chapter II, which is in breach of its own international obligations, the element of breach being specified in chapter III. The question is then to identify, from the different forms of joint or concerted actions of several States identified in paragraph 161 above, those which are not adequately resolved by this general principle. It seems that situations (a)–(d) and (i) do not raise any particular problems for the purposes of part one of the draft articles, although they may raise issues under part two as to the extent of reparation which each State is to bear. That leaves situations (e)–(h). Chapter IV proceeds on the basis that incitement of wrongful conduct (situation (f)) and assistance to a State after the conduct in question has been committed (situation (h)) are not generally wrongful in international law, or at any rate do not call for treatment in part one.

165. It is, however, necessary to consider the situations actually covered by articles 27–28 before asking whether any additional cases of collective, ancillary or inchoate responsibility should be dealt with, in chapter IV or elsewhere.³²⁰

³¹⁸ See *Yearbook ... 1998* (footnote 2 above), p. 46, para. 231, p. 51, para. 259, and draft article A as proposed by the Drafting Committee in 1998. In the *Certain Phosphate Lands in Nauru* case it was agreed that the “Administering Authority” for Nauru was not a separate legal person, i.e. it was not an international organization distinct from the three participating States: see *I.C.J. Reports 1992* (footnote 76 above), p. 258.

³¹⁹ See MacLeod, Hendry and Hyett, *The External Relations of the European Communities*, pp. 158–160; and Tomuschat, “Liability for mixed agreements”. For judicial authorities, see the opinion of Advocate General Jacobs in case C–316/91, *European Parliament v. Council of the European Union, Reports of Cases before the Court of Justice and the Court of First Instance*, 1994–3 (Luxembourg), especially paras. 69 et seq.; and the opinion of Advocate General Tesouro in case C–53/96, *Hermès International v. FHT Marketing Choice BV*, *ibid.*, 1998–6, paras. 14 and 20.

³²⁰ See paragraph 213 below.

(c) *Chapter IV as a statement of secondary rules?*

166. One obvious feature of article 27, and perhaps also of article 28, is that they specify that certain conduct is internationally wrongful. Article 27 says that aid or assistance “itself constitutes an internationally wrongful act”, while article 28 says that the international responsibility of one State is entailed by the wrongdoing of another in certain cases. Yet the draft articles are based upon a distinction between primary and secondary rules, and it is not their function “to define a rule and the content of the obligation it imposes”.³²¹ Article 27, at least, seems to do that, even though it does so by reference to the wrongful act by another State.

167. This aspect of chapter IV is neither stressed nor excused in the commentary, which says only that chapter IV is concerned with cases where one State is implicated in the internationally wrongful conduct of another.³²² But it may be justified in that responsibility under chapter IV is, in a sense, derivative.³²³ In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the “general part” of the law of civil or criminal obligations, as the case may be. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II. In certain circumstances, it may be justified to attribute the wrongfulness of State A’s conduct to State B, which is implicated in that conduct because of assistance given or direction or coercion exercised. Depending upon the scope of the responsibility defined by chapter IV, it is thus possible to defend articles 27–28 as falling within the scope of a draft concerned with the secondary rules of State responsibility. Care is needed to ensure that the articles do not go beyond the scope of “implication”, turning into substantive and possibly controversial primary rules. Whether they do so, however, depends upon their content rather than their classification.

2. REVIEW OF SPECIFIC ARTICLES

(a) *Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act*

168. Article 27 provides as follows:

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

169. Literally interpreted, article 27 posits a rather extensive principle of responsibility of one State for the acts of another. It treats as wrongful any “[a]id or assistance

³²¹ To use the words of the Special Rapporteur, Mr. Ago, *Yearbook ... 1970*, vol. II, document A/8010/Rev.1, p. 306, para. 66 (c), cited in *Yearbook ... 1998* (see footnote 2 above), p. 6, para. 13. For a discussion of the distinction, see paragraphs 12–18 (*ibid.*, pp. 6–7).

³²² *Yearbook ... 1978*, vol. II (Part Two), p. 98, para. (1) of the commentary to chapter IV.

³²³ Cf. the term “responsabilité dérivée” as used by Arbitrator Max Huber in *British Claims in the Spanish Zone of Morocco* (footnote 292 above), p. 648.

... rendered for the commission of an internationally wrongful act” carried out by the second State. The “mental element” of assistance is not specified in the article: what degree of awareness is required that the assisted State is engaging in an internationally wrongful act? Nor is any distinction made between degrees or types of “[a]id or assistance”, which might vary from the indispensable to the incidental.

170. The commentary to article 27 clarifies these matters considerably. First it distinguishes between participation in the wrongful act of another State and cases where “a State is or becomes a co-perpetrator of an internationally wrongful act”.³²⁴ Then it distinguishes between cases of advice, encouragement or incitement, on the one hand, and cases of actual assistance. “In the international legal order ... it is more than doubtful that the mere incitement by one State of another to commit a wrongful act is in itself an internationally wrongful act.”³²⁵ Incitement is thus to be distinguished from complicity, especially in international relations. For different reasons, cases of direction and coercion are also distinguished from complicity, and are dealt with in article 28. Thus article 27 is concerned with the case where the one State acts alone, and is primarily responsible, but another State materially assists it in the commission of a wrongful act.³²⁶

171. The commentary notes that certain forms of assistance are independently prohibited by international law. For example, the General Assembly’s Definition of Aggression defines as aggression, inter alia, the “action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State”.³²⁷ But according to the commentary, aiding and assisting the wrongful act of another State is itself wrongful, even though this is not expressly stated in any primary rule. Indeed, this is the case, irrespective of whether the principal act is a crime or a delict,³²⁸ or of whether the aid or assistance itself constitutes a wrongful act. It is sufficient that the assisting State has “an intent to collaborate in the execution of” a wrongful act.³²⁹ This is satisfied, for example, where the assisting State has “knowledge of the specific purpose for which the State receiving certain supplies intends to use them”.³³⁰ Most of the examples of State practice given in the commentary involve assistance by one State in a use of armed force by another, e.g. through allowing overflight or landing rights in the course

³²⁴ *Yearbook ... 1978*, vol. II (Part Two), p. 99, commentary to article 27, para. (2).

³²⁵ *Ibid.*, para. (3). In paragraph (4) are cited the conclusions of the Board of Commissioners under the Convention of 4 July 1831 between the United States of America and France, refusing to hold France responsible for acts of Denmark done under its influence and incitement but nonetheless independently. See Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, pp. 4473 et seq.

³²⁶ *Yearbook ... 1978*, vol. II (Part Two), pp. 101–102, commentary to article 27, para. (11).

³²⁷ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex, art. 3 (f), cited in *Yearbook ... 1978*, vol. II (Part Two), p. 102, commentary to article 27, para. (13).

³²⁸ *Yearbook ... 1978*, vol. II (Part Two), p. 102, commentary to article 27, para. (13).

³²⁹ *Ibid.*, p. 103, para. (14).

³³⁰ *Ibid.*

of a military operation by another State which is said to constitute aggression or intervention.³³¹ It should be noted that all of the examples given involve the breaches of obligations arising under primary rules by which the assisting State was itself bound.

172. Thus the Commission concluded, partly as a matter of progressive development, that a general rule prohibiting complicity or participation in the wrongful act of another State should be included in part one.³³² Such participation was not necessarily a wrong of the same gravity as the conduct assisted. Its gravity would depend, inter alia, on “the extent and seriousness of the aid or assistance actually furnished to the author of the principal wrongful act”, and this was a further reason for distinguishing it from the principal act.³³³ But for article 27 to apply, the assistance given had to be material, and it had to be given “with *intent* to facilitate the commission” of the wrongful act by the other State.³³⁴ Moreover, the assisted State must actually commit a wrongful act, so that the illegality of the conduct of the assisting State was strictly dependent on that of the assisted State.³³⁵

(i) *Comments of Governments on article 27*

173. Germany doubts whether existing international law goes as far as article 27, and calls for more precision both of the term “rendered for the commission” and of the necessary element of intent.³³⁶ The United States in substance agrees.³³⁷ Switzerland argues that article 27 “has no basis in positive law” and should be deleted.³³⁸ In an earlier comment, Sweden too questioned the breadth of article 27 as formulated, and queried whether it was not a primary rule.³³⁹

174. The United Kingdom, by contrast, supports the “basic principle” but raises a series of drafting points, which nonetheless raise issues of principle about article 27 as such. For the United Kingdom, the fundamental issue is the need to distinguish between cases where the act of the assisting State is independently wrongful and those where it is not. If it is independently wrongful, there is no need for article 27. If it is not, the principle of responsibility needs to be clearly expressed.³⁴⁰ Japan likewise is supportive of article 27 but calls for a clearer definition of the principle.³⁴¹ In an earlier comment, Mali noted that various factors had to be taken into account in determining whether aid had been rendered “for the commission of an internationally wrongful act”, but it nonetheless strongly supported the article.³⁴²

³³¹ *Ibid.*

³³² *Ibid.*, para. (16).

³³³ *Ibid.*

³³⁴ *Ibid.*, p. 104, para. (17).

³³⁵ *Ibid.*, para. (19).

³³⁶ *Yearbook ... 1998* (see footnote 7 above), p. 128.

³³⁷ *Ibid.*, p. 129.

³³⁸ *Ibid.*, p. 128.

³³⁹ *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 77.

³⁴⁰ *Yearbook ... 1998* (see footnote 7 above), pp. 128–129.

³⁴¹ A/CN.4/492 (reproduced in the present volume), comments on article 27.

³⁴² *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 101.

(ii) *Article 27 as a case of derived responsibility: two preliminary issues*

175. Article 27 provides for derived responsibility in two distinct ways. First, the assisting State is only responsible if the assisted State has actually committed an internationally wrongful act. As the commentary makes clear, the responsibility of the assisting State only arises if and when the assisted State carries out the wrongful act. Secondly, the assisting State is only responsible if it is established that the assistance was “rendered for the commission of an internationally wrongful act”. What is required is a specific intent to assist in the commission of the wrongful act by the assisted State. This raises questions both of definition and of principle, but two preliminary difficulties should first be mentioned.

176. One is the procedural difficulty of establishing the responsibility of the assisting State in judicial proceedings in the absence of the assisted State. ICJ has repeatedly affirmed that it cannot decide on the international responsibility of State A if, in order to do so, “it would have to rule, as a prerequisite, on the lawfulness” of the conduct of State B, in the latter’s absence and without its consent. This is the so-called *Monetary Gold* principle.³⁴³ By definition that principle will apply to cases under article 27, since it is of the essence of the responsibility of the assisting State that the assisted State has committed an internationally wrongful act. The wrongfulness of the assistance given by the former is dependent upon the wrongfulness of the conduct of the latter (as well as upon the former’s awareness of its wrongfulness). But although this may present practical difficulties in some cases in establishing the responsibility of the assisting State, it is not a good reason for rejecting article 27. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings. Diplomatic protests have been made in cases of wrongful assistance given to another State, and this is proper, since States are entitled to assert complicity in the wrongful conduct of another State even though courts may be incompetent to rule on the charge in the absence of that other State. In addition, the principle does not always apply even in judicial proceedings. For example, it does not apply in cases where the responsibility of the assisted State has already been established by a competent international body.³⁴⁴

177. A second difficulty relates to the development of specific substantive rules prohibiting one State from providing assistance in the commission of certain wrongful acts by other States, or even requiring third States to prevent or repress such acts. Paragraph 3 (f) of the General Assembly’s Definition of Aggression has been referred to

³⁴³ *East Timor (Portugal v. Australia)* (see footnote 26 above), p. 105, para. 35; see also *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32; and *Certain Phosphate Lands in Nauru* (footnote 76 above), p. 261, para. 55.

³⁴⁴ In the *East Timor* case, Portugal argued that the legal position of Indonesia had already been authoritatively established by earlier resolutions of the Security Council and the General Assembly. The Court denied that the resolutions went so far (*I.C.J. Reports 1995* (footnote 26 above), p. 104, para. 32). By implication, a clear and binding resolution of a competent organ might avoid the *Monetary Gold* principle: see *Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (footnote 85 above), p. 54, para. 117.

above, and there are other examples.³⁴⁵ These texts do not rely on any general principle of derived responsibility. Do they, by implication, deny the existence of any general principle?³⁴⁶ It does not seem so. Specific rules generated at different times prohibiting assistance to wrongdoing States may show the importance of preventing assistance in those contexts, but it goes too far to infer from them, *a contrario*, the non-existence of any general rule. It was not the function of the Definition of Aggression to deal with the general law of State responsibility, and to have remained silent on the point in formulating the text of article 3 would not have served the purpose of defining aggression. As to other treaty provisions (e.g. Article 2, paragraph 5, of the Charter of the United Nations), again these have a specific rationale which goes well beyond the scope and purpose of article 27 of the draft articles.

178. For these reasons, neither the procedural difficulty presented by the *Monetary Gold* principle nor the existence of specific primary rules overlapping with article 27 in certain fields provides grounds for rejecting the general principle.

179. A much more serious objection, however, relates to the scope of the principle. According to the very cryptic formulation of article 27, the aid or assistance must be shown to have been “rendered for the commission of an internationally wrongful act”*, but the one word “for” raises a number of questions. When is assistance rendered “for” such a purpose? Assistance can range from the indispensable to the incidental: how significant must it be in achieving the purpose? Must the assisting State be fully aware not only of the purpose but also of its illegality? Beyond these questions of formulation and definition lie more basic issues. In particular, does it matter that the assisting State is not itself bound by the rule whose breach it helps to achieve? If not, can such assistance ever be justified? The range of examples given in the commentary to article 27 is relatively narrow, and is limited to breaches of fundamental rules such as Article 2, paragraph 4, of the Charter of the United Nations. But article 27 itself is not so limited. Is a general rule, applicable equally to bilateral treaties and to peremptory norms, desirable? Does it have a place in the draft articles?

(iii) *The problem of intention or knowledge of wrongfulness*

180. It is clear that to impose on the assisting State a standard of strict responsibility is too harsh. A State providing material or financial aid to another should not be required to take the risk that the aid will be used to carry out an internationally wrongful act. In any event, it can be very difficult to show that particular resources were so used—especially financial resources or information. The commentary to article 27 stresses that the responsible organs of the assisting State must be aware that the assistance will be used for an unlawful purpose and must intend that result. In other words, the assistance must be given:

³⁴⁵ See paragraph 171 and footnote 326 above. See also Article 2, paragraph 5, of the Charter of the United Nations: “All Members shall . . . refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.”

³⁴⁶ See the comments of Switzerland and Germany (para. 173 above).

with the specific object of facilitating the commission of the principal internationally wrongful act in question ... [I]t is not sufficient that aid or assistance provided without such intention could be used by the recipient State for unlawful purposes, or that the State providing aid or assistance should be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act. Nor is it sufficient that this intention be "presumed"; as the article emphasizes, it must be "established".³⁴⁷

The explanation is helpful, but it is clear that, if article 27 is to be retained, these requirements should be expressed in the text of article 27 and not only in the commentary.³⁴⁸ Given the nature of inter-State relations and the great diversity of situations which may be involved,³⁴⁹ article 27 should cover only those cases where the assistance is clearly and unequivocally connected to the subsequent wrongful act. So far as the element of "intention" is concerned, this means that the relevant State organ(s) must have been aware that the conduct in question was planned, and must further have intended, by the assistance given, to facilitate its occurrence.

181. There is a further question as to intention. Must the assisting State not only be aware that the conduct will occur, but also know of its internationally wrongful character? Does "ignorance of the law" by the State officials who give the aid or assistance excuse the assisting State? Ignorance of international law is not generally an excuse for wrongful conduct by States. Is it, exceptionally, an excuse in the context of article 27? If so, does the assisting State have a duty of reasonable inquiry as to the illegality, or is it sufficient to exonerate it that the relevant officials turned a blind eye to the illegality? These are difficult questions,³⁵⁰ and they are, moreover, substantive questions. It is proposed to return to them below.³⁵¹

(iv) *The nexus between assistance and wrongful act*

182. A second issue, which is not resolved by any definition of intention, relates to the link required between the assistance and the wrongful act. A State might intend to assist in a wrongful act, fully aware of the circumstances, yet its assistance might be really irrelevant, amounting to little more than incitement or encouragement (which article 27 does not seek to cover). On the other hand, the assistance might be vital, as with the provision of a forward military base or refuelling facilities to aircraft otherwise out of range of their target. According to the commentary, "the aid or assistance must have the effect of making it *materially* easier for the State receiving the aid or assistance in question to commit an internationally wrongful act".³⁵² In principle this must be correct.

³⁴⁷ *Yearbook ... 1978*, vol. II (Part Two), p. 104, para. (18) of the commentary to article 27.

³⁴⁸ See the comments of various Governments to this effect (paras. 173–174 above).

³⁴⁹ For example, the use of military bases or of territory generally, overflight, military procurement, economic aid, training of personnel, provision of confidential information, etc.

³⁵⁰ Despite Article 102, paragraph 1, of the Charter of the United Nations, one State cannot be expected to be aware of the bilateral treaty obligations of another. If notice of wrongfulness is required, a formula analogous to article 46 of the 1969 Vienna Convention would be appropriate.

³⁵¹ See paragraphs 186–188 below.

³⁵² *Yearbook ... 1978*, vol. II (Part Two), p. 104, para. (17) of the commentary to article 27. See also paragraph (18).

To require that the aid should have been an indispensable prerequisite to the wrongdoing would invite speculation as to other contingencies, and might create loopholes to the application of the rule.³⁵³ But the term "materially" is problematic, if only because of its connection with the notion of "material breach" under article 60 of the 1969 Vienna Convention, which is defined as "the violation of a provision essential to the accomplishment" of the treaty. If the aid or assistance does not have to be essential to the accomplishment of the wrongful act, the word "materially" should be avoided. On balance it is sufficient to use the term "aids or assists", and to explain it in this sense in the commentary.

(v) *Must the assisting State be bound by the primary rule in question?*

183. Even assuming a satisfactory formulation of article 27 along the lines explained in the commentary, substantive issues remain. As currently formulated, article 27 would cover assistance by State A in the breach of an obligation by State B to which State A is not privy. As article 17 makes clear, the draft articles cover breaches of treaties as well as of obligations under other sources of international law. They cover breaches of obligations under unilateral commitments or bilateral treaties as well as obligations *erga omnes*.³⁵⁴ Yet it is far from clear that the same rule prohibiting assistance should apply to these different cases.³⁵⁵ Take the case of a bilateral treaty between State B and State C under which the two States agree not to export certain materials or technology to, or not to trade with, State A. In the language of national trade practices law, this is a secondary boycott. State A, the target State, is of course not bound by the treaty.³⁵⁶ Why should it be legally responsible if, knowing of the treaty, it assists State C in breaching? Article 27 could thereby become a vehicle by which the effect of well-publicized bilateral obligations was extended to the rest of the world. The position is surely different if the assisting State *is* bound by the primary rule, for example, if a party to a nuclear non-proliferation treaty assists another party in acquiring weapons from a third State in breach of the treaty. This suggests that article 27 should be limited to obligations which are binding upon or opposable to the assisting State.

184. One possible argument for the broader formulation of article 27 derives from analogies with national law. Under many national legal systems it is a civil wrong knowingly to assist another person in violating the latter's contractual obligations.³⁵⁷ No doubt analogies with national law can

³⁵³ To similar effect, see Quigley, loc. cit., pp. 121–122.

³⁵⁴ See paragraphs 17, 20–21 and 26 above.

³⁵⁵ As noted by Sweden in an earlier comment, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 77.

³⁵⁶ See the 1969 Vienna Convention, arts. 34–35.

³⁵⁷ The issue is not discussed in the commentary, nor indeed in the literature generally. Bouvé ("Russia's liability in tort for Persia's breach of contract") discusses a case of responsibility of a State for inducing, by coercion, a breach of a State's contract with a national of a third State, which is a different issue. Sir Hersch Lauterpacht relied on municipal analogies in arguing for the invalidity of a later treaty conflicting with an earlier one: see "The covenant as the 'higher law'" and "Contracts to break a contract", pp. 374–375. A fortiori he would have supported the view that inducing breach of a bilateral treaty is a delict. His position as to the invalidity of conflicting treaties was, however, not accepted in

be misleading, but the existence of a general principle of liability for inducing breach of contract could provide support for the breadth of article 27. The annex to the present report contains a brief comparative survey of the legal position with respect to inducing breach of contract in some national legal systems. The survey suggests that, while there is some comparative support for a general principle creating liability for inducing breach of an agreement with a third party, this support is heavily qualified. First of all, the principle is not recognized in some legal systems (e.g. those based on Islamic law), and only to a very limited extent by others (e.g. German law). In those systems where it is recognized in principle (e.g. French law, the common law), it is subject to important qualifications. In particular, the contract concerned must be lawful, the interference with it must be intentional and there must be no independent justification for the interference.

185. Moreover, even if the support to be drawn from domestic analogies such as inducing breach of contract were less equivocal than it is, there are difficulties in applying such a general principle to international relations. Treaties reflect the particular policies of the States entering into them, and international law has a strict doctrine of privity in relation to treaties. Moreover, treaties have proliferated, and many obligations to provide finance, materials or technology are incorporated in treaties. National legal systems have more rigorous controls on the legality of contracts than international law currently has for treaties,³⁵⁸ and there are ways under national law by which third parties can challenge the legality of contracts adversely affecting them which do not yet exist for treaties.³⁵⁹

186. All these considerations suggest that the principle in article 27 cannot be applied to bilateral obligations in an unqualified form. Take a case where finance or goods are to be provided pursuant to a treaty by State A to State B, and State A realizes that to comply with the treaty will produce a breach of State B's obligation to State C. Under international law both treaties are presumably valid, although this is without prejudice to the international responsibility of State B. In such circumstances, why should State A be the judge of State B's compliance? If State B insists upon performance of its treaty with State A, is State A entitled to refuse? Yet under article 27, it would appear that if State A knowingly provides the assistance, it is responsible to State C.³⁶⁰ Or take a case where a few

the 1969 Vienna Convention. Instead questions of State responsibility arise for the State with conflicting obligations: see paragraph 9 above, and Rosenne, *op. cit.*, pp. 87–89 and 93.

³⁵⁸ For example, in the context of competition law, *ultra vires* contracts of public authorities, contracts offending public policy, etc. For a comparative review, see von Mehren, "A general view of contract", pp. 29–40; and Marsh, *Comparative Contract Law: England, France, Germany*, pp. 87, 91 and 99–100.

³⁵⁹ Under articles 65 and 66 of the 1969 Vienna Convention, the procedure for invoking *jus cogens* to invalidate a treaty is apparently available only to the parties to the treaty in question, not to affected third States. In the *East Timor* case (see footnote 26 above), p. 90, Portugal did not purport to challenge the validity of the 1989 Treaty. See paragraphs 9 and 176 above.

³⁶⁰ It might be argued that State A's intention here is not to injure State C, but rather to comply with its obligations to State B. The fact remains that State A knows that its assistance will produce a breach of State B's obligation. Refined judgements of the "intention" of States, based on casuistical doctrines such as "double effect", are not a very secure

States, the only producers of a particular strategic good or raw material, enter into a treaty to limit sales and increase prices. Why should purchasers, who are not bound by that treaty, be potentially liable for inducing one of the treaty parties to sell to them at a reduced price?

(vi) *Conclusions on article 27*

187. There is a case for the deletion of article 27, on the ground that it states a primary rule and thus falls outside the scope of the draft articles.³⁶¹ Certainly, if the breadth of the article is to be maintained, it would be necessary to address the questions identified above, for example, as to the awareness of the assisting State of the legal obligations of the assisted State, or as to the existence of possible justifications for action in cases where there are conflicting obligations. Whatever view may be taken on these issues, it seems clear that they are substantive ones, which fall outside the scope of the secondary rules of State responsibility.

188. On the other hand, article 27 may be justified in the framework of chapter IV if it is limited to aid or assistance in the breach of obligations by which the assisting State is itself bound. It may be that the assisting State should not be required to judge the legal obligations of the assisted State, but it has notice of and must take responsibility for its own legal obligations. For State A deliberately to procure the breach by State B of an obligation by which both States are bound cannot be justified; a State cannot do by another what it cannot do by itself. Seen in this more limited light, the inclusion of article 27 in the draft articles can be justified, since it deals with the implication of one State in the commission of a wrongful act by another—that is to say, an act which is wrongful so far as both States are concerned.³⁶² For all these reasons, article 27 should be retained, but it should be limited to cases where the aid or assistance is given by the assisting State with knowledge of the circumstances of the internationally wrongful act; the aid or assistance materially advances the commission of that act, and the act in question would have been internationally wrongful if committed by the assisting State itself.³⁶³

basis for State responsibility. A broad rule such as that specified in article 27 could only work satisfactorily if it were open to the assisting State to justify its assistance, e.g. on the ground of an equally valid moral or legal duty. But to enact a principle of justification would plainly involve legislating in the field of the primary rules of responsibility.

³⁶¹ See Switzerland's comments in paragraph 173 above.

³⁶² This conclusion is consistent with criticisms in the literature of the breadth of article 27, although the specific solution proposed is slightly different. Thus Padelletti, *op. cit.*, would limit article 27 to obligations *erga omnes*, in view of their importance and of the fact that all the limited practice relates to such obligations. But other multilateral obligations are also important; why should parties to a multilateral treaty be able to assist each other to do what neither could lawfully do alone? Graefrath, *loc. cit.*, would also limit complicity to wrongful acts which affect the international community as a whole, and would create a presumption of intent to assist. The proposal in the text retains the element of intent, which can be demonstrated by proof of rendering aid or assistance with knowledge of the circumstances. Quigley, *loc. cit.*, generally supports article 27 as drafted, but advocates imposing upon the assisting State a duty of care to ensure that aid is not used for illegal means in case of doubt. He fails, however, to address the problem of obligations by which the assisting State is not bound.

³⁶³ For the proposed text of article 27, see paragraph 214 below.

(b) *Article 28. Responsibility of a State for an internationally wrongful act of another State*

189. Article 28 provides as follows:

1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.

2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.

3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other provisions of the present articles, of the State which has committed the internationally wrongful act.

(i) *Comments of Governments on article 28*

190. Switzerland points to the need for coordination between this provision and the provisions of chapter V dealing with coercion or duress.³⁶⁴ France notes that paragraph 1 reflects “a historically dated situation”; in paragraph 2, the term “coercion” is too wide, and should be limited to coercion under conditions which are contrary to international law.³⁶⁵ In an earlier comment, Mongolia doubted “the appropriateness of the present drafting” of article 28, and especially the unqualified use of the term “coercion”.³⁶⁶

191. Article 28 deals with two distinct cases, one involving situations of dependency (e.g. international protectorates or belligerent occupation), and one involving cases of coercion of one State by another. It is necessary to deal with them separately.

(ii) *Article 28, paragraph 1. Responsibility arising from actual or potential direction or control*

192. The commentary to paragraph 1 points to three different cases where there may be a relationship of dependency between one State and another, such as to warrant treating the dominant State as internationally responsible for the wrongful acts of the dependent State. These are: (a) international dependency relationships, especially “suzerainty” and international protectorate; (b) relationships between a federal State and States members of the federation which have retained their own international personality; (c) relationships between an occupying State and an occupied State in cases of territorial occupation.³⁶⁷ It contrasts these with situations of pure representation, where one State has assumed, even on an exclusive basis, responsibility for representing another State in international relations, but without any power of direction or control over the decision-making process of the dependent State.³⁶⁸

³⁶⁴ *Yearbook ... 1998* (see footnote 7 above), p. 129.

³⁶⁵ *Ibid.*

³⁶⁶ *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1-4, p. 76.

³⁶⁷ *Yearbook ... 1979*, vol. II (Part Two), p. 97, commentary to article 28, para. (10).

³⁶⁸ *Ibid.*, pp. 95-97, paras. (5)-(8), distinguishing the decision of Arbitrator Max Huber in *British Claims in the Spanish Zone of Morocco* (see footnote 292 above), p. 648, on the basis that the relationship between Spain and Morocco was not one of mere representation.

193. As to cases of international dependency (such as international protectorates), the commentary cites the decision of an arbitral tribunal in the *Brown* case in support of the proposition that “indirect responsibility ... should be attributed to a State for an internationally wrongful act committed by another State which is linked to it by a relationship of dependence, when the wrongful act complained of has been committed in an area of activity in respect of which the dominant State has effective power of control over the dependent State, and in that case only”.³⁶⁹ Such situations are admittedly dated, but according to the commentary this is no reason not to include such a well-established rule in the draft articles.³⁷⁰

194. As to relationships between a federal State and its component units possessing separate international personality, the commentary applies similar reasoning to conclude that “the federal State should be responsible for internationally wrongful acts attributable to the member State if they were committed in a sphere of activity subject to the control or direction of the federal State”, but not otherwise.³⁷¹

195. Finally, as to belligerent occupation, the same rule is again affirmed, relying on earlier diplomatic precedents as well as on the decision of the Franco-Italian Conciliation Commission in the *Duc de Guise* case.³⁷² In such cases the occupying State is responsible for the acts of the occupied State provided “(a) that the occupied State continued to exist as a separate subject of international law; and (b) that the internationally wrongful act was committed by the occupied State in an area of activity in which that State was subject to the direction or control of the occupying State”. This is so, irrespective of the legality of the occupation.³⁷³

196. The general rule in article 28, paragraph 1, is formulated on the basis of these three situations. According to article 28, paragraph 3, the responsibility of the dominant State is without prejudice to the responsibility of the dependent State, although the wrongfulness of the latter’s conduct might be attenuated or even precluded under chapter V, e.g. because of force majeure.

(iii) *The proper scope of paragraph 1 in the framework of the draft articles*

197. A wide range of dependency relationships is discussed in the commentary. But it must be stressed that chapter IV is only concerned with the responsibility of one State for the conduct of another State, and this has implications for the scope of article 28, paragraph 1:

(a) *Exclusion of dependent territories or component units of federal States which are not themselves States.* In most relationships of dependency between one territory and another, the dependent territory, even if it possesses some international personality, is not a State. This

³⁶⁹ *Yearbook ... 1979*, vol. II (Part Two), p. 98, commentary to article 28, para. (14), citing the *Brown* case, UNRIAA, vol. VI (Sales No. 1955.V.3), pp. 130-131.

³⁷⁰ *Ibid.*, pp. 98-99, paras. (15)-(17).

³⁷¹ *Ibid.*, p. 99, para. (18).

³⁷² See *International Law Reports* (London), vol. 18 (1951), p. 426.

³⁷³ *Yearbook ... 1979*, vol. II (Part Two), p. 101, para. (24) of the commentary to article 28.

is equally true of existing federal States. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right (and not by delegation from the federal State), the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other States. The normal principles specified in articles 5 and 10 of the draft articles apply,³⁷⁴ and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal Constitution;³⁷⁵

(b) *Disappearance of older cases of international dependency.* A further limitation on the scope of article 28 results from developments in international relations since the 1970s. Almost without exception, the older international dependency relationships have been terminated (as with the British protected States in the Arabian peninsula). Those that remain have mostly been reformulated so as to reduce or eliminate areas of uncertainty or dependency.³⁷⁶ The links between, for example, Italy and San Marino, Switzerland and Liechtenstein or New Zealand and Western Samoa are based on representation, and do not involve any legal right to direction or control on the part of the representing State. As the commentary to article 28 emphasizes, in pure cases of representation the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State.³⁷⁷

198. Nonetheless, instances exist, or can still be envisaged, where one State has the power to direct or control the activities of another State, whether by treaty, or as a result of a belligerent occupation, or for some other reason, and thus the issues raised by article 28, paragraph 1, do need to be addressed. Article 9 of the draft articles deals with the situation where the organ of one State is placed at the disposal of another, so that it acts under the sole direction or control of the receiving State.³⁷⁸ Article 28, paragraph 1, is concerned with what is almost the converse situation, where the organs of a dependent State are subject to the direction or control of another State in breaching international obligations owed by the dependent State to a third State.

(iv) *Is the criterion for implicated responsibility actual direction or the power to direct?*

199. The first point is that article 28, paragraph 1, takes as the criterion for responsibility not only actual direction or control but also the power to direct or control. If the conduct occurred “in a field of activity in which [the

dependent] State is subject to the power of direction or control of another State”, then the responsibility of the other State is engaged. There is, however, little authority for such a wide rule in cases where the “dependent” State survives as a separate State in international law.³⁷⁹

(a) *Robert E. Brown (United States) v. Great Britain.* The Arbitral Tribunal in this case held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer war, “fell far short of what would be required to make her responsible for the wrong inflicted upon Brown”. It went on to deny that Great Britain possessed power to interfere in matters of internal administration. But it also said that there was no evidence “that Great Britain ever did undertake to interfere in this way”. Accordingly the relation of suzerainty “did not operate to render Great Britain liable for the acts complained of”.³⁸⁰ The commentary infers that the existence of a mere power to interfere, even if not exercised, would have been enough to attract British responsibility, but the Tribunal did not actually say that. It was sufficient for its purposes to hold that there was neither a power to intervene nor any commitment by Great Britain to do so;

(b) *The Duc de Guise case.* The Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a time when it was under Allied occupation. But it did not base its decision on the absence of Allied power to requisition the property, or to stop Italy from doing so (which power certainly existed at the time). Rather the majority pointed to the absence in fact of any “intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees”.³⁸¹ In other words, the focus was on the exercise of power rather than its mere existence;

(c) *Drozd and Janousek v. France and Spain.* This decision of the European Court of Human Rights was discussed in the context of article 9.³⁸² The majority of the Court held that France was not responsible for decisions of the courts of Andorra, unless by its own participation in them, or by its subsequent endorsement and implementation of a flagrant denial of justice, it assumed its own responsibility for them.³⁸³ Unlike the minority, the Court was not prepared to infer French responsibility from the existence of any reserve powers France then may have possessed (itself or through the French co-prince), in the absence of any evidence of actual interference on its part.

³⁷⁴ See *Yearbook ... 1998* (footnote 2 above), pp. 50–51, paras. 253–259.

³⁷⁵ As ICJ had occasion to emphasize in the case of *LaGrand (Germany v. United States of America)*, *Provisional Measures, Order of 5 March 1999*, *I.C.J. Reports 1999*, p. 28. See also Opeskin, “International law and federal States”, p. 1.

³⁷⁶ See Duursma, *Fragmentation and the International Relations of Micro-States*, for details in relation to the European micro-States, which are now all States Members of the United Nations.

³⁷⁷ *Yearbook ... 1979*, vol. II (Part Two), pp. 94–95, para. (4) of the commentary to article 28.

³⁷⁸ See *Yearbook ... 1998* (footnote 2 above), pp. 44–46, paras. 219–231.

³⁷⁹ If the separate legal personality of the dependent State is not maintained, the case falls outside the scope of chapter IV altogether.

³⁸⁰ See footnote 369 above.

³⁸¹ See *International Law Reports* (footnote 372 above), discussed in *Yearbook ... 1979*, vol. II (Part Two), p. 101, para. (22) of the commentary to article 28.

³⁸² *Series A: Judgments and Decisions*, vol. 240, *Judgment of 26 June 1992* (Council of Europe, Strasbourg, 1992), discussed in *Yearbook ... 1998* (see footnote 2 above), p. 45, paras. 225–226.

³⁸³ *Series A: Judgments and Decisions* (see footnote 382 above), para. 110 (“the Convention does not require the Contracting Parties to impose its standards on third States or territories”). See also *Iribarne Pérez v. France*, European Court of Human Rights, *ibid.*, vol. 325–C, *Judgment of 24 October 1995*.

200. These and other cases³⁸⁴ do not support the broad proposition that whenever one State has the power to prevent another from committing an internationally wrongful act, it is responsible for failing to do so. Moreover, that proposition is undesirable in principle, since it would place a premium on intervention in the affairs of “dependent” States which are, *ex hypothesi*, still responsible for their own wrongful acts.³⁸⁵ Of course, the dominant State will have obligations of its own in relation to a dependent State or to territory under its control or occupation. But the mere fact of its having power over the dependent State in some field is not a sufficient basis for imputing to it all the wrongful acts of the dependent State in that field.³⁸⁶ Article 28, paragraph 1, should be limited to cases where a dominant State actually directs or controls conduct which is a breach of an international obligation of the dependent State.

(v) *Must the obligation breached be opposable to the dominant State?*

201. Since the dominant State must direct or control the commission of the wrongful act, there is no need to specify further a nexus between its conduct and that of the State committing the wrongful act (as was necessary for article 27).³⁸⁷ Two questions do remain, however. What information must the dominant State have of the circumstances amounting to the wrongful act which it directs or controls? Must the dominant State itself be bound by the obligation which is transgressed? The former question really only arises if a negative answer is given to the second. If the directing State is only to be responsible for conduct which would have been wrongful for itself, it will be on notice that the conduct it is directing another State to perform is or may be wrongful. On the other hand, if that State is to be considered as indirectly “bound” by the international obligations of the dependent State, the position may be different.

202. On this issue the position seems less clear than it was for article 27, since aid or assistance covers such a wide spectrum of cases and involves conduct which is very often neutral in character, whereas the concept of direction or control of wrongful conduct is already a more specific one. On balance, and for ease of application, the Special Rapporteur suggests that the same proviso be applied to article 28, paragraph 1, as to article 27. Thus the directing State should only be responsible for acts which would have been wrongful if it had carried out those acts itself. It should be stressed that this condition is of limited significance. All the cases referred

³⁸⁴ See, for example, the *Lighthouses case (Affaire relative à la concession des phares de l'Empire ottoman)*, decision of 24/27 July 1956 (*France v. Greece*), UNRIIAA, vol. XII (Sales No. 63.V.3), p. 155), claim Nos. 11 and 4. See also *International Law Reports* (London), vol. 23 (1956), especially p. 90.

³⁸⁵ For the position where the directing State is exclusively responsible for the conduct of the external affairs of the dependent State, see *British Claims in the Spanish Zone of Morocco* (footnote 292 above), pp. 648–649.

³⁸⁶ It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal apparatus of State does not mean that control was not exercised in fact by an occupying Power. See *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)*, Kammergericht of Berlin, *International Law Reports*, vol. 44 (1965), pp. 340–342.

³⁸⁷ See paragraph 182 above.

to in the commentary or in the discussion of article 28, paragraph 1, involved conduct (e.g. breaches of human rights or of obligations to aliens) which would have satisfied this condition.

(vi) *Article 28, paragraph 2. Responsibility arising from coercing another State to commit an internationally wrongful act*

203. Article 28, paragraph 2, deals with cases of coercion of one State by another. For the coercing State to be internationally responsible, article 28, paragraph 2, requires that the wrongful act should have been committed “as the result of coercion exerted ... to secure the commission of that act”. In other words, the act must actually have been committed, it must have been committed as a result of the coercion and this must have been intended by the coercing State. In such cases, the coercing State is implicated in the internationally wrongful act of the State which has been coerced.

204. There is a verbal difficulty with this formulation.³⁸⁸ If the acting State has truly been coerced, it will have been subjected to “an irresistible force” and the wrongfulness of its conduct will be precluded by force majeure under article 31. It is odd to speak of the wrongfulness of a coerced act, when the coercion amounts to force majeure, which is a circumstance precluding wrongfulness. As noted in discussing article 16, there is a problem with the relationship of chapter V to chapter III, and the existing language of article 28 reflects that problem.³⁸⁹ The proposal for article 28 set out below resolves the problem by referring to “an act which, but for the coercion, would be an internationally wrongful act”.

205. Turning to the substance of paragraph 2, the commentary suggests that, despite the nature of coercion as a form of imposition of will on the part of the coercing State, nonetheless the act of the coerced State remains its own act. Even if the coercion is itself unlawful,

the act [of the coercing State] will not for all that be identical with the act committed by the coerced State against a third State. The responsibility of the coercing State for the internationally wrongful act committed by the State coerced can therefore only be described as responsibility for the internationally wrongful act of another State.³⁹⁰

In conformity with this view, the commentary makes it clear that coercion for the purposes of article 28 is not limited to unlawful coercion:

[F]or the purposes of the present article, “coercion” is not necessarily limited to the threat or use of armed force, and should cover any action seriously limiting the freedom of decision of the State which suffers it—any measure making it extremely difficult for that State to act differently from what is required by the coercing State.³⁹¹

Although the commentary is clear on this point, the question whether coercion ought to be limited to unlawful conduct has been raised by a number of Governments.³⁹²

³⁸⁸ As noted by Switzerland (*Yearbook ... 1998* (footnote 7 above), p. 129; see also paragraph 190 above).

³⁸⁹ See paragraphs 11 and 14 above.

³⁹⁰ *Yearbook ... 1979*, vol. II (Part Two), p. 103, commentary to article 28, para. (28).

³⁹¹ *Ibid.*, para. (29).

³⁹² See the comments of France and Mongolia (para. 190 above).

(vii) *Should coercion for the purposes of article 28, paragraph 2, be limited to unlawful coercion?*

206. The choice between the alternatives is affected by questions relating to the scope of article 28, and in particular the meaning of coercion. In the Special Rapporteur's view, coercion for this purpose is nothing less than conduct which forces the will of the coerced State, giving it no effective choice but to comply with the wishes of the coercing State. It is not enough that compliance with the obligation is made more difficult or onerous. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the coerced act make it more difficult for the coerced State to comply with some other obligation.

207. But if that is the correct understanding of article 28, paragraph 2, then it does not seem necessary to limit article 28, paragraph 2, to unlawful coercion. Most cases of coercion meeting the suggested definition will be unlawful, e.g. because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention (i.e. coercive interference) in the affairs of another State. But even if coercion may be lawful in certain cases,³⁹³ article 28, paragraph 2, is concerned with the specific notion of coercion deliberately exercised to procure the breach of one State's obligation to another State. It is difficult to imagine any circumstances in which such coercion could be justified.

208. No doubt there are cases where a State is lawfully coerced. For example, a State may be compelled to withdraw from territory it has invaded by successful measures taken against it in self-defence. But the Charter of the United Nations does not envisage that measures will be taken in self-defence in order to coerce a State to breach a valid obligation to another State, so the hypothesis of self-defence can be excluded. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in part two of the draft articles, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.³⁹⁴

209. This analysis suggests that, having regard to the strictness of the conception of coercion underlying article 28, paragraph 2, it is unnecessary to limit that provision to coercion which is contrary to article 2, paragraph 4, of the Charter of the United Nations. By the same token, there is no reason why article 28, paragraph 2, should be limited to breaches of obligations by which the coercing State is also bound. If a State deliberately sets out to procure by coercion a breach of State B's obligations to State C, it should be held responsible to State C for the consequences. Moreover, in such a case, the wrongfulness of State B's conduct vis-à-vis State C will likely be precluded by distress or force majeure, so that State C's only remedy will be against State A. For these reasons, article 28, paragraph 2, should be retained,

³⁹³ On the debate about the definition and lawfulness of coercion, see Reuter, *op. cit.*, pp. 180–182, paras. 271–274.

³⁹⁴ See also the remarks of ICJ on the proper purposes of countermeasures in the case concerning the *Gabikovo-Nagymaros Project* (footnote 51 above), pp. 55–57, paras. 83–87.

with appropriate drafting amendments to reflect the points made in the commentary.³⁹⁵

(viii) *Article 28, paragraph 3. Preserving the responsibility of the acting State*

210. Finally, paragraph 3 preserves the responsibility of the State which has committed the internationally wrongful act, albeit under the direction or control or subject to the coercion of another State. As noted by France, the same savings clause would be appropriate for article 27.³⁹⁶ In addition, it should be made clear that the provisions of chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State.

3. CONCLUSIONS AS TO CHAPTER IV

211. On balance there seems to be support for the retention of chapter IV as such, and for the main elements in articles 27–28, but with the clarifications and limitations that have been explained above. To summarize, all three bases of implicated or derived responsibility need to be articulated further, largely incorporating explanations given in the commentary, but also, in the case of articles 27 and 28, paragraph 1, limiting responsibility to cases of obligations opposable to the assisting or directing State. Since articles 27 and 28, paragraph 1, have more in common with each other than they do with article 28, paragraph 2, they could conveniently be combined in a single article, leaving the distinct issue of coercion to be dealt with in article 28.

212. The remaining issue is whether other elements of ancillary or inchoate responsibility ought to be included in chapter IV. In some national legal systems, complicity and “indirect responsibility” are associated in a chapter of the law with other forms of accessory responsibility such as incitement, conspiracy and attempt. This is a field where national legal traditions diverge substantially. But one common feature appears to be that ancillary responsibility is more a feature of criminal law than it is of civil law.³⁹⁷ So far as international law is concerned, if there is to be a developed distinction between international crimes and international delicts, one might expect that ancillary responsibility would likewise be more extensive for crimes. But in common with the rest of part one (other than article 19, paragraphs 2–4, itself), chapter IV makes no such distinction.

213. Cases of inchoate responsibility do not involve the implication by one State in the wrongful conduct of another, and do not therefore fall within the scope of chapter IV. In any event, there does not seem to be any general international law rule dealing with attempts to commit wrongful conduct.³⁹⁸ Other possibilities should, however, be briefly referred to.

³⁹⁵ See paragraph 205 above.

³⁹⁶ *Yearbook ... 1998* (see footnote 7 above), p. 129.

³⁹⁷ The same is true of inchoate responsibility. Thus an attempt to commit a crime may be unlawful, whereas an attempt to commit a delict or to breach a contract is usually not. For the question when an internationally wrongful act is actually committed, as distinct from planned or prepared, see paragraphs 102–106 above.

³⁹⁸ See paragraphs 104 and 106 above.

(a) *Incitement.* Conduct by a State in inciting another to commit an internationally wrongful act was deliberately excluded from chapter IV. Only if it materially assists or actually directs or coerces another State to commit a wrongful act is a State implicated in that act.³⁹⁹ This position seems to have been approved in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, where ICJ noted that it was not concerned with “the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement”;⁴⁰⁰

(b) *Conspiracy.* Where two States conspire to commit an internationally wrongful act, it is usually in the context of the subsequent joint commission of that act. At least, one of the conspiring States may well aid or assist the other, and depending on the facts, the planning might itself constitute such assistance. However, there does not seem to be any need for a general concept of “conspiracy” in international law, and certainly there is no need for such a notion in chapter IV;

(c) *Assistance given after the commission of the wrongful act.* In certain circumstances, assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that wrongful act by the former State. In such cases it may assume responsibility for that act pursuant to article 15 *bis* as provisionally adopted in 1998.⁴⁰¹ Again, however, there seems to be neither call nor need for a separately identified notion of “complicity after the fact” in chapter IV. Specific problems (e.g. in the field of money-laundering) can be dealt with by appropriately tailored primary rules;

(d) *Other cases of joint or collective action by States.* Reverting to the catalogue of cases of possible joint or collective action by several States, set out in paragraph 161 above, the analysis contained in the commentaries to chapter IV and in the present report does not identify any further situation which needs to be dealt with in this chapter. Issues may arise, however, in terms of reparation for conduct caused jointly by two or more States. Such issues will be addressed in the context of part two of the draft articles.

214. For the reasons given, the Special Rapporteur proposes the following articles in chapter IV:

CHAPTER IV

RESPONSIBILITY OF A STATE FOR THE ACTS OF ANOTHER STATE

Note

The earlier title for this chapter was “Implication of a State in the internationally wrongful act of another State”. The new title proposed

³⁹⁹ See *Yearbook ... 1979*, vol. II (Part Two), pp. 100–101, paras. (6)–(7) of the commentary to article 27. See also Quigley, *loc. cit.*, pp. 80–81.

⁴⁰⁰ *I.C.J. Reports 1986* (see footnote 68 above), p. 129, para. 255. See also, and more categorically, Judge Schwebel, dissenting, *ibid.*, p. 388, para. 259 (“Customary international law does not know the delict of ‘encouragement’”).

⁴⁰¹ See *Yearbook ... 1998* (footnote 2 above), pp. 54–55, paras. 278–283.

is both shorter and more accurate, since what the various cases in chapter IV have in common is that State A is responsible for conduct which is actually performed by State B. Moreover, in the case where State B’s conduct is coerced by State A, the wrongfulness of that conduct may be precluded so far as State B is concerned.

Article 27. Assistance or direction to another State to commit an internationally wrongful act

A State which aids or assists, or directs and controls, another State in the commission of an internationally wrongful act is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Note

1. Article 27 as adopted on first reading covered all aid or assistance “rendered for the commission of an internationally wrongful act carried out by” the assisted State. Such aid or assistance was internationally wrongful even if, taken alone, it would not have amounted to a breach of an international obligation. As now formulated, article 27 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself. The first two limitations correspond to the intention of article 27 as adopted on first reading; the third is new. See paragraphs 179–188 above.

2. A State is not responsible for aid or assistance under article 27 unless the internationally wrongful act is actually committed by the assisted State. Article 27 does not address questions of the admissibility of judicial proceedings to establish the responsibility of the assisting State in the absence of or without the consent of the assisted State. See paragraph 176 above.

3. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act. On the other hand, mere incitement or encouragement, unaccompanied by aid or assistance, is not enough to give rise to responsibility under this article. See paragraphs 182 and 213 above.

4. The words “if it is established that”, which appeared in article 27 as adopted on first reading, are unnecessary. It is clear from article 27 that each of the specified elements must be sufficiently established for ancillary responsibility to arise, quite apart from the general rule that State responsibility has to be established and is not to be presumed. See *Yearbook ... 1998* (footnote 2 above), pp. 8–9, paras. 36–38.

5. In addition, article 27 now covers the situation which was previously dealt with under article 28, paragraph 1, *viz.* where one State directs and controls another to breach its international obligation to a third State. The same qualifications apply to the conduct of a State in directing and controlling wrongful conduct as apply to aid or assistance, that is to say, the directing State must be aware of the circumstances making the conduct of the assisted State internationally wrongful, and the completed act must be such that it would have been wrongful had it been committed by the directing State itself. See paragraphs 197–202 above.

6. Although article 27, paragraph 1, used the term “direction or control” disjunctively, in the context of a narrower formulation of the principle, it seems desirable to limit the responsibility of a third State to cases where it “directs and controls” the conduct in question. By contrast with article 28, paragraph 1, as adopted on first reading, the direction or control must actually be exercised for responsibility to arise.

Article 28. Responsibility of a State for coercion of another State

A State which, with knowledge of the circumstances, coerces another State to commit an act which, but for the coercion, would

be an internationally wrongful act of the latter State is internationally responsible for the act.

Note

1. Article 28, paragraph 2, as adopted on first reading dealt with coercion exercised by one State with a view to procuring conduct by another State which (if that State had not been coerced) would be a breach of that State's international obligations. It was not necessary that the coercion should have been independently unlawful, although in most cases it would be. This provision has been retained in a separate article. The commentary to former article 28, paragraph 2, made it clear that the coercing State had to be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct, and although this requirement might be thought to be implicit in the notion of coercion to commit a wrongful act, it is now spelled out in the article.

2. In the circumstances where coercion is used for this purpose, there is no reason to require that the act in question would have been unlawful if committed by the coercing State itself. There can be no justification for coercing another State to violate an international obligation, especially since, in circumstances where coercion has been used, the acting State may well be able to rely on the coercion as a circumstance precluding wrongfulness, thereby depriving the injured State of a remedy. See paragraphs 206–210 above.

Article 28 bis. Effect of this chapter

This chapter is without prejudice to:

(a) **The international responsibility, under the other provisions of the present articles, of the State which committed the act in question;**

(b) **Any other ground for establishing the responsibility of any State which is implicated in that act.**

Note

1. Article 28, paragraph 3, as adopted on first reading provided that that article was without prejudice to the responsibility of the State which had actually committed the wrongful act. This is equally true of article 27, and the savings clause has accordingly been applied to chapter IV as a whole.

2. Chapter IV is also without prejudice to the application of any other rule of international law defining particular conduct as wrongful, and this is made clear in paragraph (b). See paragraph 210 above.

C. Part one, chapter V. Circumstances precluding wrongfulness

1. INTRODUCTION

(a) *Overview*

215. Chapter V of part one specifies six circumstances precluding the wrongfulness of conduct otherwise internationally wrongful.⁴⁰² They are consent (art. 29); coun-

⁴⁰² For the *travaux* of chapter V, see *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/318 and Add.1–4, pp. 27–66; *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/318/Add.5–7, pp. 14–70; *Yearbook ... 1979*, vol. I, pp. 31–63, 184–187 and 195–208; *Yearbook ... 1980*, vol. I, pp. 153–194, 220–223, 227–231 and 235–240 (plenary debate); *Yearbook ... 1979*, vol. I, pp. 169–175 and 233–236; and *Yearbook ... 1980*, vol. I, pp. 270–273 (report of the Drafting Committee). For discussions of the justifications or excuses for international illegality in general, see Jagota, "State responsibility: circumstances precluding wrongfulness"; Salmon, "Les circonstances excluant l'illicéité"; and Lowe, "Precluding wrongfulness or responsibility: a plea for excuses". For discussion of circumstances precluding wrongfulness in relation to human rights, see Wyler, *op. cit.* pp. 183–219.

termeasures (art. 30); force majeure and fortuitous event (art. 31); distress (art. 32); necessity (art. 33); and self-defence (art. 34). Chapter V is completed by article 35, which reserves the possibility of compensation for damage to an injured State by an act otherwise wrongful, but the wrongfulness of which is precluded under articles 29 and 31–33. That possibility is not envisaged for countermeasures or self-defence.

216. Consistently with the philosophy underlying the draft articles, these "justifications", "defences" or "excuses", as they might variously be termed, are *prima facie* of general application. Unless otherwise provided,⁴⁰³ they apply to any internationally wrongful act, whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act, or by reason of its membership in an international organization or from any other source.

(b) *The evolution of chapter V*

217. The statement of the general justifications or excuses for non-compliance with an international obligation is a matter of first-rate importance, both for what is included and for what is excluded. The development of the current list of the grounds for non-performance seems to have been as follows:

(a) *The Hague Conference for the Codification of International Law of 1930*. In view of the replies made by Governments to the questionnaire on the responsibility of States for damages to foreigners, the Preparatory Committee of the 1930 Hague Conference drafted a number of Bases of Discussion.⁴⁰⁴ Under the heading "Circumstances under which States can decline their responsibility", it listed two:

[T]he immediate necessity of self-defence against a danger with which the foreigner threatened the State or other persons" (Basis of discussion No. 24);

[C]ircumstances justifying the exercise of reprisals against the State to which the foreigner belongs" (Basis of discussion No. 25).⁴⁰⁵

The Preparatory Committee considered that the extent of a State's responsibility in the context of diplomatic protection could also be affected by the "provocative attitude" adopted by the injured person (Basis of discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces "in the suppression of an insurrection, riot or other disturbance" (Basis of discussion No. 21). However, these issues were not taken to any conclusion;

(b) *Proposals of Mr. García Amador*. In dealing with international responsibility for injuries to aliens, Mr. García Amador proposed the following cases under the

⁴⁰³ For example, by a treaty to the contrary, which would constitute a *lex specialis* (see article 37).

⁴⁰⁴ League of Nations publication, *V. Legal, 1929.V.3*, p. 19. The Bases of Discussion are reproduced in *Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 2, p. 223–225.

⁴⁰⁵ *Ibid.* Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

heading “Exoneration from responsibility; extenuating and aggravating circumstances”.⁴⁰⁶

- (i) Force majeure;
- (ii) State of necessity;
- (iii) Fault on the part of the alien.⁴⁰⁷

On the other hand, he excluded some particular “grounds or circumstances”, either as falling outside the scope of his draft (self-defence) or as being “inadmissible” (reprisals, non-recognition of a State or Government and severance or suspension of diplomatic relations);⁴⁰⁸

(c) *Commission work on the law of treaties*. Sir Gerald Fitzmaurice in his fourth report on the law of treaties identified the following list of “circumstances justifying non-performance”:⁴⁰⁹

- (i) Acceptance of non-performance by the other party or parties;
- (ii) Impossibility of performance (force majeure);
- (iii) Legitimate military self-defence;
- (iv) Civil disturbances;
- (v) Major emergencies arising from natural causes;
- (vi) Previous non-performance by another party;⁴¹⁰
- (vii) Non-performance by way of legitimate reprisals;
- (viii) Incompatibility with a new rule (in the nature of *jus cogens*).

Among this list, items (c) (iii) and (vii) correspond to articles 34 and 30 of chapter V; items (c) (ii), (iv) and (v) are subsumed, more or less, in article 31 (force majeure and fortuitous event). Consent, distress and necessity (arts. 29, 32 and 33) did not appear in Sir Gerald’s list, or at least were not separately identified. On the other hand, chapter V does not deal with his items (c) (i) (unless it be subsumed under consent), (vi) or (viii). The question whether they should do so is discussed in due course below.⁴¹¹

(c) *Comments of Governments on chapter V as a whole*

218. France suggests that a single article enumerating the six circumstances precluding wrongfulness might be

⁴⁰⁶ *Yearbook ... 1958*, vol. II, document A/CN.4/111, p. 72. For the discussion of the circumstances by Mr. García Amador, see his third report, *ibid.*, pp. 50–55, and his report on international responsibility in *Yearbook ... 1956* (footnote 404 above), pp. 203–209.

⁴⁰⁷ These three cases were included in article 13, paragraphs 1–2 of the draft, article 13, paragraph 3, stating that “if not admissible as grounds for exoneration from responsibility, [they could] constitute extenuating circumstances in the determination of the quantum of reparation”. Mr. García Amador had also addressed with approval the notion of extinctive prescription (*Yearbook ... 1956* (footnote 404 above), p. 209).

⁴⁰⁸ *Yearbook ... 1958* (footnote 406 above), pp. 53–55.

⁴⁰⁹ *Yearbook ... 1959* (see footnote 6 above), pp. 43–47, and for his commentary, pp. 63–74.

⁴¹⁰ This is often referred to by reference to the Latin phrase “*exceptio inadimplenti contractus*” (more fully, “*exceptio inadimplenti non est adimplendum*”). Sir Gerald Fitzmaurice tended to the view that it was an implied condition in all treaties, unless expressly excluded, rather than a separate principle of law (*ibid.*, p. 70).

⁴¹¹ See paragraphs 306–331.

included in chapter III.⁴¹² But it also goes to point out the conceptual difference between some of those circumstances (consent, countermeasures and self-defence) and the others,⁴¹³ and this difference would be obscured by including all six circumstances in a single article.

219. The United Kingdom analyses at some length the nature of the “defences” provided for in chapter V. Like France, it suggests that consent, countermeasures and self-defence are in a different legal category from the others, since they render the conduct covered entirely lawful, and accordingly exclude any question of compensation to the other State concerned. Necessity and distress, by contrast, relate to conduct which is not involuntary and “do not entirely preclude the wrongfulness of the conduct”. Obligations of cessation (as soon as possible) and reparation for any injury caused should subsist in these cases.⁴¹⁴

220. Japan supports maintaining chapter V as an exhaustive list of the circumstances precluding wrongfulness: these need to be clearly defined and faithfully to reflect customary international law. It agrees with the idea of distinguishing between circumstances which mean that no issue of wrongfulness arises at all, from those which merely “preclude” wrongfulness, but would place force majeure and distress in the former category.⁴¹⁵

221. Both the United Kingdom and the United States observe that a State may by treaty expressly or impliedly exclude one of the circumstances precluding wrongfulness as an excuse for conduct not in conformity with an obligation. This possibility could be met, according to the United States, by making article 37 (*lex specialis*) applicable to part one as well as part two.⁴¹⁶

222. In the light of these comments, it is proposed to discuss the general conception of “circumstances precluding wrongfulness”, to deal in turn with articles 29–34, to consider whether any other justifications or excuses for wrongful conduct merit inclusion in chapter V and finally to consider whether any specific procedural or other consequences should flow from the invocation of chapter V.

2. THE CONCEPT OF “CIRCUMSTANCES PRECLUDING WRONGFULNESS”

223. The commentary stresses that the circumstances listed in chapter V do not “at least in the normal case” preclude responsibility that would otherwise result from an act wrongful in itself. Rather they preclude the characterization of the act as wrongful in the first place.⁴¹⁷ Chapter V is said to derive its title as well as its basic idea from the fundamental distinction “between the idea of ‘wrongfulness’, indicating the fact that certain conduct by a State conflicts with an obligation imposed on that State by a ‘primary’ rule of international law, and the idea of ‘responsibility’, indicating the legal consequences which

⁴¹² *Yearbook ... 1998* (see footnote 7 above), pp. 129–130.

⁴¹³ *Ibid.*, p. 130.

⁴¹⁴ *Ibid.*

⁴¹⁵ A/CN.4/492 (reproduced in the present volume), comments by Japan on chapter V.

⁴¹⁶ *Yearbook ... 1998* (see footnote 7 above), p. 133.

⁴¹⁷ *Yearbook ... 1979*, vol. II (Part Two), commentary to chapter V, p. 106, para. (2).

another ('secondary') rule of international law attaches to the act of the State constituted by such conduct".⁴¹⁸ The commentary concedes that, despite the general language of article 1, there could be circumstances precluding responsibility which did not preclude the wrongfulness of the act in question, but which preclude the State in question from being held responsible for it. But it denies that there would be any point in characterizing an act as wrongful without holding some State responsible.⁴¹⁹

224. Consistently with this approach, the commentary goes on to explain that the six circumstances enumerated "have one essential feature in common: that of rendering definitively or temporarily inoperative the international obligation in respect of which a breach is alleged".⁴²⁰ These are to be distinguished from attenuating or aggravating circumstances, which should be dealt with in part two of the draft articles.⁴²¹

(a) *Some preliminary distinctions*

225. The concept underlying chapter V is to be distinguished from several other arguments which may have the effect of allowing a State to avoid a claim of responsibility but which do not "preclude wrongfulness" in the sense explained in the commentary. First, and most obviously, these circumstances have nothing to do with any question of the jurisdiction of a court or tribunal over a dispute, or the admissibility of a dispute.⁴²² Secondly, they are to be distinguished from the constituent requirements of the obligation, i.e. those elements which have to exist for the issue of wrongfulness to arise in the first place, and which are in principle specified by the obligation itself. In this sense "circumstances precluding wrongfulness" operate like general defences or excuses in national legal systems, and indeed many of the circumstances identified in chapter V are similar to defences or excuses recognized by some or many legal systems (e.g. self-defence, necessity, force majeure).

226. A third distinction concerns the effect of circumstances precluding wrongfulness, as compared with the effect of the termination of the obligation itself. Here again it seems that the circumstances in chapter V operate more as a shield than a sword. While they may protect the State against an otherwise well-founded accusation of wrongful conduct, they do not strike down the obligation, and the underlying source of the obligation, the primary rule, is not affected by them *as such*. The distinction, which has not always been clearly perceived, was formulated by Sir Gerald Fitzmaurice as follows:

[S]ome of the grounds justifying non-performance of a particular treaty obligation are identical with some of those causing or justifying the *ter-*

⁴¹⁸ *Ibid.*, p. 107, para. (3).

⁴¹⁹ *Ibid.*, para. (5).

⁴²⁰ *Ibid.*, p. 108, para (9).

⁴²¹ *Ibid.*, p. 109, para. (11). In fact, there was no systematic consideration of attenuating or aggravating circumstances in part two, but see articles 42, paragraph 2, and 45, paragraph 2 (c), which deal incidentally with such circumstances.

⁴²² Conversely, a treaty exception for conduct necessary to preserve the essential security interests of a party operates as a specific conventional "circumstance precluding wrongfulness" so far as the treaty is concerned, and does not go to the jurisdiction of a court or tribunal. See the case concerning *Oil Platforms* (footnote 69 above), p. 811, para. 20.

mination of a treaty. Yet ... the two subjects are quite distinct, if only because in the case of termination ... the treaty ends altogether, while in the other [case] ... it does not in general do so, and (if a paradox is permissible) the non-performance is not only justified, but "looks towards" a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present ...⁴²³

This emerges clearly from two major cases decided since chapter V was first adopted, in both of which the distinction between non-performance and termination of an obligation was considered:

(a) Relevant aspects of the *Rainbow Warrior* arbitration have already been discussed.⁴²⁴ The Tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force (including the question whether the wrongfulness of any apparent breach was precluded);⁴²⁵

(b) ICJ was even more incisive in the *Gabčíkovo-Nagymaros Project* case. In purporting to terminate the 1977 Treaty in May 1992, Hungary had relied, inter alia, on the state of necessity, which it had already invoked in 1989–1990 as a circumstance precluding the wrongfulness of its conduct in discontinuing work on the Project. The Court crisply rejected the argument:

[E]ven if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but—unless the parties by mutual agreement terminate the Treaty—it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.⁴²⁶

227. In the light of these distinctions, it is necessary to revert to the effect of chapter V as described in the commentary, namely, that of "rendering definitively or temporarily inoperative the international obligation" in question.⁴²⁷ The first point is that, while the same facts may amount, for example, to force majeure under article 31 and to a case of supervening impossibility of performance under article 61 of the 1969 Vienna Convention, they are analytically distinct.⁴²⁸ Force majeure justifies non-performance of the obligation for so long as the event exists; a case of supervening impossibility justifies the termination of the treaty (or its suspension). One operates in respect of the particular obligation; the other with respect to the treaty which is the source of that obligation. Thus the scope of application of the two doctrines is different. So too is their mode of application. A fortuitous event itself justifies non-performance, as it were by operation of law. By contrast, a treaty is not terminated by supervening impossibility: at least one of the parties must decide to terminate it. As to obligations arising under general international law, these normally cannot be "terminated" by the unilateral act of one State even in cases such as material breach by another State or fortuitous event.

⁴²³ *Yearbook ... 1959* (see footnote 6 above), p. 41, para. 8.

⁴²⁴ See paragraph 109 above.

⁴²⁵ UNRIAA (see footnote 36 above), pp. 251–252, para. 75.

⁴²⁶ *I.C.J. Reports 1997* (see footnote 51 above), p. 63, para. 101; see also page 38, para. 47.

⁴²⁷ *Yearbook ... 1979*, vol. II (Part Two), commentary to chapter V, p. 108, para. (9).

⁴²⁸ *Ibid.*

228. Thus it is doubtful whether a circumstance precluding wrongfulness could ever render *definitively* inoperative any primary obligation. What it can do is to provide a justification for non-compliance which lasts as long as the conditions for relying on the given circumstance are met. If the primary obligation terminates, then so too does the need to rely on chapter V. Similarly, if the act which would otherwise be a breach ceases, no further question of wrongfulness arises. Chapter V is only relevant for so long as the obligation, the conduct inconsistent with it and the circumstance precluding the wrongfulness of that conduct coexist. Rather than saying that a circumstance precluding wrongfulness renders the obligation “definitively or temporarily inoperative”, it is clearer to distinguish between the existence of the primary obligation, which remains in force for the State concerned unless otherwise terminated,⁴²⁹ and the existence of a circumstance precluding the wrongfulness of conduct not in conformity with that obligation. This also avoids the oddity of saying that conduct, the wrongfulness of which is precluded by, say, necessity, is “in conformity” with the primary obligation. The conduct does not conform, but if the circumstance precludes the wrongfulness of the conduct, neither is there a breach.⁴³⁰ This was the approach taken by ICJ to chapter V of the draft articles in the *Gabčíkovo-Nagymaros Project* case. In dealing with the Hungarian plea of necessity it said:

The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that ... it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.⁴³¹

229. Of the six circumstances in chapter V, the one which presents the greatest difficulty for this analysis is consent, since it is clear that consent could itself definitively render an obligation “inoperative” and bring it to an end. However, for reasons given below, the Special Rapporteur does not believe that consent belongs within the framework of chapter V.⁴³²

(b) *Circumstances precluding wrongfulness or responsibility?*

230. Thus chapter V provides a shield against an otherwise well-founded claim for the breach of an obligation. But it is not clear that the different circumstances covered by chapter V apply in the same way or to the same extent. It seems that some (for example, self-defence and consent) render the conduct in question lawful; in other words, they preclude wrongfulness. Action which meets the requirements for self-defence as referred to in Article 51 of the Charter of the United Nations is lawful

⁴²⁹ If it is a treaty obligation, it can only be terminated under the law of treaties. If it is a unilateral obligation, it can only be terminated under the law (whatever it may be) relating to the termination of unilateral obligations. If it is an obligation arising under general international law, it can only be terminated in accordance with the relevant rules of that law concerned with the termination of customary obligations. None of this is the province of the law of State responsibility.

⁴³⁰ See paragraphs 10–14 above for a discussion of this issue in the context of article 16.

⁴³¹ *I.C.J. Reports 1997* (see footnote 51 above), p. 39, para. 48.

⁴³² See paragraphs 232–243 below.

as an exercise of an “inherent right”, as between the defending State and its aggressor.⁴³³ The position with such circumstances as distress or necessity is less clear, as a number of Governments have pointed out.⁴³⁴ It does not seem right to say that in a case of necessity or distress, the obligation in question is “inoperative”. Not merely does the obligation subsist, but it continues to exercise an influence on the situation, such that the interest of the other State or States concerned must be taken into account in determining whether the circumstances really do amount to a state of necessity or to distress.

231. This suggests that at least two categories of circumstances are covered by chapter V, a conclusion implicitly confirmed by article 35, which allows the possibility of compensation to an “injured” State in four of the cases covered by chapter V but not in two others (self-defence and countermeasures). However, before considering whether the draft articles should make a more explicit distinction between justifications (such as self-defence), which preclude wrongfulness, and excuses (such as necessity), which may have some lesser effect, it is necessary to review the actual provisions of chapter V.⁴³⁵

3. REVIEW OF SPECIFIC ARTICLES

(a) *Article 29. Consent*

232. Article 29 provides as follows:

1. The consent validly given by a State 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.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present articles, 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.

233. The commentary asks whether the principle *volenti non fit injuria* applies in international law, and gives a qualified affirmative answer to that question. For the purposes of chapter V, the question is not one of suspending, still less abrogating, the primary rule which gives rise to the obligation. Article 29 is concerned with the case where the other State (or other international legal person) concerned “consents not to general suspension of the rule ... but to non-application of the obligation provided for by the rule in a specific instance”. Normally the rule will continue to apply in future; the obligation has simply been dispensed with in a given case.⁴³⁶ But this can only be done by a valid consent, that is, by a consent which is not inconsistent with a peremptory norm. In addition, it may be that for some purposes the consent of a number

⁴³³ This does not mean that *all* international obligations in force between the two States are rendered “inoperative” by legitimate self-defence. See paragraphs 298–301 below.

⁴³⁴ See paragraphs 218–221 above.

⁴³⁵ See paragraph 355 below.

⁴³⁶ *Yearbook ... 1979*, vol. II (Part Two), commentary to article 29, p. 109, para. (2).

of States is required, in which case the consent of State C does not preclude wrongfulness in relation to State B.⁴³⁷ The examples given in the commentary mostly relate to the use of force on the territory of a State to suppress a coup, the stationing of troops abroad, humanitarian relief and rescue operations, or the arrest or detention of persons on foreign territory.⁴³⁸ But the commentary also refers to the decision in the *Russian Indemnity* case of 1912, where the Permanent Court of Arbitration held that, by accepting repayments of principal alone over 20 years without protest or reservation of its rights, Russia had waived the payment of moratory interest.⁴³⁹

234. For consent to amount to a circumstance precluding wrongfulness, it must be “*valid in international law, clearly established, really expressed (which precludes merely presumed consent), internationally attributable to the State and anterior to the commission of the act to which it refers*”.⁴⁴⁰ Moreover, the conduct must fall within the limits of the consent given.⁴⁴¹ The commentary goes on to develop these requirements in some detail, relying heavily on the requirements for a valid consent under the law of treaties.⁴⁴²

(i) *Comments of Governments on article 29*

235. As to paragraph 1, Austria queries the use of the qualifying phrase “in relation to that State”, since consent may render conduct lawful generally.⁴⁴³ France doubts the value of the term “validly given”, with its overtones of the law of treaties.⁴⁴⁴ The United Kingdom denies that consent can validly be given by all those persons whose conduct is attributable to the State under chapter II, despite a statement in the commentary apparently to that effect.⁴⁴⁵ For example, consent by an insurrectional movement would not bind the State for the purposes of article 29, even if the conduct of that movement might be attributable to the State under article 15. Secondly, in its view, the Commission should consider the question of implied or retrospective consent, especially where humanitarian action is taken in an emergency.⁴⁴⁶

⁴³⁷ *Ibid.*, para. (5), citing the issue of Austrian consent to the Anschluss of 1938, as dealt with by the International Military Tribunal at Nürnberg (United Kingdom, *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Cmd. 6964 (London, HM Stationery Office, 1946), pp. 17 et seq.; and H. Lauterpacht, ed., *Annual Digest and Reports of Public International Law Cases being a Selection from the Decisions of International and National Courts and Tribunals and Military Courts given during the year 1946* (London, Butterworth, 1951), pp. 208–210. The Tribunal denied that Austrian consent had been given, and noted that the Anschluss was in any event illegal in the absence of the consent of the parties to the Treaty of Versailles and the Peace Treaty of Saint-Germain-en-Laye.

⁴³⁸ *Yearbook ... 1979*, vol. II (Part Two), commentary to article 29, pp. 110–111, paras. (6)–(9), citing on the question of arrest on foreign territory the decision of the Permanent Court of Arbitration in the *Savarkar* case of 1911 (UNRIAA, vol. XI (Sales No. 61.V.4), pp. 252–255).

⁴³⁹ UNRIAA (see footnote 438 above), p. 446.

⁴⁴⁰ *Yearbook ... 1979* (see footnote 438 above), p. 112, para. (11).

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.*, para. (12).

⁴⁴³ *Yearbook ... 1998* (see footnote 7 above), p. 130.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Ibid.*, p. 131, citing commentary to article 29, para. (15).

⁴⁴⁶ *Ibid.*

236. As to paragraph 2, Austria asks whether the issue of peremptory norms (*jus cogens*) needs to be raised,⁴⁴⁷ a question which France answers firmly in the negative.⁴⁴⁸ The United Kingdom agrees with France, pointing to the uncertainties surrounding peremptory norms.⁴⁴⁹

(ii) *The place of consent in chapter V*

237. Most of the comments of Governments on article 29 relate to the formulation of the principle of consent, rather than the principle itself. The comments raise substantial concerns, e.g. about the scope of the word “validly” in paragraph 1 or about the reference to peremptory norms in paragraph 2. But it is not only in those respects that article 29 raises more issues than it resolves. All the other circumstances dealt with in chapter V are defined, either by the articles themselves (force majeure, distress, state of necessity) or elsewhere in the draft articles (countermeasures), or at least by reasonably well-understood and well-developed rules of general international law reflected in the Charter of the United Nations (self-defence). Only consent as a circumstance precluding wrongfulness is left to the uncertainties of phrases such as “validly”. Moreover, as France and the United Kingdom both point out, analogies with other areas of international law (attribution, the law of treaties) provide uncertain guidance as to whether a particular official had authority to “preclude the wrongfulness” of conduct by consenting to it. In the *Savarkar* case,⁴⁵⁰ for example, it was irrelevant that the brigadier who agreed to return the escapee to the British ship had no authority to enter into international agreements on behalf of France. Of course, his conduct would have been attributable to France under chapter II of part one, but again that was not the point. Rather, the question was whether his consent to the return of the escapee was sufficient. On this question article 29 provides no guidance. The commentary goes further, but some of its clarifications are not spelled out in the article itself and, more importantly, it says little or nothing as to the actual or ostensible authority to consent for the purposes of chapter V. It may well be that the question as to who has authority to consent to a departure from a particular rule depends, to some extent at least, on the particular rule. It is one thing to consent to a search of embassy premises, another to the trial of an extraditee on a charge other than that on which the person was extradited and yet another to the establishment of a military base on the territory of a State, or to the conduct of military operations against rebels located on that territory.

238. This suggests that there is a deeper problem with article 29 than one simply of formulation. Is it possible to distinguish between, on the one hand, the issue of consent as an element in the application of a rule (which is accordingly part of the *definition* of the relevant obligation) and, on the other hand, the issue of consent as a basis for precluding the wrongfulness of conduct inconsistent with the obligation? The commentary unequivocally excludes cases of consent given *after* the conduct has occurred, which it

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*, pp. 131–132.

⁴⁵⁰ See footnote 438 above.

rightly regards as a form of waiver.⁴⁵¹ But if consent must be given in advance, and if it is only validly given in some cases and not in others, and if authority to consent varies with the rule in question, then it may be asked whether the element of consent should not be seen as incorporated in the different primary rules, possibly in different terms for different rules. For example, the rule that a State has the exclusive right to exercise jurisdiction or authority on its territory is subject to the proviso that foreign jurisdiction may be exercised with the consent of the host State, and such cases are very common (e.g. commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, etc.). They do not involve, even *prima facie*, conduct not in conformity with the international obligation, and thus they fall outside the scope of chapter V, and indeed outside the scope of the draft articles as a whole. Sir Gerald Fitzmaurice referred to such cases under the rubric of “Non-performance justified *ab intra* by virtue of a condition of the treaty implied in it by international law”, and he formulated the distinction as follows:

Since the very issue, whether non-performance is justified, is one that assumes the existence of a *prima facie* or apparent obligation under the treaty, conditions expressed in or implied by the language of the treaty itself relate to the existence and scope of the obligation, not to the justification for its non-performance.⁴⁵²

He was of course dealing only with the law of treaties, but the same principle surely applies to the formulation of obligations arising under general international law (e.g. the obligation not to exercise civil jurisdiction on the territory of another State without its consent, or not to overfly its territory without prior authorization). This explains why Sir Gerald did not deal with consent as a separate “circumstance justifying non-performance”. Instead he dealt with it under the rubric of “acceptance of non-performance”, which is best considered as a form of waiver. It does not concern the question whether responsibility has arisen in the first place, but rather the loss of the right to invoke responsibility, which is outside the scope of part one.⁴⁵³

239. The distinction between “intrinsic” and “extrinsic” justifications or excuses raises a further doubt. All the other articles in chapter V relate to circumstances (force majeure, distress, necessity, an armed attack or other unlawful conduct giving a right to respond by way of self-defence or countermeasures) which were present at the time of the wrongful act. The commentary limits article 29 to consent given in advance, yet such consent validly given implies that the conduct is perfectly lawful at the time it occurs. By contrast, where a State acts inconsistently with an obligation and its conduct is excused on grounds such as necessity, force majeure or distress, one is not inclined to say that the conduct is “perfectly lawful”. Rather there is an apparent or *prima facie* breach which is or may be excused. Even in the case of self-defence or countermeasures, where the conduct may be intrinsically lawful in the

circumstances, at least there is a situation which requires some explanation and some justification.⁴⁵⁴

240. Is it possible to envisage cases where an obligation is properly formulated in absolute terms (i.e. without any condition or qualification relating to consent), but nonetheless the consent of the State concerned precludes the wrongfulness of the conduct? If so, article 29 might have a valid, though limited, scope of application. The Special Rapporteur is not aware of any such case.⁴⁵⁵ All the examples given in the commentary relate to rules (non-exercise of foreign jurisdiction on the territory of a State; non-use of force against it; non-intervention in its internal affairs, etc.) which are not absolute prohibitions but which allow that the conduct in question may be validly consented to by the target State. In the absence of identifiable intermediate cases (i.e. cases where consent might validly be given in advance but where it is not part of the definition of the obligation) the position appears to be as follows: either the obligation in question allows that consent may be given in advance to conduct which, in the absence of such consent, would conflict with the obligation, or it does not. In the former case, and consent is validly given, the issue whether wrongfulness is precluded does not arise. In the latter, consent cannot be given at all. Both cases are distinguishable from waiver after a breach has occurred, giving rise to State responsibility.⁴⁵⁶

241. For all these reasons, it seems that to treat consent in advance as a circumstance precluding wrongfulness is to confuse the content of the substantive obligation with the operation of the secondary rules of responsibility, whereas to treat consent given in arrears as such a circumstance is to confuse the origins of responsibility with its implementation (*mise en oeuvre*). In neither case is article 29 properly located in chapter V, and it should be deleted. Instead, an explanation of the role of consent in relation to State responsibility should be inserted in the commentary to chapter V.

242. However, in case this recommendation is not accepted, it is appropriate to say something on the specific issues raised by Governments as to the formulation of article 29:

⁴⁵⁴ A State exercising a right to self-defence is required to notify the Security Council “immediately” (Article 51 of the Charter of the United Nations). The conditions on the proper exercise of countermeasures are currently contained in draft articles 47–50 and also imply a measure of international scrutiny.

⁴⁵⁵ One possibility, which approximates to Sir Gerald Fitzmaurice’s idea of “acceptance of non-performance” might be provided by the following example: assume State A acts with respect to State B in breach of a bilateral obligation, anticipating that State B would consent if asked, and State B, aware of State A’s conduct, does not object. But such cases do not fall within the scope of article 29 as explained in the commentary, and even if they can be envisaged they would not call for separate treatment in chapter V. It seems better to deal with them under the rubric of waiver or perhaps estoppel.

⁴⁵⁶ The distinction between consent *ex ante* and waiver can be seen from the following examples: first, the State organ with authority to waive a breach, once State responsibility which has actually arisen, may be different from the State organ which had authority to consent in advance. Secondly, in the case of an *erga omnes* obligation (e.g. pursuant to Article 2, paragraph 4, of the Charter of the United Nations), it may nonetheless be true that one particular State was competent to consent in advance to conduct which would otherwise have been a breach of the obligation (see the comment by Austria in paragraph 235 above). It does not follow, however, that only that State has a legal interest in the breach after it has occurred.

⁴⁵¹ *Yearbook ... 1979* (see footnote 438 above), p. 113, para. (16). In this respect it is odd that the commentary (*ibid.*, p. 111, para. (9)) refers to the *Russian Indemnity* case (UNRIIA, vol. XI (Sales No. 61.V.4), p. 421), which was probably a case of waiver and certainly did not involve consent in advance.

⁴⁵² *Yearbook ... 1959* (see footnote 6 above), p. 46.

⁴⁵³ See paragraph 352 below.

(a) “*Consent validly given*”. Some of the difficulties raised by this phrase have been outlined above. It is clear that some such qualification is required, since it is not the case that one State can release another from every obligation (e.g. in relation to human rights). But there is no simple or non-circular test for determining in what circumstances or to what extent a dispensation from one State precludes the wrongfulness of the conduct of another.⁴⁵⁷ Moreover, the phrase “validly given” performs not one function but two: it points to the existence of cases in which consent may not be validly given at all, and it also suggests (but without specifying) that certain modalities need to be observed in giving consent and that issues of the authority to consent may arise. Neither aspect could be developed further without going deeply into the content of the primary rules, although some of the procedural prerequisites to a valid consent, spelled out in the commentary, could be included in the text;

(b) *Consent and peremptory norms*. Again, despite the uncertainties as to the scope and content of peremptory norms which have been referred to by some Governments, it is clear that one State cannot by ad hoc consent dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, any more than it could do so in a treaty. It might be argued at least that one State could absolve another from responsibility for such a breach so far as that State was concerned. But, first of all, article 29 is concerned with circumstances precluding wrongfulness, not responsibility. Secondly, there are many cases in which State consent *does* preclude wrongfulness. Thirdly, as to consent given in advance (which is all that article 29 purports to cover), the demands of a peremptory norm are hardly satisfied by maintaining in place the formal obligation while absolving the wrongdoing State from any responsibility for its breach. Agreement to dispense with responsibility for genocide or torture seems just as inconsistent with the peremptory character of the relevant norm as would be consent to dispense with the underlying obligation. But the difficulties go further. Some peremptory norms contain an “intrinsic” consent element. For example, the rule relating to the non-use of force in international relations embodied in Article 2, paragraph 4, of the Charter of the United Nations does not apply in certain cases where one State has consented to the use of force on its territory by another State. But one State cannot by consent *eliminate* the rule relating to the use of force in international relations in its relations with another State.⁴⁵⁸ Thus it may be necessary to distinguish between a consent which applies Article 2, paragraph 4, which may be valid, and a purported consent which displaces or excludes it entirely,

⁴⁵⁷ This is true even of the simplest qualifying phrase “in the relations between those States”, since what constitutes a merely “bilateral” obligation and what goes beyond the purely bilateral depends on the content and purpose of the obligation. Thus one State may be the primary beneficiary of an obligation imposed in the general interest (e.g. as to the neutrality of that State), and it may not be able alone to release another State from compliance with the obligation. For example, in the debate over whether Austrian membership of the EEC was consistent with its neutrality, it was never argued that Austria’s consent to membership precluded wrongfulness. See, for example, Seidl-Hohenveldern, “Österreich und die EWG”; and Kennedy and Specht, “Austrian membership in the European Communities”.

⁴⁵⁸ On the extent to which “invasion pacts” and “intervention by invitation” may be lawful, see, for example, Roth, *Governmental Illegitimacy in International Law*, pp. 185–195.

which, if Article 2, paragraph 4, is peremptory in character, would be invalid;

(c) *Consent of persons other than States*. Draft article 29 envisages only the consent of States and perhaps other international legal persons,⁴⁵⁹ but there are international law rules which take into account the consent, for example, of corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the 1965 ICSID Convention, consent by an investor to arbitration under the Convention suspends the right of diplomatic protection by the investor’s national State.⁴⁶⁰ In the field of human rights, it is not the case that the individual can waive the rights conferred by international treaties, but the individual’s free consent is relevant to the application of at least some of those rights;⁴⁶¹

(d) *The limits of consent*. As the commentary notes, if wrongfulness is precluded by virtue of the consent of a State, it may only be precluded within the limits of such consent.⁴⁶² But again there may be difficulties in the application of this idea. For example, consent to a visiting force on the territory of a State may be qualified (e.g. by a requirement to pay rental for the use of facilities) but the non-payment of the rental, while it would no doubt be wrongful in itself and might have further legal consequences, would not automatically transform the visiting force into an army of occupation.

(iii) *Conclusions on article 29*

243. No doubt some of these questions can be addressed in the drafting of article 29, while others are a matter of its application in specific cases. But a more detailed examination of the wording of article 29 confirms the conclusion that it is not properly located in chapter V. To summarize, lack of consent is an intrinsic condition for wrongfulness in the case of many obligations (e.g. the obligation not to overfly the territory of another State). In such cases, to regard consent as a circumstance precluding unlawfulness is very odd since consent validly given in advance renders the conduct lawful, and there is nothing to be precluded. One might as well say that refraining from overflight is a circumstance precluding wrongfulness. Such a construction would eliminate the distinction between primary and secondary obligations. Consent given after the event is quite different, and involves the waiver of a responsibility which has already arisen: it should be dealt with under the rubric of loss of the right to invoke responsibility in part two or perhaps part three of the draft articles. For these reasons, article 29 should be deleted, and its deletion carefully explained in the commentary to chapter V, to avoid misunderstandings.

⁴⁵⁹ *Yearbook ... 1979* (see footnote 438 above), pp. 109 and 113, paras. (2) and (15) respectively.

⁴⁶⁰ Art. 27, para. 1.

⁴⁶¹ See, for example, the International Covenant on Civil and Political Rights, arts. 7, second sentence; 8, para. 3 (c) (iv); 14, para. 3 (g); and 23, para. 3.

⁴⁶² *Yearbook ... 1979* (see footnote 438 above), p. 113, para. (17).

(b) *Article 30. Countermeasures in respect of an internationally wrongful act*

244. Article 30 provides as follows:

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

245. Article 30 needs to be read in the context of the articles in part two, which specify in some detail the extent and consequences of permissible countermeasures. In other words, the content of the phrase “legitimate under international law” in article 30 is now spelled out in some detail elsewhere in the text.

246. The commentary to article 30 emphasizes the exceptional role of countermeasures in rendering “inoperative” an obligation towards a State subjected to countermeasures.⁴⁶³ Countermeasures must be taken in response to unlawful conduct by the target State, either “to inflict punishment or to secure performance”, but subject to the limits laid down by international law.⁴⁶⁴ The ensuing discussion of those limits is not fully consistent with the provisions in part two: for example, the commentary to article 29 seems to envisage that the use of military force might sometimes be lawful as a countermeasure,⁴⁶⁵ which article 50 (a) expressly denies. This emphasizes the need to consider article 30 and chapter III of part two together.

247. According to the commentary, countermeasures are no longer limited to breaches of bilateral obligations, or to responses taken by the State most directly injured. A breach of obligations *erga omnes* “is to be deemed an offence against all the members of the international community and not simply against the State or States directly affected by the breach”.⁴⁶⁶ Such a breach may thus be collectively sanctioned. Whether it involves obligations *erga omnes* or not, “the prior existence of the internationally wrongful act of the State which is the subject of the measure precludes the wrongfulness of the legitimate reaction against it”,⁴⁶⁷ so far as the wrongdoing State is concerned.⁴⁶⁸

(i) *Comments of Governments on article 30*

248. France raises a number of drafting difficulties, and also calls attention to the need to distinguish individual countermeasures from collective enforcement action under the auspices of the United Nations. Article 30 should be limited to the former.⁴⁶⁹ The United Kingdom and the United States suggest that article 30 can stand alone, without what they regard as the questionable

provisions on countermeasures in part two, in the same way that the right of self-defence is referred to without its content being described in detail.⁴⁷⁰ Japan and France, on the other hand, suggest that article 30 be specifically tied to the provisions on countermeasures in part two.⁴⁷¹

249. By contrast, Mexico questions the inclusion of article 30 at all, and in any event calls for better provisions for settlement of disputes in cases involving countermeasures.⁴⁷²

(ii) *The treatment of countermeasures in the draft articles as a whole*

250. A number of Governments have raised issues about the treatment of countermeasures in part two of the draft articles (arts. 47–50), doubting the wisdom of retaining those articles and the practicality of the dispute settlement provisions. Apart from questions of drafting and expression, the doubts come from different directions, both from States which support the principle of countermeasures and from those which oppose it. This divergence of view presents a difficulty so far as article 30 is concerned. On the one hand, it is clear that, in at least some cases, countermeasures do preclude the wrongfulness of conduct taken against a wrongdoing State in order to induce it to cease its wrongful conduct and to provide essential elements of restitution. On this basis there is a strong case for the retention of article 30 in some form in chapter V. On the other hand, the extent to which the requirements for legitimate countermeasures should be spelled out in article 30 must depend on whether the articles on countermeasures in part two are retained. If they are retained, a simple cross-reference to those conditions will be sufficient (as noted by France and Japan). If they are deleted, the position will be different and the case for some further specification of the circumstances for legitimate countermeasures in article 30 will be much stronger. It is true that chapter V does not specify in any detail the conditions for invoking consent, or self-defence. But the failure to do so in relation to consent has already been criticized, while the position of self-defence is different, *inter alia*, because the inherent right to self-defence is expressly preserved in the Charter of the United Nations, and cannot be affected by anything contained in the draft articles.

251. For these reasons the Special Rapporteur proposes that article 30 be retained in square brackets, in recognition that countermeasures may, in some cases, preclude the wrongfulness of (or at least responsibility for) the conduct in question, but that the various issues of principle and of drafting be deferred for consideration in the context of the provisions on countermeasures in part two.

(c) *Article 31. Force majeure and fortuitous event*

252. Article 31 provides as follows:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an

⁴⁶³ *Ibid.*, commentary to article 30, pp. 115–116, para. (2).

⁴⁶⁴ *Ibid.*, p. 116, para. (3).

⁴⁶⁵ *Ibid.*, commentary to article 29, p. 110, para. (5), but see pages 111–112, paras. (10)–(11).

⁴⁶⁶ *Ibid.*, commentary to article 30, p. 119, para. (12).

⁴⁶⁷ *Ibid.*, p. 120, para. (16).

⁴⁶⁸ But not, the commentary stresses, so far as concerns the rights of third States (*ibid.*, pp. 120, paras. (17)–(19), and 122, para. (24), citing the *Cysne* case of 1930 (UNRIAA, vol. II (Sales No. 1949.V.1), p. 1056. See current article 47, paragraph 3.

⁴⁶⁹ *Yearbook ... 1998* (see footnote 7 above), p. 132. Japan agrees (A/CN.4/492) (reproduced in the present volume).

⁴⁷⁰ *Yearbook ... 1998* (see footnote 7 above), p. 132.

⁴⁷¹ *Ibid.* (France); A/CN.4/492 (Japan) (reproduced in the present volume).

⁴⁷² *Yearbook ... 1998* (see footnote 7 above), p. 132.

irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.

253. The commentary to article 31 begins by noting that force majeure and fortuitous event have in common “the irrelevance of the prior conduct of the State against which” they are invoked.⁴⁷³ They are involuntary both so far as the “active” and the “passive” State is concerned.⁴⁷⁴ Because there is no clear distinction between the two situations, they are included in a single article. Both cover cases of “material impossibility”, and it does not matter whether this impossibility is due to natural or human intervention, or a combination of the two, so long as it is outside the control of the acting State.⁴⁷⁵ In drafting what became article 61 of the 1969 Vienna Convention on supervening impossibility of performance, the Commission had taken the view that force majeure was also a circumstance precluding wrongfulness in relation to treaty performance.⁴⁷⁶ The same view was taken at the United Nations Conference on the Law of Treaties, although the Conference insisted on a narrow formulation of article 61 so far as treaty termination was concerned.⁴⁷⁷

254. In State practice, most of the cases where “impossibility” has been relied on did not involve actual impossibility as distinct from increased difficulty of performance, and the plea of force majeure accordingly failed. But cases of material impossibility have occurred, e.g. where “a State aircraft ... because of damage, loss of control of the aircraft or a storm, is forced into the airspace of another State without the latter’s authorization, either because the pilot’s efforts to prevent this happening have been unsuccessful or because he could not know what was happening”, and in such cases the principle that wrongfulness is precluded has been accepted.⁴⁷⁸

255. Apart from aerial incidents, the principle in article 30 is also recognized in relation to ships in innocent passage by article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone (now article 18, paragraph 2, of the United Nations Convention on the Law of the Sea), as well as in article 7, paragraph 1, of the Convention on Transit Trade of Land-locked States. “In these provisions, *force majeure* is admittedly a constituent element of the ‘primary rules’ laid down therein, but the very fact that it has been incorporated in these rules is clearly an express confirmation, in relation to particular cases, of a general principle of customary international law whereby *force majeure* has the effect of precluding wrongfulness.”⁴⁷⁹ The principle was also accepted by

⁴⁷³ *Yearbook ... 1979* (see footnote 438 above), commentary to article 31, p. 122, para. (2).

⁴⁷⁴ *Ibid.*, p. 123, para. (4).

⁴⁷⁵ *Ibid.*, para. (7).

⁴⁷⁶ *Ibid.*, p. 124, para. (9), citing *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 255.

⁴⁷⁷ *Ibid.*, pp. 124–125, commentary to article 31, para. (10).

⁴⁷⁸ *Ibid.*, p. 125, para. (12), citing cases of accidental intrusion into airspace attributable to weather, and also cases of accidental bombing of neutral territory attributable to navigational errors during the First World War.

⁴⁷⁹ *Ibid.*, commentary to article 31, p. 126, para. (16).

the Permanent Court of Arbitration. In the *Lighthouses* case, a lighthouse owned by a French company had been requisitioned by the Government of Greece in 1915 and was subsequently destroyed by enemy action. The Court denied the French claim for restoration of the lighthouse on grounds of force majeure.⁴⁸⁰ In the *Russian Indemnity* case, the principle was accepted, but the plea of force majeure failed on the facts because the payment of the debt was not materially impossible.⁴⁸¹ Force majeure was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by PCIJ in the *Serbian Loans* and *Brazilian Loans* cases.⁴⁸²

256. After a thorough review of practice, case law and doctrine, the commentary concludes by affirming the principle, but it stresses that it only applies where the impossibility was irresistible and was objectively unforeseen, so that the State concerned had “no real possibility of escaping the effects of such a force or event”. Moreover, the State “*must not itself have contributed, intentionally or through negligence, to the occurrence of the situation of material impossibility*”.⁴⁸³

(i) *Comments of Governments on article 31*

257. Austria expresses the view that article 31 blurs objective and subjective elements in a confusing way, and suggests that the notion of “material impossibility” should be developed in preference to “fortuitous event”.⁴⁸⁴ The United Kingdom accepts the principle stated in article 31 but also calls for it to be limited to exceptional cases of material impossibility which are beyond the control of the State concerned.⁴⁸⁵ France suggests that the two phrases “force majeure” and “fortuitous event” relate to the same regime; the article should be revised to eliminate redundancy.⁴⁸⁶ None of these comments questions the need for article 31 in some form.

(ii) *The application of article 31 in recent practice*

258. In the *Rainbow Warrior* arbitration, France relied on force majeure as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The Tribunal dealt with the point briefly:

New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering

⁴⁸⁰ *Ibid.*, p. 127, para. (20), citing UNRIAA, vol. XII (Sales No. 63.V.3), pp. 219–220. Many other cases of force majeure were catalogued in a study prepared by the Secretariat (*Yearbook ... 1978*, vol. II (Part One), document A/CN.4/315, “‘Force majeure’ and ‘fortuitous event’ as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine”, pp. 61–227).

⁴⁸¹ *Yearbook ... 1979*, vol. II (Part Two), commentary to article 31, p. 128, para. (22), citing UNRIAA (see footnote 451 above), p. 443.

⁴⁸² *Ibid.*, paras. (23)–(24), citing *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 33–40; and *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21*, p. 120.

⁴⁸³ *Ibid.*, p. 132, para. (36).

⁴⁸⁴ See footnote 7 above.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ *Ibid.* In addition it suggests that paragraph (2) is redundant and can be omitted.

performance more difficult or burdensome does not constitute a case of *force majeure*.⁴⁸⁷

Thus the decision adds to the many cited in the commentary and in the Secretariat survey⁴⁸⁸ which accept the principle that wrongfulness is precluded in international law, as well as in many systems of national law, by force majeure, while at the same time attaching stringent conditions to its application.

259. There is of course a distinction between force majeure as a circumstance precluding wrongfulness and impossibility of performance as a ground for termination of a treaty. Force majeure applies both to treaty and to non-treaty obligations, and it applies by operation of law on the happening of a situation of force majeure. Impossibility of performance, like other grounds for the termination of a treaty, has to be formally invoked by a party, and it applies only after it has been duly invoked. In addition, the “degree of difficulty” associated with force majeure as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 of the 1969 Vienna Convention for termination on grounds of supervening impossibility, as ICJ pointed out in the *Gabčíkovo-Nagymaros Project* case:

Article 61, paragraph 1, requires the “permanent disappearance or destruction of an object indispensable for the execution” of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties ... Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.⁴⁸⁹

260. In addition to its application in inter-State cases as a matter of public international law, force majeure has substantial currency in the field of international trade and mixed arbitration, and probably qualifies as a general principle of law.⁴⁹⁰

(a) Chapter V of part III of the United Nations Convention on Contracts for the International Sale of Goods deals with provisions common to the obligations of the seller and of the buyer. Section IV is entitled “Exemptions”, and contains only two provisions, article 79 dealing with unavoidable impediments and article 80 dealing with the *exceptio inadimpleti contractus*. Article 79 does not use the term “force majeure” but it covers the same field. A party is not liable for a failure to perform if he proves that the failure was due to

an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of

⁴⁸⁷ UNRIAA, vol. XX (see footnote 36 above), p. 253.

⁴⁸⁸ See footnote 480 above.

⁴⁸⁹ *I.C.J. Reports 1997* (see footnote 51 above), p. 63, para. 102.

⁴⁹⁰ Force majeure is not a defence to breach of contract under English common law, because of the presumption that contractual undertakings are warranties. There is a narrower conception of “act of God” which is a defence in tort. However, common-law courts have become very used to the notion of force majeure because of the frequent insertion of force majeure clauses in contract, especially in international trade. See generally McKendrick, *Force Majeure and Frustration of Contract*.

the conclusion of the contract or to have avoided or overcome it or its consequences.⁴⁹¹

(b) In the UNIDROIT Principles of International Commercial Contracts, article 7.1.7 deals with force majeure, which is defined in essentially the same terms as in the United Nations Convention on Contracts for the International Sale of Goods.⁴⁹²

261. For all these reasons, article 31 should be retained in the draft articles. There are, however, certain questions of formulation.

(iii) *Force majeure and the “knowledge” of wrongfulness*

262. One of the curious features of article 31 is the phrase “made it materially impossible ... to know that its conduct was not in conformity with that obligation”.⁴⁹³ This suggests that State responsibility depends on the State “knowing” that its conduct is wrongful, yet in general such knowledge is not required. Ignorance of a State’s legal obligations is no excuse for breaching them, nor is mistake of law.⁴⁹⁴ It is true that there might be an innocent mistake of fact (e.g. as to the location of an aircraft, owing to an undetected fault in navigational equipment), and this might qualify as a circumstance precluding wrongfulness. Article 31 can, however, be formulated without the introduction of overtly subjective elements: it should only apply in cases where an unforeseen external event deprived a State from having knowledge of a fact which was an essential element of its responsibility *in the circumstances*, and without which the conduct in question would not have been wrongful. On this basis the reference in article 31 to knowledge of wrongfulness can be deleted.⁴⁹⁵

(iv) *Exclusion of force majeure: (a) if the State has “contributed” to the force majeure situation*

263. By definition, a situation which has been caused or induced by the invoking State is not one of force majeure; the circumstance must be genuinely involuntary in order to qualify. Thus in *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi*, the Arbitral Tribunal rejected a plea of force majeure because “the

⁴⁹¹ See Schlechtriem, ed., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, pp. 600–626. For comparative law materials on force majeure, see, for example, Draetta, “Force majeure clauses in international trade practice”; Magliveras, “Force majeure in Community law”; and Van Ommeslaghe, “Les clauses de force majeure et d’imprévision (hardship) dans les contrats internationaux”, p. 15. On force majeure in the case law of the Iran-United States Claims Tribunal, see Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, pp. 306–320. Force majeure has also been recognized as a general principle of law by the Court of Justice of the European Communities: see, for example, case 145/85, *Denkavit België NV v. Belgian State Reports of Cases before the Court 1987–2*, p. 565. See further Stefanou and Xanthaki, *A Legal and Political Interpretation of Article 15 (2) [new Article 288 (2)] of the Treaty of Rome*, pp. 78–80.

⁴⁹² See UNIDROIT, *Principles of International Commercial Contracts* (Rome, Unidroit, 1994), pp. 169–171, for text and commentary.

⁴⁹³ See Austria’s comment on article 31 in paragraph 257 above.

⁴⁹⁴ In some legal systems, a claim of right, held in good faith, may justify or excuse certain conduct, even though the legal basis of the claim is incorrect. There does not appear to be any authority for such a doctrine in international law.

⁴⁹⁵ For the proposed formulation, see paragraph 358 below.

alleged impossibility is not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State ...⁴⁹⁶ However article 31 as adopted on first reading goes beyond this and excludes force majeure “if the State in question has contributed to the occurrence of the situation of material impossibility”.⁴⁹⁷ By contrast, under the otherwise more restrictive ground for termination of a treaty in article 61 of the 1969 Vienna Convention, material impossibility cannot be invoked “if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty”. This seems a more appropriate test, since it may well be that a State has unwittingly “contributed” to a force majeure situation by something which, in hindsight, might have been done differently but which did not itself constitute a breach of an international obligation or make the event any less unforeseen. Provided the ensuing situation of force majeure is genuine, there is no reason to exclude it as a circumstance precluding wrongfulness. Accordingly, article 31 should provide that force majeure is only excluded if the State has produced or contributed to producing the situation through its own wrongful conduct.

(v) *Exclusion of force majeure: (b) voluntary assumption of risk*

264. Secondly, force majeure should not excuse non-performance if the State has undertaken to prevent the particular situation arising, or has otherwise assumed that risk, and article 31 should so provide.⁴⁹⁸ It might be argued that for force majeure to be excluded, an express undertaking by the State concerned should be required, but obligations can be formulated and undertaken in a variety of ways, and in the context of chapter V it should be sufficient that the assumption of risk is clear.

(vi) *Conclusions on article 31*

265. For these reasons, article 31 should be retained with the changes indicated above. In addition, as France points out,⁴⁹⁹ it seems sufficient to refer to the circumstance by the internationally well-known and accepted title of “force majeure”, and that term should be included in the article itself as well as constituting its title. The title “*Force majeure* and fortuitous event” derives from the French Civil Code, but by no means all cases of “fortuitous event” (*cas fortuit*) qualify as excuses in international law,⁵⁰⁰ whereas

⁴⁹⁶ *International Law Reports* (Cambridge), vol. 96 (1994), pp. 317; and *Belgian Review of International Law*, vol. XXIII, 1990–1, p. 517.

⁴⁹⁷ The commentary suggests that a narrower basis for exclusion was intended (see paragraph 256 above).

⁴⁹⁸ As the study prepared by the Secretariat (see footnote 480 above) points out (p. 74, para. 31), States may renounce the right to rely on force majeure by agreement. The most common way of doing so would be by an agreement or obligation assuming in advance the risk of the particular force majeure event.

⁴⁹⁹ See paragraph 257 above.

⁵⁰⁰ The study prepared by the Secretariat (see footnote 480 above) reviews the debate among the civil lawyers as to whether and how force majeure and fortuitous event are to be distinguished (pp. 70–71, paras. 17–19), but notes (para. 19) that “[i]n international law practice and doctrine the term *force majeure* is normally used *lato sensu*, namely, covering *force majeure* (*stricto sensu*) as well as ‘fortuitous event’”.

cases of force majeure as defined in article 31 seem adequate to cover the field.⁵⁰¹

(d) *Article 32. Distress*

266. Article 32 provides as follows:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if 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.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.

267. The commentary to article 32 notes that it deals with the specific case where an individual person whose acts are attributable to the State is in a situation of extreme peril, either personally or in relation to persons under his or her care.⁵⁰² Unlike situations of force majeure, a person acting under distress is not acting involuntarily, even though the choice is effectively “nullified by the situation of extreme peril”.⁵⁰³ Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterizes situations of necessity under article 33.⁵⁰⁴ The interest concerned is the immediate one of saving people’s lives, irrespective of their nationality.

268. In practice, cases of distress have mostly involved ships or aircraft entering State territory under stress of weather or following mechanical or navigational failure.⁵⁰⁵ But distress should not be limited to ships and aircraft,⁵⁰⁶ especially if it is limited to cases involving a threat to life itself.⁵⁰⁷ Moreover, distress can only preclude wrongfulness where the interests sought to be protected (e.g. the lives of passengers and crew) clearly outweigh the other interests at stake in the circumstances. Thus if the conduct sought to be excused endangers more lives than it may save, it is not covered by the plea of distress.⁵⁰⁸

(i) *Comments of Governments on article 32*

269. France proposes tighter wording to prevent abuse of the defence of “distress”.⁵⁰⁹ Mongolia goes further, doubting the desirability of distress as a circumstance precluding wrongfulness at all.⁵¹⁰ On the other hand, the

⁵⁰¹ For the text of article 31 as proposed, see paragraph 358 below.

⁵⁰² *Yearbook ... 1979*, vol. II (Part Two), commentary to article 32, p. 133, para. (1).

⁵⁰³ *Ibid.*, para. (2).

⁵⁰⁴ *Ibid.*, p. 134, para. (3).

⁵⁰⁵ *Ibid.*, para. (5), reviewing some of the incidents. See also the study prepared by the Secretariat (footnote 480 above), pp. 102–103, paras. 141–142, and p. 125, para. 252. An analogous right for private ships has always been recognized, although it falls outside chapter V since the conduct of private persons is not as such attributable to the State (*ibid.*, pp. 150–151, paras. 328–331); Convention on the Territorial Sea and the Contiguous Zone, art. 14, para. 3, cited in *Yearbook ... 1979*, vol. II (Part Two), commentary to article 32, p. 134, para. (7).

⁵⁰⁶ *Yearbook ... 1979*, vol. II (Part Two), commentary to article 32, p. 135, para. (9).

⁵⁰⁷ *Ibid.*, para. (10).

⁵⁰⁸ *Ibid.*, pp. 135–136, para. (11).

⁵⁰⁹ *Yearbook ... 1998* (see footnote 7 above), p. 134.

⁵¹⁰ *Ibid.*

United Kingdom is critical of the limitation of article 32 to persons in the care of the State concerned, and calls for the draft articles explicitly to recognize emergency humanitarian action.⁵¹¹ Japan too supports a broader formulation, covering threats not only to life but also to other vital interests of persons, including economic interests.⁵¹²

(ii) *International practice as to the plea of distress since 1980*

270. The validity of the plea of distress has continued to be accepted in practice since the adoption of article 32 on first reading. In the conventional context of distress at sea, the exception for distress contained in article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone is repeated in much the same terms in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea.⁵¹³ More significant for present purposes was the discussion of the issue in the *Rainbow Warrior* case, since it involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft.

271. The facts of the case have already been referred to.⁵¹⁴ France sought to justify its conduct in removing the two officers from the island of Hao on the ground of “circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State”.⁵¹⁵ The Tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the Tribunal required France to show three things:

1. The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.

2. The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.

3. The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.⁵¹⁶

In fact the danger to one of the officers (Major Mafart), though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer (Captain Prieur), the justifications given (the need for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The Tribunal held that:

[C]learly these circumstances entirely fail to justify France’s responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao

⁵¹¹ Ibid.

⁵¹² A/CN.4/492 (reproduced in the present volume).

⁵¹³ See also articles 39, paragraph 1 (c), 98 and 109 of the United Nations Convention on the Law of the Sea.

⁵¹⁴ See paragraph 258 above.

⁵¹⁵ UNRIAA (see footnote 36 above), pp. 254–255, para. 78.

⁵¹⁶ Ibid., p. 255, para. 79.

(in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations ... ⁵¹⁷

272. Given the generally favourable response to article 32 and the acceptance of the principle by the Tribunal in the *Rainbow Warrior* case, it seems that it should be retained. However, certain questions have been raised as to its formulation, which need to be discussed.

(iii) *The formulation of article 32*

273. The first question is whether article 32 ought to be limited to cases where human life is at stake, or whether a serious health risk should suffice. The Tribunal in *Rainbow Warrior* seemed to take the broader view, although the health risk to Major Mafart *might* have been life-threatening. The problem here is where to place any lower limit. In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present an immense spectrum of human difficulties and griefs. Given the context of chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does not seem necessary to extend the scope of distress in this way. But it does raise a further issue. Clearly, the threat to life must be apparent and have some basis in fact, but is it sufficient that the agent who acted under distress reasonably believed that the danger existed? Or does that agent act at peril, so that if a later and detailed examination shows this was not in truth the case (however it may have appeared at the time), distress will not be available to excuse the breach? In cases of genuine distress there may be neither the time nor the personnel to conduct a proper medical or other examination before acting. In such cases, the agent should be entitled to act on the basis of a reasonable belief as to a situation of distress. For these reasons article 32 should be framed in terms of a reasonable belief in a life-threatening situation.

274. A second question is whether it is desirable to extend article 32 to all cases where threats to life are involved, irrespective of the existence of any special relationship between the State organ or agent and the persons in danger.⁵¹⁸ In the Special Rapporteur’s view, article 32 reflects a narrow but historically recognized case of distress involving, in particular, ships and aircraft. It should not be extended too far beyond that specific context, and certainly not into the general field of humanitarian intervention. That is more a matter of necessity than distress, and it will be returned to in the context of article 33.⁵¹⁹

275. Finally it should be noted that article 32 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus it does not exempt the State or its agent from complying with other requirements (national or international), e.g. the requirement to notify arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or

⁵¹⁷ Ibid., p. 263, para. 99. Sir Kenneth Keith dissented on the finding by the Tribunal relating to Major Mafart: while agreeing on the need for medical tests outside the island of Hao, he argued that the situation was not one of “extreme distress”, taking into account the delay of the French authorities in transferring Major Mafart to Paris (ibid., pp. 277–279).

⁵¹⁸ As proposed by the United Kingdom (see paragraph 269 above).

⁵¹⁹ See paragraphs 288–289 below.

the cargo.⁵²⁰ This follows from the language of article 32, but it should be further stressed in the commentary.

(iv) *Conclusions on article 32*

276. For these reasons article 32 should be retained with substantially the same coverage as at present but with amendments to reflect the suggestions made above. In addition (and by parity of reasoning from the equivalent provision in article 31), distress should only be excluded if the situation of distress results, either alone or in combination with other factors, from a wrongful act of the State invoking it.⁵²¹ Finally, the word “extreme” should be deleted, since it does not add anything to the content of the article.⁵²² It should not be open to a State to argue that, although life was at stake in a situation of unavoidable distress, nonetheless the situation was not sufficiently “extreme”.⁵²³

(e) *Article 33. State of necessity*

277. Article 33 provides as follows:

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(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.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) If the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) If the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) If the State in question has contributed to the occurrence of the state of necessity.

278. The commentary to article 33 distinguishes necessity from consent, countermeasures and self-defence, which depend on the conduct of the “target” State; in that respect it is similar to force majeure and distress.⁵²⁴ But it differs from the latter two circumstances in that a State under force majeure, or even a State agent in a situation

⁵²⁰ See *Lawrence V. Cashin and Gerald Lewis v. His Majesty the King, Canada Law Reports* (1935), p. 103 (held: even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). Other cases of this period shed light on the defence: see *Kate A. Hoff v. The United Mexican States* (United States-Mexico Claims Commission), *American Journal of International Law*, vol. 23, 1929 p. 860 (vessel (the *Rebecca*) entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); *The Ship “May” v. His Majesty the King, Canada Law Reports* (1931), p. 374; *The Ship “Queen City” v. His Majesty the King*, *ibid.*, p. 387; *Rex v. Flahaut, Dominion Law Reports* (1935), vol. 2, p. 685 (test of “real and irresistible distress” applied).

⁵²¹ See paragraph 263 above.

⁵²² As is effectively conceded in *Yearbook ... 1979*, vol. II (Part Two), commentary to article 32, p. 136, para. (12), footnote 695 (“virtually superfluous”).

⁵²³ For the proposed text, see paragraph 358 below.

⁵²⁴ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, pp. 34–35, paras. (2)–(3).

of distress, has effectively no choice but to act in a certain way, whereas “invoking a state of necessity implies perfect awareness of having deliberately chosen to act in a manner not in conformity with an international obligation”.⁵²⁵

279. In the nineteenth century, justifications of necessity often relied on such so-called “inherent rights” of States as self-preservation, which took priority over the “subjective” rights of other States. The decline of the doctrine of “inherent rights” had correspondingly tended to discredit the idea that necessity might preclude the wrongfulness of conduct.⁵²⁶ But the plea of necessity is supported by “numerous cases” of State practice, and can be justified by reference to the normal sources of international law, without recourse to any particular theory of the State.⁵²⁷ The commentary goes on to cite many cases where the plea of necessity was accepted in principle, or at least not rejected, and where the question of its applicability was treated as a question of fact and application.⁵²⁸

280. The commentary admits that scholarly opinion on the plea of necessity is sharply divided,⁵²⁹ suggesting that a further reason for this was the earlier tendency to abuse the doctrine of necessity to cover cases of aggression, annexation or military occupation—including most famously the German justification for the invasion of Belgium and Luxembourg in 1914.⁵³⁰ Whatever the position in earlier years, “an assault on the very existence of another State or on the integrity of its territory or the independent exer-

⁵²⁵ *Ibid.*, p. 34, para. (3).

⁵²⁶ *Ibid.*, p. 35, para. (4).

⁵²⁷ *Ibid.*, pp. 35–36, paras. (5)–(6).

⁵²⁸ These include: the *Russian Indemnity* case of 1912 (see footnote 451 above), p. 443; the arbitral award in *Forests of Central Rhodopia*, decision of 29 March 1933, UNRIAA, vol. III (Sales No. 1949.V2), p. 1405; the PCIJ decision in the case concerning the *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78* (by implication); *Properties of the Bulgarian minorities in Greece*, Report of the Commission of Enquiry into the incidents on the frontier between Bulgaria and Greece, League of Nations, *Official Journal*, 7th year, No. 2 (February 1926), annex 815, p. 209; the case of *Fur seal fisheries off the Russian coast* (1893), text in La Fontaine, *Pasicrisie Internationale, 1794–1900: Histoire Documentaire des Arbitrages Internationaux*, p. 426, and *British and Foreign State Papers, 1893–1894* (London, HM Stationery Office, 1899), vol. LXXXVI, p. 220 (and see the correspondence between the Russian and the British Governments in Moore, *op. cit.*, vol. I, p. 826); the *Company General of the Orinoco* case, 31 July 1905, UNRIAA, vol. X (Sales No. 60.V.4), p. 280; and, more recently, the *Torrey Canyon* incident, as discussed in *The “Torrey Canyon”*, Cmnd. 3246 (London, HM Stationery Office, 1967). It was significant in the latter case that there was no protest at the action of the British Government in bombing the ship so as to set fire to the oil threatening to pollute the coast, and indeed that the incident led to the conclusion of an international convention regulating the matter for the future: International Convention relating to intervention on the high seas in cases of oil pollution casualties; see also article 221 of the United Nations Convention on the Law of the Sea. Other individual opinions allowing necessity in certain circumstances include: the law officer’s opinion of 22 November 1832, in Lord McNair, ed., *International Law Opinions*, p. 231, and the individual opinion of Judge Anzilotti in *Oscar Chinn, Judgment, 1934, P.C.I.J., Series A/B, No. 63*, pp. 112–114.

⁵²⁹ For an instructive review of the earlier literature, see *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, pp. 47–48, para. (29). More recent contributions include: Barboza, “Necessity (revisited) in international law”; Salmon, “Faut-il codifier l’état de nécessité en droit international?”; and Raby, “The state of necessity and the use of force to protect nationals”.

⁵³⁰ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, p. 43, para. (22).

cise of its sovereignty” is a contravention of a norm of *jus cogens* and cannot possibly be justified by the doctrine of necessity.⁵³¹ But not all conduct infringing the territorial sovereignty of a State need necessarily be considered an act of aggression, or otherwise as a breach of a peremptory norm. The commentary refers to limited measures (e.g. of humanitarian intervention or of protection against the hostile action of armed bands based on foreign territory) which are “restricted to eliminating the perceived danger”.⁵³² The “*Caroline*” case, though frequently referred to as an instance of self-defence, really involved necessity. The British attack had been directed against private parties for whose conduct the United States was not responsible. Both Secretary of State Webster and President Tyler in their respective replies to the British Government had allowed that conduct might be permissible in case of “clear and absolute necessity”,⁵³³ or of “the most urgent and extreme necessity”.⁵³⁴ In the exchange of letters of 1842 which closed the controversy, the two Governments recognized that the “great principle” of inviolability of the territory of another State might be suspended in certain cases of “a strong overpowering necessity”, but that this would apply only “for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity”.⁵³⁵

281. The commentary declines to pronounce on the question whether the invocation of necessity to justify a violation of territorial integrity could be justified under modern international law: this comes down to asking whether the Charter of the United Nations expressly or by implication (e.g. by Article 51) has excluded reliance on necessity as a justification or excuse. But it is not the function of the Commission authoritatively to interpret the Charter provisions on the use of force.⁵³⁶ The commentary notes, however, that in modern cases of humanitarian intervention, the excuse of necessity has hardly ever been relied on.⁵³⁷ In almost every such case, “[t]he concept of state of necessity has been neither mentioned nor taken into consideration, even in cases where the existence of consent or a state of self-defence has been contested, and even if some of the facts alleged might relate more to a state of necessity than to self-defence”.⁵³⁸

282. Finally, the commentary considers the defence of military necessity under the law of war. That doctrine “ap-

pears in the first place as the underlying criterion for a whole series of substantive rules of the law of war and neutrality”, and not in the confined context of necessity as a circumstance precluding wrongfulness.⁵³⁹ As to the question whether military necessity is an excuse for non-compliance with international humanitarian law, the answer is clearly that it cannot be: “even in regard to obligations of humanitarian law which are not obligations of *jus cogens* ... to admit the possibility of not fulfilling the obligations imposing limitations on the method of conducting hostilities whenever a belligerent found it necessary to resort to such means in order to ensure the success of a military operation would be tantamount to accepting a principle which is in absolute contradiction with” the relevant conventions: necessity is thus excluded by the terms of the very obligation itself.⁵⁴⁰ Although no specific conclusion is reached, the commentary by implication denies any separate existence to a doctrine of “military necessity”.

283. The Commission (with one dissentient) concluded that concerns about abuse of necessity are better met by an express provision rather than by silence, and that the idea of necessity is “too deeply rooted in general legal thinking for silence on the subject” to be an appropriate solution.⁵⁴¹ As to the formulation of the principle, the interest concerned has to be essential, but it need not relate only to the “existence” of the State. Indeed the defence of the “existence” of the State (as distinct from the preservation of human life or of the environment) has rarely been considered a justification, since the purpose of the positive law of self-defence is to safeguard that existence. But no a priori definition of an essential interest can be offered. “The extent to which a given interest is ‘essential’ naturally depends on all the circumstances in which the State is placed in different specific situations; the extent must therefore be judged in the light of the particular case into which the interest enters, rather than be predetermined in the abstract.”⁵⁴² In addition, the danger to that interest must be “extremely grave” and “imminent”, and such that a breach of the international obligation is the only method of avoiding the peril.⁵⁴³ Necessity cannot be invoked in cases where an equal interest of the other State was involved,⁵⁴⁴ nor in cases of breach of a peremptory norm,⁵⁴⁵ nor in cases where the invocation of necessity is expressly or impliedly excluded by a treaty.⁵⁴⁶

(i) *Comments of Governments on article 33*

284. Despite the doctrinal controversy it has provoked, rather few Governments have commented on article 33. Denmark (on behalf of the Nordic countries)⁵⁴⁷ and France⁵⁴⁸ accept the principle embodied in article 33. Only the United Kingdom does not, citing the risk of

⁵³¹ Ibid.

⁵³² Ibid., p. 44, para. (23).

⁵³³ *British and Foreign State Papers, 1840–1841* (London, Ridgeway, 1857), vol. 29, p. 1133 (Secretary of State Webster), cited in *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, p. 44, para. (24).

⁵³⁴ Ibid., vol. 30, p. 194 (President Tyler), cited in *Yearbook ... 1980* (see footnote 533 above).

⁵³⁵ Ibid., pp. 196 (Lord Ashburton) and 201 (Secretary of State Webster).

⁵³⁶ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, pp. 44–45, para. (24).

⁵³⁷ Ibid., p. 45, para. (25). The only example to 1980 was the Belgian rescue operation in the Congo in 1960. No position was taken by the Security Council on the plea (*Official Records of the Security Council, Fifteenth Year*, 873rd meeting, paras. 34–39; 877th meeting, paras. 101, 149 and 150; and 879th meeting, p. 29).

⁵³⁸ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, p. 45, para. (26).

⁵³⁹ Ibid., para. (27).

⁵⁴⁰ Ibid., p. 46, para. (28).

⁵⁴¹ Ibid., p. 49, para. (31).

⁵⁴² Ibid., para. (32).

⁵⁴³ Ibid., para. (33).

⁵⁴⁴ Ibid., p. 50, para. (35).

⁵⁴⁵ Ibid., para. (37).

⁵⁴⁶ Ibid., pp. 50–51, para. (38).

⁵⁴⁷ *Yearbook ... 1998* (see footnote 7 above), p. 134, but reserving the right to comment in further detail.

⁵⁴⁸ Ibid.

abuse.⁵⁴⁹ But it does accept that environmental emergencies can arise, posing an immediate threat to the territory of a State, in circumstances akin to force majeure or distress, and as noted above, it argues for a wider rule of distress allowing humanitarian action even in relation to persons not entrusted to the care of the State agent concerned.⁵⁵⁰ In an earlier comment, Mongolia noted the difficulty of balancing individual State interests against international obligations and remarked that “[i]f article 33 is to remain in the draft, it must be so formulated that the state of necessity is subject to strict conditions and limitations which prevent all possibility of abuse”.⁵⁵¹

(ii) *Experience in the application of the doctrine of necessity since the adoption of draft article 33*

285. In the *Rainbow Warrior* arbitration, the Tribunal expressed doubt as to the existence of the excuse of necessity, although the point did not need to be developed since France did not rely on that excuse (as distinct from distress and force majeure). The Tribunal referred to the draft articles and said:

Article 33, which allegedly authorizes a State to take unlawful action invoking a state of necessity, refers to situations of grave and imminent danger to the State as such and to its vital interests.

This distinction between the two grounds justifies the general acceptance of Article 32 and at the same time the controversial character of the proposal in Article 33 on state of necessity.⁵⁵²

286. By contrast, in the case concerning the *Gabčíkovo-Nagymaros Project*, ICJ carefully considered an argument based on article 33, expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, it noted that the parties had both relied on article 33 as an appropriate formulation,⁵⁵³ and continued:

The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft ...

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an “essential interest” of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a “grave and imminent peril”; the act being challenged must have been the “only means” of safeguarding that interest; that act must not

have “seriously impair[ed] an essential interest” of the State towards which the obligation existed; and the State which is the author of that act must not have “contributed to the occurrence of the state of necessity”. Those conditions reflect customary international law.⁵⁵⁴

As to the application of the principle, the Court agreed that the Hungarian concerns as to the environment and drinking water related to an “essential interest” for the purposes of article 33, citing certain passages in the commentary.⁵⁵⁵ But it denied that the mere existence of uncertainties as to the environmental effects of the Project could, “alone, establish the objective existence of a “peril” in the sense of a component element of a state of necessity”. The “peril” had to be objectively established and not merely apprehended as possible.⁵⁵⁶ In addition to being “grave”, the peril had to be “imminent” in the sense of “proximate”. But, it added:

That does not exclude, in the view of the Court, that a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.⁵⁵⁷

Crucially, the Court was not convinced that, whatever the uncertainties and risks, the unilateral suspension and subsequent abandonment of the Project by Hungary was the only course open in the circumstances, having regard in particular to the amount of work already done and money expended on it. It noted that many of the concerns related to the operation of the scheme in peak mode, and that it had not yet been agreed whether or to what extent that mode would be adopted.⁵⁵⁸ Having regard to the previous conduct of the parties, the state of the works, the scientific uncertainties and the existence of other possibilities to resolve the problems, the Court concluded that Hungary had failed to prove the existence of a grave and imminent peril sufficient to justify its conduct.⁵⁵⁹ In addition, since Hungary had “helped, by act or omission, to bring” about the situation of alleged necessity, it could not now rely on that situation as a circumstance precluding wrongfulness.⁵⁶⁰ It was accordingly not necessary to consider whether the interests of Czechoslovakia in the continuation of the Project would have been a sufficient countervailing factor in accordance with draft article 33, paragraph 1 (b).⁵⁶¹

287. The plea of necessity was also, apparently, raised in the *Fisheries Jurisdiction* case, in circumstances which bore some resemblance to the *Fur seal fisheries off the Russian coast* case a century earlier.⁵⁶² Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization (NAFO) but had, in the opinion of Canada, proved ineffective for various reasons. By the Coastal Fisheries

⁵⁴⁹ *Ibid.*, pp. 134–135.

⁵⁵⁰ See paragraph 269 above, and for discussion, paragraph 274 above.

⁵⁵¹ *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 76.

⁵⁵² UNRIAA (see footnote 36 above), p. 254. In *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi* (see footnote 496 above), the Tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest against a grave and imminent peril.

⁵⁵³ *I.C.J. Reports 1997* (see footnote 51 above), p. 39, para. 50. It should be noted that no issue of obligations *erga omnes* arose in that case, which concerned a bilateral treaty. See paragraph 292 below.

⁵⁵⁴ *Ibid.*, pp. 40–41, paras. 51–52. None of the separate or dissenting judges disagreed with the Court in its endorsement of article 33.

⁵⁵⁵ *Ibid.*, p. 41, para. 53.

⁵⁵⁶ *Ibid.*, p. 42, para. 54.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*, pp. 42–43, para. 55.

⁵⁵⁹ *Ibid.*, pp. 42–45, paras. 55–56.

⁵⁶⁰ *Ibid.*, p. 46, para. 57.

⁵⁶¹ *Ibid.*, para. 58.

⁵⁶² See the ICJ judgment of 4 December 1998, declining jurisdiction (*Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432). For the *Fur seal fisheries off the Russian coast* case, see footnote 528 above.

Protection Act Amendment of 12 May 1994, Canada declared that the straddling stocks of the Grand Banks of Newfoundland were “threatened with extinction”, and asserted that the purpose of the Act and regulations was “to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding”. Pursuant to the Act, Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Government of Spain denied that the arrest could be justified by concerns as to conservation “since it violates the established provisions of the NAFO Convention [Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries] to which Canada is a party”.⁵⁶³ Canada disagreed, asserting that “the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen”.⁵⁶⁴ The European Union, in its protest of 10 March 1995, said, *inter alia*, that:

The arrest of a vessel in international waters by a State other than the State of which the vessel is flying the flag and under whose jurisdiction it falls, is an illegal act under both the NAFO Convention and customary international law and cannot be justified by *any means*.⁵⁶⁵

But the subsequent Memorial of Spain dealt with issues of justification at some length. Without expressly referring to draft article 33, it seems on the whole to have taken the position that the Canadian measures could not be justified because they were in conflict with an international convention to which both Canada and Spain were parties and which directly regulated the conservation of halibut fisheries.⁵⁶⁶ In other words, the plea of necessity was not rejected *a priori*. The Court held that it had no jurisdiction over the case; the claim was, however, neither formally pleaded nor adjudicated on the merits.

(iii) Article 33 and humanitarian intervention

288. One of the issues discussed at some length in the commentary is the relationship between the plea of necessity as a circumstance precluding wrongfulness and the doctrine of humanitarian intervention as a ground for the

⁵⁶³ As cited in the judgment of 4 December 1998 (see footnote 562 above), p. 443, para. 20.

⁵⁶⁴ *Ibid.* See further the Canadian Counter-Memorial (29 February 1996), *I.C.J. Pleadings, Fisheries Jurisdiction (Spain v. Canada)*, paras. 17–45.

⁵⁶⁵ *I.C.J. Reports 1998* (see footnote 562 above), p. 444, para. 20.

⁵⁶⁶ See Memorial of Spain (Jurisdiction of the Court), *I.C.J. Pleadings* (footnote 564 above), p. 38, para. 15. By an Agreed Minute between Canada and the European Union, Canada agreed that it would repeal the regulations applying the Coastal Fisheries Protection Act to Spanish and Portuguese vessels in the NAFO area and release the *Estai*. The parties expressly maintained “their respective positions on the conformity of the amendment of 25 May 1994 to Canada’s Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention” and reserved “their ability to preserve and defend their rights in conformity with international law”. See Canada-European Community, Agreed Minute on the Conservation and Management of Fish Stocks (Brussels, 20 April 1995), *International Legal Materials*, vol. 34 (1995), pp. 1263–1264. See also the 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 (A/CONF.164/37), which goes beyond the pre-existing law in excluding non-participating “third States” from fishing in areas of the high seas subject to a conservation regime (arts. 8, para. 4, and 17, para. 2), and in allowing certain enforcement measures by States parties as against other States parties (art. 21).

use of force on the territory of another State. There are two difficulties here. First of all, of course, is the continuing controversy over whether and to what extent measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law. This is not a question on which the Commission can take a position in formulating the secondary rules of responsibility, nor does the commentary purport to do so. But there is a second difficulty, in that article 33 expressly excludes from the scope of the plea of necessity violations of peremptory norms of international law, among which the rules relating to the use of force referred to in Articles 2, paragraph 4, and 51 of the Charter certainly rank. Thus it could be argued that article 33, while purporting not to take a position on the exception of humanitarian intervention, in fact does so, since such an exception cannot stand with the exclusion of obligations under peremptory norms. The commentary appears to suggest that this difficulty can be avoided by differentiating between the peremptory status of some aspects of the rules relating to the use of force (e.g. the prohibition of aggression) and the non-peremptory status of other aspects (e.g. the injunction against a use of force even when carried out for limited humanitarian purposes).⁵⁶⁷ By implication, therefore, necessity can excuse the wrongfulness of genuine humanitarian action, even if it involves the use of force, since such action does not, at any rate, violate a peremptory norm.

289. This construction raises complex questions about the “differentiated” character of peremptory norms which go well beyond the scope of the draft articles. For present purposes it seems enough to say that either modern State practice and *opinio juris* license humanitarian action abroad in certain limited circumstances, or they do not. If they do, then such action would appear to be lawful in those circumstances, and cannot be considered as violating the peremptory norm reflected in Article 2, paragraph 4, of the Charter of the United Nations.⁵⁶⁸ If they do not, there is no reason to treat them differently than any other aspect of the rules relating to the use of force. In either case, it seems that the question of humanitarian intervention abroad is not one which is regulated, primarily or at all, by article 33. For these reasons, it is suggested that the exception in article 33 for obligations of a peremptory character should be maintained.

(iv) The issue of scientific uncertainty

290. A major question for article 33 is that of scientific uncertainty, and the associated question of the precautionary principle.⁵⁶⁹ At present, article 33 requires

⁵⁶⁷ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, pp. 42–45, paras. (21)–(26).

⁵⁶⁸ Similar reasoning would apply to the controversy over whether “anticipatory” self-defence is ever permissible. If it is in specific circumstances, article 33 would appear to be unnecessary. If it is not, then there is no reason why article 33 should be available to preclude responsibility for anticipatory action.

⁵⁶⁹ Generally on the precautionary principle, see Sands, *Principles of International Environmental Law*, pp. 212–213; and Nguyen Quoc Dinh, Daillier and Pellet, *op. cit.*, p. 1255. The principle has frequently been applied by national courts: see, for example, *Vellore Citizens Welfare Forum v. Union of India and Others*, *All India Reporter* (India, Supreme Court, 28 August 1996).

that the conduct in question must be “the only means of safeguarding an essential interest of the State against a grave and imminent peril”. Yet in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be substantial areas of scientific uncertainty, and different views may be taken by different experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. This has already been considered in the context of distress: it was concluded that in the context of saving life, the agent concerned should be entitled to act on the basis of a reasonable belief as to a situation of distress.⁵⁷⁰ The question is whether similar latitude should be allowed in relation to the plea of necessity.

291. The plea of distress covers cases of action to save individual human lives, whereas the plea of necessity covers a wider range of contingencies. The first point to be noted in relation to the latter is that the concern in question is that of safeguarding against peril, i.e. against an extremely serious risk. By definition the peril will not yet have occurred, and it cannot be required that the invoking State prove that it would *certainly* have occurred otherwise. It is difficult and may be impossible to prove a counterfactual. In the *Gabčíkovo-Nagymaros Project* case⁵⁷¹ ICJ noted first that the invoking State could not be the sole judge of the necessity, and secondly that the existence of scientific uncertainty was not enough, of itself, to establish the existence of an imminent peril. This is plainly right, but on the other hand, neither should a measure of scientific uncertainty about the future disqualify a State from invoking necessity, if the peril is established on the basis of the evidence reasonably available at the time (as based, for example, on a proper risk assessment procedure), and the other conditions laid down for necessity are met. This is consistent with principle 15 of the Rio Declaration on Environment and Development,⁵⁷² 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”. This principle has received general support, and is reflected, for example, in article 5, paragraph 7, of the 1994 Agreement on the Application of Sanitary and Phytosanitary Measures.⁵⁷³ Article 5, paragraph 7, provides that a WTO member may provisionally adopt sanitary or phytosanitary measures (and restrict imports) “where relevant scientific evidence is insufficient”. In the *Beef Hormones* case the WTO Appellate Body recognized that a WTO member may rely on a risk assessment procedure conducted under article 5, paragraphs 1–2, of the 1994 Agreement notwithstanding that such an assessment indicated a “a state of scientific

uncertainty”.⁵⁷⁴ The question is whether the language of article 33 should be amended expressly to incorporate a precautionary element.⁵⁷⁵ The cases for and against are rather evenly balanced, but given the need to keep the defence of necessity within tight bounds, and the possibility of reflecting that element in the commentary, no change has been made.

(v) *The formulation of article 33*

292. As to the formulation of article 33, three further issues should be mentioned, in ascending order of difficulty:

(a) The term “State of necessity” can be retained in the title to article 33, but to avoid confusion with the other sense of “State” in the text, a reference to “necessity” alone seems sufficient;

(b) Article 33, paragraph 2 (b), contemplates that the plea of necessity may be excluded, expressly or impliedly, by an obligation arising out of a treaty, and this is clearly correct in principle.⁵⁷⁶ But there is no reason why this limiting effect can only be produced by a treaty. The draft articles proceed on the basis that, generally speaking, obligations arising from treaties and from other sources of international law have similar consequences in the realm of responsibility.⁵⁷⁷ For example, if a treaty rule protecting a particular value or interest excludes the plea of necessity, why should a customary rule generated in parallel with that treaty by widespread and convergent practice, and having essentially the same content, not have the same effect? Paragraph 2 (b) should be amended accordingly;

(c) Article 33, paragraph 1 (b), stipulates that, for necessity to be invoked, the conduct of the invoking State must not “seriously impair an essential interest of the State towards which the obligation existed”. This language is not well adapted to the breach of an obligation *erga omnes*. For example, it is not clear what individual interest Ethiopia and Liberia had in the *South West Africa* cases, as distinct from the public interest in compliance with the relevant norm.⁵⁷⁸ But South Africa could not have invoked necessity against those States on the basis that no essential interest of theirs was seriously impaired. The relevant interest for that purpose was that of the people of South West Africa itself. Of course, many obliga-

⁵⁷⁴ WTO, *EC Measures concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, 16 January 1998 (WT/DS26/AB/R–WT/DS48/AB/R), para. 194.

⁵⁷⁵ An alternative version of article 33, expressly reflecting the precautionary principle, might read as follows:

“(a) The act was the only means of safeguarding an essential interest of the State against a grave and imminent peril, the occurrence of which could not reasonably be excluded on the best information available.”

⁵⁷⁶ Thus the provisions of human rights treaties excluding derogations from certain fundamental rights even in time of public emergency impliedly exclude reliance on article 33. But see Oraá, *Human Rights in States of Emergency in International Law*, pp. 220–226, stressing the similarities between the derogation clauses and the plea of necessity.

⁵⁷⁷ See paragraph 26 above for a discussion of this principle in the context of former article 17.

⁵⁷⁸ It was precisely because of the lack of such an individual interest that a narrow majority of the Court held their claim inadmissible (*I.C.J. Reports 1966* (see footnote 83 above), p. 6).

⁵⁷⁰ See paragraph 283 above.

⁵⁷¹ See paragraph 286 above.

⁵⁷² *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.

⁵⁷³ See *Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15 April 1994* (GATT secretariat publication, Sales No. GATT/1994–7), p. 72.

tions *erga omnes* involve peremptory norms, which are excluded entirely from the scope of article 33. Moreover, in the case of an obligation *erga omnes* (e.g. in the field of human rights or international peace and security), the obligation itself may expressly or impliedly exclude reliance on necessity. Nonetheless, circumstances can be envisaged of a single unforeseen case where the interests at stake in compliance with an *erga omnes* obligation ought not to prevail over a claim of necessity. In such cases the balance to be struck by paragraph 1 (b) is not a balance between the interests of the respondent State and the individual interests of the State or States complaining of a breach. What matters is the extent of the injury to the interests protected by the obligation, and paragraph 1 (b) should be reformulated accordingly.

(vi) *Conclusions on article 33*

293. Overall it seems that concerns as to the possible abuse of necessity are not borne out by experience. There is a parallel here with the *rebus sic stantibus* principle in the law of treaties. This was for a long time treated with considerable reserve, but it was embodied in carefully limited terms in the 1969 Vienna Convention,⁵⁷⁹ and it has not had the destabilizing effect some feared it would have.⁵⁸⁰ It should also be stressed that (unlike *rebus sic stantibus*) the plea of necessity only operates by way of a temporary preclusion of wrongfulness. Overall it seems that the considerations set out in article 33 allow a reasonable balance to be struck between the interests of the States concerned and those of the international community as a whole. ICJ in the *Gabčíkovo-Nagymaros Project* case was able to apply the principle without undue difficulty and it also, as has been seen, made a clear and helpful distinction between its proper role as a precluding factor and the continuity and stability of the underlying treaty relationship.⁵⁸¹ For these reasons, the Special Rapporteur favours the retention of article 33 essentially in its present form, but with the amendments referred to above.⁵⁸²

(f) *Article 34. Self-defence*

294. Article 34 provides as follows:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

295. The commentary to article 34 stresses that it is concerned with the principle of self-defence only insofar as it is a circumstance precluding wrongfulness covered by chapter V, and that consequently it is not concerned to define the extent of lawful self-defence or to enter into the various controversies which have arisen about self-defence under the Charter of the United Nations. Article 34 is thus presented as “the inevitable inference” from the

⁵⁷⁹ Article 62 is formulated in the negative (“A fundamental change of circumstances . . . may not be invoked as a ground for terminating or withdrawing from the treaty unless . . .”). Article 33 is the only circumstance in chapter V formulated in similar negative terms.

⁵⁸⁰ The parallel is relied on in *Yearbook . . . 1980*, vol. II (Part Two), commentary to article 33, p. 51, para. (40).

⁵⁸¹ See paragraph 226 above.

⁵⁸² For the actual language proposed, see paragraph 358 below.

inherent right of self-defence as referred to in Article 51 of the Charter.⁵⁸³ The commentary notes that self-defence usually involves the use of force, in apparent contrast with lawful countermeasures which may not,⁵⁸⁴ but it declines to be drawn into such questions as “any total identity of content between the rule in Article 51 of the Charter and the customary rule of international law on self-defence”; it is sufficient “to remain faithful to the content and scope of the pertinent rules of the United Nations Charter”.⁵⁸⁵ However, the article as drafted does not refer in terms to Article 51, a matter which gave rise to some disagreement within the Commission at the time of adoption of article 34.⁵⁸⁶

296. The commentary goes on to stress that the preclusive effect of article 34 does not entitle the State acting in self-defence to violate the rights of third States.⁵⁸⁷ In this respect self-defence is subject to the same limitation as countermeasures.

(i) *Comments of Governments on article 34*

297. France believes that the reference to self-defence “in conformity with the Charter of the United Nations” is too narrow, and that the broader limits laid down by international law should be referred to instead.⁵⁸⁸ Apart from this comment, the inclusion of article 34 in chapter V appears uncontroversial.

(ii) *How far does the preclusive effect of article 34 extend?*

298. However, there is a central difficulty with article 34, which was referred to in an earlier observation of Mongolia. Complaining of the formulation of article 34, Mongolia noted that “[a]cts of a State constituting self-defence do not violate any international obligation whatsoever of any State . . . Hence, what is ‘unlawful’ cannot be part of the concept of self-defence”.⁵⁸⁹ This is plainly right so far as concerns the core obligation under Article 2, paragraph 4, of the Charter of the United Nations not to use force in international relations. So far as that obligation is concerned, the exclusion of action in self-defence is part of the definition of the obligation itself. A State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4, and if the only effect of self-defence as a circumstance precluding wrongfulness is so to provide, then it should be deleted, for the same reasons as already given with respect to consent.⁵⁹⁰

299. But in the course of self-defence, a State may violate other obligations towards the aggressor. For example, it may trespass on its territory, interfere in its internal af-

⁵⁸³ *Yearbook . . . 1980*, vol. II (Part Two), commentary to article 34, p. 52, para. (1).

⁵⁸⁴ *Ibid.*, p. 54, para. (6).

⁵⁸⁵ *Ibid.*, p. 59, para. (20).

⁵⁸⁶ *Ibid.*, p. 60, para. (26).

⁵⁸⁷ *Ibid.*, p. 61, para. (28).

⁵⁸⁸ See footnote 7 above.

⁵⁸⁹ *Yearbook . . . 1981*, vol. II (Part One), document A/CN.4/342 and Add.1-4, p. 76, para. 8.

⁵⁹⁰ See paragraphs 238-241 above. Cf. *Legality of the Threat or Use of Nuclear Weapons* (see footnote 211 above), pp. 244, para. 38, and 263, para. 96, emphasizing the lawfulness of a use of force in self-defence.

fairs, disrupt its trade contrary to the provisions of a commercial treaty, etc. Traditional international law dealt with these problems to a great extent by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.⁵⁹¹ In the Charter period, by contrast, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at “peace” with each other.⁵⁹² Indeed the legality of a formal state of war in the Charter period has been doubted. The 1969 Vienna Convention leaves such issues to one side by providing in article 73 that the Convention does not prejudice “any question that may arise in regard to a treaty ... from the outbreak of hostilities between States”.

300. Thus it seems clear that there are cases where self-defence may preclude the wrongfulness of conduct which would otherwise be in breach of treaty or other obligations of the State concerned, even though no question can possibly arise, for a State acting in self-defence, of action contrary to the basic obligation under Article 2, paragraph 4, of the Charter of the United Nations. But the problem is that self-defence does *not* preclude the wrongfulness of conduct vis-à-vis the aggressor State in all cases or with respect to all obligations. The issue is not of course whether the particular action was or was not necessary or proportionate, since that is part of the definition of self-defence. It is that there are some obligations which cannot be violated even in self-defence. The most obvious examples relate to international humanitarian law and human rights obligations. The Geneva Conventions of 12 August 1949 and the Protocol I thereto of 8 June 1977 apply equally to aggressors and defenders, and the same is true of customary international humanitarian law.⁵⁹³ All the human rights treaties contain derogation provisions for times of public emergency, including actions in self-defence.⁵⁹⁴ It is perfectly clear that self-defence does not preclude the wrongfulness of conduct in breach of obligations in these fields.

301. The problem is accordingly to distinguish between those obligations which prevail even over a possibly justified claim of self-defence and those which do not. Curiously, neither the commentary nor the debates on article 34 shed much light on this question.⁵⁹⁵ However,

⁵⁹¹ See further McNair and Watts, *The Legal Effects of War*.

⁵⁹² In *Oil Platforms* (see footnote 69 above), p. 803, it was not denied that the Treaty of Amity, Economic Relations and Consular Rights of 15 August 1955, which provides the basis of the Islamic Republic of Iran’s claim, remained in force at all relevant times, despite many actions by United States naval forces against the Islamic Republic of Iran, justified as self-defence, during the relevant period. In that case both parties agreed that to the extent that any such operations were justified by self-defence they would be lawful.

⁵⁹³ As the Court said of the rules of international humanitarian law in *Legality of the Threat or Use of Nuclear Weapons* (see footnote 211 above), p. 257, para. 79, they constitute “intransgressible principles of international customary law”. On the relationship between human rights and humanitarian law in time of armed conflict, see page 240, para. 25.

⁵⁹⁴ See Oraá, *op. cit.*, especially chapters 4 and 9.

⁵⁹⁵ This is the more curious in that the precise issue is perceptively analysed in the commentary, and the appropriate conclusion reached, in relation to article 33 (see paragraph 282 above). However, Mr. Riphagen indirectly referred to that issue in the course of the debate on article 34, stating in particular that “the rules of *jus cogens* relating to the

ICJ did do so in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. One issue was whether the use of nuclear weapons must be a breach of environmental obligations because of the massive and long-term damage such weapons caused. The Court said:

[T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.*

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.⁵⁹⁶

Although the Court did not approach the issue using the terminology of “circumstances precluding wrongfulness” or by referring to article 34, the issue being considered here is precisely the same. In what circumstances is a State acting in self-defence “totally restrained” by an international obligation? The answer is that it depends on whether the obligation was expressed or intended to apply as a definitive constraint even to States in armed conflict. For international humanitarian law, this clearly is the case; similarly for human rights law, subject to the possibility of derogation in time of emergency which is part and parcel of that law. Another example would be a unilateral commitment by a nuclear-weapon State that it would not engage in a first use of nuclear weapons in any circumstances. For other general obligations, by contrast (e.g. those relating to trade and the environment), the answer may be different, but it depends on the formulation and purpose of the primary rule in question. A treaty concerned precisely with protection of the environment in time of armed conflict⁵⁹⁷ will be intended, subject to its terms, as an “obligation of total restraint” and the plea of self-defence will not preclude wrongfulness. Accordingly, article 34 needs to embody language which distinguishes between the two categories. Adopting the language of the Court, it is suggested that article 34 should be subject to an exception for obligations which are “expressed or intended to be obligations of total restraint even to States engaged in armed conflict or acting in self-defence”. In addition it is useful for the sake of clarity and to confirm a vital principle of the law of armed conflict to give, as an example of such obligations, those in the field of international humanitarian law.

(iii) *The position of third States*

302. The commentary to article 34 emphasizes that the principal effect of the article is to preclude the wrongfulness of conduct of a State acting in self-defence vis-à-vis

protection of human rights in armed conflicts remained valid even in the relationship with an aggressor State” (*Yearbook ... 1980*, vol. I, 1620th meeting, p. 189, para. 5). He added later that “[a]ny act—including genocide or a serious violation of human rights, which were not lawful measures—could be described as self-defence. Consequently, the inclusion of the word ‘lawful’ [in the text of article 34] was essential” (*ibid.*, 1635th meeting, p. 272, para. 59).

⁵⁹⁶ *I.C.J. Reports 1996* (see footnote 211 above), p. 242, para. 30.

⁵⁹⁷ For example, the Convention on the prohibition of military or any other hostile use of environmental modification techniques.

the attacking State,⁵⁹⁸ and this is plainly correct as a general proposition. In the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ observed that:

[A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.⁵⁹⁹

This rather convoluted formulation may have been adopted to indicate that the law of neutrality, while it clearly distinguishes between conduct as against a belligerent and conduct as against a neutral, does not imply that neutral States are unaffected by the existence of a state of war. A State exercising an inherent right of self-defence of a State has certain belligerent rights, even as against neutrals. The extent to which the traditional law of neutrality has survived unchanged in the Charter period is still controversial, but fortunately the Commission does not need to enter into these controversies in this context. The language of article 34 leaves open all issues of the effect of action in self-defence vis-à-vis third States, and no alteration seems required.

(iv) *The formulation of article 34*

303. Finally, France and (in an earlier comment) Mongolia question the simple reference in article 34 to self-defence in conformity with the Charter of the United Nations.⁶⁰⁰ However, these suggestions are opposed to each other: France seeks a reference to what it regards as the wider right of self-defence under general international law, whereas Mongolia seeks an express reference to Article 51. In the Special Rapporteur's opinion, it is neither necessary nor desirable to resolve underlying questions about the scope of self-defence in modern international law—even if it were possible to do so in the draft articles, which having regard to Article 103 of the Charter it is not. It is not the function of the draft articles to specify the content of the primary rules, including that referred to in Article 51. Article 34 uses the phrase “a lawful measure of self-defence taken in conformity with the Charter of the United Nations”, and this is a sufficient reference to the modern international law of self-defence, customary and conventional. No change to article 34 is proposed in this respect.

(v) *Conclusions on article 34*

304. For these reasons it is recommended that article 34 be retained, but that a new paragraph be added to distinguish in general terms between those obligations which prevail even as against a State exercising a right of self-defence, and those which do not.⁶⁰¹

⁵⁹⁸ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 34, p. 61, para. (28).

⁵⁹⁹ *I.C.J. Reports 1996* (see footnote 211 above), p. 261, para. 89.

⁶⁰⁰ See paragraph 297 above, and for Mongolia's comment, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1-4, p. 76, para. 8.

⁶⁰¹ For the proposed formulation of the article, see paragraph 358 below. For its location, see paragraph 357 below.

(g) *Article 35. Reservation as to compensation for damage*

305. Article 35 provides as follows:

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudice any question that may arise in regard to compensation for damage caused by that act.

Article 35 is the only provision in chapter V which deals with the consequences (substantive or procedural) of invoking circumstances precluding wrongfulness. It is proposed to deal with it in that context, and after considering whether any additional circumstances ought to be provided for.⁶⁰²

4. POSSIBLE JUSTIFICATIONS OR EXCUSES NOT INCLUDED IN CHAPTER V

306. Although the Commission saw six circumstances originally enumerated in chapter V as the main generally applicable ones, it evidently did not regard the list as “absolutely exhaustive”, and noted the possibility of the development of further general or specific excuses for wrongful conduct. In its view, chapter V was “not to be construed as closing the door on that possibility”.⁶⁰³ This raises a number of questions for the Commission on second reading. First, are there other circumstances precluding wrongfulness of a general character which ought to be recognized in chapter V? Secondly, what provision—if any—is necessary to deal with the possibility that new excuses for non-performance might arise in the future? The second question is dealt with in the context of chapter 1 of part two, since it concerns the effect of the draft articles as a whole. The first question is addressed below.

307. Different legal systems, in fact, recognize different ranges of justifications or excuses for non-performance of obligations, and the review undertaken earlier of the evolution of chapter V shows that a number of other candidates for inclusion have been considered at various times.⁶⁰⁴ It is necessary to mention three of them.

(a) *Performance in conflict with a peremptory norm (jus cogens)*

308. Articles 53 and 64 of the 1969 Vienna Convention deal with cases where the provisions of a treaty are themselves in contradiction with an existing or new peremptory norm, in which case the consequence is the invalidity or termination of the treaty. Moreover, those cases are regarded so seriously that the offending provision is inseparable, i.e. the whole treaty is invalid, even if only one of its provisions is impugned.⁶⁰⁵ But there is a third possibility. A treaty, apparently lawful on its face and innocent in its purpose, might fail to be performed in circumstances where its performance would produce, or

⁶⁰² See paragraphs 338–349 below.

⁶⁰³ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 34, p. 61, para. (29).

⁶⁰⁴ See paragraph 217 above.

⁶⁰⁵ 1969 Vienna Convention, art. 44, para. 5. Article 64 states that in the case of a new peremptory norm, “any existing treaty which is in conflict with that norm becomes void and terminates”. Thus the whole treaty terminates if any provision of it is in conflict with a peremptory norm.

substantially assist in, a breach of a peremptory norm. An example might be where a treaty right of passage through a strait or overflight through the airspace of a State was being exercised in order to commit an act of aggression against another State, or where weapons promised to be provided under an arms supply agreement were to be used to commit genocide or crimes against humanity. There is no reason in such cases why the treaty itself should be void or should terminate. It is not intrinsically unlawful, and no new peremptory norm is involved. It is simply that, as a result of extrinsic circumstances, the performance of the treaty would violate, or lead directly to the violation of, a peremptory norm. In such cases the question is whether “non-performance of a treaty stipulation which conflicts with a rule of *jus cogens*—provided that the conflict is properly established—should not be considered a ground [i.e. a justification] for a breach of that treaty”.⁶⁰⁶ At the level of principle, the answer must surely be yes. If a peremptory norm invalidates an inconsistent treaty, how can the obligation to perform the treaty stand against the breach of such a norm? No doubt the link between performance of the treaty obligation and breach of the peremptory norm would have to be clear and direct. But in such cases, the temporary suspension of the obligation to perform surely follows from the peremptory character of the norm that would otherwise be violated.

309. On the other hand, there is a question as to how this result is to be achieved. In many cases it will be sufficient to interpret the relevant treaty rule as not requiring the conduct in question, in the same way as direct conflict between treaties and peremptory norms will usually be avoided by interpretation.⁶⁰⁷ However, the relevant rule may be clear, and so too the conflict with the peremptory norm in the given circumstances.

310. Sir Gerald Fitzmaurice treated this question under the heading “Non-performance justified *ab intra* by virtue of a condition of the treaty implied in it by international law”, and specifically on the basis of an implied condition of “continued compatibility with international law”,⁶⁰⁸ noting that:

A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility ...

The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.⁶⁰⁹

No similar rule applied to “a rule in the nature of *jus dispositivum*”,⁶¹⁰ since the parties were free to contract out of such a rule, including prospectively.

311. It should be stressed that, in the passage quoted, Sir Gerald Fitzmaurice evidently did not contemplate either

⁶⁰⁶ Rosenne, *op. cit.*, p. 65. The author adds that “it is difficult to foresee this hypothesis in concrete terms” (*ibid.*).

⁶⁰⁷ This discussion focuses on the potential conflict between treaty performance and a peremptory norm. In the case of a rule of customary international law, the possibility of conflict is much less, but it is not excluded.

⁶⁰⁸ *Yearbook ... 1959* (see footnote 6 above), p. 46.

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.*

the invalidity of the treaty or its termination. His focus was on the question of non-observance, in a situation of what might be referred to as occasional conflict or inconsistency. A treaty which is on its face inconsistent with a peremptory norm no doubt cannot stand, but few treaties are of this character. Cases of “occasional conflict” are much more likely, and it is not clear why these should entail total invalidation.⁶¹¹ Moreover, it should again be noted that under the 1969 Vienna Convention, it is necessary that a State should take action to invoke some ground for invalidity or termination, and this includes action pursuant to articles 53 and 64. A State may be reluctant to see a treaty invalidated or terminated as a whole, yet it may be legitimately concerned as to a specific case of performance of the treaty conflicting with the demands of a peremptory norm.⁶¹² In the event of such a conflict, there is, anyway, no room for election or for an option as between the two conflicting norms.

312. As various comments on the draft articles indicate, a number of Governments continue to harbour concerns about the notion of *jus cogens*.⁶¹³ These relate, it seems, not so much to a lack of support for the substantive values embodied in the relatively few indisputable *jus cogens* norms (the prohibitions against genocide, slavery, crimes against humanity and torture, the prohibition of aggression, and a few others), as to the worry that the notion is radically indeterminate and will destabilize treaty relations. But in nearly 20 years since the 1969 Vienna Convention came into force there has been no case where *jus cogens* has been invoked to invalidate a treaty. During the same period, tribunals, national and international, have affirmed the idea of peremptory norms in various contexts, not limited to the validity of treaties.⁶¹⁴ ICJ, while so far avoiding the use of the term itself, has also endorsed the notion of “intransgressible principles”.⁶¹⁵

313. In the Special Rapporteur’s view, there can be no going back on the clear endorsement of the notion of peremptory norms contained in the 1969 and 1986 Vienna Conventions. According to article 53 common to the two Conventions, a peremptory norm of general international law is one from which no derogation is permitted, except by a later norm of the same status. It follows from this definition that obligations generated by a peremptory norm must prevail over other obligations in case of conflict. The Special Rapporteur thus agrees with Sir Gerald Fitzmaurice and Rosenne that, once the peremptory character of a norm of *jus cogens* is clearly recognized, that norm must prevail over any other international obligation not having the same status. Indeed

⁶¹¹ Any more than the “occasional” inconsistency between a Security Council resolution and the 1971 Montreal Convention invalidated the latter (see paragraphs 9 and 24 above).

⁶¹² See the remarks of Judge ad hoc Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, pp. 439–441. The Court did not address these issues in its Order.

⁶¹³ See paragraph 236 above.

⁶¹⁴ See, for example, the decisions of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Anto Furundzija*, judgement of 10 December 1998, unreported, and of the British House of Lords in *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, 24 March 1999, *The Weekly Law Reports 1999*, vol. 2, especially pp. 832–848 (Lord Browne-Wilkinson).

⁶¹⁵ *I.C.J. Reports 1996* (see footnote 211 above), p. 257, para. 79.

in such cases the State concerned would not have the choice whether or not to comply: if there is inconsistency in the circumstances, the peremptory norm must prevail. On the other hand, the invalidation of a treaty which does not in terms conflict with any peremptory norm, but whose observance in a given case might happen to do so, seems both unnecessary and disproportionate. In such cases, the treaty obligation is, properly speaking, inoperative⁶¹⁶ and the peremptory norm prevails. But if the treaty can in future have applications not inconsistent with the peremptory norm, why should it be invalidated by such an occasional conflict? Certainly, an occasional conflict with a non-peremptory norm of customary international law (which may have the same content as a treaty) would not invalidate the customary rule for the future.

314. Is such a conflict to be resolved at the level of the secondary rules, or is it not (like consent⁶¹⁷), more properly considered part of the formulation of the primary obligation? The position is not the same as it is with respect to consent since, as argued above, the consent requirement is intrinsic to the *particular* norm or obligation, whereas the effect of peremptory norms is extrinsic to that norm or obligation and arises as an aspect of the system of international law. Nonetheless in some respects at least the impact or effect of peremptory norms occurs prior to and independently of the secondary rules of responsibility—for example, in the case of article 53 of the 1969 Vienna Convention itself. If a treaty is invalid, no obligation arises to which chapter V can apply. But is this always the situation? The question may be asked in the following way: when the draft articles speak of the obligations of States in accordance with the applicable primary rules, do they nonetheless conceive of those obligations as general in form? Or are they obligations applicable to the specific States concerned in the specific circumstances of each particular case? In short, are the obligations referred to in articles 3 (a) and 16 general in character, or are they highly individualized and specified? The latter conception, rigorously applied, might dissolve part one of the draft articles altogether, referring everything to the auspices of the primary rules. Yet this does not seem a useful result or one consistent with the development of a systematic approach to State responsibility. Thus it seems sensible still to think of the obligations which are the subject of the draft articles as being, or at least as including, obligations of a general character. By the same token, it seems appropriate to reflect the overriding impact of peremptory norms *in casu*—in situations of occasional conflict—as a circumstance precluding wrongfulness under chapter V of part one.⁶¹⁸

315. Accordingly, chapter V should contain a provision to the effect that the wrongfulness of an act of a State not in conformity with an international obligation is precluded if the act is required in the circumstances by a peremptory norm of general international law. It should be stressed that nothing less than direct conflict between the

two obligations, that is to say, an impossibility to comply at the same time with both in the circumstances that have arisen, can be sufficient for this purpose.⁶¹⁹

(b) *The “exceptio inadimplenti non est adimplendum”*

316. The maxim “*exceptio inadimplenti non est adimplendum*” (often referred to as the *exceptio inadimplenti contractus*) stands for the idea that a condition for one party’s compliance with a synallagmatic obligation is the continued compliance of the other party with that obligation. It is connected with a broader principle, that a party ought not to be able to benefit from its own wrong. This was formulated by PCIJ in the *Factory at Chorzów* case in the following way:

It is ... a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.⁶²⁰

The *exceptio* thus operates in the same manner as other circumstances precluding wrongfulness, and it requires consideration here.

(i) *Application of the exceptio in international case law*

317. The application of the *exceptio* was an issue in the *Diversion of Water from the Meuse* case. In that case, the Netherlands complained, inter alia, about Belgium’s taking of water for irrigation and other purposes from a particular lock on the Belgian side, which was said to be unlawful under a bilateral Treaty of 1863. Belgium argued that its use of the lock was not unlawful having regard to the similar use by the Netherlands of a lock on its side. Subsidiarily it argued that, “by constructing certain works contrary to the terms of the Treaty, the Applicant has forfeited the right to invoke the Treaty against the Respondent”.⁶²¹ The Court upheld the principal Belgian contention, inter alia, by comparing the use of the two locks:

Neither of these locks constitutes a feeder, yet both of them discharge their lock-water into the canal, and thus take part in feeding it with water otherwise than through the treaty feeder ... In these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past.⁶²²

In his separate opinion, Judge Altamira denied that the obligations of the two parties were synallagmatic; accordingly Belgium could not invoke the Netherlands’ own conduct as a circumstance precluding wrongfulness.⁶²³ Judges Anzilotti (dissenting) and Hudson disagreed. Judge Anzilotti, referring to Belgium’s subsidiary submission, said that:

I am convinced that the principle underlying this submission (*inadimplenti non est adimplendum*) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any

⁶¹⁶ See paragraphs 227–228 above.

⁶¹⁷ See paragraph 243 above.

⁶¹⁸ The “nominalist” approach to obligations, which is rejected here, might have further consequences for chapter V. It would reinforce a very narrow conception of the chapter (covering only circumstances precluding responsibility, not wrongfulness). It would tend to the exclusion of article 34 on self-defence.

⁶¹⁹ For the text of the proposed article, see paragraph 358 below.

⁶²⁰ *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 31.*

⁶²¹ *Diversion of Water from the Meuse, P.C.I.J., Series C, No. 81, p. 209.*

⁶²² *Ibid., Judgment, 1937, P.C.I.J., Series A/B, No. 70, p. 25.*

⁶²³ *Ibid.*, p. 43.

case, it is one of these “general principles of law recognized by civilized nations” which the Court applies in virtue of Article 38 of its Statute.⁶²⁴

Judge Hudson referred both to analogous principles of the English law of equity as well as to civil law sources and said:

It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law ... A very similar principle was received into Roman Law ... The *exceptio non adimpleti contractus* required a claimant to prove that he had performed or offered to perform his obligation ... [E]ven where a code is silent on the point Planiol states the general principle that “in any synallagmatic relationship, neither of the two parties may claim a benefit to which it is entitled unless it offers to perform its own obligation” ...

The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State’s appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.⁶²⁵

318. In the *Appeal Relating to the Jurisdiction of the ICAO Council*, ICJ emphasized that a mere allegation by a party to a treaty that another party had committed a material breach of it could not allow the former unilaterally to consider that treaty as terminated or suspended.⁶²⁶ In his separate opinion, Judge de Castro expressly referred to the *exceptio inadimpleti contractus* in the context of India’s contention that “[n]o question of interpretation or application can arise with regard to a treaty which has ceased to exist or which has been suspended”.⁶²⁷ Relying upon the principle laid down in article 60 of the 1969 Vienna Convention, “which follows from the contractual nature of treaties”,⁶²⁸ Judge de Castro said:

It should not be overlooked that the rule opens the possibility of raising the *exceptio inadimpleti non est adimplendum*. The breach of an obligation is not the cause of the invalidity or termination of the treaty. It is a source of responsibility and of new obligations or sanctions. Alongside this, it is the material breach of a treaty which entitles the injured party to invoke it in order to terminate or suspend the operation of the treaty.⁶²⁹

319. In the *Gabčíkovo-Nagymaros Project* case, the question arose in a rather specific and unusual form. As noted above, ICJ held that Hungary was not justified in suspending and terminating work on the project in the period 1989–1991, but equally that Czechoslovakia was not entitled unilaterally to divert the Danube for the purposes of its Variant C. Both parties were accordingly in breach of the 1977 Treaty, but the Court declined to allow

Hungary to rely on Czechoslovakia’s breach (undoubtedly a material breach) as a ground for termination. Relying on the passage from the *Factory at Chorzów* case, cited above (para. 316), the Court said it could not:

overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary’s own prior wrongful conduct ... Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.⁶³⁰

Subsequently the Court noted that “[t]he principle *ex injuria jus non oritur* is sustained by the Court’s finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct”.⁶³¹ However, it should be noted that while Slovakia’s later breach of the Treaty was “caused” by Hungary’s earlier breach (in the sense of it being a *causa sine qua non*), it was not caused by the earlier breach in the sense of the *Factory at Chorzów* dictum. Instead it was, as the Court held, independently unlawful.

(ii) Comparative law underpinnings of the “exceptio”

320. As Judges Anzilotti and Hudson indicated in *Diversion of Water from the Meuse*,⁶³² the principle underlying the *exceptio* is widely recognized in national legal systems in respect of reciprocal or synallagmatic obligations, i.e. where it is clear that performance of an obligation by one party is either a precondition or a concurrent condition to the performance of the same or a related obligation by the other party. A cognate situation arises where the breach by one party is consequential upon and directly produced by an earlier breach of the other party (e.g. where a delay in completion of certain work by one party is caused by a delay in delivery of a necessary piece of equipment by the other). Moreover, in national law (just as in the treaty cases cited above), what is at stake appears to be a circumstance precluding wrongfulness in respect of the continued performance of an obligation, rather than its termination. As Treitel notes, after a thorough review of the comparative law experience:

The effect of the *exceptio* in CIVIL LAW must be distinguished from that of termination ... Termination brings to an end each party’s duty to perform, though the circumstances making the remedy available may give the injured party a right to damages; it also gives the injured party a right to the return of his own performance on restoring what he has received under the contract. The *exceptio* does not produce these effects, but only gives rise to what has been called a “waiting position”. It is a “dilatatory plea” which does not terminate the contract but merely entitles the injured party *for the time being* to refuse to perform his part ... The injured party may rely on the *exceptio* both in legal proceedings and extra-judicially. Where the circumstances are such as to justify the injured party’s refusal to perform the court is bound to give effect to

⁶³⁰ *I.C.J. Reports 1997* (see footnote 51 above), p. 67, para. 110.

⁶³¹ *Ibid.*, p. 76, para. 133. Among the dissentients on this point, see the declaration of President Schwebel (*ibid.*, p. 85) or the dissenting opinions of Judges Herczegh and Fleischhauer, who both consider as a decisive element the seriousness or lack of proportionality of Czechoslovakia’s breach of its obligations as compared to Hungary’s (*ibid.*, p. 198 (Judge Herczegh), and p. 212 (Judge Fleischhauer), stressing that “[t]he principle that no State may profit from its own violation of a legal obligation does not condone excessive retaliation”). See also the declaration of Judge Rezek (p. 86). But Judge Bedjaoui strongly objects to that view, noting that treaties “cannot be destroyed by violating them. Save by mutual consent, States cannot and may not rid themselves of their treaty obligations so easily” (*ibid.*, p. 138).

⁶³² See footnote 621 above.

⁶²⁴ *Ibid.*, p. 50.

⁶²⁵ *Ibid.*, p. 77, citing, inter alia, Planiol, *Droit civil*, 6th ed. (1912), vol. 2, p. 320.

⁶²⁶ *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 67, para. 38.

⁶²⁷ *Ibid.*, p. 124.

⁶²⁸ *Ibid.*, p. 129.

⁶²⁹ *Ibid.*, p. 128, footnote 1. Judge de Castro adds further that “[i]t is the breach of rights or obligations having their source in the agreement which lies at the root of the *exceptio non adimpleti*” (p. 129), thus pointing out the limits of India’s contention.

the *exceptio*: it has no discretion in the matter even in those systems (such as the French) in which the remedy of termination is subject to the discretion of the court.⁶³³

321. The principle of the *exceptio* is also reflected in international commercial law instruments. For example, article 80 of the United Nations Convention on Contracts for the International Sale of Goods provides simply that:

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

It does not seem to matter for the purposes of article 80 whether the act or omission which caused the non-performance was or was not wrongful. The principle is differently formulated, under the rubric of "withholding performance", in article 7.1.3 of the UNIDROIT Principles of International Commercial Contracts, which provides that "[w]here the parties are to perform simultaneously, either party may withhold performance"⁶³⁴ if the other is not willing and able to perform.

(iii) *Should the principle be recognized in the draft articles?*

322. In his fourth report on the law of treaties, Sir Gerald Fitzmaurice discussed the principle in the framework of "circumstances justifying non-performance". He was not certain whether it was properly classified as a justification "*ab extra* by operation of a general rule of international law", or "*ab intra* by virtue of a condition of the treaty implied in it by international law".⁶³⁵ But he was clear that the principle existed, and indeed he formulated it very broadly:

By virtue of the principle of reciprocity, and except in the case of the class of [multilateral treaties of the "integral" type ... where the force of the obligation is self-existent, absolute and inherent for each party, irrespective and independently of performance by the others], non-performance of a treaty obligation by one party to the treaty will, so long as such non-performance continues, justify an equivalent and corresponding non-performance by the other party or parties.⁶³⁶

His commentary was also clear in regarding this as a general principle, not only applicable to treaty obligations:

[T]here is a general *international law rule of reciprocity* entailing that the failure of one State to perform its international obligations in a particular respect will either *entitle other States to proceed to a corresponding non-performance* in relation to that State, or will at any rate *disentitle that State from objecting to such corresponding non-performance*.⁶³⁷

The commentary goes on to mention the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, where ICJ declined to apply the principle to a treaty providing for the constitution of an arbitral commission; the wrongful refusal of one party to the dispute to appoint its own member was held to prevent the constitution of the commission as a whole, on the ground that:

⁶³³ Treitel, *Remedies for Breach of Contract: A Comparative Account*, pp. 310–311, para. 235; for his review, see pages 245–317 ("defence of refusal to perform").

⁶³⁴ See footnote 492 above.

⁶³⁵ *Yearbook ... 1959* (see footnote 6 above), pp. 44 and 46.

⁶³⁶ *Ibid.*, p. 46.

⁶³⁷ *Ibid.*, p. 70, para. 102.

The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties.⁶³⁸

This is reminiscent of Czechoslovakia's attempt, in the case concerning the *Gabčíkovo-Nagymaros Project*, to fashion, by way of "approximate application", a version of the project favourable to it when faced with Hungary's wrongful refusal to proceed. The Court rejected the argument, holding that Hungary's breach of the 1977 Treaty could not be remedied by creating a project which was not the kind of project contemplated by the Treaty.⁶³⁹

323. The Commission did not debate Sir Gerald Fitzmaurice's fourth report on the law of treaties, nor did his successor, Sir Humphrey Waldock, address the issue. Under his guidance the scope of the 1969 Vienna Convention was narrowed so as to deal with the treaty as an instrument, leaving to one side most questions of the performance of treaty obligations. These were reserved to the topic of State responsibility by article 73 of the Vienna Convention.

324. The issue of the *exceptio* was addressed by Mr. Willem Riphagen in the context of countermeasures. In his fifth report, he proposed as article 8 of part two the following text:

Subject to articles 11 to 13, the injured State is entitled, by way of reciprocity, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached.⁶⁴⁰

In the debate, some members pointed to "the fine and somewhat formalistic distinction between [draft article 8] and the suspension of the *performance* of treaty obligations".⁶⁴¹ Mr. Gaetano Arangio-Ruiz likewise dealt with the issue as an aspect of countermeasures, noting that:

⁶³⁸ *I.C.J. Reports 1950* (see footnote 34 above), p. 229, cited by Sir Gerald Fitzmaurice, *Yearbook ... 1959* (see footnote 6 above), p. 71.

⁶³⁹ Or, as the Court actually put it:

"[E]ven if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty ...

"It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations ... but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse."

(*I.C.J. Reports 1997* (see footnote 51 above), pp. 53–54, paras. 76 and 78)

On the so-called "principle of approximate application", see *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion*, *I.C.J. Reports 1956*, separate opinion of Sir Hersch Lauterpacht, p. 46, and the discussion by Rosenne, *op. cit.*, pp. 95–101.

⁶⁴⁰ *Yearbook ... 1984*, vol. II (Part One), document A/CN.4/380, p. 3, and for the draft commentary, see *Yearbook ... 1985*, vol. II (Part One), document A/CN.4/389, pp. 10–11. Draft article 11 as proposed by Mr. Riphagen excluded the application of article 8 in cases of obligations arising from multilateral treaties and affecting the collective interests of the States parties. Draft article 12 was a savings clause dealing with *ius cogens*.

⁶⁴¹ *Yearbook ... 1984*, vol. II (Part Two), p. 103, para. 373.

The problem here is to see whether practice justifies making a distinction between such “conventional” measures as treaty suspension and termination and countermeasures in general, not only for merely descriptive purposes but in view of the legal regime to be codified or otherwise adopted by way of progressive development. As well as the question of so-called reciprocity in general, the issues relating to these two “conventional” measures—issues connected with the relationship between the law of treaties and the law of State responsibility—will require further study before any draft articles are formulated.⁶⁴²

The Commission decided not to consider reciprocal measures “as a distinct category of countermeasures” on the ground that they “did not deserve special treatment”.⁶⁴³

(iv) *Relationship of the exceptio to other procedures*

325. As this history suggests, in considering whether to include the *exceptio* in chapter V it is first necessary to ask whether its role is not sufficiently performed by two other procedures. The first of these is countermeasures. Almost by definition, where one State has breached a synallagmatic obligation, the other State’s refusal to perform that obligation will be a legitimate countermeasure, since it is very unlikely to be disproportionate and may well be the most appropriate response of all. On the other hand, the *exceptio* has a much more limited application than countermeasures, is not subject to the same limitations and is a more specific response to a particular breach, lacking the opprobrium often associated with countermeasures. A legal system might reject countermeasures, self-help other than in self-defence and reprisals but still find a role for the *exceptio*. Although the Commission has already rejected the category of reciprocal countermeasures, for reasons which are valid enough in that context, that rejection does not exclude the possibility of adopting some version of the *exceptio* in chapter V of part one—a possibility the Commission has not yet considered.⁶⁴⁴

326. The second alternative procedure is the suspension of a treaty for breach. Under article 60, paragraph 1, of the 1969 Vienna Convention, a material breach of a bilateral treaty by one party entitles the other to terminate the treaty, but also to suspend it in whole or in part. In the case of a multilateral treaty, the *only* possibility for a party aggrieved by a material breach is to suspend the treaty in its relations with the defaulting State, since termination is a matter for all the parties to the treaty.⁶⁴⁵ Overall the Convention gives considerable emphasis to suspension of treaties, no doubt out of a desire to leave open the possibility of a resumption of treaty relations even after a material breach.⁶⁴⁶

⁶⁴² *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/440 and Add.1, p. 14, para. 35.

⁶⁴³ *Yearbook ... 1992*, vol. II (Part Two), p. 23, para. 151.

⁶⁴⁴ *Ibid.* See also *Yearbook ... 1996*, vol. II (Part Two), p. 67, para. (1) of the commentary to article 47, footnote 200.

⁶⁴⁵ See article 60, paragraph 2 (b) and (c). The rather strict provisions of article 44 on separability do not apply to suspension for breach: see article 44, paragraph 2, presumably on the ground that a State which may terminate the whole treaty for breach may suspend less than the whole. This could however lead to unfair results in practice, if a State were to suspend those provisions which imposed obligations on it, while seeking to maintain in force those that gave it rights.

⁶⁴⁶ In the case concerning the *Gabčíkovo-Nagymaros Project*, the Court seems to have taken the view that Hungary suspended the operation of the 1977 Treaty, apart from any express provision of the 1969 Vienna Convention permitting it to do so. It said:

327. There are, however, still differences between reliance on the *exceptio* as a circumstance precluding wrongfulness, and the suspension of a treaty under article 60 of the 1969 Vienna Convention or its customary law equivalent. First, article 60 only applies to “material” breaches, rather narrowly defined, whereas the *exceptio* applies to any breach of treaty. Secondly, article 60 allows the suspension of the whole treaty, or (apparently) any combination of its provisions, whereas the *exceptio* only allows non-performance of the same or a closely related obligation. Thirdly, the *exceptio* may also be more readily applied to cases of obligations of simultaneous performance, given the formal procedure for suspension in article 65.⁶⁴⁷ And finally, article 60 is of course only concerned with the suspension of treaty obligations, whereas there is no reason to think that the *exceptio*, as it is formulated in the *Factory at Chorzów*⁶⁴⁸ dictum, does not apply to all international obligations whatever their origin.

(v) *Forms of the exceptio distinguished*

328. There is thus some, but far from complete, overlap between the *exceptio* and the other doctrines discussed, and this supports the view that—regard being had to the weight of authority behind it and to its general good sense—some version of the *exceptio* ought to be recognized in chapter V. However, it is necessary here to distinguish at least two different forms of the *exceptio*. One, expressed in the *Factory at Chorzów* dictum⁶⁴⁹ and in article 80 of the United Nations Convention on Contracts for the International Sale of Goods,⁶⁵⁰ requires that there be a causal link between the breach of the obligation by State A and its non-performance by State B. The second, broader one is concerned with synallagmatic or interdependent obligations, with each seen as in effect a counterpart of the other: it is as expressed by Judge Hudson in *Diversion of Water from the Meuse*,⁶⁵¹ in article 7.1.3 of the UNIDROIT Principles of International Commercial Contracts⁶⁵² and by Sir Gerald Fitzmaurice in his reports.⁶⁵³ The position taken by the majority in the *Gabčíkovo-Nagymaros Project* case seems to have been different again,⁶⁵⁴ although still a manifestation of the

“The Court cannot accept Hungary’s argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself ...”

(*I.C.J. Reports 1997* (see footnote 51 above), p. 39, para. 48.)

The context suggests that by this it meant that Hungary in substance attempted to suspend the Treaty, despite its own statements that it was acting out of necessity (i.e. on the basis of circumstances precluding wrongfulness). Under article 65 of the 1969 Vienna Convention, suspension (like termination) is a formal act. It is slightly odd to describe a State as suspending a treaty when (a) it has never purported to do so; and (b) it is not entitled to do so as a matter of law.

⁶⁴⁷ On the procedure for invoking circumstances precluding wrongfulness, see paragraph 354 below.

⁶⁴⁸ See footnote 620 above.

⁶⁴⁹ See paragraph 316 above.

⁶⁵⁰ See paragraph 321 above.

⁶⁵¹ See paragraph 317 above.

⁶⁵² See paragraph 321 above.

⁶⁵³ See paragraph 322 above.

⁶⁵⁴ See paragraph 319 above.

general principle of law that a party cannot be allowed to benefit from its own wrongful act.

329. Looking first at the broader, synallagmatic idea of the *exceptio*, it is clear that this could only be admitted in chapter V with many qualifications and limitations. These exceptions would include, in Sir Gerald Fitzmaurice's words, multilateral treaties of the "integral" type (i.e. where performance is not premised on reciprocity).⁶⁵⁵ It could not justify a breach of the rules relating to the use of force or, more generally, a breach of *jus cogens*, and could not stand against any express or clearly implied excluding effect of the primary rule. It could have no application to obligations *erga omnes*, e.g. obligations in the field of human rights, humanitarian law or international criminal law, as was recognized by ICJ in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, where it said that:

Bosnia and Herzegovina was right to point to the *erga omnes* character of the obligations flowing from the Genocide Convention ... and the Parties rightly recognized that in no case could one breach of the Convention serve as an excuse for another.⁶⁵⁶

It seems that the effect of the *exceptio*, even in its broader form, is strictly relative and bilateral: in Mr. Riphagen's words, it would be limited to breaches which "correspond to, or are directly connected with", the prior breach of the other party.⁶⁵⁷

330. A statement of the synallagmatic form of the *exceptio*, limited in this way, nonetheless presents difficulties of application, as can be seen from the United Nations experience with the monitoring of ceasefire agreements. The difficulties were analysed, for example, in a 1956 report of Secretary-General Dag Hammarskjöld, dealing with the extent to which breaches of any of the Middle East armistice agreements of 1949 could be held to justify a retaliatory breach by the other party (acting other than in immediate self-defence).⁶⁵⁸ The report referred to "a chain of actions and reactions ... which, unless broken, is bound to constitute a threat to peace and security", and continued:

[S]ome uncertainty concerning the scope of the obligations of the armistice agreements has, in my view, served to contribute to the unfortunate development ...

As a matter of course, each party considers its compliance with the stipulations of an armistice agreement as conditioned by compliance of the other party to the agreement ...

Obviously, therefore, the question of reciprocity must be given serious consideration and full clarity sought. The point of greatest significance in this context is: to what extent can an infringement of one or several of the other clauses of an armistice agreement by one party

⁶⁵⁵ See paragraph 322 above.

⁶⁵⁶ *I.C.J. Reports 1997* (see footnote 241 above), p. 258, para. 35. See also, and more emphatically, the dissenting opinion of Judge Weeramantry (*ibid.*, pp. 292–294). The Court went on to hold that nonetheless a counterclaim for genocide could be brought under article 80 of the Rules of Court "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" (*ibid.*, p. 258, para. 35).

⁶⁵⁷ See paragraph 324 above.

⁶⁵⁸ *Official Records of the Security Council, Eleventh Year, Supplement for April, May and June 1956*, document S/3596, pp. 30–66, cited by Rosenne, *op. cit.*, pp. 111–115.

be considered as entitling the other party to act against the cease-fire clause which is to be found in all the armistice agreements ...

The very logic of the armistice agreements shows that infringements of other articles cannot serve as a justification for an infringement of the cease-fire article. If that were not recognized, it would mean that any one of such infringements might not only nullify the armistice régime, but in fact put in jeopardy the cease-fire itself. For that reason alone, it is clear that compliance with the said article can be conditioned only by similar compliance of the other party.⁶⁵⁹

Thus in a context in which there was no strictly causal nexus between one breach and the other, the Secretary-General's view was that only an infringement of a cease-fire obligation specified in a given article could justify what would otherwise be an infringement of that article. Indeed it may be that under the Charter of the United Nations, any underlying entitlement to use force is terminated on the conclusion of a permanent ceasefire, and that thereafter the only exception to the ceasefire obligation is provided by the right of self-defence.⁶⁶⁰

331. The underlying problem is that a broad view of the *exceptio* may produce escalating non-compliance, negating for practical purposes the continuing effect of the obligation. For these reasons the Special Rapporteur is firmly of the view that the justification for non-compliance with synallagmatic obligations should be resolved (a) by the law relating to the suspension or termination of those obligations (which is sufficient to deal with most problems of treaty obligations); and (b) by the law of countermeasures. The question then becomes whether the narrower form of the *exceptio*, as recognized by the Court in the *Factory at Chorzów* dictum,⁶⁶¹ should be included in chapter V. There is certainly a case for doing so, both as a matter of authority or tradition and as a matter of ordinary common sense. To facilitate debate, the Special Rapporteur proposes that chapter V should include a provision to the effect that the wrongfulness of an act of a State is precluded if it has been prevented from acting in conformity with the obligation in question as a direct result of a prior breach of the same or a related international obligation by another State.⁶⁶²

(c) *The so-called "clean hands" doctrine*

332. Finally, some brief reference should be made to the so-called "clean hands" doctrine, which has sometimes been relied on as a "defence", or at least as a ground of inadmissibility of a claim, in State responsibility cases—mostly, though not always, in the framework of diplomatic protection. For example, in his dissenting opinion in *Military and Paramilitary Activities in and against Nicaragua*, Judge Schwebel relied on the doctrine as a subsidiary basis for dismissing Nicaragua's claim.⁶⁶³ The majority did not refer directly to the point.

⁶⁵⁹ *Ibid.*, pp. 112–113, paras. 12 and 15–18.

⁶⁶⁰ See the discussion by Lobel and Ratner, "Bypassing the Security Council: ambiguous authorizations to use force, cease-fires and the Iraqi inspection regime", pp. 144–152, with references to earlier literature. For the Secretary-General the problem was partly jurisdictional, since his specific authority in the Middle East was to supervise the armistice agreements as such.

⁶⁶¹ See paragraph 316 above.

⁶⁶² For the proposed provision, see paragraph 358 below.

⁶⁶³ *I.C.J. Reports 1986* (see footnote 68 above), pp. 392–394.

333. The doctrine has hardly been referred to in the Commission's previous work on State responsibility. The Special Rapporteur, Mr. F. V. García Amador, dealt with it only in relation to "Fault on the part of the alien", which is now subsumed in part two, article 42, paragraph 2, as a basis for limiting the amount of reparation due.⁶⁶⁴ To the extent that "clean hands" may sometimes be a basis for rejecting a claim of diplomatic protection,⁶⁶⁵ the doctrine appears to operate as a ground of inadmissibility rather than as a circumstance precluding wrongfulness or responsibility, and it can be left to be dealt with under the topic of diplomatic protection.

334. Even within the context of diplomatic protection, the authority supporting the existence of a doctrine of "clean hands", whether as a ground of admissibility or otherwise, is, in Salmon's words, "fairly long-standing and divided".⁶⁶⁶ It deals largely with individuals involved in slave-trading and breach of neutrality, and in particular a series of decisions of the United States-Great Britain Mixed Commission set up under a Convention of 8 February 1853 for the settlement of shipowners' compensation claims. According to Salmon, in the cases where the claim was held inadmissible:

In any event, it appears that these cases are all characterized by the fact that *the breach of international law by the victim was the sole cause of the damage claimed, [and] that the cause-and-effect relationship between the damage and the victim's conduct was pure, involving no wrongful act by the respondent State.*

When, on the contrary, the latter has in turn violated international law in taking repressive action against the applicant, the arbitrators have never declared the claim inadmissible.⁶⁶⁷

335. It is true that legal principles based on the underlying notion of good faith can play a role in international law. These include the principle (which underlines the *exceptio*) that a State may not rely on its own wrongful conduct, and the principle *ex turpi causa non oritur actio*. Such principles may be capable of generating new legal consequences within the field of responsibility, as the former appears to have done in the case concerning the *Gabčíkovo-Nagymaros Project*.⁶⁶⁸ But this does not mean that new and vague maxims such as the "clean hands" doctrine should be recognized in chapter V. According to Fitzmaurice:

[A] State which is guilty of illegal conduct may be deprived of the necessary *locus standi in iudicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short,

⁶⁶⁴ *Yearbook ... 1958*, vol. II, document A/CN.4/111, pp. 53–54, paras. 16–21.

⁶⁶⁵ As was the case in two awards cited by Judge Schwebel, *I.C.J. Reports 1986* (see footnote 68 above), pp. 393–394, para. 270: viz. the *Clark* claim (1865), in Moore, *op. cit.*, vol. III, pp. 2738–2739, and the *Pelletier* claim, *Papers relating to the Foreign Relations of the United States, for the Year 1887* (Washington, Government Printing Office, 1888), p. 607. A similar argument was raised in the *Barcelona Traction* case: see *I.C.J. Pleadings, Barcelona Traction, Light and Power Company, Limited (New Application: 1962)*, Vol. X, p. 11, but was not discussed by the Court itself in either phase of that case.

⁶⁶⁶ Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", p. 249.

⁶⁶⁷ *Ibid.*, p. 259. See also García-Arias, "La doctrine des 'clean hands' en droit international public", p. 18; and Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux".

⁶⁶⁸ See paragraph 319 above.

were provoked by it. In some cases, the principle of legitimate reprisals will remove any aspect of illegality from such counter-action.⁶⁶⁹

But chapter V is not concerned with such procedural questions as *locus standi*, or with the admissibility of claims. And it is significant that even in the above passage it is not suggested that the illegal conduct of an injured State (still less its lack of "clean hands") is a distinct circumstance precluding the wrongfulness of the conduct which caused injury to that State.

336. For these reasons there is in the Special Rapporteur's view no basis for including the clean hands doctrine as a new "circumstance precluding wrongfulness", distinct from the *exceptio* or from countermeasures. On the contrary, the conclusion reached by Rousseau seems still to be valid: "[I]t is not possible to consider the 'clean hands' theory as an institution of general customary law".⁶⁷⁰

5. PROCEDURAL AND OTHER INCIDENTS OF INVOKING CIRCUMSTANCES PRECLUDING WRONGFULNESS

337. The only provision in chapter V which deals with the incidents or consequences of invoking a circumstance precluding wrongfulness is article 35. This contrasts with the rather elaborate provisions in the 1969 Vienna Convention dealing with the consequences of invoking a ground for invalidity, termination or suspension of a treaty. A number of different issues need to be considered, beginning with article 35 itself.

(a) *Compensation for losses in cases where chapter V is invoked*

338. The terms of article 35 have already been set out.⁶⁷¹ As its title suggests, the article is a reservation as to questions of possible compensation for damage in certain cases covered by chapter V. It does not confer any rights to compensation, although in relation to the two cases not mentioned, countermeasures and self-defence, by clear implication it excludes any such rights.

339. The brief commentary to article 35 notes that the issue of a reservation with respect to damage first arose in 1979 in the discussion of article 31 dealing with force majeure. Because such a proviso was relevant to other provisions of chapter V it was set aside and only reconsidered in 1980. Although the possibility of compensation was argued "forcefully" in connection with the state of necessity,⁶⁷² article 35 was eventually included as "a reservation in quite general terms", applicable to all the circumstances in chapter V except self-defence and countermeasures.⁶⁷³ But it was emphasized that the inclusion of article 35 did not "prejudge any of the questions of principle that might arise in regard to the matter, either

⁶⁶⁹ Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law, p. 119, quoted by Judge Schwebel, *I.C.J. Reports 1986* (see footnote 68 above), p. 394, para. 271.

⁶⁷⁰ Rousseau, *Droit international public*, p. 177, para. 170.

⁶⁷¹ See paragraph 305 above.

⁶⁷² *Yearbook ... 1980*, vol. II (Part Two), commentary to article 35, p. 61, para. (3).

⁶⁷³ *Ibid.*, para. (4).

with respect to the obligation to indemnify, which would be considered in the context of part 2 of the present draft”, or the location of the article.⁶⁷⁴ Nor was there any discussion of State practice or doctrine on the point, either in the commentary or in the debate following the Drafting Committee’s proposal for article 35.⁶⁷⁵

(i) *Comments of Governments on article 35*

340. Austria suggests that article 35 be reformulated to avoid undercutting chapter V as a whole. Only where international law independently provides for compensation should that possibility arise.⁶⁷⁶ France goes further, proposing the deletion of article 35 on the ground that it “envisages no-fault liability”.⁶⁷⁷ Germany appears to envisage that compensation should be limited to the case of necessity under article 33.⁶⁷⁸ The United Kingdom welcomes article 35 as applied to cases (such as necessity) where the circumstance precluding wrongfulness operates as an excuse rather than a justification.⁶⁷⁹ Japan too supports the principle, but suggests the use of a different term than “compensation”, which is an aspect of reparation for wrongful acts under part two.⁶⁸⁰

(ii) *Is there room for a principle of compensation for loss when circumstances preclude wrongfulness?*

341. The commentary takes a very reserved position with respect to article 35, which it regards as a mere “without prejudice” clause. In part this may have been in the expectation that the issue would be dealt with in part two, but this did not occur. As Japan points out, however, article 35 is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of part two.⁶⁸¹ Rather it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any actual losses suffered by any State directly affected by that reliance. That is a perfectly proper condition, in principle, for allowing the former State to rely on a circumstance precluding wrongfulness. It has nothing to do with the general issue of whether a State may be “liable” for injuries caused by lawful activities causing harm to other States, which has been the subject of a separate topic. Under the secondary rules of responsibility, which are the proper subject of the present draft articles, a State would normally be required to make full reparation to an injured State for conduct which (in terms of article 16) is not in compliance with its international obligations.⁶⁸² If the draft articles define circumstances in which the putatively injured State is not so entitled, it is perfectly proper that they should do so subject to the proviso that any actual losses suffered by

that State, and for which it is not itself responsible, should be met by the invoking State. Formally this falls within the scope of the secondary rules of responsibility, since it relates to a situation where State responsibility *prima facie* arises in terms of the draft articles, but the draft articles go on expressly to exclude that responsibility.⁶⁸³ As a matter of substance, the case for such a condition is that, without it, the State whose conduct would otherwise be unlawful would be able to shift the burden of the defence of its own interests or concerns onto an innocent third State.

342. This was accepted by Hungary in invoking the plea of necessity in the case concerning the *Gabčíkovo-Nagyymaros Project*. It would have been unconscionable for Hungary to have sought to impose on Czechoslovakia the whole cost of the cancellation of a joint project, where the cancellation occurred for reasons which were not (or at least not only) attributable to Czechoslovakia. As ICJ noted:

Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.⁶⁸⁴

Because the plea of necessity was rejected on other grounds, the precise scope of such compensation in the circumstances of the case was not decided.⁶⁸⁵

(iii) *To which of the circumstances in chapter V should article 35 apply?*

343. For these reasons there is no a priori reason for excluding article 35 from the draft articles. If its retention implies that at least some of the circumstances in chapter V are circumstances precluding responsibility rather than wrongfulness, then that too is within the province of the secondary rules of responsibility, just as it would be if they were to be conceptualized as circumstances mitigating responsibility.⁶⁸⁶ Thus the question becomes one of determining which of the circumstances dealt with in chapter V give rise, or might give rise, to the possibility of compensation for actual losses incurred, and how article 35 should be formulated.

344. It is clear that article 35 should not apply to self-defence or countermeasures, since those circumstances depend upon and relate to prior wrongful conduct of the “target” State, and there is no basis to compensate it for the consequences of its own wrongful conduct. If consent were to be retained as a circumstance precluding wrongfulness, it too ought to be excluded from the scope of article 35. A State whose consent is the basis for the conduct of another State (e.g. overflight, or its occupation of territory) is of course entitled to make its consent conditional on the payment of a fee, or rental, or compensation for harm incurred: this is a matter for negotiation at the time consent is given. However, for the reasons given above, there is no place for article 29 within the framework of chapter V.⁶⁸⁷

⁶⁸³ See the ICJ dictum in the case concerning the *Gabčíkovo-Nagyymaros Project*, quoted in paragraph 228 above.

⁶⁸⁴ *I.C.J. Reports 1997* (see footnote 51 above), p. 39, para. 48.

⁶⁸⁵ There is a separate issue, which is that of accounting for accrued costs and damages (*ibid.*, p. 81, paras. 152–153).

⁶⁸⁶ See paragraph 230 above.

⁶⁸⁷ See paragraph 243 above.

⁶⁷⁴ *Ibid.*

⁶⁷⁵ But for a case where compensation was awarded even though the wrongfulness of the conduct was precluded, see the *Company General of the Orinoco* case (footnote 528 above), cited in *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, p. 40, para. (17).

⁶⁷⁶ See footnote 7 above.

⁶⁷⁷ *Ibid.*

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *Ibid.*

⁶⁸⁰ A/CN.4/492 (reproduced in the present volume).

⁶⁸¹ *Ibid.*

⁶⁸² See paragraph 14 above.

345. That leaves the three circumstances (force majeure, distress, necessity) which are in principle independent of the conduct or will of the putatively injured State. As for force majeure, this is defined as the occurrence of an “irresistible force or an unforeseen external event beyond the control of the State, making it materially impossible in the circumstances to perform the obligation”; moreover, the invoking State must not have contributed to the occurrence of the situation of force majeure by its own wrongful conduct, and it must not have assumed the risk of the force majeure event occurring.⁶⁸⁸ In these circumstances there seems to be no reason to require the invoking State to assume any special obligation of compensation. Circumstances beyond its control have made it materially impossible to perform, and it has not accepted the sole risk of their occurrence.⁶⁸⁹ Conversely—and as noted above—there is a strong case for compensation for actual loss where a State relies on necessity, provided at least that the other State has not itself through its own default or neglect produced the situation of necessity.

346. As to distress, in the Special Rapporteur’s view, this is closer to the plea of necessity than it is to force majeure. Assume a vessel in distress of weather and already damaged which puts into a foreign port in order to save the lives of the crew. Why should the vessel not be required to pay for any injury to port installations (e.g. arising from fuel oil leaking from a ruptured tank)? To require it to do so may facilitate reliance on distress as a basis for saving lives, which must be in the general interest.

347. As to the two additional circumstances proposed to be added to chapter V, it is suggested that neither needs to be mentioned in article 35. Compliance with peremptory norms is of common interest and concern to all States in the international community, and there is no reason why one State should be required to compensate any other for the exigencies of complying with that common responsibility. As to the *exceptio*, like countermeasures this is dependent on the wrongful conduct of the “target” State and there is no case for countermeasures. For these reasons the Special Rapporteur would limit the scope of article 35 to distress and necessity.

(iv) *Issues of formulation: a right or a mere reservation?*

348. The remaining question is whether, as to distress and necessity, article 35 should be formulated as a positive right or as a reservation. There are difficulties with the former, however, since the range of cases varies so much and since practice is scarce. On balance it is proposed to retain the form of a savings clause, but to strengthen the language to some extent to make it clear that an innocent third State is not expected to bear alone any actual losses arising from the invocation of distress or necessity.

(v) *Conclusions on article 35*

349. For these reasons article 35 should be retained in relation to distress and necessity. The invocation of those

circumstances should be “without prejudice ... to the question of financial compensation for any actual harm or loss caused by” the act of the invoking State.⁶⁹⁰

(b) *Temporal effect of invoking circumstances precluding wrongfulness*

350. The commentary to the various draft articles in chapter V makes it clear that they only preclude wrongfulness (and thus responsibility) for as long as the circumstances in question continue to exist and to satisfy the conditions laid down for their invocation. The same principle was affirmed by the Tribunal in the *Rainbow Warrior* case and by ICJ in the case concerning the *Gabčíkovo Nagymaros Project*.⁶⁹¹ Although probably implicit in chapter V as adopted on first reading, it is of such significance that it should be spelled out expressly. Of course it may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation (e.g. a breach of a treaty justifying countermeasures may be “material” in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty). Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which the draft articles can or should resolve, but at least it should be provided that the invocation of circumstances precluding wrongfulness is without prejudice to “the cessation of any act not in conformity with the obligation in question, and subsequent compliance with that obligation, if and to the extent that the circumstance precluding wrongfulness no longer exists”.⁶⁹²

(c) *Onus of proof*

351. In principle, State responsibility is not to be presumed, and the onus of establishing such responsibility lies on the State which asserts it.⁶⁹³ However, where conduct in conflict with an international obligation of a State is attributable to that State and it seeks to avoid its responsibility by relying on some circumstance under chapter V, the position changes and the onus lies on that State to justify or excuse its conduct. In addition, it will often be the case that only the invoking State is fully aware of the circumstances of the case. It seems that this result is sufficiently achieved by the existing language of chapter V, and that no further provision is required.

(d) *Loss of the right to invoke responsibility*

352. The suggestion has been made that the draft articles should cover the question of loss of the right to invoke responsibility, by analogy with article 45 of the 1969 Vienna Convention, which deals with “Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty”. A number

⁶⁸⁸ See paragraphs 263–265 above, and for the terms of article 31, paragraph 358 below.

⁶⁸⁹ Where the force majeure results from coercion by a third State, that State may be responsible for the consequences to the putatively injured State (see paragraph 204 above). As between the invoking State and the third State, clearly the latter should bear responsibility.

⁶⁹⁰ See paragraph 358 below.

⁶⁹¹ See paragraph 228 above.

⁶⁹² Draft article 35 (para. 358 below).

⁶⁹³ As Arbitrator Max Huber said in *British Claims in the Spanish Zone of Morocco*, “the international responsibility of the State is not to be presumed” (UNRIAA (footnote 292 above), p. 699).

of earlier codification attempts included elements which are appropriately dealt with under this rubric, in particular the “acceptance of non-performance by the other party or parties”.⁶⁹⁴ On the other hand, this issue only arises if responsibility has already been incurred, i.e. if all the conditions for the international responsibility of a State have been satisfied. It therefore belongs properly to part two of the draft articles and will be discussed in that framework.

(e) *Dispute settlement in relation to circumstances precluding wrongfulness*

353. Because the effect of the circumstances dealt with in chapter V is to preclude a responsibility which would otherwise exist in relation to some other State or States, the question of settlement of disputes naturally arises. This is manifested, for example, by the linkage which already exists in part two between countermeasures and dispute settlement, and also by the linkage that the States participating in the United Nations Conference on the Law of Treaties insisted on creating between invocation of *jus cogens* under articles 53 and 64 of the 1969 Vienna Convention, and dispute settlement.⁶⁹⁵

354. It is true that the issue of dispute settlement arises generally with respect to the draft articles as a whole, and especially part three. But whatever conclusion may be reached with respect to part three, there is a procedural issue for chapter V which arises by analogy with article 65 of the 1969 Vienna Convention. If a State seeks to rely on a circumstance precluding wrongfulness, i.e. in order to excuse what would otherwise be a breach of international law, it should, as a minimum, promptly inform the other State or States of that fact, and of the consequences for its performance of the obligation. It should then be a matter for the States concerned to seek to resolve any questions arising, by the procedures provided for in the Charter of the United Nations and in particular by article 33. The matter will have to be returned to in the context of part three of the draft articles, but a provision to this effect should, for the time being at least, be included in chapter V.⁶⁹⁶

6. CONCLUSIONS AS TO CHAPTER V

355. At the outset of this discussion of chapter V, it was noted that the circumstances dealt with probably fell into several categories, and that at least with respect to certain of them it might be more appropriate to speak of circumstances precluding responsibility than wrongfulness.⁶⁹⁷ At least with respect to force majeure, distress and necessity, an alternative formulation for the purposes of chapter V might be “A State is not responsible for its failure to perform an international obligation if the failure is due to” one of those circumstances. This could contrast with the formulation in the case of self-defence, and possibly countermeasures, where it could be said that the

circumstance precludes wrongfulness (and therefore the very idea of “failure”). The conflicting requirements of a peremptory norm, and the *exceptio* in the narrow formulation proposed, would no doubt fall in the latter category as well. But on balance the Special Rapporteur is not persuaded that a categorical distinction needs to be made as between the circumstances to be covered by chapter V. There is in truth a range of cases, and a clear example of distress or even necessity may be more convincing as a circumstance precluding wrongfulness than a marginal case of self-defence. It seems sufficient to deal with all the circumstances under the existing general rubric of chapter V, making the specific distinctions and qualifications between them that have been proposed.

356. A second question, left open in the discussion of article 16, is that of the relationship between that article and chapter V.⁶⁹⁸ It would be inelegant, and would tend to give too much emphasis to the issue of excuses for non-performance, to make article 16 (and a fortiori articles 1 or 3) expressly subject to chapter V. Articles 1 and 3 are in the nature of a statement of principle, like article 26 of the 1969 Vienna Convention (*pacta sunt servanda*), and in the context of the draft articles as a whole there is no need for them to contain further qualifications. The phrase “under international law”, proposed by France for inclusion in article 16, is a sufficient qualification for the purposes of that article.⁶⁹⁹ France had also proposed that chapter V be brought, in the form of a single article, within chapter III.⁷⁰⁰ It is not desirable to compress chapter V into a single article, but it may be that present chapters III–V could be subsections of a single chapter dealing with breach of an international obligation. The Drafting Committee may wish to consider the possibility.

357. Finally there is the question of the order of the various circumstances included in chapter V. The original order was consent, countermeasures, force majeure, distress, necessity and self-defence (an order which may have owed something to the historical link between self-defence and necessity⁷⁰¹). Under modern international law, however, self-defence has more in common with countermeasures than necessity, and should be grouped with it. So too does the *exceptio inadimpleti contractus*, which likewise constitutes a response to unlawful conduct by the State against which the circumstance is invoked. On balance it seems appropriate to list the circumstances now to be covered in chapter V in two subgroups: first, compliance with a peremptory norm, self-defence, countermeasures and the *exceptio*; followed by force majeure, distress and necessity, and then by the ancillary clauses discussed above.

358. For the reasons given, the Special Rapporteur proposes the following articles in chapter V. The notes appended to each article explain very briefly the changes that are proposed.

⁶⁹⁴ *Yearbook ... 1959* (see footnote 6 above), pp. 44 and 63. See also paragraphs 217 and 239 above.

⁶⁹⁵ See also the dictum of the Arbitral Tribunal in the *Rainbow Warrior* case (para. 271 above).

⁶⁹⁶ For the proposed provision, see paragraph 358 below.

⁶⁹⁷ See paragraphs 223–231 above.

⁶⁹⁸ See paragraph 14 above.

⁶⁹⁹ See paragraphs 8 and 14 above.

⁷⁰⁰ See paragraph 218 above.

⁷⁰¹ See the discussion of the “*Caroline*” case (para. 280 above).

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

*Article 29. Consent**Note*

Former article 29 dealt with consent validly given as a circumstance precluding wrongfulness. In many cases, the consent of a State, given in advance of an act, is sufficient to legalize the act in international law, for example, consent to overflight over territory etc. In other cases consent given after the event may amount to a waiver of responsibility, but will not prevent responsibility from arising at the time of the act. Thus either consent is part of the defining elements of a wrongful act, or it is relevant in terms of the loss of the right to invoke responsibility. In neither case is it a circumstance precluding wrongfulness, and accordingly article 29 has been deleted. See further paragraphs 237–243 above.

Article 29 bis. Compliance with a peremptory norm (jus cogens)

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is required in the circumstances by a peremptory norm of general international law.

Note

1. Just as a peremptory norm of international law invalidates an inconsistent treaty, so it must have the effect of excusing non-compliance with an obligation in those rare—but nonetheless conceivable—circumstances where an international obligation, not itself peremptory in character, is overridden by an obligation which is peremptory. For example, a right of transit or passage across territory could not be invoked if the immediate purpose of exercising the right was unlawfully to attack the territory of a third State. See paragraphs 308–315 above.

2. Peremptory norms of general international law are defined by the 1969 Vienna Convention (art. 53), as norms from which no derogation is permitted other than by subsequent norms of the same status. It is not thought necessary to repeat this definition in article 29 bis.

3. Article 29 bis only applies where the conflict between a peremptory norm and some other obligation is clear and direct in the circumstances that have arisen. The act which is otherwise wrongful must be specifically required by the peremptory norm in the circumstances of the case, so as to leave the State concerned no choice of means and no way of complying with both obligations.

4. The question of dispute settlement in relation to article 29 bis will be considered in the context of part three of the draft articles.

Article 29 ter. Self-defence

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

2. Paragraph 1 does not apply to international obligations which are expressed or intended to be obligations of total restraint even for States engaged in armed conflict or acting in self-defence, and in particular to obligations of a humanitarian character relating to the protection of the human person in time of armed conflict or national emergency.

Note

1. Paragraph 1 is unchanged from that provisionally adopted on first reading.

2. Paragraph 2 has been added to draw a distinction between those obligations which constrain even States acting in self-defence (especially in the field of international humanitarian law) and those which, while they may be relevant considerations in applying the criteria of necessity and proportionality which are part of the law of self-defence, are not obligations of “total restraint”. The language of paragraph 2 adapts that of ICJ in the advisory opinion concerning the *Legality of the*

Threat or Use of Nuclear Weapons,⁷⁰² The additional phrase specifying obligations of a humanitarian character draws on article 60 of the 1969 Vienna Convention and is intended to single out, by way of example, the most important category of these obligations of total restraint (see paragraphs 298–304 above).

3. The location of this article is changed to bring it into relation with articles 29 bis and 30 and to emphasize the importance of the “inherent right” of self-defence in the system of the Charter of the United Nations.

Article 30. Countermeasures in respect of an internationally wrongful act

[The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.]

Note

Legitimate countermeasures preclude the wrongfulness of the conduct in question, vis-à-vis the State whose wrongful conduct has prompted the countermeasures. However, the drafting of article 30 depends on decisions still to be taken on second reading in relation to the inclusion and formulation of the articles in part two which deal in detail with countermeasures. Article 30 is retained in square brackets pending consideration of the issue of countermeasures as a whole.

Article 30 bis. Non-compliance caused by prior non-compliance by another State

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the State has been prevented from acting in conformity with the obligation as a direct result of a prior breach of the same or a related international obligation by another State.

Note

1. Article 30 bis reflects the principle expressed in the maxim *exceptio inadimplenti non est adimplendum* (or in the case of treaty obligations, *exceptio inadimplenti contractus*). It bears a certain relationship with countermeasures, in the sense that the later act (otherwise wrongful) of State A is conditioned upon and responds to the prior wrongful act of State B. But in the case of the *exceptio*, the link between the two acts is immediate and direct. As expressed by PCIJ in the *Factory at Chorzów* case, the principle only applies where one State has, by its unlawful act, actually prevented the other from complying with its side of the bargain, i.e. from complying with the same or a related obligation. In other words, the link is a direct causal link, and certainly not a question of one breach provoking another by way of reprisal or retaliation. For example, where State A by failure to complete its share of joint works causes State B itself to fall behind the agreed schedule, State A cannot complain of the latter delay, for it would then in effect be seeking to rely on its own wrongful act (see paragraphs 316–331 above).

2. Because of this direct causal link between the two acts, it is not necessary to include the various restrictions on legitimate countermeasures which apply under part two of the draft articles as adopted on first reading. The principle is a very narrow one, with its own built-in limitations. In particular it only applies if the prior breach is established, if it is causally linked to the later act and if the breaches concern the same or related obligations. For this purpose an obligation may be related either textually (as part of the same instrument) or because it deals with the same subject matter or the same particular situation (see paragraph 328 above).

3. Consideration was given to including in article 30 bis the slightly wider situation of synallagmatic obligations, i.e. obligations (usually contained in a treaty) of such a character that continued compliance with the obligation by one State is conditioned upon similar compliance by the other State. In such a case there is no direct causal link between non-performance by State A and non-performance by State B. It remains possible for State B to comply, but to do so would contradict the expectations underlying the agreement. An example would be

⁷⁰² *I.C.J. Reports 1996* (see footnote 211 above), p. 242, para. 30.

a ceasefire agreement, or an agreement for exchange of prisoners or mutual destruction of weapons. However, it is thought that this situation is adequately dealt with by a combination of other rules: treaty interpretation, the application of countermeasures and the possibility of suspension or even termination of the treaty for breach (see paragraphs 329–331 above).

Article 31. Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure. For the purposes of this article, force majeure is the occurrence of an irresistible force or an unforeseen external event beyond the control of the State making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) The occurrence of force majeure results, either alone or in combination with other factors, from the wrongful conduct of the State invoking it; or

(b) The State has by the obligation assumed the risk of that occurrence.

Note

1. Article 31 was originally entitled “Force majeure and fortuitous event”, but by no means all cases of fortuitous event qualify as excuses, whereas force majeure as defined does sufficiently cover the field. The title to article 31 has been correspondingly simplified, without loss of content in the article itself.

2. As originally drafted, paragraph 1 also covered cases of force majeure which made it impossible for the State “to know that its conduct was not in conformity with” the obligation. This added a confusing subjective element and appeared to contradict the principle that ignorance of wrongfulness (i.e. ignorance of law) is not an excuse. The words were intended to cover cases such as an unforeseen failure of navigational equipment causing an aircraft to intrude on the airspace of another State. The words “in the circumstances” are intended to cover this situation without the need to refer to knowledge of wrongfulness (see paragraph 262 above).

3. As adopted on first reading, paragraph 2 provided that the plea of force majeure “shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility”. But force majeure is narrowly defined in paragraph 1, and this additional limitation seems to go too far in limiting invocation of force majeure. Under the parallel ground for termination of a treaty in article 61, paragraph 2, of the 1969 Vienna Convention, material impossibility can be invoked “if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty”. By analogy with this provision, article 31, paragraph 2 (a), excludes the plea of force majeure in cases where the State has produced or contributed to producing the situation through its own wrongful conduct (see paragraph 263 above).

4. In addition, it is conceivable that by the obligation in question the State may have assumed the risk of a particular occurrence of force majeure. Paragraph 2 (b) excludes the plea of force majeure in such cases (see paragraph 264 above).

Article 32. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question reasonably believed that there was no other way,

in a situation of distress, of saving that person’s own life or the lives of other persons entrusted to his or her care.

2. Paragraph 1 does not apply if:

(a) The situation of distress results, either alone or in combination with other factors, from the wrongful conduct of the State invoking it; or

(b) The conduct in question was likely to create a comparable or greater peril.

Note

1. This article is substantially as proposed on first reading. Certain changes have however been made. First, the State agent whose action is in question must have reasonably believed, on the information available or which should have been available, that life was at risk. The previous standard was entirely objective, but in cases of genuine distress there would usually not be time for the medical or other investigations which would justify applying an objective standard.

2. Secondly, in parallel with the proposed article 31, paragraph 2 (a), a new version of article 32, paragraph 2 (a), is proposed, and for substantially the same reasons. It will often be the case that the State invoking distress has “contributed” even if indirectly to the situation, but it seems that it should only be precluded from relying on distress if that State has contributed to the situation of distress by conduct which is actually wrongful.

3. Thirdly, the requirement that the distress be “extreme” has been deleted. It is not clear what it adds, over and above the other requirements of article 32 (see paragraphs 273–276 above).

Article 33. State of necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless:

(a) The act is the only means of safeguarding an essential interest of that State against a grave and imminent peril; and

(b) The act does not seriously impair:

(i) An essential interest of the State towards which the obligation existed; or

(ii) If the obligation was established for the protection of some common or general interest, that interest.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question arises from a peremptory norm of general international law; or

(b) The international obligation in question explicitly or implicitly excludes the possibility of invoking necessity; or

(c) The State invoking necessity has materially contributed to the situation of necessity occurring.

Note

1. Article 33 corresponds to the text adopted on first reading, with certain drafting amendments. For the most part these are minor in character. For example, like other articles in chapter V, article 33 should be expressed in the present tense, and there is no need to refer to the “state of necessity” in the text, the term “necessity” sufficing.

2. Three changes should be noted. First, paragraph 1 (b) has been reformulated to make it clear that the balance to be struck in cases where the obligation is established in the general interest (e.g. as an obligation *erga omnes*) is that very interest. Secondly, paragraph 2 (b) is no longer confined to treaty obligations. Thirdly, paragraph 2 (c) uses the phrase “materially contributed”, since in the nature of things the invoking State is likely to have contributed in some sense to the situation, and the ques-

tion is whether that contribution is sufficiently material to disentitle it to invoke necessity at all (see paragraphs 292–293 above).

Article 34. Self-defence

Note

See current article 29 *ter*.

Article 34 bis. Procedure for invoking a circumstance precluding wrongfulness

1. A State invoking a circumstance precluding wrongfulness under this chapter should, as soon as possible after it has notice of the circumstance, inform the other State or States concerned in writing of it and of its consequences for the performance of the obligation.

[2. If a dispute arises as to the existence of the circumstance or its consequences for the performance of the obligation, the parties should seek to resolve that dispute:

(a) In a case involving article 29 *bis*, by the procedures available under the Charter of the United Nations;

(b) In any other case, in accordance with part three.]

Note

Chapter V as adopted on first reading made no provision for the procedure for invoking circumstances precluding wrongfulness, or for settlement of disputes. The latter issue will be discussed in relation to part three of the draft articles, and paragraph 3 of article 34 *bis* is included *pro memoria*, pending further discussion of issues of dispute settlement. However, if a State wishes to invoke a circumstance precluding wrongfulness, it is reasonable that it should inform the other State or States concerned of that fact and of the reasons for it, and paragraph 1 so provides (see paragraphs 353–355 above).

Article 35. Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness under this chapter is without prejudice:

(a) To the cessation of any act not in conformity with the obligation in question, and subsequent compliance with that obligation, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) In the case of articles 32 and 33, to the question of financial compensation for any actual harm or loss caused by that act.

Note

1. Article 35 as adopted on first reading contained a reservation as to compensation for damage arising from four of the circumstances precluding wrongfulness, *viz.* under articles 29 (consent), 31 (force majeure), 32 (distress) and 33 (state of necessity). Article 29 is recommended for deletion (and listing it in article 35 was questionable in any event). In the case of force majeure, the invoking State is acting subject to external forces making it materially impossible to perform the obligation, and it has not assumed the sole risk of non-performance. But in the case of articles 32–33, there is at least a measure of choice on the part of the invoking State, whereas the State or States which would otherwise be entitled to complain of the act in question as a breach of an obligation owed to them have not contributed to, let alone caused, the situation of distress or necessity, and it is not clear why they should be required to suffer actual harm or loss in the interests of the State invoking those circumstances. Accordingly article 35 has been retained in relation to distress and necessity. Without entering into detail on questions of compensation, its language has been modified slightly to make it less neutral and anodyne, as well as to avoid technical difficulties with the terms “damage” and “compensation” (see paragraphs 341–349 above).

2. In addition, article 35 (a) has been added to make it clear that chapter V has a merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming

it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly (see paragraph 350 above).

3. In consequence of the broader scope of article 35, its title has been changed.

D. Countermeasures as provided for in part one, chapter V and part two, chapter III

359. Article 30, which is contained in chapter V of part one, deals with acts which are a “legitimate” countermeasure under international law in response to wrongful conduct on the part of other States. It provides that the wrongfulness of such acts by way of countermeasure is precluded, and thus no responsibility arises with respect to them.⁷⁰³ In the draft articles as adopted on first reading this was emphasized by article 35, which preserved the possibility of compensation for actual harm arising from conduct covered by certain other articles in part five, but not for harm caused by countermeasures or self-defence.⁷⁰⁴

360. In its subsequent work on part two of the draft articles, the Commission went on to deal in some detail with countermeasures, following detailed reports on that subject by Mr. Arangio-Ruiz.⁷⁰⁵ The relevant provisions, which were adopted only after substantial debate and in some cases on the basis of votes taken in plenary,⁷⁰⁶ are contained in chapter III of part two. They comprise articles 47–50. These articles also need to be read in the context of part three dealing with settlement of disputes.

The definition of countermeasures

361. According to article 47, paragraph 1, countermeasures are taken when “an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act”. Their purpose is to induce the latter State (hereafter referred to as the target State) to comply with its obligations of cessation and reparation, and they may be taken for as long as those obligations have not been complied with and the countermeasures remain “necessary in the light of its response to the demands of the injured State” (art. 47, para. 1). Thus countermeasures are seen as essentially remedial rather than punitive in their purpose, but on the other hand there is no specific limit on the obligations which may be disregarded by way of countermeasure. In particular, the notion of “reciprocal countermeasure”, earlier developed by Mr. Riphagen, Special Rapporteur, was not adopted.⁷⁰⁷

362. Article 30 has already made it clear that countermeasures only preclude wrongfulness in the relations be-

⁷⁰³ See paragraph 244 above.

⁷⁰⁴ See paragraph 305 above.

⁷⁰⁵ *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/440 and Add.1, p. 1; and *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1–4, p. 1.

⁷⁰⁶ See *Yearbook ... 1993*, vol. II (Part Two), p. 11, para. 16; *Yearbook ... 1994*, vol. II (Part Two), p. 136, para. 228; and *Yearbook ... 1995*, vol. II (Part Two), p. 61, para. 339.

⁷⁰⁷ See paragraph 324 above.

tween an injured State and the State which has committed the internationally wrongful act. The implications so far as third States are concerned are spelled out in article 47, paragraph 3, which provides that countermeasures against State A cannot justify “a breach of an obligation towards a third State”. On the other hand indirect or consequential effects of countermeasures on a third State, or on third parties generally, which do not involve an independent breach of any obligation are not covered by this proviso.

363. Articles 48–50 impose a range of restrictions and qualifications on the taking of countermeasures, in the interests of avoiding their abuse and of limiting them to the purposes specified in article 47. These are both substantive and procedural. In the debate on countermeasures on first reading, the procedural issues were in fact the more controversial.

Substantive limitations on countermeasures

364. The first substantive limitation, which is well established as a matter of general international law, is that of proportionality. It is formulated in the negative in article 49: countermeasures “shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State”. The use of the term “and” indicates that both the seriousness of the breach and the extent to which it affects the injured State are relevant for this purpose.

365. A number of additional substantive limitations are spelled out in article 50, which is entitled “Prohibited countermeasures”. Some of these are self-evident. Countermeasures may not involve “the threat or use of force as prohibited by the Charter of the United Nations” (art. 50 (a)), or “[a]ny other conduct in contravention of a peremptory norm of general international law” (art. 50 (e)). Nor may they involve “[a]ny conduct which derogates from basic human rights” (art. 50 (d)). Thus belligerent reprisals involving the use of force are excluded. A further specific prohibition relates to “conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents” (art. 50 (c)). But there is no specific exclusion of conduct involving a breach of international humanitarian law norms.

366. In addition, article 50 (b) prohibits “[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”. The use of the term “extreme” here implies that even ordinary countermeasures may be coercive, and indeed, since they are designed to induce the target State to comply with its international obligations, it may be that they are coercive by definition.

367. The draft articles do not deal with the possibility that countermeasures may be expressly or implicitly excluded by the obligation in question. There was no need to do so with respect to non-derogable human rights, since they are already covered by the broader language of article 50 (d). But obligations which fall within the ICJ description of “obligations of total restraint” might also be thought expressly or impliedly to exclude countermeas-

ures.⁷⁰⁸ It is true that the category of “obligations of total restraint” was expressed to deal with limitations on action in self-defence, but the same idea would seem to apply a fortiori to action taken by way of countermeasures.

Procedural conditions on the taking of countermeasures

368. The procedural consequences of taking countermeasures are spelled out in article 48. In the form finally adopted, article 48 distinguishes between “interim measures of protection”, which may be taken by the injured State immediately upon the commission of an internationally wrongful act by the target State, and full-scale countermeasures, which can only be taken after negotiations to resolve the dispute, as required by article 54, have taken place and have not succeeded. The distinction was introduced late in the debate on countermeasures, after the Commission had voted by a narrow majority to require negotiation as a necessary prerequisite to the taking of countermeasures.⁷⁰⁹ “Interim measures of protection” are defined as measures “which are necessary to preserve its rights and which otherwise comply with the requirements of this chapter” (art. 48). This language is not very clear, since under article 47 all countermeasures, to be lawful, have to be necessary to ensure that the injured State’s rights to cessation and reparation under articles 41–46 are respected, and to that extent all countermeasures are, by definition, measures which are “necessary to preserve [the] rights” of the injured State. Although it is not stated in so many words, “interim measures” seem to be measures which are necessary to protect the right of the injured State to take countermeasures if negotiations fail. The intention was evidently to allow immediate measures to be taken in relation to items which might otherwise be removed from the territory of the injured State and be no longer available as a subject of countermeasures. Examples include the freezing of assets or bank accounts or the detention of a ship or aircraft. The use of the phrase “interim measures of protection” has obvious overtones of judicial measures, such as those referred to in article 41, paragraph 1, of the ICJ Statute or article 290 of the United Nations Convention on the Law of the Sea. But while there may be some analogy between the two situations, it is not a close one. Article 48 is concerned with unilateral measures taken by a State at its own risk in response to wrongful conduct, measures which would themselves otherwise be internationally wrongful. Provisional measures ordered or indicated by an international court or tribunal are by definition not unilateral, and would hardly authorize conduct not otherwise in conformity with the international obligations of the State party taking them. “Interim measures of protection” as envisaged in article 48, paragraph 1, are closer to a form of unilateral *saisie conservatoire* such as that which may be available to the holder of a lien under national law.

369. Assuming that negotiations have taken place and have not succeeded in resolving the dispute, article 48 contemplates that countermeasures may then be taken, to the full extent allowed by the other articles of chapter III. Thereafter measures of dispute settlement may be pursued

⁷⁰⁸ See paragraph 301 above.

⁷⁰⁹ See *Yearbook ... 1996*, vol. I, 2456th meeting, p. 171, para. 57.

concurrently with those countermeasures, rather than as a necessary prerequisite. But it goes on to provide that the taking of countermeasures entails an obligation of dispute settlement as set out in part three, if no other “binding dispute settlement procedure” is in force between the injured State and the target State in relation to the dispute (art. 48, para. 2). In order to see how this system is to work, it is necessary to outline the provisions of part three, which is entitled “Settlement of disputes”.

370. Part three provides for a three-stage process. The first involves conciliation by a Conciliation Commission (arts. 56–57 and annex I). If neither party submits the dispute to conciliation, or there is no agreed settlement within six months of the report of the Commission, the parties may agree to refer the dispute to arbitration (arts. 58–59 and annex II). A challenge to the validity of the arbitral award may be instituted by either party: such challenges go to ICJ, unless the parties have within three months agreed on some other forum (art. 60). Thus according to part three, arbitration is normally dependent on the consent of the parties, but if they agree, their consent carries with it the compulsory jurisdiction of ICJ with respect to any dispute over the validity of the resulting award.

371. However special provision is made for countermeasures in article 58, paragraph 2:

In cases, however, 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.

This is the only provision for compulsory settlement of disputes in the draft articles, and it arises only when one State party has taken countermeasures against another. Evidently it sidesteps the procedure of the Conciliation Commission. Paragraph 2 does not precisely define “the dispute” which is to be submitted to arbitration. It seems clear that it includes the underlying dispute over the (alleged) internationally wrongful act, i.e. the dispute which has led to the taking of countermeasures. But does it also include any consequential dispute (a dispute which is highly likely to arise in practice), for example over whether the countermeasures taken are lawful in terms of the requirements of chapter III? In other words does “the dispute” include such questions as whether the countermeasures are proportionate, whether they are prohibited by article 50, whether there was a genuine attempt at prior negotiation, and if not, whether the countermeasures qualify as “interim measures” within article 48, paragraph 1? Either view might be defended textually. In favour of the narrower view (i.e. the view that “the dispute” is limited to the underlying dispute arising from the internationally wrongful act) is the point that the obligation of dispute settlement arises as soon as countermeasures have been taken, yet the question of the lawfulness of the countermeasures might depend upon subsequent facts e.g. facts relevant to the disproportionate effects of the countermeasure on the injured State. In favour of the wider view is the point that the dispute is only referred to arbitration at a time when the countermeasures have actually been taken: moreover it would be unfair and unbalanced to require the target State to submit to arbitration the issue of the wrongfulness of its own conduct, without being able to test the wrongfulness of the conduct taken by the injured State in

response. Probably the wider view is the better one. But there are limits, in any event, on the scope of the obligation to arbitrate. For example, it does not seem to extend to counterclaims which the target State may have against the injured State in respect of the underlying dispute.

372. Article 48 goes on to regulate the extent to which countermeasures may be maintained in force pending arbitration. Under article 48, paragraph 3, countermeasures must be suspended “when and to the extent that” the target State is cooperating in the arbitral process. But the obligation to suspend countermeasures terminates if the target State fails to comply with a request or order made by the tribunal, e.g. an order or request for provisional measures, and it apparently does not revive (see article 48, paragraph 4). These provisions only apply if the internationally wrongful act of the target State has ceased, i.e. they do not apply to continuing wrongful acts which the target State has not withdrawn. The distinction between continuing and completed wrongful acts has been dealt with above, and endorsed in principle.⁷¹⁰ In practice, what is a continuing wrongful act depends to some extent on the way in which the injured State formulates its demands, so that the requirement of suspension of countermeasures under article 48, paragraph 3, may not apply in many cases.

Countermeasures in relation to “international crimes” as defined in article 19

373. Chapter IV of part two, which is entitled “International crimes”, spells out the specific consequences of international crimes of States, as defined in article 19 adopted on first reading. The paucity of those consequences, as contrasted with the gravity of the concept of crime so defined, has already been analysed.⁷¹¹ Chapter IV modifies two of the limitations on reparation contained in chapter II,⁷¹² and to that modest extent it creates a specific regime of reparation in relation to “State crimes”. But it makes no such modifications in relation to chapter III, so that there are, according to the draft articles, no special aggravating consequences of State crime in the field of countermeasures. It is true that under the definition of “injured State” in article 40 all States are defined as injured by a crime, and that therefore all States have the individual right to seek reparation for, and to take countermeasures in response to, a crime. The draft articles, however, contain no provision dealing with the possible consequences of many States taking countermeasures in response to a wrongful act described as a “crime”, except perhaps for article 53 (d) which provides that States should “cooperate with other States in the application of measures designed to eliminate the consequences of the crime”. It appears that proportionality under article 48 is judged on a bilateral basis, as between the injured State and the target State, so that there is no mechanism for assessing the overall proportionality of conduct taken by way of collective countermeasures. This is however a broader consequence of the width of the definition of “injured

⁷¹⁰ See paragraphs 93–113 above.

⁷¹¹ See *Yearbook ... 1998* (footnote 2 above), p. 11, para. 51, and p. 22, paras. 84–86.

⁷¹² See *Yearbook ... 1996*, vol. II (Part Two), p. 64, article 52, referring to the limitations contained in articles 43 (c)–(d) and 45, para. 3.

State”, and of the fact that all injured States are treated by article 40 in the same way, whether the internationally wrongful act specifically concerns them or whether they are reacting, as it were in the public interest, to a grave breach of international law or of human rights.

374. In 1998 the Commission decided to set aside the notion of State crime for the time being, and to explore “whether the systematic development in the draft articles of key notions such as obligations (*erga omnes*), peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19”.⁷¹³

1. REFLECTIONS ON THE TREATMENT OF COUNTERMEASURES IN PART TWO

375. It is proposed in this section to review a number of the general issues raised by the treatment of countermeasures in part two. There are two principal questions to be decided at this stage: (a) whether to retain the treatment of countermeasures, and (b) how to deal with the explicit linkage between countermeasures and dispute settlement, given that the status of part three, and the form of the draft articles themselves, are unresolved. There is a further and consequential question, left open in the discussion of chapter V of part one, viz. the precise formulation of article 30.

(a) *Comments of Governments*

376. The comments of Governments on countermeasures have been both general and specific in character. Whatever their purpose and content, they clearly show that States consider countermeasures as a key issue in the context of the draft articles on State responsibility.

377. At the general level a number of Governments stress that the treatment of countermeasures in part two, with its emphasis on settlement of disputes, implies that the draft articles would necessarily take the form of a convention. Thus Germany notes that “[t]he 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”.⁷¹⁴

378. Governments have also expressed their concerns as to the relationship between the settlement of disputes and the regime of countermeasures. Article 58, paragraph 2, is particularly criticized in that respect: whereas a few Governments are in favour of its retention,⁷¹⁵ many others have pointed out that it “could incite a State to take countermeasures to force another State to accept recourse to arbitration”.⁷¹⁶ Such a provision would then contradict the need to limit recourse to countermeasures. Indeed it

could create “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”.⁷¹⁷ Several Governments call, if not for its deletion,⁷¹⁸ at least for careful reconsideration.

379. It is not the function of the present report to make proposals for each of the articles on countermeasures in part two, but it is useful to summarize the tenor of the specific comments made so far,⁷¹⁹ especially since these concern not only the formulation of the articles but their place in the draft as a whole.

380. A first distinction is to be drawn between Governments which favour the general approach taken by the Commission and those which have expressed doubts about it. Among the former, Germany considers the relevant provisions in the draft as “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”.⁷²⁰ Among the latter, critics and concerns proceed from different, indeed sometimes opposite, perspectives. The United States, for example, “believes that the draft articles contain unsupported restrictions”⁷²¹ on the use of countermeasures and, consequently, that the Commission should “delete or substantially revise the prohibitions”⁷²² on them. By contrast, Argentina calls for a careful reconsideration of the topic by the Commission, so as to “reverse the presumption of the lawfulness of countermeasures by providing that, while States do not have a right to take them, in certain cases, under circumstances of exceptional gravity, their use is not unlawful”.⁷²³ Other States are of the opinion that the issues raised by countermeasures would be “more appropriately addressed in a specialist forum”⁷²⁴ or should be dealt with by the Commission within the context of a separate study, and they therefore support the entire deletion of articles 47–50.⁷²⁵ But Italy, among others, strongly opposes that view and considers it “of the utmost importance that the countermeasures regime (for example, conditions relating to resort to countermeasures, and prohibited countermeasures) should be codified”.⁷²⁶

381. Whatever their position as to the proper treatment of countermeasures in the draft articles, Governments

⁷¹⁷ *Ibid.*, p. 173, Denmark on behalf of the Nordic countries. See also United States of America (*ibid.*, pp. 172–173) and Japan (A/CN.4/492, reproduced in the present volume).

⁷¹⁸ As suggested by Mexico (*Yearbook ... 1998* (see footnote 7 above), p. 173).

⁷¹⁹ As for comments on specific articles, those relating to article 30 have already been mentioned (paras. 248–249 above).

⁷²⁰ *Yearbook ... 1998* (see footnote 7 above), p. 152. See also Czech Republic (*ibid.*), Mongolia (*ibid.*, p. 151) and Japan (A/CN.4/492, reproduced in the present volume).

⁷²¹ *Yearbook ... 1998* (see footnote 7 above), p. 100.

⁷²² *Ibid.*, p. 154.

⁷²³ *Ibid.*, pp. 151–152. See in that respect the comment made by the Czech Republic (*ibid.*, p. 152).

⁷²⁴ *Ibid.*, p. 153, as stated by Singapore.

⁷²⁵ *Ibid.* This option is proposed by France (p. 152) and the United Kingdom (p. 154), the latter being satisfied, however, with the present drafting of article 30.

⁷²⁶ *Ibid.*, p. 153. See also Ireland (*ibid.*).

⁷¹³ *Yearbook ... 1998*, vol. II (Part Two), p. 77, para. 331.

⁷¹⁴ *Yearbook ... 1998* (see footnote 7 above), p. 97. See also comments made by Italy (*ibid.*) and Singapore (referring to the WTO procedures, *ibid.*, p. 140).

⁷¹⁵ *Ibid.*, p. 170 (Switzerland and Germany). For Argentina, “[c]ountermeasures and compulsory arbitration should be regarded as two sides of the same coin” (*ibid.*, p. 173).

⁷¹⁶ *Ibid.*, p. 173, in the words used by France. See also comments made by Mexico and the United Kingdom (*ibid.*, pp. 173–174).

have also expressed opinions about specific issues related to them. These include:

(a) The difficulty of distinguishing in practice between countermeasures and interim measures of protection referred to in article 48, paragraph 1;⁷²⁷

(b) The key issue of whether the measures taken should be related or have some nexus to the right infringed;⁷²⁸

(c) The eventuality of “collective measures”⁷²⁹ and of countermeasures in case of breach of multilateral or *erga omnes* obligations;⁷³⁰

(d) The potential effects of the distinction between crimes and delicts upon the regime of countermeasures,⁷³¹ and, more generally, the question whether countermeasures should be conceived as having a punitive function;⁷³²

(e) The position of third States;⁷³³

(f) The impact of countermeasures on the economic situation of the target State⁷³⁴ and on human rights;⁷³⁵

(g) The influence of countermeasures in aggravating inequalities between States, since resort to countermeasures “favours the powerful countries”.⁷³⁶

(b) *Developments in the law and practice relating to countermeasures*

382. The law and literature on countermeasures are thoroughly reviewed in the third and fourth reports of Mr. Arangio-Ruiz,⁷³⁷ and it is not necessary to revisit them at this stage. Since the Commission completed the first reading of the draft articles, however, ICJ has considered the question for the first time, and its handling of it is of particular interest.

383. In the case concerning the *Gabčíkovo-Nagymaros Project*, ICJ had to decide upon the legality of Variant C, the unilateral diversion of the Danube through the

⁷²⁷ *Ibid.*, pp. 156–157. This is especially a matter of concern for Ireland, Germany, the United Kingdom and the United States (*ibid.*) and Japan (A/CN.4/492, reproduced in the present volume). *Contra*, see the comment by Argentina (*Yearbook ... 1998* (footnote 7 above), p. 173).

⁷²⁸ As Singapore puts it (*Yearbook ... 1998* (footnote 7 above), p. 153).

⁷²⁹ Japan (A/CN.4/492, reproduced in the present volume).

⁷³⁰ See *Yearbook ... 1998* (footnote 7 above), comments by the United Kingdom, p. 154.

⁷³¹ *Ibid.*, for example, Mongolia (p. 153). See also Greece (A/CN.4/492, reproduced in the present volume).

⁷³² *Yearbook ... 1998* (see footnote 7 above). See the differing views expressed by Denmark on behalf of the Nordic countries (p. 152), Ireland (*ibid.*, p. 153), on the one hand, and France (*ibid.*, p. 152) on the other.

⁷³³ *Ibid.*, Denmark on behalf of the Nordic countries (p. 152) and Singapore (p. 154).

⁷³⁴ *Ibid.*, pp. 161–162, Ireland, Switzerland, United Kingdom, United States; Singapore (p. 154); and Japan (A/CN.4/492, reproduced in the present volume).

⁷³⁵ *Yearbook ... 1998* (see footnote 7 above), Ireland, United Kingdom, United States (pp. 161–163) and Japan (A/CN.4/492, reproduced in the present volume).

⁷³⁶ *Yearbook ... 1998* (see footnote 7 above), p. 152, Denmark on behalf of the Nordic countries, Argentina (*ibid.*, p. 151) and Singapore (*ibid.*, p. 154).

⁷³⁷ See footnote 705 above.

Gabčíkovo power plant.⁷³⁸ Czechoslovakia had taken that action following Hungary’s refusal to proceed with the works assigned to it under the 1977 Treaty, relying on several arguments but not explicitly on the argument that the implementation of Variant C was a countermeasure. In its argument before the Court, Slovakia similarly “did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful”, but it did express the view that “Variant C could be presented as a justified countermeasure to Hungary’s illegal acts”.⁷³⁹ The Court, having held that Hungary’s refusal to continue the works could not be justified, but that Variant C was itself an internationally wrongful act, went on to consider whether Variant C could be justified as a countermeasure. In the first place it referred to two conditions for justified countermeasures which were satisfied in the circumstances:

In order to be justifiable, a countermeasure must meet certain conditions ...

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary’s suspension and abandonment of works and that it was directed against that State; and it is equally clear, in the Court’s view, that Hungary’s actions were internationally wrongful.

Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case ... that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.⁷⁴⁰

However, the Court held that Czechoslovakia’s actions failed to fulfil a third criterion, that of proportionality, and they were accordingly unlawful.

In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

...

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—failed to respect the proportionality which is required by international law.

...

The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its

⁷³⁸ For the facts in further detail, see paragraphs 103–104 above.

⁷³⁹ *I.C.J. Reports 1997* (see footnote 51 above), p. 55, para. 82.

⁷⁴⁰ *Ibid.*, pp. 55–56, paras. 83–84. In support of its statement of the law of countermeasures, the Court referred generally to its judgment in *Military and Paramilitary Activities in and against Nicaragua* (see footnote 68 above), p. 127, para. 249; the decision of 9 December 1978 in the case concerning the *Air Service Agreement of 27 March 1946 between the United States of America and France*, UNRIIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 443 et seq.; and to the Commission’s draft articles 47–50.

obligations under international law, and that the measure must therefore be reversible.⁷⁴¹

384. Thus ICJ, in a bilateral context in which no issue of prohibited countermeasures in article 50 was at stake, endorsed four distinct elements of the law of countermeasures: (a) the countermeasure must be taken in response to an unlawful act; (b) it must be preceded by a demand for compliance by the injured State;⁷⁴² (c) the countermeasure must be proportionate, in the sense of “commensurate with the injury suffered, taking account of the rights in question”; and (d) the countermeasure must have as its purpose “to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible”. In particular, the Court accepted the conception of countermeasures underlying article 47, as well as the requirement of proportionality (while adding useful clarifications in relation to the latter, and adopting a stricter approach than the language of article 49 might suggest). It took a slightly different approach to the question of prior notification, dealt with in article 48, which will deserve careful consideration as an alternative to the existing formulation. Overall its position was a balanced one. On the one hand, it did not doubt that countermeasures may justify otherwise unlawful conduct, to the extent of making such conduct “lawful” (as distinct from “legitimate”, the term used in article 30 but avoided in the judgment), and it conceived of countermeasures as falling properly within the scope of the State responsibility. On the other hand, it formulated relatively strict, cumulative requirements for lawful countermeasures and applied them rigorously to the facts of the case, drawing inter alia on the Commission’s earlier work.

(c) *Particular issues raised by articles 47–50*

385. The review of articles 47–50 undertaken so far suggests that a number of issues are left unresolved by the draft articles, especially on matters of procedure. But these should not be allowed to obscure the value of these articles as a first attempt to formulate the international law rules governing the practice of countermeasures. That practice is rather widespread, is directly related to issues of State responsibility, and has given rise to concerns as to its possible abuse. In formulating articles 30 and 47–50, the Commission succeeded in producing a measure of agreement on key questions, as to which earlier practice and decisions were uncertain or equivocal. In particular the following points appear to be generally accepted:

(a) Countermeasures can only be justified in response to conduct which is internationally wrongful in law and in fact. The belief of the “injured” State in the wrongfulness is not a sufficient basis. Thus “an injured State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and

⁷⁴¹ *I.C.J. Reports 1997* (see footnote 51 above), pp. 56–57, paras. 85 and 87. The Court referred to the importance of the equality of the parties in control of the waters of an international watercourse, and noted also that Hungary’s consent to the diversion of water from the Danube had been within the framework of a joint project and not a unilateral diversion.

⁷⁴² The Court did not mention any requirement of prior negotiations, although in that case there had been extensive negotiations.

may incur responsibility for an unlawful act in the event of an incorrect assessment”,⁷⁴³

(b) Countermeasures are not limited to “reciprocal” measures in relation to the same or a related obligation. This enables a clearer distinction to be drawn between countermeasures and the application of the *exceptio in-adimpleti contractus*;⁷⁴⁴

(c) The principle of proportionality is a key limiting constraint on the taking of countermeasures. ICJ has given further guidance on its application by reference to the notion of “commensurability” and the requirement that the effects of a countermeasure should as far as possible be reversible in their effects;⁷⁴⁵

(d) The purpose of countermeasures is to induce the target State to cease its unlawful conduct and to provide appropriate reparation.

The comments of Governments, summarized above, raise a number of particular points about the formulation of articles 47–50. For the most part these can be reflected in specific changes to the text or the commentary: this will be a matter for the Commission at its fifty-second session, in 2000, assuming that it is decided to retain the detailed provisions on countermeasures in articles 47–50. Two general matters have however given rise to widespread concern and should be dealt with at this preliminary stage.

(i) *Dispute settlement and the form of the draft articles*

386. A key question in the formulation of the provisions on countermeasures relates to the explicit link drawn between the taking of countermeasures and compulsory arbitration. The existing provisions are drafted on the assumption that the draft articles will be adopted as a convention rather than, for example, as a declaration annexed to a resolution of the General Assembly. As many Governments have noted, this is a controversial assumption, and in any event the Commission has not yet decided on the form in which the draft articles should be recommended to the General Assembly. It does not seem desirable to propose texts dealing with any specific issue, such as countermeasures, if those texts assume that only one possible solution is open as to the form of the draft articles.

387. There are, moreover, specific difficulties with the current linkage between countermeasures and dispute settlement, which make those linkages problematic, whatever position may be taken on the general issue of the form of the draft articles. These concern both “interim measures” and the general regime of countermeasures.

388. The last-minute inclusion of the notion of “interim measures” in article 48, and the difficulties with the terminology, have already been mentioned. The language of “interim measures” is potentially misleading, but it is also

⁷⁴³ *Yearbook ... 1996*, vol. II (Part Two), commentary to article 47 p. 67, para. (1). The earlier dictum to the contrary in the case concerning the *Air Service Agreement of 27 March 1946* (see footnote 740 above), thus does not reflect international law.

⁷⁴⁴ See paragraphs 324–325 above. The Commission has decided to defer consideration of the formulation of the *exceptio*, pending conclusions on the content and formulation of the articles on countermeasures.

⁷⁴⁵ See paragraph 383 above.

unhelpful, since it fails to provide any criterion for distinguishing between “interim” and other forms of countermeasure. All countermeasures are intended to induce the target State to cease the wrongful conduct and to provide reparation, and thus to protect the rights of the injured State in that regard. All countermeasures are instrumental and thus their effects should be, as far as possible, reversible as ICJ held in the *Gabčíkovo-Nagymaros Project* case.⁷⁴⁶ In that important sense all countermeasures are “interim” measures, which envisage the normalization of relations through the resolution of the underlying dispute.⁷⁴⁷ Thus the second sentence of article 48 uses a misleading term to indicate a so far undefined concept, and it clearly needs to be revisited. A simple solution would be to follow the Court’s requirement that before taking countermeasures, the injured State must at least have called on the wrongdoing State to comply with the relevant primary rule or to offer reparation.

389. Turning to the general regime of countermeasures, the position here is at least as problematic. In one sense to make a connection between the taking of countermeasures and resort to arbitration may be seen as progressive, as a step towards moderating the old system of “reprisals”, and as contributing towards the peaceful settlement of international disputes. It recalls the connection made, exceptionally, in the 1969 Vienna Convention between compulsory third-party settlement and the invocation of a peremptory norm (*jus cogens*) as a ground for the invalidity of a treaty.⁷⁴⁸ That procedure, which has never been invoked, can be defended as maintaining the stability of treaty relations.⁷⁴⁹ By contrast the linkage of countermeasures with compulsory arbitration has serious disadvantages and could be a cause of instability. The essential difficulty is that only the target State is entitled to commence compulsory arbitration after countermeasures have been taken, and this places the two disputants in a position of inequality that it is difficult to defend by any principle. Why should the State which has allegedly committed an internationally wrongful act be entitled to require the injured State to arbitrate the dispute, but the injured State not have the same right? An injured State seeking third-party settlement of a dispute thus has an incentive to take countermeasures (even, perhaps, excessive or disproportionate countermeasures) in order to induce the target State to commence arbitration. It should be the policy of international law to discourage resort to countermeasures, but in this respect the draft articles may tend to encourage them. The draft articles deliberately do not require third-party judicial settlement of disputes concerning State responsibility, but since countermeasures can be taken, in principle, in relation to any breach of an international obligation, the effect of article 58, paragraph 2, is arguably to introduce such a system by the back door, and

in an unequal way. There are also technical difficulties with triggering an obligation to arbitrate by reference to the taking of countermeasures: for example, a State which declines to characterize its conduct as a countermeasure may thereby escape that obligation,⁷⁵⁰ and there are difficulties with respect to issues such as counterclaims, which are not provided for in the existing text.⁷⁵¹ For all these reasons, the Special Rapporteur is firmly of the view that the linkage between the taking of countermeasures and compulsory arbitration should not be retained.

(ii) *The balance between “injured” and “target” States*

390. A second point of widespread concern relates to the de facto inequality which countermeasures imply, since almost by definition the most powerful States will have the greatest scope and capacity to take countermeasures. It was precisely that consideration which led the Commission on first reading to introduce a special regime of compulsory arbitration in cases where countermeasures have been taken. But the States which have expressed this concern generally do not support the view that countermeasures should be deleted from the draft articles. In particular, in the Special Rapporteur’s view article 30 cannot be deleted without “decodifying” international law. But once the principle of article 30 is accepted, it is desirable that appropriate limits be set on resort to countermeasures, and in particular that their relationship to cessation and restitution be established. This is a proper task of the draft articles: for the Commission now to decline to carry it through would only tend to accentuate the inequality inherent in the capacity to take countermeasures.

2. GENERAL CONCLUSIONS

(a) *Options for the Commission*

391. To summarize, the Commission would seem to have the following options in dealing with countermeasures:

(a) Option 1 is to retain article 30 in essentially its present form, but to delete the treatment of countermeasures in part two;

(b) Option 2 is not to deal with countermeasures in part two, but to incorporate substantial elements of the legal regime of countermeasures into article 30;

(c) Option 3 is to engage in a substantial treatment of countermeasures in part two, along the lines of the present text, including the linkage with dispute settlement (but without prejudice to other issues which have been raised as to specific articles);

⁷⁴⁶ Ibid.

⁷⁴⁷ See further Crawford, “Counter-measures as interim measures”.

⁷⁴⁸ See articles 53, 64 and 66 of the 1969 Vienna Convention. In that case the linkage with dispute settlement was made not by the Commission but by the United Nations Conference on Diplomatic Intercourse and Immunities.

⁷⁴⁹ There is an element of paradox in providing, on the one hand, that the parties to a treaty cannot, on pain of invalidity, opt out of certain peremptory norms of interest to the international community as a whole, and on the other hand restricting challenges to invalid treaties to the parties thereto.

⁷⁵⁰ An analogous problem arose in the International Tribunal for the Law of the Sea in the case of the *M/V “Saiga” (Saint Vincent and the Grenadines v. Guinea)*, dispute concerning the prompt release of the *M/V “Saiga”* and its crew, judgment of 4 December 1997, para. 72, where the Tribunal held that “given the choice between a legal classification that implies a violation of international law and one that avoids such implication it must opt for the latter”. On this point the Tribunal divided 12–9.

⁷⁵¹ See paragraph 393 below. In many State responsibility cases in which countermeasures have been taken, issues of potential counterclaims will arise.

(d) Option 4 is to deal with countermeasures in part two, dealing with the various criticisms that have been made of articles 47–50, but avoiding any specific linkage with dispute settlement.

392. The Special Rapporteur prefers the fourth of these options. The subject of countermeasures in response to an internationally wrongful act is properly regarded as within the field of State responsibility, and it has always been envisaged that it would be included in part two of the draft articles. The link established in article 47 between countermeasures, cessation of the wrongful conduct and reparation is helpful, and overall the provisions on countermeasures seem to have had a beneficial effect in consolidating the law, as the Court showed in the *Gabčíkovo-Nagymaros Project* case.⁷⁵² There is widespread concern among States and commentators as to the potential for abuse of countermeasures. But there is also a general recognition that the institution of countermeasures exists in international law, a recognition reflected in the Commission's decision in principle to retain article 30 within chapter V. In the Special Rapporteur's view, it would be inappropriate to recognize that countermeasures are a circumstance precluding wrongfulness within the law of State responsibility—i.e. that they may constitute an excuse or justification for wrongful conduct—and not at the same time to spell out at least the main legal limitations upon the taking of countermeasures.⁷⁵³ It is true that there are difficulties with articles 47–50, in particular the linkage with dispute settlement and the failure to deal with problems arising from “collective” countermeasures in situations where there are many “injured States”. But these difficulties can be resolved in the framework of the consideration of part two, and in the case of “collective” responses to breaches of obligation *erga omnes* they will have to be addressed in any event, in the context of article 40 and the incidence of obligations *erga omnes*.

⁷⁵² See footnote 51 above.

⁷⁵³ As noted above (para. 295), the analogy between self-defence and countermeasures does not require the adoption of the same approach to both in the framework of chapter V of part one. The law of self-defence is relatively well developed and is incorporated in Article 51 of the Charter of the United Nations. Nor has the law of self-defence ever been treated as an aspect of the law of State responsibility, as distinct from a point of reference. In all these respects the position of countermeasures is different.

393. There is admittedly a slight awkwardness in referring to countermeasures first of all in the somewhat “incidental” context of article 30, before going on to deal with them in further detail in part two, and this might be a reason for preferring option 2 above.⁷⁵⁴ But the difficulty seems essentially presentational, and the main focus of countermeasures should be on their instrumental purpose in relation to cessation and reparation, rather than their incidental effect as circumstances precluding wrongfulness. This is perhaps the principal advance made in articles 47–50: countermeasures are seen in relation to the obligations of cessation and reparation set out in part two, and not simply as a diffuse and relatively indiscriminate form of sanction, reprisal or penalty. In these circumstances it is difficult to avoid referring to the secondary obligations arising from an internationally wrongful act, as set out in part two. Overall this consideration is insufficient to tilt the balance in favour of option 2 as set out in paragraph 391 above.

(b) *The formulation of article 30*

394. If this recommendation is accepted, it becomes possible to recommend the precise terms of article 30, a matter postponed for reasons already explained.⁷⁵⁵ The Special Rapporteur agrees with the suggestions made by some Governments that article 30 should cross-refer to the treatment of countermeasures in part two, and that it should distinguish between countermeasures and the “measures” taken by or under the auspices of international organizations under their own constituent instruments.⁷⁵⁶ On that basis he proposes the following text for article 30:

“The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if and to the extent that the act constitutes a lawful countermeasure as provided for in articles [xx]–[xx].”

⁷⁵⁴ References to later articles of a law-making text, while they may be awkward, are certainly not unknown: see, for example, the 1969 Vienna Convention (arts. 17, para. 1, 27, 44, paras. 1, 4 and 5, 45 and 48, para. 3).

⁷⁵⁵ See paragraph 250 above.

⁷⁵⁶ For these comments, see paragraphs 248–249 and 376–381 above.

ANNEX

INTERFERENCE WITH CONTRACTUAL RIGHTS: A BRIEF REVIEW OF THE COMPARATIVE LAW EXPERIENCE

1. In assessing whether article 27 of the draft articles should apply to cases where one State induces another to breach a treaty with a third State, reference is sometimes made to general principles of law, e.g. to the effect that it is a wrong to interfere with the legal right of another, including a contractual right.¹ In order to test this argument at its source, it is useful to undertake a brief comparative review.² As will be seen, English, French, German and United States law all recognize that knowingly and intentionally inducing a breach of contract is a civil wrong, but there are important differences between them. By contrast, no such liability seems to be recognized under Islamic law.

English law³

2. The English law of inducing breach of contract is based on a general principle, formulated by Lord Macnaghten in *Quinn v. Leathem* in the following terms:

[I]t is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.⁴

The tort is described variously as inducing or procuring breach of contract, actionable interference with contractual rights or “the principle in *Lumley v. Gye*”. It has been applied to contracts of all kinds. Since its inception it has been seen as an aspect of the more general tort of direct invasion of legal rights. In other words, it has been held wrongful intentionally and without justification to bring

¹ See, for example, Lauterpacht, “Contracts to break a contract”, p. 374.

² The Special Rapporteur would like to thank Mr. Roger O’Keefe of Magdalene College, Cambridge, for his assistance in preparing this annex, and Messrs Heinz Kötz, Basil Markesinis and Tony Weir for their useful comments on it.

³ The matter is governed by the common law in England, not by statute: the law appears to be substantially similar in other common-law jurisdictions. For the position in the United States, see paragraphs 4–5 below.

⁴ *The Law Reports*, House of Lords (1901), p. 510. The tort was first recognized in *Lumley v. Gye* (1853), *The All England Law Reports Reprint 1843–1860*, p. 216. Leading modern authorities are *J. T. Stratford & Sons Ltd v. Lindley and Another*, House of Lords, *Law Reports 1965*, p. 269; *Merkur Island Corp. v. Laughton*, *ibid.*, *Law Reports 1983*, p. 570; *Associated British Ports v. TGWU*, *ibid.*, *The Weekly Law Reports 1989*, vol. 1, p. 939; *Ticehurst and Thompson v. British Telecommunications plc*, Court of Appeal [1992] ICR 383; *Middlebrook Mushrooms Ltd v. TGWU*, *ibid.* [1993] ICR 612; and *Law Debenture Trust Corporation v. Ural Caspian Oil Corporation Ltd*, *ibid.*, *The Weekly Law Reports 1994*, vol. 3, p. 1221.

about the violation of a legal right, in this case, the legal right of one party vis-à-vis the other to have a contract performed.⁵

3. For an act of inducement to be actionable, three elements are necessary. First, the procurer must know of the existence of the contract and intend to interfere with its performance.⁶ However, knowledge of the contract’s precise terms is unnecessary.⁷ Secondly, the procurer must not have had any sufficient justification for so acting.⁸ In this respect, the courts may have regard “to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and ... the object of the person in procuring the breach”.⁹ To justify an inducement, it is not enough to show that the defendant was acting in good faith in the pursuit of a legitimate interest; there has to be something in the nature of a moral duty,¹⁰ or a distinct legal right to act.¹¹ Thirdly, the contract must actually have been broken, causing actual damage to the plaintiff.¹²

⁵ See *Lumley v. Gye* (footnote 4 above), pp. 216 and 232 (Erle); *Allen v. Flood*, House of Lords, *The Law Reports* (1898), p. 96 (Lord Watson); *Quinn v. Leathem* (para. 2 above); *Associated British Ports v. TGWU* (footnote 4 above), pp. 939, 959 (Butler-Sloss) and 964 (Stuart-Smith); *F. v. Wirral Metropolitan Council*, *The Weekly Law Reports 1991*, vol. 2, p. 1132 (Ralph Gibson and Stuart-Smith).

⁶ See *Merkur Island Corp. v. Laughton* (footnote 4 above), p. 608 (Lord Diplock); and *Middlebrook Mushrooms Ltd v. TGWU* (footnote 760 above) (Neill).

⁷ *J. T. Stratford & Sons Ltd v. Lindley and Another* (see footnote 4 above); *Merkur Island Corp. v. Laughton* (see footnote 4 above), p. 609 (Lord Diplock).

⁸ According to *Clerk & Lindsell on Torts*, 17th ed. (London, Sweet & Maxwell, 1995), p. 1218, “it is impossible to lay down any general rule about the nature of this defence”. See, for example, *Glamorgan Coal Co. Ltd. v. South Wales Miners’ Federation* [1903] 2 K.B. 545, 573–574 (Romer), 577 (Striling); *Smithies v. National Association of Operative Plasterers*, House of Lords, *The Law Reports* (1909), p. 310; and *Edwin Hill v. First National Finance Corporation plc*, *The Weekly Law Reports 1989*, vol. 1, p. 225 (Court of Appeal).

⁹ *Glamorgan Coal Co. Ltd.* (see footnote 8 above), p. 574 (Romer), adopted in *Greig v. Insole*, *The Weekly Law Reports 1978*, vol. 1, p. 340 (Slade), and quoted in *British Industrial Plastics v. Ferguson*, *All England Law Reports 1938*, vol. 4, p. 510 (Slessor).

¹⁰ *Ibid.*

¹¹ For example, *Edwin Hill v. First National Finance Corporation plc* (footnote 8 above). Some other common-law jurisdictions take a more liberal approach to justification.

¹² *Jones Brothers (Hunstanton) Ltd. v. Stevens*, *The Law Reports 1955*, vol. 1 (Queen’s Bench), p. 275.

United States law¹³

4. *The Restatement of the Law, Second, Torts* (1979) deals with “Intentional interference with performance of contract by third person”: paragraph 766 provides that:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

The term “improperly” is used by the drafters of paragraph 766 to connote “unjustified”. The latter term, which is used most frequently by the courts, was thought to imply too strongly that the factors involved were all matters of defence. “Factors in determining whether interference is improper” are spelled out in paragraph 767. They include:

- (a) The nature of the actor’s conduct;
- (b) The actor’s motive;
- (c) The interests of the other with which the actor’s conduct interferes;
- (d) The interests sought to be advanced by the actor;
- (e) The social interests in protecting the freedom of action of the actor and the contractual interests of the other;
- (f) The proximity or remoteness of the actor’s conduct to the interference; and
- (g) The relations between the parties.

5. Comment *c* to paragraph 766 traces the development of United States law back to the same English source, *Lumley v. Gye*.¹⁴ The tort has been applied in the United States to all types of contract, except contracts to marry.¹⁵ As under English law, there must be knowledge of the contract on the part of the defendant (comment *i*) and an intention to interfere with the performance of the contract (comment *j*).

German law¹⁶

6. Inducing breach of contract (*Verleitung zum Vertragsbruch*) constitutes a delict under § 826 BGB (Civil Code), which establishes a general form of tortious responsibility for intentional infliction of harm

¹³ The case law is usefully summarized in Keeton, ed., *Prosser and Keeton on the Law of Torts*, p. 978, para. 129, concurring with the *Restatement of the Law, Second, Torts* (para. 4 above). Note that, contrary to the position in other states of the United States as well as in France, Louisiana has not recognized the tort.

¹⁴ See footnote 4 above.

¹⁵ See comment *d*. Under English law, the tort applies to contracts of all kinds: *Clerk & Lindsell on Torts* (footnote 8 above), p. 1178. Note, however, that a father was traditionally justified in interfering to prevent a child marrying a person of immoral character: *Glamorgan Coal*, p. 577 (Stirling) and *South Wales Miners’ Federation v. Glamorgan Coal Company*, House of Lords, *The Law Reports 1905*, p. 249 (Lord James); *Crofter Hand Woven Harris Tweed Co. v. Veitch*, *ibid.* 1942, pp. 442–443 (Viscount Simon).

¹⁶ See Markesinis, *The German Law of Obligations*, p. 898; and Zweigert and Kötz, *op. cit.*, pp. 622–623.

contra bonos mores (“sittenwidrig”).¹⁷ But the German law “tak[es] a restrictive view [and] does not regard interference with someone else’s contractual rights as tortious conduct in and of itself”.¹⁸ Mere knowledge of or “cooperation” in the breach of a contract with a third party will not suffice.¹⁹ The Bundesgerichtshof (BGH) has stated:

Contractual claims are not amongst the rights whose infringement in itself gives rise to claims in tort. Nor does the moral order oblige an independent third party in a case of conflict to subordinate its own interests to those of the contracting parties . . . Thus, there is no claim under § 826 BGB for damages against a third party simply on the ground of his cooperation in the violation [of a contract] . . . The allegation of conduct *contra bonos mores* is well-founded only in cases of serious offences to feelings of decency, where the course of conduct of a third party is incompatible with the basic requirements of a proper view of the law (*Grundbedürfnissen loyaler Rechtsgesinnung*).²⁰

It is well established in the case law of the BGH that a third party’s interference with a contractual relationship is tortious “only when the third party shows a special degree of wanton or reckless behaviour (*Rücksichtslosigkeit*) towards the contracting party who is prejudiced by the breach of contract that occurs”.²¹ This would be the case, for example, where a third party is in “collusion with the debtor under the contract in order specifically to frustrate the claims of the creditor concerned”,²² or where a third party promises to indemnify the debtor against claims by the creditor.²³ Moreover the breach induced must be central to the performance of the contract as a whole, not a breach of some collateral or incidental provision.

French law²⁴

7. Anyone who knowingly assists another to breach a contractual obligation owed by that other commits a delict under articles 1382 and 1383 of the *Code civil* as regards the victim of the breach.²⁵ It would appear that responsibility for interference with another’s contractual obligations (*la responsabilité du tiers complice* or, in some specific senses, *concurrency déloyale*) is not dependent upon the defendant’s having actually incited or induced the breach in question. Knowledge of the existence of the

¹⁷ See RG JW 1913, 866; RGZ 78, 14, 17; RG JW 1913, 326; BGH NJW 1981, 2184, as cited by Markesinis, *op. cit.*, p. 898. See also cases cited in Palandt, *Bürgerliches Gesetzbuch*, para. 826; and Ulmer, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, para. 826.

¹⁸ Gerven and others, eds., *Torts: Scope of Protection*, p. 279.

¹⁹ See BGH NJW 1969, 1293 ff., cited by Markesinis, *op. cit.*, p. 898; and BGH NJW 1994, 128, excerpted in Gerven and others, eds., *op. cit.*, pp. 277–279 (translation by N. Sims).

²⁰ BGH NJW 1994 (see footnote 19 above), p. 278.

²¹ *Ibid.*, p. 279.

²² *Ibid.*, p. 278.

²³ See BGH NJW 1981, 2184, as cited by Youngs, *English, French and German Comparative Law*, p. 282, footnote 422.

²⁴ For a useful overview, see Palmer, “A comparative study (from a common law perspective) of the French action for wrongful interference with contract”.

²⁵ See Dalloz, *Recueil périodique et critique de jurisprudence*, 1908, Civ 27 May 1908, p. 459; Com 29 May 1967, *Bull civ* III, No. 209; Com 11 October 1971, *Recueil Dalloz Sirey*, 1972 (Paris), p. 120; Civ 2nd 13 April 1972, *ibid.*, p. 440; Civ 3rd 10 May 1972, *Bull civ* III, No. 300; Civ 3rd 8 July 1975, *ibid.*, No. 249; Com 13 March 1979, *Recueil Dalloz Sirey*, 1980, pp. 1–3, note by Serra; Com 23 April 1985, *Bull civ* IV, No. 124; Com 5 February 1991, *ibid.*, No. 51; Com 4 May 1993, *ibid.*, No. 164.

contractual obligation is sufficient to ground responsibility, as was made clear by the Cour de cassation in *Dlle Pedelmas et autres v. Époux Morin et autre*.²⁶ The standard statement of the law is that:

Anyone who knowingly assists another to breach a contractual obligation owed by that other commits a delict as regards the victim of the breach.²⁷

In the words of Savatier's classic text, "case law ... on the one hand, affirms the delictual character of the responsibility of the collusive third party and on the other hand, limits itself, in principle, to declaring [that party] at fault because of his knowledge of the contract, without any other wrong being required".²⁸

8. More explicitly, Serra states in his note on *Dlle Pedelmas et autres v. Époux Morin et autre*:

It is enough for the third party to have acted with full knowledge of the facts, being aware of the existence of the commitment ... with the breach of which he is associated. It is not at all necessary for the third party to have incited the debtor to breach his obligation for him to be considered to have played a determining role in the failure to execute the agreement.²⁹

Viney agrees:

Knowledge of the contract and the conscious performance of acts which impede its execution are sufficient to establish the responsibility of the third party.³⁰

9. These principles were applied to surprising effect in a series of cases, in which it was held that a selective distribution network established under contract by several producers *inter se* can give rise to delictual responsibility, under article 1382 of the *Code civil*, on the part of a "rogue" distributor who obtains and sells their products.³¹ In *S.A.R.L. Geparo Im En Export BV v. S.N.C. Les Parfums Cacharel et Cie*,³² the Cour de cassation stated that:

In view of article 1382 of the *Civil Code* ... a non-authorized intermediary of a lawful selective distribution network commits a civil wrong in attempting to obtain from an authorized distributor, in breach of the contract binding him to the network, the sale of products marketed through this mode of distribution ...³³

Similarly, in *Soc. Allonnes Distribution Centre Leclerc et autre v. Soc. anon. Estée Lauder*, the Cour de cassation declared:

In view of article 1382 of the *Civil Code* ... the selective distribution network can be used as evidence against the companies Allonnes and

²⁶ Com 13 March 1979 (see footnote 25 above), p. 1.

²⁷ *Ibid.*

²⁸ Savatier, *Traité de la responsabilité civile en droit français*, p. 187, para. 144.

²⁹ Com 13 March 1979 (see footnote 25 above), p. 2. See also *Lehmann v. Société des comédiens français*, 2 June 1930, *La Gazette du Palais*, No. 2 (1930), p. 119; and *Maréchal v. Époux Loustau*, Com 4 May 1993 (see footnote 25 above).

³⁰ Viney, *Traité de droit civil: Introduction à la responsabilité*, p. 382, para. 207–2.

³¹ See Com 16 February 1988, *Bull civ IV*, No. 76; Com 13 December 1988, *ibid.*, Nos. 343–344; Com 31 January 1989, *ibid.*, No. 45; Com 21 March 1989, *ibid.*, No. 98; Com 10 May 1989, *Recueil Dalloz Sirey*, 1989, p. 427, especially 3rd, 4th and 5th specific cases.

³² Com 21 March 1989, *Recueil Dalloz Sirey*, 1989 (see footnote 31 above), 4th specific case.

³³ *Ibid.*, p. 428.

Direct Distribution, and ... they have committed a delict by importing and selling without being authorized distributors ...³⁴

The novelty of these cases has been noted, but they appear to meet with approval.³⁵

10. Obviously, for responsibility to arise, the contract breached must itself be a lawful one. Beyond that, however, there appears to be no express provision on the question of justification for interference with contractual relations. In this respect, it is important to recall that responsibility for interference with contractual relations is seen as a manifestation of the "general duty not to harm others":³⁶

Any harm caused by one member of society to another in a case where the former could have foreseen and avoided such harm engenders a presumption of civil wrong and responsibility.³⁷

But, as suggested by the use of the word "presumption", "the harm caused may ... be justified by the exercise of a right"—a right which, in a "simple" and slightly crude term, Savatier places among "the rights allowing one to harm others".³⁸ According to Savatier:

Most of the time, the rights allowing one to harm others are sufficiently based on fairness. They stem ... from the requirements of life in society. Such rights include, for example, the right to freedom of expression ... [or] the right to compete ... These are rights to harm others in *fairness*. Moreover, they are closely correlated with the principles that protect individual freedom: freedom of thought [and] of speech, ... freedom of commerce and of work ...³⁹

He divides these general justifications into five categories, of which only two need to be mentioned here. The first is what might be called the right to compete:

The right to cause certain harm arises from the inevitable parallelism of legitimate human activities: these are competition rights. Whatever the source (competitive examination, bidding, similarity between occupations, etc.), what the candidate obtains (an award, a job, a market, a clientele) is acquired only at the expense of others. Although harmful to the latter, his activity is legitimate.⁴⁰

Whatever the general validity of this principle, the Cour de cassation in the landmark case of *Dœuillet et Cie v. Raudnitz*⁴¹ placed firm limits on the right to compete as it relates to interference with valid contractual obligations, at least in the specific case of contracts of employment. Similar limits have subsequently been applied in principle, if not always on the particular facts, to several other types of commercial contract.

11. Savatier's second justification equates with self-defence and/or necessity:

Like parallel activities, legitimate conflicting activities cause inevitable harm. These are the *rights of self-defence*. Thus, there may be a defence either of a legitimate *group* (national, occupational, social or

³⁴ Com 10 May 1989 (see footnote 31 above), 5th specific case, pp. 428–429.

³⁵ *Ibid.*, note by Bénabent, pp. 430–431.

³⁶ Savatier, *op. cit.*, chap. III, p. 47.

³⁷ *Ibid.*, para. 35.

³⁸ *Ibid.*, p. 48, para. 36.

³⁹ *Ibid.*, pp. 48–49.

⁴⁰ *Ibid.*, pp. 49–50, para. 37 (a).

⁴¹ Civ 27 May 1908 (see footnote 25 above).

religious), or of an *individual*. Self-defence, legal proceedings or necessity are examples of this.⁴²

In the case of the perfume importer/distributor outside the selective distribution network, the Cour de cassation held on the facts that in the absence of proof establishing the irregularity of the acquisition of the goods, the defendant did not breach article 1382 of the *Code civil*. By “irregularity of the acquisition”⁴³ of the goods, the Cour de cassation apparently means their acquisition from a party to the selective distribution agreement in breach of that party’s contractual obligation. Similar findings were reached in several of the other cases. In summary, then, the mere act of circumventing the selective distribution agreement (that is, without the involvement of any of the parties to the agreement) does not constitute a violation of article 1382. This is a simple *pacta tertiis* situation. But to do so with the involvement of one of the parties to the agreement constitutes a violation of article 1382, assuming the legality of the agreement is established.

Islamic law

12. Islamic law embodies no general category of rules of delictual responsibility. Any principles of civil liability must be gleaned from the Koran, Sunna and the opinions of learned jurists. Even then, tortious liability (*jinayah*; sometimes *‘uqubat*) does not constitute a coherent legal category but is divided into specific nominate torts such as usurpation (*ghasab*), conversion (*itlaf*), trover (*tasarruf-i beja*), detinue (*habs*) and trespass (*mudakhalat-i beja*).⁴⁴

13. Notwithstanding this, the term *jinayah* has been defined in general terms by a prominent jurist as “an act of transgression which results into a damage or an injury to a person, his property or honour ... [or] a violation of a right recognised *a priori* by law and which casts a civil liability on the defendant”.⁴⁵ It is not clear whether this definition is simply descriptive of the accepted nominate torts or is also prescriptive; there also appears to be some debate as to the meaning of “a right recognised *a priori* by law”.⁴⁶ As a result, in the absence of any evidence specifically on that point, it is impossible to state whether Islamic law recognizes delictual responsibility for interference with contractual relations.

⁴² Savatier, *op. cit.*, p. 50, para. 37 (*b*). See also pages 73–83, paras. 60–64 (*ibid.*).

⁴³ Com 10 May 1989 (see footnote 31 above).

⁴⁴ See, for example, Masoodi, “Civil liability in English and Islamic laws: a comparative view”, pp. 34–37.

⁴⁵ *Ibid.*, p. 36, citing Ibn Rushd.

⁴⁶ *Ibid.*, p. 39.

14. Two things, however, limit the possibility of tortious liability under Islamic law for interference with contractual relations. First, the basis of civil liability under *jinayah* is exclusively intention: a defendant who did not intend to inflict a loss on the plaintiff will not be liable.⁴⁷ Secondly, in terms of justification, at least one influential school of Muslim jurists affirms “the principle that ‘a wrong caused in the course of exercise of a legal right precludes the defendant of his civil liability’—summed up by an Arabic proposition *al-jawaz al-shar ‘iyuna fi al-dhaman*”.⁴⁸ Limitation by reference to the public interest (*al-maslaha al-mursalah*) has been suggested by others.⁴⁹ Thus even if Islamic law, or systems based upon it, were to recognize the principle of tortious liability for inducing breach of contract, such liability would be very limited.

Conclusions

15. This brief review shows that, while the four European systems reviewed recognize that knowingly and intentionally inducing a breach of contract is a civil wrong, they approach the matter in different ways, and these differences are accentuated if one brings into account a wider range of comparison, such as, for example, Islamic law or Russian law. Thus while it may be that some of these systems produce similar results in practice,⁵⁰ that is by no means universally so. Moreover, a number of additional points can be made. First, even among the Western European systems reviewed, there are important differences in approach. French law is the most open in principle to such liability (but subject to limitations in practice such as a strict burden of proof); German law least so, since it requires something over and above knowing assistance or inducement, amounting to improper conduct. English and United States law take an intermediate position; there is liability in principle for deliberate and knowing inducement, but this is subject to the defence of justification and the proof of actual damage arising from the breach. Secondly, the rules in question operate within the framework of a developed system of regulation of the types of lawful contracts (e.g. in the field of competition law). Thus the statement of a general principle that any knowing interference with the performance of any contract constitutes a delict or a tort is an oversimplification of a more complex situation. Thirdly, in all the systems reviewed, the relevant rules would be classified as “primary” rather than “secondary”, in the sense of the draft articles, if that classification were relevant to them.

⁴⁷ *Ibid.*, p. 49.

⁴⁸ *Ibid.*, p. 43.

⁴⁹ *Ibid.*, pp. 44 and 47.

⁵⁰ See Zweigert and Kötz, *op. cit.*, pp. 622–623.

STATE RESPONSIBILITY

[Agenda item 3]

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Comments and observations received from Governments

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CONTENTS

	<i>Page</i>
INTRODUCTION	103
COMMENTS AND OBSERVATIONS RECEIVED FROM GOVERNMENTS	104
<i>General remarks</i>	104
Greece	104
Japan.....	104
PART ONE. ORIGIN OF INTERNATIONAL RESPONSIBILITY	104
CHAPTER I. GENERAL PRINCIPLES	104
<i>Article 1. Responsibility of a State for its internationally wrongful acts</i>	104
Japan.....	104
<i>Article 2. Possibility that every State may be held to have committed an internationally wrongful act..</i>	104
Greece	104
CHAPTER II. THE "ACT OF THE STATE" UNDER INTERNATIONAL LAW	104
<i>Article 5. Attribution to the State of the conduct of its organs</i>	104
Greece	104
<i>Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority</i>	104
Greece	104
<i>Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity</i>	105
Greece	105
<i>Article 11. Conduct of persons not acting on behalf of the State</i>	105
Greece	105
<i>Article 12. Conduct of organs of another State</i>	105
Greece	105
<i>Article 13. Conduct of organs of an international organization</i>	105
Greece	105
CHAPTER III. BREACH OF AN INTERNATIONAL OBLIGATION	105
Japan.....	105
<i>Article 17. Irrelevance of the origin of the international obligation breached</i>	105
Greece	105

	<i>Page</i>
<i>Article 18. Requirement that the international obligation be in force for the State</i>	105
Greece	105
<i>Article 19. International crimes and international delicts</i>	105
Greece	105
Japan	105
<i>Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct</i>	106
Japan	106
<i>Article 21. Breach of an international obligation requiring the achievement of a specified result</i>	106
Japan	106
<i>Article 23. Breach of an international obligation to prevent a given event</i>	106
Japan	106
<i>Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time</i>	106
Greece	106
Japan	106
<i>Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time</i>	106
Greece	106
Japan	106
<i>Article 26. Moment and duration of the breach of an international obligation to prevent a given event</i>	106
Greece	106
Japan	106
CHAPTER IV. IMPLICATION OF A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE	107
<i>Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act</i>	107
Japan	107
CHAPTER V. CIRCUMSTANCES PRECLUDING WRONGFULNESS	107
Japan	107
<i>Article 30. Countermeasures in respect of an internationally wrongful act</i>	107
Japan	107
<i>Article 32. Distress</i>	107
Japan	107
<i>Article 35. Reservation as to compensation for damage</i>	107
Japan	107
PART TWO. CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY	107
CHAPTER I. GENERAL PRINCIPLES	107
<i>Article 37. Lex specialis</i>	107
Japan	107
<i>Article 38. Customary international law</i>	108
Japan	108
<i>Article 39. Relationship to the Charter of the United Nations</i>	108
Japan	108
<i>Article 40. Meaning of injured State</i>	108
Japan	108
CHAPTER II. RIGHTS OF THE INJURED STATE AND OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY WRONGFUL ACT	108
<i>Article 42. Reparation</i>	108
Japan	108

	<i>Page</i>
<i>Article 43. Restitution in kind</i>	108
Japan.....	108
<i>Article 44. Compensation</i>	108
Japan.....	108
<i>Article 45. Satisfaction</i>	109
Japan.....	109
CHAPTER III. COUNTERMEASURES	109
Greece	109
Japan.....	109
<i>Article 48. Conditions relating to resort to countermeasures</i>	109
Japan.....	109
<i>Article 50. Prohibited countermeasures</i>	109
Japan.....	109
CHAPTER IV. INTERNATIONAL CRIMES	109
Japan.....	109
<i>Article 53. Obligations for all States</i>	109
Greece	109
PART THREE. SETTLEMENT OF DISPUTES.....	110
Greece	110
Japan.....	110
<i>Article 56. Conciliation</i>	110
Japan.....	110
<i>Article 58. Arbitration</i>	110
Japan.....	110
<i>Article 60. Validity of an arbitral award</i>	110
Japan.....	110

Introduction

1. In addition to the comments and observations received from Governments on the draft articles on State responsibility adopted on first reading by the Commission in 1996,¹ which are reproduced in

Yearbook ... 1998, vol. II (Part One), document A/CN.4/488 and Add.1–3, the following replies have been received as of 10 February 1999 (on the dates indicated): Greece (17 September 1998) and Japan (7 September 1998). These replies are reproduced below.

¹ See *Yearbook ... 1996*, vol. II (Part Two), pp. 58 et seq.

Comments and observations received from Governments

General remarks

Greece

1. Greece wishes first of all to commend all the special rapporteurs of the Commission who have worked on the topic of State responsibility which is both difficult and of fundamental importance for international law as a whole. It commends Mr. Roberto Ago in particular, who has given impressive impetus to study of the issue. It wishes the new Rapporteur, Mr. James Crawford, similar success.

2. Greece is in favour of giving this draft, which has been adopted on first reading, top priority, so that the work carried out over a number of decades can be completed as soon as possible, before the Commission's mandate expires.

3. As to the form the set of articles should take, Greece has always been in favour of a convention, essentially because of the exceptional importance of the articles and because of the impact that a treaty has on practice. A convention, even if ratified by only a small number of States, has a far greater impact and influence than just a declaration or a set of guiding principles.

4. As they stand, the draft articles already represent not only a valuable source of inspiration with respect to State responsibility, but also an authoritative reference text in both international and national practice; moreover, the international community is already well acquainted with some key provisions of the articles, particularly those concerning the concept of an international crime, and these key provisions even form part of general international law. The articles on State responsibility must be able to play both a preventive role and a positive role, promoting international justice by protecting the weakest and serving the interests of peace.

Japan

1. More than four decades have passed since the Commission decided to begin a study of State responsibility. And now, the draft articles on State responsibility have been finalized owing greatly to the dedicated efforts of four special rapporteurs and intensive discussions undertaken by members of the Commission. On this occasion, Japan would like to express its deep appreciation to those involved in preparing the draft articles.

2. The Commission is expected, however, to make further efforts to complete the exercise of codifying and developing international law in this important area, because a number of problems remain unresolved. First of all, Japan would like to offer some general remarks and then some specific comments on individual sections. It should like to reserve the right to make further comments at a later stage.

3. It is Japan's fundamental view that the primary objective of any effort to codify a multilateral treaty on State responsibility is to provide an effective legal framework

for the resolution of international disputes on that subject. The draft articles consequently must reflect actual State practice and international jurisprudence. Those with provisions that are unrealistic or ambitious will be useless in solving actual disputes. Worse, unrealistic provisions are likely to embroil States participating in diplomatic conferences in prolonged discussions, with the result that the ratification of a treaty is likely to become more difficult.

4. Japan is therefore obliged to take a critical stance on certain provisions in the draft articles, in particular, those related to international crimes of States, "injured States", countermeasures and the compulsory dispute settlement mechanism.

PART ONE. ORIGIN OF INTERNATIONAL RESPONSIBILITY

CHAPTER I. GENERAL PRINCIPLES

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

Japan

See article 40 below.

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

Greece

Article 2 is superfluous and could be deleted.

CHAPTER II. THE "ACT OF THE STATE" UNDER INTERNATIONAL LAW

Article 5. Attribution to the State of the conduct of its organs

Greece

The words "individual or collective" could be inserted before the words "State organ", and the words "having that status under the internal law of that State" could be deleted, since they are superfluous and might be hard to apply in practice.

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

Greece

An explicit reference should also be made to the case of States members of a federal State.

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

Greece

An explicit reference should also be made to the case of States members of a federal State.

Article 11. Conduct of persons not acting on behalf of the State

Greece

Article 11 should be more closely linked to article 8.

Article 12. Conduct of organs of another State

Greece

Article 12 should be more closely linked to article 9.

Article 13. Conduct of organs of an international organization

Greece

Article 13 should be more closely linked to article 9.

CHAPTER III. BREACH OF AN INTERNATIONAL OBLIGATION

Japan

1. In some provisions of the draft articles, excessively abstract concepts are laid down in unclear language. Perhaps the most obvious example of this is the categorization of international obligations in part one, chapter III.

2. Articles 20, 21 and 23 classify international obligations respectively as international obligations requiring the adoption of a particular course of conduct, international obligations requiring the achievement of a specified result and international obligations to prevent a given event. The moment and duration of international obligations are differentiated by articles 24–26. Article 25, while distinguishing between “composite” acts and “complex” acts of a State, specifies the moment at which the breach of an international obligation can be said to occur.

3. In view of the fact that the moment and duration of breaches of international obligations are closely related to the content and extent of reparation, Japan understands the importance attached to these classifications. But the categorization developed in the draft articles tends to be too abstract. Thus, Japan has doubts on its usefulness in resolving actual disputes. In fact, it is likely to be very difficult to make clear-cut distinctions between obligations requiring the adoption of a particular course of conduct and obligations requiring the achievement of a specified result, breaches extending in time and not extending in time, and composite acts and complex acts. Rather, these distinctions, if actually applied, would be counterproductive to any effort to settle a dispute.

Article 17. Irrelevance of the origin of the international obligation breached

Greece

Article 17, paragraph 2, would appear to be superfluous.

Article 18. Requirement that the international obligation be in force for the State

Greece

1. The drafting of paragraph 2 is in need of improvement, because the word “subsequently” gives the false impression that a *jus cogens* rule can have a retroactive effect.

2. Paragraphs 3–5 should be worded more simply and more clearly.

Article 19. International crimes and international delicts

Greece

1. Article 19, which sets forth the concept of an international crime without, however, criminalizing or penalizing the international responsibility of States—is one of the most important and essential articles in the draft. Greece has consistently supported this concept in the Sixth Committee of the General Assembly; the concept of an international crime, in turn—with the establishment of the principle of collective security by Chapter VII of the Charter of the United Nations and the peremptory norms of general international law laid down in the 1969 Vienna Convention on the Law of Treaties¹—makes a considerable contribution to the establishment and strengthening of an international public order that the world sorely needs.

2. See also article 53 below.

Japan

1. The draft articles seem to imply that the function of international law in regard to State responsibility now involves restoring and maintaining international legal order. Thus, the draft articles categorize the types of internationally wrongful acts that can affect the “fundamental interests of the international community” as an “international crime” and, in order to restore international legal order, provide certain measures that can be applied especially to an international crime, in addition to the normal forms of reparation.

2. It cannot be denied that international society has evolved from a group of individual independent States to a community with shared interests and common concerns, and that certain legal forms are necessary to protect the interests of the community as a whole. However, even if the provisions in the draft articles relating to international

¹ United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

crimes can be thought to embody such an idea, they entail the following problems, and thus need to be fundamentally rethought.

3. Article 19, paragraph 3, lists four categories of international crimes, namely: (a) a serious breach of an international obligation to maintain international peace and security; (b) a serious breach of an international obligation to safeguard the right of self-determination of peoples; (c) a serious breach of an international obligation to safeguard the human being, such as slavery, genocide and apartheid; and (d) a serious breach of an international obligation to safeguard and preserve the human environment, such as massive pollution.

4. If certain types of internationally wrongful acts are treated as international crimes of States and are put into a legal framework that is stricter than that applied to ordinary types of internationally wrongful acts, it is obviously necessary to define them clearly. But these four categories of "crime" seem nothing more than examples; and their wording and content are still vague, particularly categories (c) and (d). Furthermore, Japan is not certain whether it is appropriate to treat massive environmental pollution in the same legal manner as other international crimes that fall into category (d).

5. If certain categories of internationally wrongful acts are regarded as international crimes, then the legal consequences attached to them must be differentiated. In the case of international crimes, the draft articles treat all States other than the wrongdoing State as "injured States", each of which is entitled to seek full reparation and take countermeasures. In addition, such "injured States" are released from certain restrictions which would otherwise be imposed upon their efforts to obtain restitution in kind and compensation. On the other hand, article 53 imposes special duties on "every other State" than that which has committed an international crime.

6. In cases of international crimes, an "injured State" suffering no tangible damage is entitled to seek reparation more freely than in cases of international delicts. Specifically, it is entitled to seek compensation out of proportion to the benefit it would gain by obtaining restitution in kind, and to endanger the political independence or economic stability and impair the dignity of the wrongdoing State in the course of obtaining restitution in kind and satisfaction. This sort of special treatment would not contribute to restoring or maintaining the international legal order, but would rather undermine legal stability.

7. Since the cold war era, it has become possible for the United Nations to play a more active role in resolving international disputes of grave concern to the international community. What the draft articles are supposed to accomplish through the provisions on international crimes may be achieved by means of collective security measures carried out by the Security Council.

8. Consequently, Japan believes that it is not necessary to incorporate the idea of international crimes into the draft articles on State responsibility. Unless the problems pointed out above are solved in an appropriate manner, the regime designed to deal with international crimes will remain unacceptable.

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

Japan

See the general comments under part one, chapter III, above.

Article 21. Breach of an international obligation requiring the achievement of a specified result

Japan

See the general comments under part one, chapter III, above.

Article 23. Breach of an international obligation to prevent a given event

Japan

See the general comments under part one, chapter III, above.

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

Greece

Article 24 should be worded more simply and more clearly.

Japan

See the general comments under part one, chapter III, above.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

Greece

Article 25 should be worded more simply and more clearly.

Japan

See the general comments under part one, chapter III, above.

Article 26. Moment and duration of the breach of an international obligation to prevent a given event

Greece

Article 26 should be worded more simply and more clearly.

Japan

See the general comments under part one, chapter III, above.

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**

Japan

1. The Commission's commentary to article 27 identifies those elements that determine whether aid or assistance rendered by one State to another constitutes an internationally wrongful act, namely: (a) it must have the effect of making it materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act; and (b) it must have been rendered with intent to facilitate the commission of that internationally wrongful act.
2. Although Japan basically agrees with the Commission on the validity of these elements, it suggests that they should be clearly defined in the draft articles in order to prevent unnecessary disputes over their interpretation.
3. With regard to paragraph 1 (b) above, further consideration may be necessary to formulate the means of determining when one State has the intention of helping another commit an internationally wrongful act.

CHAPTER V. CIRCUMSTANCES PRECLUDING WRONGFULNESS

Japan

1. It is appropriate and necessary to provide for circumstances precluding wrongfulness in the draft articles on State responsibility. However, in order to decide the content and extent of these circumstances, customary international law and State practice should be well reflected. Unless the content and extent of these circumstances are clearly defined, the wrongdoing States may be prone to abuse the provisions. From this point of view, the circumstances precluding wrongfulness must be provided not in an illustrative list but in an exhaustive one.
2. Among the circumstances precluding wrongfulness listed in chapter V, such circumstances as force majeure (art. 31), distress (art. 32) or state of necessity (art. 33) can be treated differently from the others. Could it not be concluded that with these circumstances in place, wrongfulness of conduct of a wrongdoing State would not exist in the first place, and thus these circumstances would not preclude wrongfulness but render it non-existent? This may appear to be an important point in practice, and therefore it is suggested that it be further studied.

**Article 30. Countermeasures in respect of an
internationally wrongful act**

Japan

1. The countermeasures provided in article 30, as with those in part two, chapter III, must be understood as individual measures taken by an individual State whose interests have been damaged directly by the internationally wrongful act of another State, and thus do not include col-

lective measures or sanctions that international organizations such as the United Nations would take.

2. Although not specifically mentioned in article 30, it is our understanding that countermeasures provided for in that article are also subject to the conditions specified in part two, chapter III.

Article 32. Distress

Japan

Distress as a circumstance precluding wrongfulness under article 32 may not necessarily be limited to a situation where the life of a person is in grave danger; it can also be invoked where important interests of a person (such as significant financial and economic interests) are jeopardized, so long as a reasonable balance is maintained between such interests and the extent to which an international obligation is breached.

Article 35. Reservation as to compensation for damage

Japan

1. As is provided in article 35, Japan understands that even if the wrongfulness of conduct by a State that would otherwise constitute an internationally wrongful act and entail State responsibility is precluded by certain circumstances, the question of "compensation" for that conduct may remain unresolved.
2. Some confusion has been detected in the language used here inasmuch as article 44 cites "compensation" as one of the means to make full reparation for State responsibility, which by definition presupposes the existence of an internationally "wrongful act". Thus, in order to preserve the integrity of the draft articles concerning the basic concept of State responsibility and to avoid conceptual confusion, Japan suggests replacing the word "compensation" in article 35 with another term.

PART TWO. CONTENT, FORMS AND DEGREES
OF INTERNATIONAL RESPONSIBILITY

CHAPTER I. GENERAL PRINCIPLES

Article 37. Lex specialis

Japan

Article 37 of part two states that the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question. This statement is in itself appropriate. However, the precedence given to the *lex specialis* rule certainly cannot be unique to part two, but may also be relevant to part three or even part one. Thus Japan suggests that this article be placed in part one, chapter I.

Article 38. Customary international law**Japan**

What is meant by the phrase the “rules of international law” as provided in article 38 is not made sufficiently clear. If this refers to the relationship between State responsibility in the event that international law is breached and other legal consequences in the field of the law of treaties, this should be clearly stated. However, if the intention of this article is to set out in a more general manner the relationship between the draft articles and customary international law, it seems odd because the draft articles are the product of efforts to codify what has been regarded as customary rules of international law on State responsibility. Either way, Japan suggests that the Commission specify the rules of customary international law envisaged in this article.

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

It is evident that under such provisions as Article 103 of the Charter of the United Nations and article 39 of the draft articles, the Charter has precedence over the draft articles. As article 39 is related to the draft articles as a whole, it would seem better to place it in part one, chapter I, rather than in part two.

Article 40. Meaning of injured State**Japan**

1. The fundamental definition of State responsibility is provided in article 1 of the draft articles: “Every internationally wrongful act of a State entails the international responsibility of that State”. That is to say, damage, whether tangible or not, is not required for there to be international responsibility. With a view to further ensuring the rule of law in international society, Japan basically supports this formula.

2. On the other hand, Japan believes that careful consideration should be given to whether States whose interests are not directly damaged should always be entitled to seek full reparation from the wrongdoing State or, as long as certain conditions are met, to take countermeasures against the wrongdoing State. Allowing every Contracting Party to a multilateral treaty whose “legal” interests are infringed to seek full reparation against a wrongdoing State may, more often than not, create more disputes and rather hamper a peaceful settlement of the original dispute. It would therefore seem more appropriate that an injured State suffering no tangible damage to its interests is, in principle, entitled only to request the wrongdoing State to cease its internationally wrongful act as provided in article 41.

3. Regarding the definition of “injured State” contained in article 40, clarification is needed with respect to the phrase “[t]he right has been created or is established for the protection of human rights and fundamental freedoms” in paragraph 2 (e) (iii), and the phrase “for the protection

of the collective interests of the States parties thereto” in paragraph 2 (f).

CHAPTER II. RIGHTS OF THE INJURED STATE AND
OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN
INTERNATIONALLY WRONGFUL ACT

Article 42. Reparation**Japan**

1. What is intended in article 42, paragraph 2, and article 43 (d), is not defined clearly. The provisions contained therein are very likely to be used as a pretext by the wrongdoing State to refuse full reparation.

2. Article 42, paragraph 3, should clearly provide that a contribution to damage through an action of the injured State or any of its nationals does not automatically release the wrongdoing State from its obligation to make full reparation.

Article 43. Restitution in kind**Japan**

1. As regards article 43 (d), though Japan agrees with the Commission on the need to place such a provision in the draft articles, it is concerned that the words “seriously jeopardize the ... economic stability” might serve as an easy justification for the wrongdoing State to insist on rejecting requests for compensation or even restitution in kind. Thus, this part must be redrafted to define what it actually intends and some wording must be added to pre-empt the abuse of this provision; otherwise this part should be deleted.

2. See also article 42.

Article 44. Compensation**Japan**

In article 44, paragraph 1, the phrase “if and to the extent that the damage is not made good by restitution in kind” may be interpreted, in the first place, as requiring the injured State to seek restitution in kind whatever the circumstances may be, and entitling it to seek compensation only when restitution in kind proved to be impossible in making full reparation. According to this interpretation, the wrongdoing State would be able to reject the request made by the injured State for (financial) compensation with the excuse that restitution in kind had not been proved completely impossible. However, in the light of the principle of full reparation, the relationship between restitution in kind and compensation should not be interpreted in this way, since it would severely restrict the freedom of the injured State to choose whatever form of full reparation it deems appropriate.

Article 45. Satisfaction**Japan**

1. Article 45, paragraph 1, provides that the injured State is entitled to obtain satisfaction, for damage, “in particular moral damage”. Japan is of the view that the phrase “in particular moral damage” should be deleted, because the term “moral damage”, which is not defined in this article, may lead to disputes concerning its interpretation. Also, the purpose of the words “in particular” is unclear.

2. In article 45, paragraph 2 (c), the phrase “damages reflecting the gravity of the infringement” can be interpreted as virtually allowing for punitive reparation. However, punitive reparation is not well established in State practice. Japan therefore suggests that this provision be deleted.

CHAPTER III. COUNTERMEASURES

Greece

Greece has some doubts about draft articles 47–50, concerning countermeasures, as currently worded. These articles would appear to be more appropriate for breaches characterized as delicts than for breaches that constitute international crimes. They are much in need of improvement, so as to reflect the distinction just mentioned.

Japan

1. Japan highly appreciates the fact that the Commission has provided for the regulation of countermeasures in the draft articles on State responsibility.

2. What is most important in this area is to maintain a reasonable balance between the wrongdoing States and the injured States. From this point of view, articles 48–50 are, generally speaking, well drafted in that they would prevent abuse of countermeasures by imposing not only procedural but also substantive restrictions.

Article 48. Conditions relating to resort to countermeasures**Japan**

1. Article 48, paragraph 1, provides that, prior to taking countermeasures, an injured State must fulfil its obligation to negotiate with the wrongdoing State provided for in article 54 and is not entitled to take countermeasures unless it does so.

2. Presumably, the injured State needs to take countermeasures when it urges the wrongdoing State to restore, as quickly as possible, the situation in which its interests are being damaged to what it was before the wrongful act was committed, and there is not enough time to negotiate. In such a situation, the obligation to negotiate prior to taking countermeasures would work in favour of the wrongdoing State. This obligation should not be interpreted as meaning that negotiations must proceed substantially prior to taking countermeasures, but rather that the injured State is permitted to take countermeasures if the wrongdoing State has not made any specific response to its proposal within a reasonable period of time.

3. If the obligation to negotiate prior to taking countermeasures is interpreted in the latter manner, with this interpretation to be elaborated in the draft articles, the obligation to negotiate per se would not work in favour of the wrongdoing State.

4. In addition, in order to meet its urgent needs, the injured State may invoke interim measures of protection without fulfilling the obligation to negotiate.

5. However, since interim measures of protection are not specifically defined in the draft articles, disputes may arise over what constitutes such a measure. The injured State would naturally favour a broad interpretation and, thus, the distinction between a countermeasure and an interim measure of protection might be blurred. As Japan is apprehensive about the abuse of interim measures of protection that may actually serve as countermeasures, it believes it is necessary to define interim measures of protection as clearly as possible in the draft articles.

6. Article 48, paragraph 3, provides that countermeasures must be suspended if and when a “dispute is submitted to a tribunal which has the authority to issue orders binding on the parties” and “the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith”.

7. Japan supports this provision because it can contribute to the peaceful settlement of international disputes. It must be noted, however, that the wording “the dispute settlement procedure ... is being implemented in good faith” is rather vague and that if the procedure mentioned is a judicial procedure, this should be clearly stated.

8. See also articles 30 and 58.

Article 50. Prohibited countermeasures**Japan**

1. The expression “[e]xtreme economic and political coercion” in subparagraph (b) is unclear. Japan suggests deleting it, for fear that it would prohibit virtually all countermeasures.

2. The same objection can be raised with respect to the expression “basic human rights” in subparagraph (d). Unless the concept is more clearly defined, it too should be deleted.

CHAPTER IV. INTERNATIONAL CRIMES

Japan

See article 19 above.

Article 53. Obligations for all States**Greece**

The obligations of solidarity laid down in draft article 53, although not forcefully worded, nonetheless constitute a basic requirement of international moral standards and have a rightful place in contemporary law.

PART THREE. SETTLEMENT OF DISPUTES

Greece

Greece is in favour of including in the draft articles special provisions on the settlement of disputes arising from the interpretation or implementation of the articles; the provisions in question could be more progressive and go further than current draft articles 54–60.

Japan

1. The procedures for the settlement of disputes listed in the draft articles are basically acceptable, as they would help to do so peacefully. However, they seem rather too detailed, and Japan is not entirely certain as to their effectiveness.

2. The disputes to which reference is made in article 54 are those “regarding the interpretation or application of the present articles”. Thus, it is the understanding of Japan that the dispute settlement procedures in part three are not necessarily to be applied to disputes on State responsibility in general, nor to disputes related to those international agreements with their own built-in dispute settlement procedures.

3. The conciliation procedures in part three are regarded as compulsory, as mentioned in the commentary to article 56. This would seem difficult, however, for many States to accept, and some may refuse to become Contracting Parties for this reason alone.

4. Japan suggests, therefore, that the Commission give further consideration to the question of whether the provisions that make up part three should be made an optional protocol. (Should the draft articles eventually be made a set of guidelines not legally binding, it would not be

necessary to discuss the nature of dispute settlement procedures separately.)

Article 56. Conciliation**Japan**

See the general comments under part three.

Article 58. Arbitration**Japan**

While article 58, paragraph 2, provides that the State against which countermeasures are taken is entitled at any time unilaterally to submit the dispute in question to an arbitral tribunal, article 48, paragraph 3, provides that the countermeasures must be suspended when the “dispute is submitted to a tribunal which has the authority to issue orders binding on the parties”. Under these provisions, Japan fears that the invocation of countermeasures would be severely restricted. Article 58, paragraph 2, favours the wrongdoing State unduly and should be reconsidered, in particular, for its effect on countermeasures.

Article 60. Validity of an arbitral award**Japan**

Judging from the language of article 60, if one of the parties to a dispute wishes to discuss the validity of an arbitral award further, it can submit the dispute in question to ICJ. This provision is problematic because it can negate an eventual arbitral award and, in general, it treats ICJ as an appellate court. It is the view of Japan that this article needs serious reconsideration.

**INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES
ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW
(PREVENTION OF TRANSBOUNDARY DAMAGE FROM
HAZARDOUS ACTIVITIES)**

[Agenda item 4]

DOCUMENT A/CN.4/501

**Second report on international liability for injurious consequences arising out
of acts not prohibited by international law
(prevention of transboundary damage from hazardous activities),
by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur**

[Original: English]
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CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report	112
Works cited in the present report	112
	<i>Paragraphs</i>
<i>Chapter</i>	
I. QUESTIONS RAISED IN THE 1998 REPORT OF THE COMMISSION.....	1 114
II. VIEWS EXPRESSED BY MEMBER STATES DURING THE FIFTY-THIRD SESSION OF THE GENERAL ASSEMBLY	2-17 114
III. IMPLEMENTATION OF THE OBLIGATION OF DUE DILIGENCE	18-49 116
A. The concept of due diligence: some salient features.....	18-34 116
B. Implementation of the due diligence obligation: some reflections	35-49 119
IV. TREATMENT OF THE TOPIC OF INTERNATIONAL LIABILITY.....	50-66 121
A. The work of the Commission	50-59 121
B. The status of ongoing negotiations on international liability	60-66 123
V. FUTURE COURSE OF ACTION ON THE TOPIC OF LIABILITY: OPTIONS	67-72 126

Multilateral instruments cited in the present report

	<i>Source</i>
Antarctic Treaty (Washington, D.C., 1 December 1959)	United Nations, <i>Treaty Series</i> , vol. 402, No. 5778, p. 71.
Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991)	<i>International Legal Materials</i> (Washington, D.C.), vol. XXX, No. 6 (November 1991), p. 1461.
Convention on the International Liability for Damage Caused by Space Objects (London, Moscow, Washington, D.C., 29 March 1972)	United Nations, <i>Treaty Series</i> , vol. 961, No. 13810, p. 187.
Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, D.C., 3 March 1973)	Ibid., vol. 993, No. 14537, p. 243.
Convention on Liability for Damage Caused by Radiological Accidents in International Carriage of Irradiated Nuclear Fuel from Nuclear Power Plants (16 September 1987)	Not published (CMEA convention).
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Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992)	<i>International Legal Materials</i> (Washington, D.C.), vol. XXXII, No. 4 (July 1993), p. 1069.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	United Nations, <i>Treaty Series</i> , vol. 1760, No. 30619, p. 79.
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Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	<i>Official Records of the General Assembly, Fifty-first Session, Supplement No. 49, resolution 51/229, annex.</i>

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CHAPTER I

Questions raised in the 1998 report of the Commission

1. On the subject of international liability, the Commission submitted to the General Assembly at its fifty-third session, in 1998, a complete set of draft articles and commentaries thereto on prevention of transboundary damage from hazardous activities and also raised the following questions for comments by States:¹

(a) Should the duty of prevention still be treated as an obligation of conduct? Or should failure to comply be subjected to suitable consequences under the law of State

¹ *Yearbook ... 1998*, vol. II (Part Two), p. 17, paras. 31–34.

responsibility or civil liability or both where the State of origin and the operators are both involved? If the answer to the latter question is in the affirmative, what types of consequences are appropriate or applicable?

(b) What form should the draft articles take? A convention, a framework convention or a model law?

(c) What kind or form of dispute settlement procedure is most suitable for disputes arising from the application and interpretation of the draft articles?

CHAPTER II

Views expressed by Member States during the fifty-third session of the General Assembly

2. While participating in the debate on the report of the Commission in the Sixth Committee, several delegations attempted to respond to these questions. A summary of their views is presented below.

3. The question whether non-compliance with the duty of due diligence should entail any legal consequences gave rise to different responses. China noted that failure to comply with the duty of due diligence in the absence of damage would not entail any liability. However, once damage occurred, State responsibility or civil liability or both might come into play. Where a State complied with its duties of due diligence and damage occurred despite such compliance, the operator must pay and accept the liability.²

4. A breach of the duty of due diligence, according to the United Kingdom of Great Britain and Northern Ireland and Austria, could give rise to consequences in the field of State responsibility.³ Japan noted that the obligation of prevention was one of conduct, not of result, and failure to comply with that obligation fell into the realm of State responsibility. A distinction should be made between international liability for significant transboundary harm and State responsibility, although in some cases such harm could be partially attributed to failure to comply with the obligation of prevention.⁴

5. The United Republic of Tanzania and Mongolia felt that treatment of the duty of prevention separately from the issue of liability was a cause for worry or perplexity as it was difficult to envisage legal consequences in the absence of any damage.⁵ Switzerland and Greece felt that more time was required to reflect upon the problem.⁶

² *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting, para. 43.

³ *Ibid.*, para. 7 (United Kingdom) and 15th meeting, para. 6 (Austria).

⁴ *Ibid.*, 14th meeting, para. 18.

⁵ *Ibid.*, 13th meeting, para. 59 (United Republic of Tanzania) and 15th meeting, para. 40 (Mongolia).

⁶ *Ibid.*, para. 67 (Switzerland) and 22nd meeting, para. 43 (Greece).

Germany took the view that it was difficult at the current stage to answer all the questions put to Governments by the Commission and that the latter should proceed with caution in this connection. It also stressed that other rules and developments in the area of transboundary damage from hazardous activities should be studied. Reference was made in this respect to draft article 6 which makes it clear that the draft articles are without prejudice to the existence, operation or effect of any other rule of international law.⁷

6. Guatemala and Mongolia felt that it was not possible to avoid the question of liability from being reintroduced into the draft articles. It was pointed out that, according to the regime proposed by the Commission, failure to comply with the proposed obligations of conduct would entail State responsibility towards the affected State.⁸ Guatemala felt, however, that such responsibility was different from the liability originally envisaged, in that the State of origin did not commit an act not prohibited by international law but rather an act prohibited by international law.⁹ It was observed that, under the earlier version of the draft articles, a State could be both liable and responsible: the former, if it harmed another State despite compliance with its obligation of prevention, the latter, if it had failed to comply and the harm was attributable exclusively to that non-compliance.

7. Several delegations also emphasized that the Commission should not lose sight of the originally conceived task of elaborating rules on liability proper.¹⁰ Mexico cited the following reasons for taking a similar view:

⁷ *Ibid.*, 15th meeting, para. 79 (Germany).

⁸ *Ibid.*, 13th meeting, para. 53 (Guatemala) and 15th meeting, para. 40 (Mongolia).

⁹ *Ibid.*, para. 53 (Guatemala).

¹⁰ *Ibid.*, 15th meeting, para. 7 (Austria); 16th meeting, para. 44 (New Zealand); 17th meeting, para. 1 (Sweden, on behalf of the Nordic countries); 18th meeting, para. 42 (Libyan Arab Jamahiriya); and para. 50 (Cuba); 20th meeting, para. 28 (Portugal); 21st meeting, para. 12 (Bahrain); 22nd meeting, paras. 22–23 (Sri Lanka) and 17th meeting, para. 44 (statement of the AALCC Secretary-General).

first, there was otherwise a risk of weakening obligations of conduct. If prevention was better than cure, it was essential to establish rules governing the consequences of non-compliance, whether or not damage occurred. Secondly, questions that should be addressed together would be otherwise separated. In determining the consequences of non-compliance, consideration should also be given to the effect when damage occurred. Separation also had the effect of determining the consequences of liability at a time when the Commission was meant to be dealing solely with prevention and thus distorted the decision taken at the forty-ninth session that the issues of prevention and liability should be dealt with separately.¹¹

8. Chile suggested that the notion of prevention should be linked to the obligations of response action and rehabilitation, which should also apply to the operator of the activity. Further, failure to comply with those obligations could give rise to international liability, regardless of the damage caused. At the same time, the impact of the damage should be taken into account in assessing the liability incurred. It was important, according to this view, that the operator should be linked more directly to a liability regime together with the State, insurance carriers, special funds and so on.¹² While Bulgaria and Bahrain shared this view,¹³ Austria disagreed: since duties of prevention were couched in terms of obligations upon States, it felt there was no need for the Commission to address issues relating to the civil liability of the private operator involved in any given context.¹⁴

9. According to the United States of America, effective implementation of the draft articles was doubtful in federal States, where regulatory authority was shared, as the said articles appeared to have been premised upon the existence of a highly centralized State with comprehensive regulatory powers.¹⁵

10. Israel believed that, in cases involving a private operator, State responsibility and civil liability would not adequately protect legitimate environmental interests. The duty of prevention should therefore be regarded as an obligation of conduct that was inspired by a detailed and universally applicable code of conduct comprising the standards already embodied in the current international conventions on the environment and other related matters.¹⁶

11. The Czech Republic dealt with the issue of legal consequences at some length and observed that, if damage occurred as a result of a breach of the obligation of prevention or of other obligations of the State of origin, the latter's international responsibility was engaged and

full compensation was due, provided that a causal link could be established between the wrongful act or omission and the damage. Where such causal link was difficult to establish, the resulting situation might often be similar to one where there was no material or moral damage because of the breach of an obligation. In such a case, responsibility would entail merely the obligation of cessation of the wrongful conduct and, perhaps, elements of satisfaction. These issues, however, should be dealt with not in the framework of prevention, but under the topic of State responsibility. If obligations were not fulfilled but no damage was caused, then there was still, strictly speaking, room for State responsibility, which was defined in broader terms than the notion of responsibility in a number of domestic legal systems.¹⁷

12. Argentina took the view that it was important to clarify and establish the consequences of international law in cases where substantial transboundary damage was caused, even when the State of origin had complied with all the rules of prevention. Given the unique nature of the obligation to make reparation in such cases, it was noted that the relevant rules should embody certain principles supplementary to those governing responsibility for unlawful acts. In cases of liability in the strict sense, even full compliance with due diligence did not exempt the State.¹⁸

13. According to Bangladesh, the principle of due diligence had an objective element, traceable to the fact that hazardous activities carried, as it were, the seeds of their own physical consequences, which could be foreseen with a degree of certitude and precision. In that sense, "result" defined the duty of care, although that might be an "obligation of conduct". It was emphasized that considerations governing liability were not identical to those governing the measure of damages. Accordingly, higher limits of tolerance in developing countries did not argue for a higher threshold of liability, only a possibly lower measure of damages. If a State permitted hazardous activities in its territory, it must be presumed to be able to take care of the potential consequences thereof. Therefore such presumption applied irrespective of the level of economic development of a State.¹⁹

14. Algeria also felt that, while international law created obligations for States whose activities were harmful to the environment of other States, the specific situation of the developing countries, which were the most vulnerable in that respect,²⁰ should however be taken into account as regards compensation payable for damages.

15. Endorsing the concept of prevention as an obligation of conduct, Italy made the point that the draft articles should not call for penalties in cases where States failed to comply with their obligation of prevention, whether or not transboundary damage had occurred. In its view, the purpose of the international legal system was not to punish, but to correct, violations. As the obligation of prevention

¹¹ Ibid., 16th meeting, paras. 6–8 (Mexico).

¹² Ibid., 14th meeting, paras. 25 and 28 (Chile).

¹³ Ibid., 16th meeting, para. 24 (Bulgaria); and 21st meeting, para. 12 (Bahrain).

¹⁴ Ibid., 15th meeting, para. 6.

¹⁵ Ibid., 14th meeting, para. 44 (United States of America). See also Reid, "The harmonization of federal and provincial policies and norms, and intergovernmental cooperation"; Chevrette, "Fédéralisme et protection de l'environnement"; and Piette, "L'harmonisation des politiques et des normes fédérales et provinciales et la coopération intergouvernementale", pp. 371–379.

¹⁶ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 15th meeting, para. 19 (Israel).

¹⁷ Ibid., paras. 61–62 (Czech Republic). See also 16th meeting, paras. 47–48 (New Zealand); 17th meeting, para. 33 (Nigeria); and 20th meeting, para. 7 (Islamic Republic of Iran).

¹⁸ Ibid., para. 94 (Argentina).

¹⁹ Ibid., 16th meeting, paras. 4–5 (Bangladesh).

²⁰ Ibid., 20th meeting, para. 63 (Algeria).

applied specifically to transboundary harm and therefore, by implication, to violations of the sovereignty of another State, in cases where no violation had taken place there could be no justification for the imposition of penalties.²¹

16. China, Cuba, Egypt and India were of the view that the concept of prevention as proposed by the Commission did not place it sufficiently within the broader realm of sustainable development, so as to give considerations of environment and development equal and due weight. It was felt that several other important principles should also have been considered as relating to the concept of prevention. Moreover, there should be no penalties for non-compliance with obligations by a State or operator, which,

²¹ Ibid., 15th meeting, paras. 68–69 (Italy).

while willing, lacked the capacity to comply. The differences between the levels of economic and technological development of a State and the shortage of financial and other resources in developing countries were cited in support of this position. It was further observed that the concept of due diligence did not lend itself to codification.²²

17. In the light of the discussion in the Sixth Committee, an attempt is made below to deal, first, with the legal consequences of failure to implement the duty of prevention; and, secondly, with the future course of action open to the Commission on the subject of liability.

²² Ibid., paras. 85–86 and 91 (India); 14th meeting, para. 42 (China); 18th meeting, para. 51 (Cuba); and 22nd meeting, para. 18 (Egypt).

CHAPTER III

Implementation of the obligation of due diligence

A. The concept of due diligence: some salient features

18. The duty of prevention, which is an obligation of conduct, is essentially regarded as a duty of due diligence. Any question concerning implementation or enforcement of the duty of prevention would necessarily have to deal with the content of the obligation and hence the degree of diligence which should be observed by States.

19. The notion of due diligence, which became well known in international law after the American civil war and particularly with the “*Alabama*” case,²³ has given rise to different interpretations as regards the standard of care involved. For example, in that instance, Great Britain urged a restrictive interpretation of due diligence, according to which lack of due diligence meant a failure to use, for the prevention of an act which the Government was bound to endeavour to prevent, such care as Governments ordinarily employed in their domestic concerns and might reasonably be expected to exert in matters of international interest and obligation. However, the United States, which was the complainant in the case, favoured a more active diligence test, which would be commensurate with the magnitude of the results of negligence. The award itself favoured the test of due diligence advanced by the United States.²⁴

²³ The Geneva Arbitration (The “*Alabama*” case) (*United States of America v. Great Britain*), decision of 14 September 1872 (Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, p. 495).

²⁴ For a mention of the positions of the United Kingdom and the United States in the “*Alabama*” case, see Blomeyer-Bartenstein, “Due diligence”, pp. 138–139. Max Huber observed in the *British Claims in the Spanish Zone of Morocco* case that a minimal degree of vigilance and employment of infrastructure and monitoring of activities in its territory was a natural attribute of any Government. Huber also found that the degree of diligence which must be exercised in a specific case was a function of the available means, the deployment of which depended upon the circumstances of the case and the nature of the interests to be protected (UNRIIAA, vol. II (Sales No. 1949.V.1) p. 644). The House

20. The application of the due diligence test also arose in connection with State responsibility for acts of private persons in peacetime, which involved faulty conduct of its organs, i.e. normally the omission to use due diligence to prevent and repress acts committed by private persons. In this connection, the commentary to article 10 of the Harvard Law School draft Convention on Responsibility of States stated that:

The phrase “due diligence” implies ... jurisdiction to take measures of prevention as well as an opportunity for the state to act, consequent upon knowledge of impending injury or circumstances which would justify an expectation of probable injury.²⁵

It was also clarified that due diligence was a standard and not a definition.²⁶

21. According to Mr. F. V. García Amador, the first Special Rapporteur on the subject of State responsibility, due diligence involved due care in taking measures normally undertaken in the particular circumstances of the case; foreseeability of the injurious acts and the possibility of preventing their commission with the resources available in the State; necessary exercise of authority in apprehending the individuals who committed injurious acts and giving the alien the opportunity to bring a claim against such individuals.²⁷ He also noted that:

The learned authorities are in almost unanimous agreement that the rule of “due diligence” cannot be reduced to a clear and accurate definition

of Lords of the United Kingdom had an occasion to deal with applicable due diligence standards in the *Donoghue v. Stevenson* case. It was pointed out that reasonable care must be taken to avoid acts or omissions which could be reasonably foreseen as likely to injure a neighbour (see United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council* (London, 1932), p. 580).

²⁵ Harvard Law School, “Responsibility of States for damage done in their territory to the person or property of foreigners”, p. 187. The draft Convention was also reproduced in *Yearbook ... 1956*, vol. II, p. 229.

²⁶ Ibid.

²⁷ *Yearbook ... 1961*, vol. II, document A/CN.4/134 & Add.1, addendum, p. 46, art. 7.

which might serve as an objective and automatic standard for deciding, regardless of the circumstances, whether a State was “diligent” in discharging its duty of vigilance and protection.²⁸

22. The principle of due diligence was also considered in the context of the Commission’s work on international watercourses. The matter was dealt with specifically for the first time in Mr. Stephen McCaffrey’s fourth report. In relation to draft article 16 on pollution of international watercourses, he indicated that the obligation of due diligence should not be interpreted as resulting in the strict liability of a State for any harm caused by pollution.²⁹ He identified the following elements of the obligation of due diligence:

(a) Exercise of the degree of care that could be expected of a good Government. In other words, a Government or a State should possess “on a permanent basis, a legal system and material resources sufficient to ensure the fulfilment of [its] international obligations under normal conditions”.³⁰ In particular, the State must have established, and maintain, an administrative apparatus that is minimally sufficient to permit it to fulfil those obligations;

(b) Use of the infrastructure with a degree of vigilance adapted to the circumstances;

(c) Conduct giving rise to the transfrontier pollution damage, as well as the damage itself, must have been foreseeable. In other words, the higher the degree of the inadmissible transfrontier water pollution, the greater would be the duty of care to prevent such pollution on the part of the State. Similarly, use of dangerous technologies or industries imposes on States a higher degree of responsibility to exercise vigilance, irrespective of the extent of their general development.³¹

²⁸ *Yearbook ... 1957*, vol. II, document A/CN.4/106, p. 122, para. 7 of the commentary to article 12. However, when the study of the subject of State responsibility was expanded to cover more general rules, the Commission decided to limit the draft articles strictly to secondary rules. According to this scheme, due diligence was considered as an element of an obligation, i.e. a primary rule, and hence excluded from the draft. Even a milder, indirect reference to the concept of due diligence made by the Special Rapporteur, Mr. Roberto Ago, in his draft article 11, paragraph 2 (*Yearbook ... 1972*, vol. II, document A/CN.4/264 and Add.1, p. 126), was also later dropped. The article finalized in 1979 was drafted essentially as a savings clause. Further, the set of draft articles on State responsibility did not incorporate the element of fault, and wrongfulness of an international act was defined as a breach of international obligation, unless objective circumstances could be shown to exclude same. See Blomeyer-Bartenstein, loc. cit., pp. 141–142. It appears that, during the second reading of these draft articles, the Commission may drop article 11 altogether, so as to eliminate unnecessary negative formulations (*Yearbook ... 1998*, vol. II (Part Two), p. 85, paras. 421 and 425).

²⁹ *Yearbook ... 1988*, vol. II (Part One), document A/CN.4/412 and Add.1 and 2, p. 238, para. (6).

³⁰ Dupuy, “Due diligence in the international law of liability”, p. 373.

³¹ *Yearbook ... 1988* (see footnote 29 above), pp. 239–240, paras. (7)–(9). In arriving at these conclusions, Mr. McCaffrey relied on the studies and conclusions of Dupuy and Lammers. According to Dupuy, “Due diligence ... is the diligence to be expected from a ‘good government’, i.e. from a government mindful of its international obligations. ... It is both the counterpart to the exclusive exercise of territorial jurisdiction and the limiting factor to international liability flowing from failure to act in accordance with it” (“Due diligence ...”, pp. 369–370). He also pointed out that “the behaviour required from a State whose economic resources supply it with the means to increase the extent of its control cannot be the same as that required from a State whose administration is sparse and relatively ineffective for want of material

23. The reaction within the Commission to the proposals of Mr. McCaffrey was mixed.³² One member expressed doubts regarding the propriety of linking the concept of due diligence with an international minimum standard to be expected of a “good government” or a “civilized State”, a doctrine propounded by Dupuy that was reminiscent of the controversial international minimum standard doctrine of traditional international law. Accordingly, he felt that the obligation to exercise due diligence would be more acceptable to States as a whole if it was linked to vigilance consonant with a State’s degree of development.³³ Another member observed that the burden of proof on the discharge of the obligation of conduct should rest on the source State.³⁴ Yet another member believed that, as a matter of pragmatism, the degree of due diligence required depended upon the circumstances. He also considered that the activity which was likely to cause harm, and the harm itself, should be foreseeable, namely, the State had to know or should have known that the given activity might result in harm. He also agreed that the degree of diligence might depend upon the level of development of the State in question.³⁵

24. The duty of due diligence was also a central part of draft article 7 on the law of the non-navigational uses of international watercourses adopted by the Commission on second reading. In that context, due diligence was defined to mean “a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it”; and ‘such care as governments ordinarily employ in their domestic concerns’. ... It [was] not intended to guarantee that in utilizing an international watercourse significant harm would not occur”.³⁶ A breach of the due diligence obligation could be presumed only in cases when a State had intentionally or negligently caused the event which had to be prevented or had intentionally or negligently not prevented others in its territory from causing that event or had abstained from abating it.³⁷ Therefore, under the article, a “State may be responsible ... for not enacting necessary legislation, for not enforcing its laws ..., or for not preventing or terminating an illegal activity, or for not punishing the person responsible for it”.³⁸ Further, according to the Commission, a watercourse State could be deemed to have violated its due diligence obligation only if it knew or ought

resources” (ibid., p. 376). While the standard of vigilance may vary according to a State’s degree of development, Dupuy emphasized that the minimum rules concerning the attributes of a good government, as outlined above, “cannot be the subject of any compromise” (ibid.). Lammers concluded that a due care or due diligence obligation could only be said to have been violated by a State “if the public organs of the State knew or should have known that certain conduct on their part or on the part of private persons or entities would give rise to inadmissible transfrontier water pollution” (*Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law*, p. 349).

³² See *Yearbook ... 1988*, vol. II (Part Two), pp. 30–31, paras. 163–168, for a summary of the views of members of the Commission.

³³ Ibid., vol. I, 2065th meeting, statement by Mr. Shi, pp. 140–141, para. 16.

³⁴ Ibid., statement by Mr. Arangio-Ruiz, pp. 141–142, para. 24.

³⁵ Ibid., statement by Mr. Barsegov, pp. 144–145, paras. 44–45.

³⁶ *Yearbook ... 1994*, vol. II (Part Two), p. 103, para. (4) of the commentary to draft article 7.

³⁷ Ibid.

³⁸ Ibid., citing *Restatement of the Law, Third, Foreign Relations Law of the United States*, vol. 2 (St. Paul, Minn., American Law Institute Publishers, 1987), sect. 601, comment (d), p. 105.

to have known that the particular use of an international watercourse could cause significant harm to other watercourse States.³⁹

25. However, as noted by ICJ in the *Corfu Channel* case, “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”.⁴⁰ It is obvious that “control” in this context actually refers to jurisdiction and not control of the specific activity.⁴¹

26. Article 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses refers to the obligation of the State to adopt “appropriate measures” to prevent the causing of significant harm to other watercourse States. This formula was suggested by Canada, Switzerland and a few other States. The due diligence obligation involved in this respect is to be interpreted in the light of the above-mentioned commentary of the Commission.

27. Consideration of the concept of due diligence by the Commission in connection with its work on the duty of prevention drew inspiration largely from its study of the draft articles on the law of the non-navigational uses of international watercourses. Mr. Quentin-Baxter and Mr. Barboza conceived the standard of due diligence applicable with regard to the principle of prevention to be proportional to the degree of risk of transboundary harm in a particular case. Mr. Quentin-Baxter also 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 observed that the 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.⁴²

28. The commentary to article 4 entitled “prevention” recommended by the Working Group of the Commission in 1996⁴³ referred to the obligation of the State to take the legislative, administrative or other action necessary for enforcing the laws, administrative decisions and policies that the State had adopted. It was also indicated that the due diligence standard must be directly proportional to the degree of risk or harm. The size of the operation, its location, special climatic conditions and the materials used in the activity were some of the factors that must be taken into consideration in determining the applicable standards. However, note was taken of principle 11 of the Rio Declaration on Environment and Development (Rio Declaration), according to which standards applied by

some countries may be inappropriate and of unwarranted economic and social costs to other countries, in particular to developing countries.⁴⁴

29. The importance of the concept of due diligence is constantly growing beyond the field of injury to foreign private persons on the territory of a State. The need to define liability or State responsibility for acts or risk of damage involved in the conduct of hazardous activities is a current concern.

30. The whole issue of due diligence has also been considered in relation to different sectors of environmental management and was the subject of a recent UNEP analysis, which noted that its conceptualization has proved highly difficult. It was observed that, while certain specific duties of environmental impact assessment and duties of precaution were adequately articulated, several underlying issues related to international risk assessment, State or economic actor responsibility and international liability continued to be addressed and evaluated. The latter were among the most difficult areas in international environmental law. However, due diligence did not imply that a State or economic actor was an absolute guarantor in the prevention of harm. Furthermore, there was considerable flexibility in the manner in which a State could discharge its duty of due diligence. That flexibility was related, for example, to the employment of different environmental control measures in relation to the severity of the threat; the resources available for developing countries; and the nature of the specific activity. Moreover, it had been suggested that, as part of due diligence procedures, industry should follow agreed minimum international environmental and associated standards. Some such standards had been elaborated in international forums like IMO, ISO and WHO.⁴⁵

31. On the basis of the above analysis, it may be concluded that the obligation of due diligence involved in the duty of prevention of transboundary damage from hazardous activities can be said to entail the following elements: the degree of care in question is that expected of a good Government. In other words, the Government concerned should possess, on a permanent basis, a legal system and material resources sufficient to ensure the fulfilment of its international obligations.⁴⁶ To that end, the State must also establish and maintain an adequate administrative

³⁹ *Yearbook ... 1994*, vol. II (Part Two), p. 104, para. (8) of the commentary to draft article 7.

⁴⁰ *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 18.

⁴¹ See also the view of Mr. Julio Barboza, who was convinced that the concepts of control and jurisdiction were more appropriate for the definition of the scope of the draft articles on international liability than was territory (*Yearbook ... 1988*, vol. II (Part Two), p. 15, paras. 60–61).

⁴² See the first report on prevention of transboundary damage from hazardous activities, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/487 and Add.1, p. 191, para. 55 (f).

⁴³ *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 110.

⁴⁴ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1))* (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

⁴⁵ Informal note of the UNEP secretariat on international due diligence, prepared for the UNEP Executive Director’s Advisory Group on Banking and Environment (October 1993).

⁴⁶ In its decision of 27 January 1999 in the *A. P. Pollution Control Board v. Prof. M. V. Nayudu (Retd.) and others* case, the Supreme Court of India reviewed various concepts concerning the polluter-pays principle, the precautionary principle, as well as the principle of placing the burden of proof on the person or entity proposing the activity to show that his action is environmentally friendly. In this context, the judgement of Justices Majmudar and Jagannadha Rao also highlighted the importance of good governance through the establishment of appellate authorities or tribunals consisting of judicial as well as technical personnel who are well versed in environmental law to monitor and implement environmental regulations. The decision also emphasized the need to provide for regular appeal to the Supreme Court from such environmental courts. It is also noteworthy that the Supreme

apparatus. However, it is understood that the degree of care expected of a State with well-developed economic, human and material resources and with highly evolved systems and structures of governance is not the same as for States which are not in such a position.⁴⁷ But even in the latter case, a minimal degree of vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, is expected.⁴⁸

32. The required degree of care is also proportional to the degree of hazardousness of the activity involved.⁴⁹ Moreover, the degree of harm itself should be foreseeable and the State must know or should have known that the given activity has the risk of causing significant harm. In other words, the higher the degree of inadmissible harm, the greater would be the duty of care required to prevent it.

33. In this connection, it is worth recalling the various principles considered in the Special Rapporteur's first report, such as the need for prior authorization, environmental impact assessment and the taking of all necessary and reasonable precautionary measures.⁵⁰ As activities become more hazardous, the observance of procedural obligations becomes more important and the quality of the measures to prevent and abate significant transboundary environmental harm must be higher.⁵¹

34. It is also believed that, in connection with the discharge of the duty of due diligence, the State of origin would have to shoulder a greater degree of the burden of proof that it had complied with relevant obligations than had the States or other parties which are likely to be affected.

B. Implementation of the due diligence obligation: some reflections

35. An emphasis upon the implementation of the duty of due diligence has the advantage of providing the parties likely to be affected by the operation of hazardous activities with an opportunity to seek remedies in case of failure to perform those duties, even before any damage or harm has occurred. These remedies could be in the nature of requiring specific performance of the various components of the duty of due diligence. This is in addition to the obligation of the State of origin to consult, notify and engage in dispute avoidance and settlement in respect of activities which are likely to cause significant

Court in that case drew upon the work of the Commission in arriving at its conclusions (AIR 1999 SC 812).

⁴⁷ According to Lefeber, this introduces a subjective element because particular characteristics, such as the state of development and geographical features, must be deemed to affect the means a State has at its disposal. The operation of these variables makes the due diligence concept elusive. This also derives from the dynamic nature of the concept, as the degree of diligence which must be exercised varies with changing social, economic and political values. See Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, p. 65.

⁴⁸ See also the observations of Max Huber (footnote 24 above).

⁴⁹ See Lefeber, *op. cit.*, p. 68, footnote 50.

⁵⁰ See footnote 42 above.

⁵¹ Lefeber, *op. cit.*, p. 68.

harm. Further, other remedies like cessation of the activity, satisfaction and payment of damages or compensation could also come into play, depending upon the degree of State responsibility.

36. Apart from the question of available remedies, in case of failure of performance of duties of due diligence, of equal importance is the matter of enhancing the culture of compliance and encouraging more voluntary enforcement obligations. In this connection, the Special Rapporteur has already identified several useful steps in his first report. These are relevant and still valid.⁵²

37. According to studies conducted on issues concerning compliance with and enforcement of international environmental agreements, the effectiveness of such compliance or enforcement depends upon several factors: precision of the obligations involved; administrative capacity of a country; endowment of financial and other infrastructural facilities to institute and monitor compliance procedures; economic factors, including per capita gross national product; production techniques; engagement in international trade; sharing of authority among different political units of the country, including delegation and decentralization of authority and power; role of non-governmental organizations; and leadership exercised by individuals. However, the more proximate important variables identified are administrative capacity, leadership, non-governmental organizations and knowledge and information.⁵³

38. Suggested strategies for strengthening compliance have been differentiated depending upon the position of the country. In this regard, two dimensions have been considered to be particularly important, namely, intention to comply and ability to comply.⁵⁴ Based on a matrix, countries could be separated into six categories: intends to comply and can comply; has not thought through the obligations of compliance, but could comply; does not intend to comply, but could comply; intends to comply, but cannot comply; has not thought through the obligations of compliance and could not comply; does not intend to comply and could not comply.⁵⁵

39. Accordingly, three strategies of compliance have been articulated in respect of international environmental agreements: the sunshine approach, incentives to comply,

⁵² *Yearbook ... 1998* (see footnote 42 above), pp. 190–191, para. 55.

⁵³ See Jacobson and Brown Weiss, "Assessing the record and designing strategies to engage countries", pp. 535–536. See also Bothe, "The evaluation of enforcement mechanisms in international environmental law: an overview". Bothe came to the following conclusions: there is a conflict between the unilateral and bilateral approaches to compliance by other States. Unilateral sanctions are important, but problematic. Enforcing international obligations at the bilateral level through the mechanism of international State responsibility is declining. The role of traditional dispute settlement procedures is of limited significance. True multilateral implementation procedures are developing, namely, reporting systems, systematic reviews of national resources, new non-compliance procedures, and financial instruments, in particular a system of remunerated compliance. Enforcing compliance with environmental agreements is still largely done through diplomatic instruments. Greater access for non-governmental organizations and less reliance on intergovernmental processes is also being encouraged (*loc. cit.*, p. 36).

⁵⁴ Jacobson and Brown Weiss, *loc. cit.*, p. 538.

⁵⁵ *Ibid.*

or sanctions. The first two approaches, it has been suggested, are dominant; sanctions are used only as a “last resort”.⁵⁶ This is in contrast to the trade field, where sanctions are the primary strategy for compliance, or human rights law, where the sunshine approach coupled with sanctions prevails.

40. In the view of another commentator,⁵⁷ while efficient reporting mechanisms and procedures under a multilateral convention to promote better knowledge of each State’s practices is without doubt useful, compliance is likely to be more forthcoming from the developing countries

if they are assisted in pursuing alternative technologies and in building up their capacity to implement and internalize the new behaviour in their local cultures. Implementing international conventions often requires states to build institutions, adopt domestic regulations, and develop and implement national environmental plans for sound environmental conditions. Political will to meet these requirements is necessary but not sufficient; governments must have the necessary means to carry out their obligations.⁵⁸

41. The sunshine approach consists of a series of measures that are intended to bring the behaviour of parties and targeted actors into the open. These include regular national reporting, peer scrutiny of reports, establishment of special secretariats, regional and international bodies, access to information by non-governmental organizations, participation of non-governmental organizations in compliance monitoring, on-site monitoring, transparency of information and regular monitoring of behaviour through national and regional forums, workshops, corporate or private-sector networks or consultants working on site.⁵⁹

42. Some illustrations are presented below. Thus, article 8 of the Montreal Protocol on Substances that Deplete the Ozone Layer provides for a non-compliance procedure, which was adopted in 1992. According to this procedure, information concerning non-compliance can be reported to the Implementation Committee established under paragraph 5 thereof. This can be done either by a State party which has reservations regarding another party’s record of implementation of its obligations or by the secretariat or by the party concerned, who has concluded that, despite its best bona fide efforts it is unable to comply fully with its obligations. The Implementation Committee will consider the matter further and attempt to secure an amicable solution. In order to fulfil its functions it may, where necessary and upon invitation of the party concerned, gather information in the latter’s territory.⁶⁰ States parties to the Protocol, after considering the report and recommenda-

⁵⁶ *Ibid.*, pp. 542 and 547. For the view that, in the face of non-compliance, coercive sanctions are rare, ineffective and inherently unsuitable for cooperative regimes by which States regulate major common problems, see also Chayes, Chayes and Mitchell, “Active compliance management in environmental treaties”, p. 77. See Dupuy, “International liability for transfrontier pollution”, p. 379, for an analysis of arrangements that could be considered for compensation procedures which could be worked out by bilateral or multilateral negotiations.

⁵⁷ Shihata, “Implementation, enforcement, and compliance with international environmental agreements: practical suggestions in light of the World Bank’s experience”.

⁵⁸ Shihata, *loc. cit.*, pp. 43–44.

⁵⁹ Jacobson and Brown Weiss, *loc. cit.*, p. 543. See also Sachariew, “Promoting compliance with international environmental legal standards: reflections on monitoring and reporting mechanisms”.

⁶⁰ A similar requirement is in place under article XIII, paragraph 2, of the Convention on International Trade in Endangered

tions of the Implementation Committee, could decide upon and call for steps to bring about full compliance with the Protocol. The Meeting of States Parties may also issue, pending completion of the proceedings, an interim call and/or recommendations.⁶¹ The aim of the non-compliance procedure under the Montreal Protocol is to secure “an amicable solution of the matter on the basis of respect for the provisions of the protocol”.⁶²

43. The Convention on Nuclear Safety, which entered into force on 24 October 1996, provides for a reporting requirement under article 5. This is essentially a “peer review mechanism” (PRM). Article 29 further stipulates that parties shall consult within the framework of a meeting of the Contracting Parties with a view to resolving disagreements concerning the interpretation or application of the Convention. Disputes should be settled in an amicable manner and not be brought before any court. The PRM is conducted on the basis of: (a) guidelines regarding the review process; (b) guidelines regarding national reports; and (c) rules of procedure and financial rules for the review meetings of the Contracting Parties. While each Contracting Party is allowed a certain freedom and flexibility in preparing its report for submission to the PRM, the agreed guidelines provide for a structure to facilitate the international review. As such, these guidelines go beyond the “incentive character” of the Convention and add rigour to the reporting requirement and a certain internal transparency to the review process. The latter involves an opportunity for every Contracting Party to offer comments. For this purpose, two different country groups have been established. Contracting Parties are encouraged to discuss the safety-specific elements of their programme, and gaps therein can be more easily identified by others. At the end of each Review Meeting, a summary report is to be prepared and made available to the public in accordance with article 25 of the Convention.

44. The system of the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions foresees cooperative measures such as assisting parties to comply with the Protocol. In addition, the functions of the Protocol Implementation Committee include reviewing periodically complaints by parties with the reporting requirements of the Protocol and considering any submission or reference made to facilitate constructive solutions.⁶³

45. Similarly, the multilateral consultative process established under article 13 of the United Nations Framework Convention on Climate Change is available to the parties for the resolution of questions regarding the implementation of the Convention. The aim of the procedure is to resolve such questions by providing advice and assist-

Species of Wild Fauna and Flora, which provides that an on-site inspection is permissible with the consent of the party in question.

⁶¹ For a similar procedure, see article 10, paragraph 1, of the Convention for the Protection of the Marine Environment of the North-East Atlantic.

⁶² See a UNCCD secretariat note on the question of implementation measures under some relevant conventions submitted to the Intergovernmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification (ICCD/COP (2)/10), 23 October 1998, p. 4.

⁶³ See *Ibid.*, pp. 4–5.

ance to parties for overcoming difficulties of implementation and to promote understanding of the provisions of the Convention with a view to preventing disputes from arising. This multilateral consultative process is facilitative, non-confrontational, transparent, timely and non-judicial. Thus, problems are resolved by: (a) clarifying and resolving questions; (b) providing advice on the procurement of technical and financial resources for the resolution of these difficulties; and (c) providing advice on the compilation and communication of information.⁶⁴

46. The incentive approach involves providing financial and technical incentives: funds established by the treaty, such as the Montreal Protocol Fund, the World Heritage Fund or the Bali Fund under the new International Tropical Timber Agreement; projects funded by the Global Environment Facility (GEF), multilateral development bank projects;⁶⁵ bilateral assistance from Governments; and technical assistance from the private sector, as is the

⁶⁴ Ibid., p. 5.

⁶⁵ On the role of international financial institution (IFIs), Shihata observed:

“Through their policy dialogue and loans, especially concessional ones, IFIs provide incentives for observance of the environmental standards they require. Their technical assistance also helps to set up institutions and establish appropriate legal and regulatory frameworks. The grants that they administer facilitate the preparation of national environmental plans . . .

“The GEF, with its focus on additional concessional funding to meet incremental costs of projects with global benefits in the four focal areas of concern [climate change, biological diversity, the ozone layer and international waters], has a special and growing role. By providing an economic incentive for developing countries to comply with international environmental treaties, the GEF constitutes part of a global approach based on the principles of cooperation in a spirit of global partnership and of common, but differentiated, responsibilities.

“The positive incentives provided through these different forms of financial assistance have their sanctional aspects too; assistance is suspended or cancelled in case of default under the loan or grant agreements. Flexibility is the key.”

(Loc. cit., p. 48). See also Christofidis, “The European Investment Bank and environmental protection: policies and activities”.

case for the implementation of the Montreal Protocol on Substances that Deplete the Ozone Layer.⁶⁶

47. Sanctions may vary from a loss of special status under the agreement (such as article 5 status under the Montreal Protocol on Substances that Deplete the Ozone Layer, which determines eligibility for funds) to prohibitions on trade with the offending country. The establishment of a body that can address issues of implementation and non-compliance and the development of non-compliance procedures that ultimately include sanctions may, for certain kinds of agreements, be useful even if the threat of sanctions serves only to deter non-compliance.⁶⁷

48. The Special Rapporteur has revisited the concept of due diligence essentially with a view to establishing the type of duty that is required to be enforced. He has also considered various means and methods of enforcement or compliance. It is clear that mostly non-confrontational and transparent procedures would be more in order for encouraging and helping States to improve their record of compliance. This is, however, without prejudice to the invocation of private law remedies and principles of State responsibility.

49. It is also clear that matters of compliance and specific regimes of enforcement are subjects appropriate for negotiations between States parties to agreements on the operation of dangerous or hazardous activities. This is the procedure followed in respect of several important activities. As such, the matter of compliance may be considered to fall outside the realm of the preparation of the draft articles on prevention by the Commission. If otherwise desired and mandated by the General Assembly, the Commission could prepare a separate protocol on compliance.

⁶⁶ Jacobson and Brown Weiss, loc. cit., p. 547.

⁶⁷ Ibid., p. 546. See also the chapter on enforcement in *Environmental Liability, 7th Residential Seminar on Environmental Law, 9–13 June 1990, Montreux, Switzerland* (London, Graham & Trotman and International Bar Association, 1991), pp. 213–274, for the experience of New South Wales, Australia, and New Zealand in matters of enforcement and compliance.

CHAPTER IV

Treatment of the topic of international liability

A. The work of the Commission

50. When the Commission took up the topic early in 1978, the then Special Rapporteur Mr. Quentin-Baxter attempted to establish a conceptual basis or framework and suggested a schematic outline in his third report.⁶⁸ In this connection, he indicated the need to turn to the concept of strict liability, even as he was aware of the difficulties associated with it. He observed:

At the very end of the day, when all the opportunities of régime-building have been set aside—or, alternatively, when a loss or injury has

occurred that nobody foresaw—there is a commitment, in the nature of strict liability, to make good the loss. The Special Rapporteur finds it hard to see how it could be otherwise, taking into account the realities of transboundary dangers and relations between States, and the existing elements of a developing chapter of international law.⁶⁹

51. More importantly, according to Mr. Quentin-Baxter, the concept of liability and the duty to pay compensa-

⁶⁸ *Yearbook . . . 1982*, vol. II (Part One), document A/CN.4/360, p. 62, para. 53.

⁶⁹ Ibid., p. 60, para. 41. He also stated, with respect to the difficulties of dealing with the concept of strict liability: “[A]t the end of the journey, the monster of strict liability should be domesticated” (*Yearbook . . . 1981*, vol. II (Part One), document A/CN.4/346 and Add.1 and 2, p. 123, para. 92). For his view that prevention and reparation form a continuum and together are to be treated as a compound obligation, see *Yearbook . . . 1998* (footnote 42 above), p. 188, para. 40.

tion were conditioned by his concept of shared expectations. As he explained, the vagueness of the latter concept was an advantage in that it allowed States to arrive at a mutually acceptable distribution of costs and benefits on a case-by-case basis. It may be recalled that, under section 4, paragraph 4, of the schematic outline, shared expectations included expectations which

(a) have been expressed in correspondence or other exchanges between the States concerned or, in so far as there are no such expressions,

(b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they belong, or in the international community.⁷⁰

This leaves open the possibility to settle a dispute by means of civil liability regimes. It is also possible that such shared expectations could decide and determine whether the loss should be compensated by the source State, should be shared between the source and the affected States or should lie where it falls.⁷¹

52. Mr. Barboza took the view that questions of liability should be settled by States through liability regimes concluded specifically for that purpose. Thereby, they are free to opt for a civil or State-to-State liability regime. The liability regime that he proposed was to operate only as a residual regime, functioning as a “safety net”.⁷² Mr. Barboza suggested that in case of transboundary harm not arising out of an internationally wrongful act, the State of origin should be bound by the duty to negotiate with the affected State or States “to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully compensated for”.⁷³ Only failure to comply with the duty to negotiate would give rise to State responsibility.⁷⁴

53. Mr. Barboza also indicated that his concept of liability did not require proof of the source State’s failure to adopt adequate measures of prevention and abatement. Similarly, neither did it require that the conduct involved should be treated as wrongful. Draft article 9 proposed in 1990 also left open the possibility of limiting the liability in amount and in time.⁷⁵ Moreover, unlike Mr. Quentin-Baxter, who chose the concept of shared expectations to mitigate the rigours of the concept of strict liability, Mr. Barboza relied upon factors limiting liability⁷⁶ and on exonerations or exceptions to such liability.⁷⁷ He further observed:

[T]he norm set forth in this article [draft article 21⁷⁸] is based on strict liability, which means that if there is no doubt about the causal relationship between the activity and the transboundary harm in question compensation should, in principle, be paid. Negotiations would start

from that premise and would focus more on the “quantum” of the compensation.⁷⁹

54. While he had earlier argued in favour of State liability, in the latter part of his work he began to mix that concept and that of the operator’s civil liability. In his seventh report, in response to various suggestions for dealing with the question of liability by giving greater weight to domestic or private-law remedies, Mr. Barboza proposed that civil liability should be primary and State liability should be residual.⁸⁰ In this regard, State liability would only replace civil liability if the private person who is liable cannot fully compensate the harm or if that person cannot be identified or located. Further, victims should be entitled to choose between the domestic channel and the diplomatic channel to pursue their claim.⁸¹ Even this mixed approach did not receive much support. Consequently, in his tenth report, Mr. Barboza proposed that States should not be held liable for harm covered by the draft articles unless they had committed an internationally wrongful act.⁸² In that connection he noted different possibilities for holding the State liable: (a) situations where there is no State liability for a wrongful act; (b) situations where the State bears both strict liability and liability for a wrongful act; (c) situations where there is strict liability on the part of the State but it is subsidiary to the operator’s civil (also strict) liability for the payment of compensation in respect of incidents resulting from the dangerous activity; and (d) situations where there is State liability for a wrongful act, but such liability is subsidiary to the operator’s civil liability for harm caused by the dangerous activity.

55. He came to the conclusion that none of the foregoing alternatives seemed to be entirely suited to the purposes of the draft articles, although alternative (d) appeared to him as an option to be considered. Under the circumstances, it appeared simplest to him “not to impose any form of strict liability on the State and to draw the sharpest possible distinction between its liability for its failure to fulfil its obligations (liability for wrongful acts) and strict liability for harm caused by incidents resulting from the risk involved in the activity in question”.⁸³ He hoped that such a system would be more acceptable to States and would simplify the relationship between State liability and the liability of private parties. It would also, in his view, simplify the procedural aspects, since only domestic courts would be competent and such thorny issues as that of a State appearing before a court in a case involving a private party, particularly if it had to do so in the domestic courts of another State, would not arise.⁸⁴

56. The draft articles adopted by the Working Group of the Commission in 1996 dealt with the subject of liability in article 5. The commentary to that article stated that “[t]he principle of liability is without prejudice to the question of: (a) the entity that is liable and must make

⁷⁰ *Yearbook ... 1982* (see footnote 68 above), p. 84.

⁷¹ *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/334 and Add.1 and 2, p. 261, para. 47.

⁷² *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/428 and Add.1, p. 95, para. 48.

⁷³ *Ibid.*, p. 108, para. 49.

⁷⁴ *Ibid.*, pp. 94–95, para. 43.

⁷⁵ *Ibid.*, p. 95, para. 44, and annex, p. 106.

⁷⁶ *Ibid.*, annex, pp. 108–109, draft articles 23 and 27.

⁷⁷ *Ibid.*, draft article 26.

⁷⁸ *Ibid.*, p. 108.

⁷⁹ *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/437, p. 86, para. 56.

⁸⁰ *Ibid.*, p. 85, para. 50; see also page 78, para. 23.

⁸¹ *Ibid.*, para. 51.

⁸² *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459, p. 136, para. 30.

⁸³ *Ibid.*, p. 135, para. 29.

⁸⁴ *Ibid.*

reparation; (b) the forms and the extent of reparation; (c) the harm that is subject to reparation; and (d) the basis of liability".⁸⁵

57. The reaction of the General Assembly to the proposals of the Working Group was mixed. On the one hand, there was a group of States which believed that the draft articles did not sufficiently focus on the principle of liability and compensation. It was felt that a fuller and more comprehensive regime of liability and compensation should be developed in the interest of finding a proper balance between profits derived by entities pursuing dangerous or hazardous activities and the burden caused to third parties because of the risk of harm such activities posed. It was noted that only draft articles 5 and 21 dealt with the issue of international liability. Moreover, the text contained no provision concerning the nature of the liability or the measure of compensation and also failed to make any distinction between the concepts of responsibility and liability. In the light of such considerations, it was suggested that the Commission should approach the draft articles as a text concerning an environmental protection regime rather than international liability. It was observed that the duty of compensation arising out of such liability could be performed directly by the operator or by way of a two- or three-tier system based on the establishment of a compensation fund and other means (through the polluter-pays principle, which was not applicable in all cases, or through a regime of civil or State liability or through a combination of both).⁸⁶

58. Another group of delegations felt that the concept of liability incorporated in the draft articles of the Working Group was not properly defined and that its elements were left without any specific content. In this connection, it was noted that the draft articles were both ambiguous and troubling as they left open the question of precisely who (or what) was liable. It could also be assumed that they sought to impose obligations only on States, not on private entities. The United States did not believe that

under customary international law, States are generally liable for significant transboundary harm caused by private entities acting on their territory or subject to their jurisdiction or control. From a policy point of view, a good argument exists that the best way to minimize such harm is to place liability on the person or entity that causes such harm, rather than on the State.⁸⁷

France argued that the Working Group had not defined the characteristics of liability. The liability of the State could

⁸⁵ *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 112, para. (6) of the commentary to article 5.

⁸⁶ See *Official Records of the General Assembly, Fifty-first Session, Sixth Committee, 37th meeting*, statement by Austria, paras. 17 and 19. For similar views, see the statements of Portugal (39th meeting, para. 66), Australia (40th meeting, paras. 2–3), Ireland (indicating that it was prepared to accept the exclusion of "absolute liability" or even "strict liability" provided that it was accepted that no-fault liability was not also excluded (*ibid.*, paras. 6 and 8), the Republic of Korea (41st meeting, para. 53), Cuba (appearing to support State liability, *ibid.*, para. 57), New Zealand (supporting the polluter-pays principle, 39th meeting, para. 5), Venezuela (*ibid.*, paras. 18–21) and Brazil (*ibid.*, para. 26).

⁸⁷ See the written comments submitted by the United States to the Commission, *Yearbook ... 1997*, vol. II (Part One), document A/CN.4/481 and Add.1, p. 3, para. 27. See also the statement of the United States (*Official Records of the General Assembly, Fifty-first Session, Sixth Committee, 39th meeting*, paras. 31–33). See also Jacoby and Eremich, "Environmental liability in the United States of America".

be conceived only residually vis-à-vis the liability of the operator of the activity at the origin of the transboundary harm. Recognition of the residual liability of States for harm caused by lawful activities would itself constitute a very considerable development of international law. States would be unlikely to accept such a development in a general form. To date, they had accepted it only in specific treaties, such as the Convention on the International Liability for Damage Caused by Space Objects. There, however, the States originating the Convention had considered space activities as activities reserved exclusively to States, which would clearly not be the case for all the activities engaged in the draft articles under consideration. It would therefore be preferable to make the draft articles a sort of compendium of principles, to which States could refer when establishing specific regimes of liability. That would be a realistic, pragmatic and constructive approach to the topic.⁸⁸ India took the view that jurisdictional control or sovereignty over a territory did not per se constitute a basis for the international liability of States, and what was crucial was the actual control of operations taking place within the territory of a State. Therefore, international liability for transboundary harm must be imputed to the operator who was in direct physical control of the activity.⁸⁹ The United Kingdom demanded that the Commission should cease considering the topic, given the burden it imposed on it as it was "devoid of substance".⁹⁰

59. The Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, which reviewed the matter in 1997, for its part, was not convinced that there was enough clarity on the scope and content of the topic. It also felt that the Commission should await further comments from States before it could take any decision on the subject of international liability. As an interim measure, it agreed that the topic of liability for damage should be separated from the topic of prevention.⁹¹

B. The status of ongoing negotiations on international liability

60. The view of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law was corroborated by the fact that, except for the case of liability involving space objects and a few other instances,⁹² many of the interna-

⁸⁸ *Official Records of the General Assembly, Fifty-first Session, Sixth Committee, 37th meeting*, para. 25. See paragraph 40, for the statement of Sweden, on behalf of the Nordic countries, which also wished it to be made clear that it was primarily incumbent on the operator to provide compensation and that the liability of the State, if any, was residual.

⁸⁹ *Ibid.*, 41st meeting, para. 63 (India).

⁹⁰ *Ibid.*, 38th meeting, para. 19 (United Kingdom).

⁹¹ *Yearbook ... 1997*, vol. II (Part Two), p. 59, paras. 165–167.

⁹² Some conventions have attempted to incorporate the principle of strict State liability in one form or the other. The Convention on the International Liability for Damage Caused by Space Objects makes the launching State "absolutely liable" for damage caused by space objects on the surface of the earth to aircraft in flight (art. II). Although the fault standard was incorporated in article III for damage done to space objects in flight as a result of collision between space objects in outer space or in the air, the Convention could still be treated as a modi-

(Continued on next page.)

tional conventions dealing with transboundary damage or damage to the global environment have not so far succeeded in putting into place any regime of liability. Most of the conventions have only indicated the need for development of suitable protocols on liability and most of these protocols have been under negotiation for a considerable amount of time without any resolution of or consensus on the basic issues involved.⁹³ A review of the status of some of these negotiations is presented below.

61. The Antarctic Treaty Consultative Meeting has been attempting to develop an annex or annexes on environment liability and for this purpose established a Group of Legal Experts on Liability, which has been meeting both during the Antarctic Treaty Consultative Meetings and intersessionally since 1993. The deliberations of the Group have taken place on the basis of "offerings" prepared by the Chairman, Mr. Rüdiger Wolfrum. At the last meeting, the Group had before it the Chairman's Eighth Offering. The United States delegation also proposed an alternative.⁹⁴ The issues under consideration were: scope of application, definition of the notion of damage, response measures or remedial measures, standard of liability, exemption and limits, rules concerning the quantum of damage, State responsibility, insurance, as well as implementation of the annex or annexes, including dispute settlement. The Group came to an understanding on some of those issues, but on others it was only possible to identify alternatives. For example, it was agreed that the aim of an annex or annexes was a liability regime which would cover all activities under the Antarctic Treaty and its Protocol on Environmental Protection. However, it remained an open question whether that should be achieved in one comprehensive annex or in more than one annex. On the definition of damage, while it was agreed that it must meet certain conditions, different variations were favoured. According to article 3 of the Eighth Offering, the impact had to be of a more than minor and more than transitory na-

(Footnote 92 continued.)

fied regime of liability *sine delicto*. The abandonment of the no-act-of-the-State and the non-availability of due diligence exemptions, as well as the accepted interpretation about the disconnection of liability and internationally wrongful act, would appear to support this view. Like the above-mentioned Convention, the CMEA Convention on Liability for Damage Caused by Radiological Accidents in International Carriage of Irradiated Nuclear Fuel from Nuclear Power Plants also makes States primarily liable for nuclear damage under international law. Moreover, in respect of other nuclear activities, namely the use of nuclear power sources in outer space and nuclear testing, there is some evidence of abandonment of the no-act-of-the-State exemption and the due diligence exemption and of disregarding the condition of wrongfulness (Lefebvre, *op. cit.*, p. 166). Similar exemptions have also been ignored in the case of at least two bilateral treaties on international watercourses (*ibid.*, p. 169).

⁹³ For an excellent summary of international practice dealing with remedies for transboundary harm caused by a hazardous activity to persons or property or the environment and for a mention of the different forms of liability and occasions of payment of compensation without any attribution of responsibility or liability along with examples of treaties and case law, see *Yearbook ... 1996*, vol. II (Part Two), annex I, pp. 111–116, commentary to article 5. For an analysis of some of the relevant conventions and arguments involved, see also Arsanjani and Reisman, "The quest for an international liability regime for the protection of the global commons".

⁹⁴ See generally the report of the Group of Legal Experts on Liability on work undertaken to elaborate an annex or annexes on liability for environmental damage in Antarctica, agenda item 9 (XXII ATCM/WP1) (November 1997), pp. 1–14.

ture or, alternatively, it had to be significant and lasting. While some favoured exclusion of impacts that had been assessed in environmental impact assessments and found acceptable by national authorities from the definition of damage, others were concerned that any form of environmental impact assessment would be used to avoid liability. Similarly, concerning the standard of liability, while all members favoured strict liability, doubts were expressed about distinctions to be made between activities of States and non-State entities or types of damage. Proposals for joint and several liability also raised questions as regards the compatibility with some national legal systems. Although all agreed that the operator should take reasonable precautionary measures to prevent the occurrence of incidents, it was pointed out that any such obligation could be treated as a new obligation not found in the Protocol. The question of payment of compensation to third parties which undertook remedial measures without prior authorization from the operator was also an important one. While the operator was to be generally held liable for damage, a problem arose in respect of a provision imposing on the operator an obligation of reasonable compensation for unrepaired damage or irreparable harm or where response action was not possible, not feasible or, for environmental or other reasons, not desirable.

62. There was general agreement within the Group of Legal Experts on Liability that the liability of the State, not acting as an operator, should only be invoked in narrowly defined circumstances. Accordingly, all members were in agreement that a liability annex or annexes should not create a new liability for States merely for the reason that damage had been caused by an operator within its jurisdiction. According to article 7 of the Eighth Offering, a State party could be liable for damage caused by an operator only if damage would not have occurred or continued if a State party had carried out its obligations under the Protocol on Environmental Protection and the annexes; but this was only the case to the extent that liability was not satisfied by the operator or otherwise. There was general agreement that State liability under a liability annex should not exceed State responsibility under general international law.

63. All members favoured including exemptions from liability for natural catastrophes and armed conflicts and terrorist acts. Compulsory insurance or other financial security for activities involving a risk to the environment was also provided in article 8 of the Eighth Offering. The question of limitation on liability, the establishment of an environmental protection fund and the dispute settlement mechanism had also given rise to discussions. The United States draft is based upon the principle of strict liability and in particular deals with response action obligations. The amount of compensation is to be calculated on the basis of the costs of the response action taken by other States. The draft also provides for exemptions and limits and the establishment of a fund.⁹⁵

64. The need for a liability regime has also been considered in the context of transboundary movement of living modified organisms. On the basis of article 19, paragraph 3, of the Convention on Biological Diversity, the second Conference of Parties to the Convention decided

⁹⁵ *Ibid.*, pp. 14–16.

to establish an Open-ended Ad Hoc Working Group of Experts on Biosafety to develop a biosafety protocol to deal with transboundary movement of living modified organisms. Although the protocol aims at the establishment of an advance informed agreement procedure, the majority of developing countries have insisted that it should also deal with provisions on liability and redress.⁹⁶ Six meetings of the Working Group have been held, with the final meeting of the Group at Cartagena de Indias, Colombia, from 14 to 22 February 1999. On the liability and redress issue, countries had diverse positions, ranging from strict State liability to no liability. Developing countries of Africa and Asia supported the elaboration of liability and compensation provisions, but countries such as the Russian Federation, the United States and members of the European Union insisted that the time allotted for the negotiation was not sufficient to work out a detailed provision of liability and compensation in the protocol. Argentina and Japan were against any such provision. Although the negotiations failed on other contentious issues, there was a compromise to have an enabling provision on liability and compensation, work on which would be completed within three years from the date of coming into force of the protocol.⁹⁷

65. A protocol on liability and compensation for damage resulting from the transboundary movement of hazardous wastes and their disposal has been under negotiation since the conclusion of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. Eight meetings of the Ad Hoc Working Group of Legal and Technical Experts have so far been held and the negotiations on the protocol are said to be near completion. Although there appears to be no consensus on many aspects of the scope and the application of the protocol, there is agreement that it should apply to damage attributable to an incident occurring during a transboundary movement of hazardous wastes and other wastes or their disposal. In that connection, no decision has been taken as regards the liability of the State of export and/or the State of transit in respect of shipment of wastes which have left the territorial jurisdiction of the State of export. Similarly, the question of liability concerning illegal traffic in wastes is also left open. The problem of channelling the liability has further been the subject of controversy.⁹⁸ However, there was consensus at the last session that the “notifier” shall be liable for damage until the movement document is signed by the disposer. Thereafter, the disposer shall be liable for damage. If the State of export is the notifier or if no notification has taken place, the exporter shall be liable for damage until the movement document is signed by the disposer. Thereafter the disposer shall be liable for the damage. There is also disagreement as to the nature and purpose of a fund or funds to be established under the protocol. While de-

veloped countries would like a compensation fund to be established only for the purpose of meeting the expenses connected with emergency relief and clean-up, developed countries would like the compensation fund to cover claims on loss of property, persons and the environment, in addition to a separate emergency fund. The nature and the role of an insurance coverage in meeting the claims of compensation is also the subject of debate.⁹⁹

66. In many other cases it did not even appear to be possible to discuss the issue of liability seriously.¹⁰⁰ The general trend appears to go against any formulation of the concept of State liability, and even more so, strict liability, even though it is regarded as more suitable to problems of transboundary pollution.¹⁰¹ After reviewing the work of the Commission and the views of Governments on the subject of international liability along with existing State practice, one commentator recently came to the conclusion that “the search for sources in this [connection] has revealed that there are neither treaties in force nor other instances of consistent state practice that support the procedural approach to liability *sine delicto*, as envisaged by the special rapporteurs”.¹⁰²

⁹⁹ See the Draft Articles of a Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and their Disposal, annexed to the report of the eighth meeting of the Ad Hoc Working Group of Legal and Technical Experts to Consider and Develop a Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (UNEP/CHW.1/WG.1/8/5, annex).

¹⁰⁰ Lefeber, *op. cit.*, p. 177.

¹⁰¹ Generally, Argentina, Australia, Brazil (cautiously), Canada, the Democratic Republic of the Congo, Ireland, Jordan, the Nordic countries, Sierra Leone, Spain, Thailand, Trinidad and Tobago, Uruguay and Venezuela would appear to support the abandonment of the due diligence exemption. Further, Australia, Canada and the Nordic countries appear to favour strict liability. For an analysis of the views of the States, see Lefeber, *op. cit.*, pp. 178–179, footnotes 131–132. See also the above-mentioned views of States (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*). Some commentators appear to favour a strict liability concept in matters of transboundary harm borrowing from municipal law analogies. See, for example, Bedjaoui, “Responsibility of States: fault and strict liability”, p. 361. See also Schachter, *International Law in Theory and Practice*, p. 377.

¹⁰² Lefeber, *op. cit.*, p. 226. See also pages 184–186, footnotes 153–161, for the views of other scholars. For example, Schachter observed that:

“International liability is an essential, though troubling, concept in regard to trans-border environmental injury ... [E]fforts have been made by international bodies to formulate general principles and procedures. International legal scholars have contributed many analytical and policy studies to this end. Governments, however, have moved cautiously. They have concluded only a few multilateral agreements prescribing principles of liability and compensation in regard to particular activities. State practice has been sparse and international adjudication rare”

(*Op. cit.*, p. 375). Further, alluding to the fact that several international lawyers argued in favour of strict State liability in cases of disastrous accidents, he observed that: “It is true that municipal law has decoupled liability from wrongfulness in regard to some areas of environmental damage (especially ultrahazardous acts), but governments were not ready to do so as a general principle on the level of international liability.” (*Ibid.*, p. 378.) See also several papers on the legal position of countries such as Canada, Germany, Japan, New Zealand, South Africa, the South Pacific countries and the United Kingdom regarding liability (*Environmental Liability* (footnote 67 above)). See also Taylor, *An Ecological Approach to International Law: Responding to Challenges of Climate Change*, p. 152: “There is some support for strict liability within state practice and amongst scholars. However, it is probably the prevailing view that it is not a general norm of international law in the context of transboundary environmental harm.”

⁹⁶ UNEP/CBD/BSWG/1/4 (22 August 1996), p. 17. See also M. Gandhi’s presentation entitled “Relationship between discussions in the bio-safety negotiations and work undertaken in relation to article 14 of CBD”, at the workshop hosted by the United Kingdom and the European Commission, London, 30 June–2 July 1998.

⁹⁷ UNEP/CBD/ExCOP/1/2, draft article 25, p. 32.

⁹⁸ See the note prepared by Günther Handl, “Comments on draft articles of a protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal” (UNEP/CHW.1/WG.1/5/L.1/Add.1).

CHAPTER V

Future course of action on the topic of liability: options

67. In view of the above, the following options appear to be available in respect of the future course of action:

(a) To proceed with the topic of liability and finalize some recommendations. An abundance of material was surveyed by Mr. Quentin-Baxter and even more so later by Mr. Barboza. Draft articles were also prepared by a working group of the Commission;

(b) Alternatively, the Commission could also suspend its work on the topic of international liability, at least for the time being, until the regime of prevention is finalized in its second reading. The Commission should further await developments in the negotiation of some of the protocols on liability;

(c) Of course, there is also another option. The Commission could decide to terminate its work on the topic of international liability,¹⁰³ unless a fresh and revised mandate is given by the General Assembly itself.

68. Of the three options, the Special Rapporteur would like to recommend the second alternative for consideration and approval. It is clear that much of the mate-

¹⁰³ See the review of literature on international liability by the editors of the Harvard Law Review and their conclusion that no legitimate expectations about the consequences of action or inaction to prospective environmentally injurious States could be communicated (Guruswamy, Palmer and Weston, "Editors of the Harvard Law Review, Trends in international environmental law", p. 332). Brownlie, while commenting on the concept of liability for "lawful acts", felt that:

"It is fundamentally misconceived. Moreover, the nature of the misconception is such that the contagion may induce a general confusion in respect of the principles of state responsibility, since the misunderstanding relates to those principles and is not confined to a certain area of problems. Much of state responsibility—as long accepted by governments and tribunals—is concerned with categories of lawful activities which have caused harm ...

"The search for principles governing 'liability' for 'lawful activities' seems to fly in the face of all existing legal experience ...

"In any case the practice of states and the jurisprudence of international tribunals fail to support the concept of liability for lawful activities."

(Brownlie, *System of the Law of Nations: State Responsibility*, p. 50)

See also Boyle, "State responsibility and international liability for injurious consequences of acts not prohibited by international law: a necessary distinction?". Dupuy observed that "[o]ne must recall that in general international law, the use of the concept of 'due diligence' concerns unlawful omissions by a State ... International law only requires States to exercise 'sufficient diligence' or 'due diligence'. This is the measure of international responsibility" ("International liability ...", p. 369)). Jiménez de Aréchaga noted in his Hague lecture that:

"The International Law Commission wisely decided not to codify the topic of State responsibility for unlawful acts and the rules concerning the liability for risks resulting from lawful activities simultaneously, for the reason that 'a joint examination of the two subjects could only make both of them more difficult to grasp'.

"Several members urged the Commission to embark as soon as possible on the codification of State responsibility resulting from risks originating in lawful but hazardous conduct.

"The difficulty of making such a codification is that this type of responsibility only results from conventional law, has no basis in customary law or general principles and, since it deals with exceptions rather than general rules, cannot be extended to fields not covered by the specific instruments."

("International law in the past third of a century", p. 273.) For other citations, see Lefeber, op. cit., p. 191, footnote 14.

rial surveyed and examined by Mr. Quentin-Baxter and Mr. Barboza on international liability has not so far been considered by the Commission as providing a sufficient basis to finalize any recommendations in this regard. The situation does not appear to have changed even now. The dominant trend among States is still against accepting any concept of strict State liability. Hence, the first alternative would not appear to be any more attractive today than it was a few years ago.

69. It is equally clear that it is not proper and appropriate to reject here and now the possibility of dealing with the topic of international liability. Such a categorical rejection would create more confusion in respect of the applicable law in case of actual damage or harm occurring across international borders or at the global level because of activities pursued or permitted by States within their territory or other areas under their exclusive jurisdiction and control. Such a view would also not do justice to the strong sentiment among a large group of States in favour of providing a balance between the interests of the State of origin of hazardous activities and the States likely to be affected. It would also not enable the Commission to take advantage of any further developments that are likely to take place on the subject.

70. If and when the Commission is in a position to take up the subject of international liability, it would, however, need to take a stand on several issues in order to lay down properly a regime of liability: the activities to be covered, the form of their coverage, the definition of damage, the establishment of the measure of damages, the identification of the person or persons against whom the claim should be brought, the determination of who may bring a claim, the designation of the forum or forums before which claims will be brought, the determination of available remedies, the role of the State in payment of compensation, the conditions governing the operator's liability, the circumstances precluding liability, the requirement of insurance and other financial security, and dispute settlement procedures.

71. In conclusion, it may also be noted that the present report did not attempt to deal with the question of the final form the draft articles on prevention could take. Different suggestions have been made both within the Commission and within the General Assembly, ranging from a model law or guidelines to a fully fledged convention. A framework convention has also been suggested as an alternative. This is a question the Commission should only take up at the end of its exercise, and not now.

72. Similarly, the question concerning the most suitable settlement of disputes procedure for the topic of prevention addressed by some States¹⁰⁴ would be fit for review in connection with the second reading of the draft articles on prevention.

¹⁰⁴ Switzerland, for example, felt that draft article 17 on the settlement of disputes was inadequate. According to that State, if a dispute could not be settled by means of a fact-finding commission, a State party should be entitled to embark on a judicial procedure leading to a binding decision (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 13th meeting, para. 67).

RESERVATIONS TO TREATIES

[Agenda item 5]

DOCUMENT A/CN.4/499

Fourth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

[Original: French]
[25 March 1999]

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report	127
	<i>Paragraphs</i>
INTRODUCTION	1–63 128
A. The earlier work of the Commission on the topic	1–54 128
1. First and second reports on reservations to treaties and the outcome	2–16 128
(a) Outcome of the first report (1995)	2–6 128
(b) Outcome of the second report (1996–1997)	7–16 129
2. Third report and the outcome	17–54 131
(a) Consideration of the third report by the Commission	18–23 131
(b) Consideration of the report of the Commission by the Sixth Committee	24–38 132
(c) Action by other bodies	39–43 134
(d) Reconsideration of the draft guideline relating to “statements of non-recognition”	44–54 135
B. General presentation of the fourth report	55–63 137
ANNEX	
Bibliography (A/CN.4/478/Rev.1)	139

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Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, <i>Treaty Series</i> , vol. 1155, No. 18232, p. 331.
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	<i>Ibid.</i> , vol. 1946, No. 33356, p. 3.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	<i>Ibid.</i> , vol. 1249, No. 20378, p. 13.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

Introduction

A. The earlier work of the Commission on the topic

1. The first report of the Special Rapporteur on the law and practice relating to reservations to treaties contains a relatively detailed description of the Commission's earlier work on the topic and the outcome of that work.¹ It is therefore unnecessary to return to that subject in detail in the present report, except in order to inform Commission members of new developments in that connection since the preparation of the third report, which described the reception given to the first and second reports.² Sections 1 and 2 deal with the outcome of the first and second reports and the discussion of the third report in the Commission and the Sixth Committee; section 2 also deals with a number of subsequent developments.

1. FIRST AND SECOND REPORTS ON RESERVATIONS TO TREATIES AND THE OUTCOME

(a) *Outcome of the first report (1995)*

2. In his first report, the Special Rapporteur briefly examined the problems to which the topic gives rise, noting that where reservations are concerned there are gaps and ambiguities in the relevant Vienna Conventions (1969 Vienna Convention on the Law of Treaties, 1978 Vienna Convention on Succession of States in respect of Treaties, and 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations), which meant that the topic should be considered further in the light of the practice of States and international organizations.³ In order to have a clearer picture of such practice, with the Commission's authorization⁴ the Special Rapporteur prepared two detailed questionnaires on reservations to treaties, to ascertain the practice of States and international organizations and the problems encountered by them. 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 of conventions, to answer the questionnaires promptly; it reiterated that request in paragraph 7 of its resolution 51/160 of 16 December 1996.

3. By the time the third report was prepared,⁵ 32 States and 22 international organizations, which were listed in the third report,⁶ had replied either partially or fully to the questionnaires. Since then, no more States⁷ and just two

¹ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 126–141, paras. 8–90.

² See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, pp. 229–233, paras. 1–30.

³ *Yearbook ... 1995* (see footnote 1 above), pp. 141–150, paras. 91–149.

⁴ See *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489.

⁵ In the case of that part of the report, 30 April 1998.

⁶ *Yearbook ... 1998* (see footnote 2 above), p. 230, footnotes 7 and 9.

⁷ A number of States that had transmitted only partial replies completed their replies, for which the Special Rapporteur wishes to thank them.

more international organizations⁸ have transmitted replies to the Secretariat.

4. The Special Rapporteur regards this number of replies, which represents a higher response rate than normal for Commission questionnaires, as encouraging; it indicates that there is great interest in the topic and confirms that studying it meets a real need. The number of replies is nonetheless unsatisfactory: replies have been received from only 32 of the 187 States Members of the United Nations or observers to which the questionnaire was sent and 24 of the 65 international organizations that received questionnaires, or 17 per cent and 40 per cent, respectively. Moreover, the replies are not evenly distributed geographically: they are mainly from European States (or other States in that group) (19 replies) and Latin American States (8 replies); and although five Asian countries have also replied, the Special Rapporteur has so far received no replies from any African countries. Furthermore, one of the most active treaty-making international organizations, the European Communities, has as yet not replied to the questionnaire sent to it.

5. The Special Rapporteur is fully aware that Commission questionnaires are burdensome for the legal departments of ministries of foreign affairs and international organizations, and that this applies particularly in the case of the long and detailed questionnaire on reservations; he is also aware that States that have not yet been able to respond to the questionnaire have other ways of informing the Commission of problems that they encounter and of their expectations, particularly by means of statements by their representatives in the Sixth Committee; he attaches the greatest importance to such responses.⁹ However, they are no substitute for replies to the questionnaire, which is almost entirely factual; its purpose is not to determine the "normative preferences" of States and international organizations but, rather, to try to assess their actual practice on the basis of their replies, in order to guide the Commission in its task of progressively developing and codifying international law; this cannot really be achieved on the basis of oral statements, which are necessarily brief. Moreover, such comments are made at a later stage, whereas it is easier for both the Commission and the Special Rapporteur to make their proposals in the light of replies made earlier than to adjust them afterwards.

6. The Special Rapporteur therefore feels strongly that the Commission should recommend to the General Assembly that it should appeal once again to States and international organizations that have not yet replied to the questionnaires, and to those that have transmitted only partial responses and thus need to complete their replies, to do so.

⁸ The organizations in question are WMO and the United Nations (Treaty Section), both of which the Special Rapporteur also wishes to thank. The United Nations actually transmitted its reply to him in 1998, but he failed to indicate that he had received it; he presents his apologies to the Treaty Section for that oversight.

⁹ See paragraphs 24–38 below.

(b) *Outcome of the second report (1996–1997)*

7. Owing to lack of time, the Commission was unable to consider the second report on reservations to treaties¹⁰ at its forty-eighth session, in 1996. It did so at its following session, in 1997. Once it had considered the report, it adopted the preliminary conclusions of the Commission on reservations to normative multilateral treaties including human rights treaties.¹¹

8. 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 the text 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,¹² requesting them to transmit the texts to the members of the bodies in question and to inform him of any comments they made. He sent similar letters to the presiding officers of a number of regional bodies.¹³

9. So far, only the chairpersons of two monitoring bodies and the presiding officer of the eighth and ninth meetings of the chairpersons of bodies established pursuant to human rights instruments have transmitted their observations.¹⁴ In addition, in a letter dated 23 January 1998, the President of the Inter-American Court of Human Rights thanked the Secretary of the Commission for transmitting the preliminary conclusions.

10. In a letter dated 9 April 1998,¹⁵ the Chairperson of the Human Rights Committee emphasized the role of universal monitoring bodies in the process of developing the applicable practice and rules. She restated the Committee's views in a second letter, dated 5 November 1998, in which she indicated that the Committee was concerned at the views expressed by the Commission in paragraph 12 of its preliminary conclusions¹⁶ and stressed that the proposition enunciated in paragraph 10,¹⁷ "was subject to

modification as practices and rules developed by universal and regional monitoring bodies gained general acceptance". She added the following:

Two main points must be stressed in this regard.

First, in the case of human rights treaties providing for a monitoring body, the practice of that body, by interpreting the treaty, contributes consistent with the Vienna Convention to defining the scope of the obligations arising out of the treaty. Hence, in dealing with the compatibility of reservations, the views expressed by monitoring bodies necessarily are part of the development of international practices and rules relating thereto.

Second, it is to be underlined that universal monitoring bodies, such as the Human Rights Committee, must know the extent of the States parties' obligations in order to carry out their functions under the treaty by which they are established. Their monitoring role itself entails the duty to assess the compatibility of reservations, in order to monitor the compliance of States parties with the relevant instrument. When a monitoring body has reached a conclusion about the compatibility of a reservation, it will, in conformity with its mandate, base its interactions with the State party thereon. Furthermore, in the case of monitoring bodies dealing with individual communications, a reservation to the treaty, or to the instrument providing for individual communications, has procedural implications on the work of the body itself. When dealing with an individual communication, the monitoring body will therefore have to decide on the effect and scope of a reservation for the purpose of determining the admissibility of the communication.

The Human Rights Committee shares the International Law Commission's view, expressed in paragraph 5 of its Preliminary Conclusions, that monitoring bodies established by human rights treaties "are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them". It follows that States parties should respect conclusions reached by the independent monitoring body competent to monitor compliance with the instrument within the mandate it has been given.¹⁸

11. The Chairman of the Committee against Torture informed the Secretary of the Commission that the Committee had considered the Commission's preliminary conclusions at its twenty-first session, from 9 to 20 November 1998, and that it shared the views expressed by the Human Rights Committee.

In addition, the Committee against Torture believes that the approach taken by monitoring bodies of international human rights instruments to appreciate or determine the admissibility of a reservation to a given treaty so that the object and purpose of that treaty are correctly interpreted and safeguarded is consistent with the Vienna Conventions on the law of treaties.

12. In a letter dated 29 July 1998, the presiding officer of the eighth and ninth meetings of the chairpersons of bodies established pursuant to human rights instruments informed the Chairman of the Commission of the discussions on the matter at the ninth meeting of the chairpersons held in Geneva from 25 to 27 February 1998. He indicated in that letter that the chairpersons of the human rights bodies, after having recalled the emphasis placed in the Vienna Declaration and Programme of Action (as adopted by the World Conference on Human Rights on 25 June 1993) on the importance of limiting the number and extent of reservations to human rights treaties, welcomed the role that the Commission assigned to human rights bodies with respect to reservations in its preliminary conclusions.

They considered, however, that the draft was unduly restrictive in other respects and did not accord sufficient attention to the fact that human rights treaties, by virtue of their subject matter and the role they recog-

¹⁰ *Yearbook... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1.

¹¹ *Yearbook... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

¹² Letters were sent to the Chairpersons of the Committee on Economic, Social and Cultural Rights, the Committee on Human Rights, 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.

¹³ 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.

¹⁴ The Special Rapporteur intends to reproduce these replies in full in an annex to a future report; see paragraph 15 below.

¹⁵ The most important paragraph of the letter is reproduced in the third report (*Yearbook... 1998* (footnote 2 above), p. 230, para. 16).

¹⁶ *Yearbook... 1997*, vol. II (Part Two), p. 57, para. 157: "The Commission emphasizes that the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts."

¹⁷ *Ibid.*: "The Commission notes also that, in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State's either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty."

¹⁸ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 40 (A/54/40)*, vol. I, annex VI.

nize to individuals, could not be placed on precisely the same footing as other treaties with different characteristics.

The chairpersons believed that the capacity of a monitoring body to perform its function of determining the scope of the provisions of the relevant convention could not be performed effectively if it was precluded from exercising a similar function in relation to reservations. They therefore recalled the two general recommendations adopted by the Committee on the Elimination of Discrimination against Women and noted the proposal by that Committee to adopt a further recommendation on the subject in conjunction with the fiftieth anniversary of the Universal Declaration of Human Rights, and expressed their firm support for the approach reflected in General Comment No. 24, adopted by the Human Rights Committee. They requested their Chairperson to address a letter to the International Law Commission on their behalf to reiterate their support for the approach reflected in General Comment No. 24, and to urge that the conclusions proposed by the International Law Commission be adjusted accordingly.¹⁹

13. Moreover, although this document is not, strictly speaking, a reaction to the Commission's preliminary conclusions, the Special Rapporteur wishes to draw the Commission's attention to the important report, dated 28 June 1998, of Working Group II of the Committee on the Elimination of Discrimination against Women, established under article 21 of the Convention on the Elimination of All Forms of Discrimination against Women, concerning reservations to that Convention, which was transmitted to it by the Division for the Advancement of Women and which the Committee adopted at its nineteenth session.²⁰ This report calls on States parties to the Convention which have formulated reservations to withdraw or modify them. The Committee bases itself *inter alia* on the second report on reservations to treaties,²¹ saying that it agrees with the Special Rapporteur that "objections by States are often not only a means of exerting pressure on reserving States, but also serve as a useful guide for the assessment of the permissibility of a reservation by the Committee itself",²² and it concludes

that it has certain responsibilities as the body of experts charged with the consideration of periodic reports submitted to it. The Committee, in its examination of States' reports, enters into constructive dialogue with the State party and makes concluding comments routinely expressing concern at the entry of reservations to articles 2 and 16²³ or the failure of States parties to withdraw or modify them.²⁴

And it adds that:

The Special Rapporteur [of the Commission] considers that control of the permissibility of reservations is the primary responsibility of the States parties. However, the Committee again wishes to draw to the attention of States parties its grave concern at the number and extent of impermissible reservations. It also expresses concern that, even when States object to such reservations there appears to be a reluctance on the

¹⁹ *Official Records of the General Assembly, Fifty-third Session*, item 113 (a) of the preliminary list, document A/53/125, annex.

²⁰ *Ibid.*, *Fifty-third Session, Supplement No. 38 (A/53/38/Rev.1)*, part two, paras. 5–21.

²¹ *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1. The Committee seems to be referring to paragraphs 241–251, although they are not specifically mentioned.

²² *Official Records of the General Assembly* (see footnote 20 above), para. 21.

²³ Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women enumerates the general obligations of States parties and article 16 draws specific conclusions from the principle of equality of men and women in all matters stemming from marriage and family relations.

²⁴ *Official Records of the General Assembly* (see footnote 20 above), para. 23.

part of the States concerned to remove and modify them and thereby comply with general principles of international law.²⁵

14. In addition, in accordance with the recommendation contained in paragraph 2 of General Assembly resolution 52/156,²⁶ five States transmitted to the Secretariat comments regarding the preliminary conclusions adopted by the Commission in 1997.²⁷ Generally speaking, these States welcomed the adoption of the preliminary conclusions²⁸ and the opportunity to comment on them before the Commission took a final decision on the matters dealt with therein. Monaco and the Philippines (which made several additional suggestions) endorsed the preliminary conclusions. China, while emphasizing the importance it attached to the cooperation of the human rights bodies, considered that the latter should remain strictly within the framework of their mandate, as defined in the respective treaties, adding that where the latter contained no specific provision, the permissibility of reservations was not part of the functions and responsibilities of the monitoring bodies; it also suggested that the term "traditional modalities" in paragraph 6 should be replaced by the words "well-established modalities"²⁹ and that paragraph 12 should be deleted so as not to give the impression that regional practices and rules differ from or take precedence over those in effect at the universal level.³⁰ China agreed with Liechtenstein that the implementation of the recommendation in paragraph 7 of the preliminary conclusions might prove difficult in practice.³¹ Liechtenstein concluded its comments by drawing the Commission's attention

²⁵ *Ibid.*, para. 24.

²⁶ "The General Assembly

"...

"Draws the attention of Governments to the importance for the International Law Commission of having their views ... in particular on:

"...

"(b) The preliminary conclusions of the Commission on reservations to normative multilateral treaties, including human rights treaties."

With reference to that request, the Director of the Codification Division addressed a letter on 29 December 1997 to the permanent missions of States Members and to observers, requesting their comments on the preliminary conclusions of the Commission.

²⁷ The three States mentioned in the third report, Liechtenstein, Monaco and the Philippines (*Yearbook ... 1998* (footnote 2 above), p. 232, footnote 35), and also China and Switzerland. The Special Rapporteur wishes to thank those States and to express the hope that other States will follow suit.

²⁸ Liechtenstein wondered, however, whether they were not premature.

²⁹ Paragraph 6 of the preliminary conclusions reads as follows:

"The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties."

(See footnote 11 above.)

³⁰ See footnote 16 above.

³¹ Paragraph 7 reads as follows:

"The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation."

(See footnote 11 above.)

to the following points, which it felt deserved particular attention:

(a) Reconsideration of the correlation between paragraphs 5 and 7 of the preliminary conclusions;

(b) The possibility of drafting optional protocols should be further elaborated upon. In doing so, the Commission should consider issues such as feasibility, usefulness from a practical point of view, including time frame;

(c) Practical and concrete suggestions for the imminent future to remedy the current state of affairs involving uncertainties concerning the application of multilateral treaties, especially in the field of human rights;

(d) Comments on the legal effect of objections by States parties made to reservations lodged by other States parties;

(e) Study of the potential of an enhanced role played by depositaries of multilateral treaties.

Switzerland, which merely confirmed the comments and observations made by its delegation in the Sixth Committee, had also drawn attention, on that occasion, to the role of the depositaries and to what it saw as a contradiction between the provisions of paragraph 5 of the preliminary conclusions (and those of paragraph 4) stating that the competence of monitoring bodies in respect of reservations could not be evaluated except with reference to the instrument in question and dependent on the will expressed by the States parties.³²

15. The lengthy passages concerning the reactions of States and human rights treaty-monitoring bodies have been reproduced above for the information of members of the Commission. The Special Rapporteur believes that it would be pointless, at the present stage, to reopen discussion of the preliminary conclusions which the Commission adopted in 1997. Although, as he tried to explain in his third report,³³ he does not believe that the adoption was premature, it would be preferable not to revise formally the conclusions adopted two years earlier, since such a revision would only be provisional in nature; on the one hand, because other States or human rights bodies may still respond (and those that have already done so may complete their responses) and, on the other hand, and above all, because it seems only reasonable that the Commission should not reopen that aspect of the issue until it has completed consideration of all the substantive questions concerning the regime for reservations to treaties. This should be done by the year 2000, or by 2001 at the latest. At that point, as he indicated in his third report,³⁴ the Special Rapporteur proposes to submit draft final conclusions on the issues dealt with in the preliminary conclusions; if necessary, those conclusions could be incorporated in the Guide to Practice (although they may not lend themselves to such inclusion). The Commission did not voice any objection to that suggestion at its fiftieth session in 1998.

16. Moreover, the Special Rapporteur had annexed to his second report a bibliography concerning reservations

³² See *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 22nd meeting, paras. 80–87.

³³ *Yearbook ... 1998* (see footnote 2 above), p. 232, para. 22.

³⁴ *Ibid.*, para. 23.

to treaties.³⁵ As announced in the third report, a complete text of that document is annexed to the present report.³⁶

2. THIRD REPORT AND THE OUTCOME

17. The third report on reservations to treaties³⁷ consisted of three chapters of very unequal length. Its introduction served the same “purpose” as this one—it recapitulated the Commission’s earlier work on the topic and gave a general presentation of the report, essentially stating the methodology used.³⁸ Chapter I dealt with the definition of reservations and of interpretative declarations.³⁹ In chapter III there was a recapitulation of the draft guidelines proposed by the Special Rapporteur in the context of the Guide to Practice.⁴⁰

(a) *Consideration of the third report by the Commission*

18. In 1998, at its fiftieth session, the Commission considered the third report on reservations to treaties in three stages.

19. First, it discussed the part of the report dealing with the definition of reservations to multilateral treaties and the corresponding draft guidelines,⁴¹ which it referred to the Drafting Committee. (However, at the conclusion of the debate in plenary concerning draft guideline 1.1.7 proposed by the Special Rapporteur concerning reservations relating to non-recognition,⁴² the latter stated that he was convinced he had been mistaken in considering, initially, that these were reservations in the legal sense of the word.⁴³ He therefore proposed, see below,⁴⁴ a draft guideline which reflected the position of the vast majority of members of the Commission and which he, too, supported.)

20. The Commission then proceeded—the Drafting Committee having made a number of amendments to the draft guidelines—to consider the amended text, which it adopted after making relatively minor adjustments to draft guidelines 1.1 (general definition of reservations), 1.1.1 (object of reservations),⁴⁵ 1.1.2 (cases in which a reserva-

³⁵ *Yearbook ... 1996* (see footnote 21 above), annex I (A/CN.4/478).

³⁶ A/CN.4/478/Rev.1.

³⁷ *Yearbook ... 1998* (see footnote 2 above), p. 221.

³⁸ *Ibid.*, pp. 229–235, paras. 1–46.

³⁹ *Ibid.*, pp. 236–284, paras. 47–413. Notwithstanding what the Special Rapporteur had hoped to do and had initially said he would do (*ibid.*, p. 235, paras. 43 and 46) he was unable in his third report to tackle the issue of the formulation of reservations (and of interpretative declarations), acceptances and objections to reservations (and to interpretative declarations) because of the wealth of material. Moreover, an issue linked to that of the definition of reservations and interpretative declarations, that of “alternatives to reservations” (*ibid.*, p. 299, para. 511) could not be dealt with.

⁴⁰ *Ibid.*, para. 512.

⁴¹ *Ibid.*, pp. 236–284, paras. 47–413, and draft guidelines 1.1 and 1.1.1–1.1.8 (*ibid.*, p. 299, para. 512).

⁴² *Ibid.*, p. 253, para. 177.

⁴³ *Ibid.*, pp. 251–253, paras. 164–177.

⁴⁴ Paras. 44–53.

⁴⁵ Corresponds to draft guideline 1.1.4 in the report; it was understood that that draft guideline would be reconsidered in the light of the debate on interpretative declarations.

tion may be formulated), 1.1.3 (reservations having territorial scope),⁴⁶ 1.1.4 (reservations formulated when notifying territorial application)⁴⁷ and 1.1.7 (joint formulation of a reservation).⁴⁸ In addition, the Commission adopted the text of one “safeguard” guideline, proposed by the Special Rapporteur at the request of several members,⁴⁹ which states that “[d]efining a unilateral declaration as a reservation is without prejudice to its permissibility under the rules relating to reservations”.⁵⁰ On the other hand, in full agreement with the Special Rapporteur, the Commission decided to refer back to the Drafting Committee draft guidelines 1.1.5 and 1.1.6 concerning “extensive reservations” since neither the wording proposed by the Special Rapporteur nor that proposed by the Committee itself seemed fully satisfactory.

21. Lastly, the Commission approved the commentaries on the draft articles it had adopted, which are reproduced in its report to the General Assembly.⁵¹ The Special Rapporteur wishes, however, to draw attention to one aspect of the procedure followed which, although traditional, is less than satisfactory, namely, that although the report contains a summary of the debate on the draft texts which were not finally adopted,⁵² it does not contain a summary of the debate on those which were, since the commentaries on those texts are supposed to take its place. That is a very debatable point, for the summary of discussions, on the one hand, and the commentaries, on the other, serve separate functions and meet different needs. Moreover, it is not logical that discussions on a provision which was not adopted or which was not accompanied by a commentary, owing to lack of time, should be summarized, while no summary is prepared of discussions on other draft articles or guidelines which may have been finally approved and on which the Special Rapporteur and the secretariat have had the time to prepare a commentary, which discussions may be just as interesting. This practice is unlikely to encourage special rapporteurs to hurry up and draft the commentaries on provisions adopted on first reading.

22. At the close of the fiftieth session, in 1998, the Special Rapporteur also submitted the part of his third report⁵³ which deals with the distinction between reservations and interpretative declarations.⁵⁴ However, owing to lack of

time, there was only a very brief exchange of views on that part of the third report and only draft guideline 1.2 regarding the general definition of interpretative declarations was referred to the Drafting Committee.⁵⁵

23. As to the part of the third report which deals with “reservations” and interpretative declarations on bilateral treaties,⁵⁶ it was not considered nor was it even submitted.

(b) *Consideration of the report of the Commission by the Sixth Committee*

24. During the debate on the section of the report of the Commission concerning reservations to treaties,⁵⁷ some delegations returned to topics considered in previous years. Those which did so were unanimous in restating their desire not to see the Vienna regime called into question,⁵⁸ although some believed that a specific reservations regime should apply to human rights treaties,⁵⁹ while others adamantly opposed the idea.⁶⁰

25. Several delegations drew attention to the growing interest in the subject⁶¹ and stressed the practical usefulness the Guide to Practice would have for States once it was completed.⁶² In the view of the Special Rapporteur, this point is of particular importance: indeed, it is the first time States are able to assess *in concreto* the form that the future Guide to Practice could take, the first guidelines of which have been submitted to the General Assembly along with commentaries, in accordance with the decisions taken in 1997.⁶³ It is encouraging to note that the exercise appeared convincing to those States which spoke on this point, none of which criticized the form selected.

26. More specifically, with regard to the “definition” exercise which the Commission began in 1998, and which it should complete in 1999, most delegations which spoke felt that it was useful and even very important,⁶⁴ even if

⁵⁵ *Ibid.*, vol. I, 2552nd meeting, p. 228, para. 56.

⁵⁶ *Yearbook ... 1998* (see footnote 2 above), pp. 284–298, paras. 414–510.

⁵⁷ *Ibid.*, vol. II (Part Two), pp. 90–99, paras. 469–540.

⁵⁸ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting, para. 52 (United States); 16th meeting, para. 64 (France); 17th meeting, para. 5 (Sweden, on behalf of the Nordic countries); para. 20 (Pakistan); 18th meeting, para. 4 (Romania); para. 23 (Germany); para. 29 (Venezuela); para. 55 (Cuba); para. 57 (Tunisia); 19th meeting, para. 23 (Hungary); para. 27 (Singapore); 20th meeting, para. 9 (Islamic Republic of Iran); para. 36 (Portugal); 21st meeting, para. 34 (India); 22nd meeting, para. 14 (Egypt).

⁵⁹ *Ibid.*, 17th meeting, para. 6 (Sweden, on behalf of the Nordic countries); and 18th meeting, para. 33 (Italy); see also 20th meeting, para. 50 (Ireland).

⁶⁰ *Ibid.*, 19th meeting, paras. 27–28 (Singapore); 22nd meeting, para. 15 (Egypt); see also 20th meeting, para. 61 (Algeria) and 17th meeting, para. 45, statement by the AALCC Secretary-General.

⁶¹ *Ibid.*, 17th meeting, paras. 4 and 6 (Sweden, on behalf of the Nordic countries); 18th meeting, para. 23 (Germany); and 22nd meeting, para. 44 (Greece).

⁶² *Ibid.*, 14th meeting, para. 15 (United Kingdom); 17th meeting, para. 26 (Japan); 18th meeting, para. 33 (Italy) and para. 57 (Tunisia).

⁶³ *Ibid.*, 16th meeting, para. 65: France disputed the use of the word “*directives*” and would have preferred the expression “*lignes directrices*”; the Special Rapporteur is not convinced that this change is warranted.

⁶⁴ *Ibid.*, 15th meeting, para. 16 (Austria); 18th meeting, para. 33 (Italy) and para. 57 (Tunisia); and 22nd meeting, para. 41 (Slovakia).

⁴⁶ Corresponds to draft guideline 1.1.8 in the report; it was understood that that draft guideline would be reconsidered together with guideline 1.1.1 (see footnote 44 above).

⁴⁷ Corresponds to draft guideline 1.1.3 in the report.

⁴⁸ Corresponds to draft guideline 1.1.1 in the report.

⁴⁹ See *Yearbook ... 1998*, vol. I, inter alia, statements by Messrs Economides, 2545th and 2548 meetings, pp. 184 and 203, paras. 20 and 29 respectively; Simma, 2548th meeting, p. 202, para. 17; Hafner (*ibid.*, p. 202, para. 15); Dugard (*ibid.*, para. 14); Mikulka (*ibid.*, para. 18); Crawford (*ibid.*, para. 19); Pambou-Tchivounda (*ibid.*, p. 203, para. 26); and the presentation of the Special Rapporteur (*ibid.*, 2552nd meeting, p. 223, para. 1).

⁵⁰ The corresponding draft guideline proposed by the Special Rapporteur was the subject of a brief presentation in the third report (*Yearbook ... 1998* (footnote 2 above), p. 284, paras. 407–413). The Commission decided that the title and placement of that guideline would be determined at a later stage (*ibid.* (Part Two), footnote 209).

⁵¹ *Yearbook ... 1998*, vol. II (Part Two), p. 99, para. 540.

⁵² *Ibid.*, pp. 96–98, paras. 521–539.

⁵³ *Yearbook ... 1998* (see footnote 2 above), pp. 261–283, paras. 231–406.

⁵⁴ *Yearbook ... 1998*, vol. I, 2551st meeting, pp. 217–223, and vol. II (Part Two), pp. 94–96, paras. 505–519.

some believed that the exercise should not stop there.⁶⁵ However, as some delegates and the Special Rapporteur once again have noted,⁶⁶ the definition of reservations on the one hand and their permissibility on the other must not be confused. It is only by determining precisely whether or not a particular unilateral statement constitutes a reservation that it is possible to apply or not apply the legal regime for reservations, and thus to assess permissibility.

27. That is also why almost all delegations supported the intention of the Special Rapporteur to define interpretative declarations in relation to reservations and to conduct a parallel study of the legal regimes applying to each.⁶⁷ Moreover, some States supported the Special Rapporteur's position on the definition of interpretative declarations⁶⁸ or "reservations" to bilateral treaties,⁶⁹ although the Commission had been unable to examine these aspects of the third report at its fiftieth session in 1998.⁷⁰

28. The draft guidelines adopted received overall approval from several delegations,⁷¹ although others offered some criticisms, generally on points of detail, or made interesting drafting suggestions.⁷²

29. Two delegations proposed amendments to guideline 1.1, replacing the word "modify" by "limit" or "restrict".⁷³ However, as one delegation and the Special Rapporteur noted, that would amount to amending the Vienna

definition,⁷⁴ which the Commission had decided to avoid as far as possible.⁷⁵ Other speakers approved the composite method used to adopt the general definition contained in guideline 1.1.⁷⁶

30. Four delegations nevertheless drew attention to the problems posed by the effects of State succession on the legal regime for reservations to treaties, including the definition itself.⁷⁷ They agreed that it would be sufficient to return to that topic when the Commission addressed reservations from that angle, which it had planned to do in a special chapter of the Guide to Practice.⁷⁸

31. Draft guideline 1.1.1 was approved by several delegations,⁷⁹ some nevertheless wondering about its degree of precision, which could appear to be inadequate,⁸⁰ while just one appeared to cast doubt on the possibility of "across-the-board" reservations.⁸¹ In the opinion of the Special Rapporteur, this is supported by practice that is so generalized⁸² that it would be pointless and counter-productive to question it. On the other hand, he agrees that it would perhaps be desirable to make the formulation of this guideline more precise, but that the adoption of a definition of interpretative declarations could be sufficient to clear up the uncertainties. The re-examination of draft guideline 1.1.1 in the light of the definition of interpretative declarations, which the Commission has already provided,⁸³ will be the time to adopt a final position in that regard.

32. The same will be true as far as draft guideline 1.1.3⁸⁴ is concerned; it should, however, be noted that it was generally approved,⁸⁵ although one delegation wondered whether it would be appropriate to extend its scope be-

⁶⁵ Ibid., 14th meeting, para. 15 (United Kingdom).

⁶⁶ He was able to take the floor in the Sixth Committee, in accordance with the very welcome practice instituted in 1997, as were all the special rapporteurs present in New York during the two weeks allocated by the Sixth Committee to the report of the Commission. See *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 17th meeting, paras. 11–13 (Mr. Rao); 18th meeting, paras. 62–66 (Mr. Rodríguez Cedeño); 20th meeting, paras. 71–72 (Mr. Mikulka) and paras. 73–84 (Mr. Pellet); and 22nd meeting, paras. 50–54 (Mr. Crawford). The Chairmen of the Commission (ibid., para. 55) and of the Sixth Committee (ibid., para. 56) welcomed the new practice. In the view of the Special Rapporteur, it could be further improved if the special rapporteurs present in New York were to introduce the section of the report of the Commission for which they were responsible themselves, rather than the Chairman of the Commission; that would allow a genuine dialogue between the two bodies to be initiated.

⁶⁷ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 17th meeting, para. 5 (Sweden on behalf of the Nordic countries); 18th meeting, para. 24 (Germany); para. 30 (Venezuela); para. 33 (Italy); para. 57 (Tunisia); 21st meeting, para. 5 (Slovenia); 22nd meeting, para. 41 (Slovakia); para. 45 (Greece); para. 47 (Bosnia and Herzegovina); para. 49 (Republic of Korea). Only the United Kingdom appeared to express doubts on this point (ibid., 14th meeting, para. 15).

⁶⁸ Ibid., 18th meeting, para. 15 (Mexico); and 22nd meeting, para. 45 (Greece).

⁶⁹ Ibid., 15th meeting, para. 98 (Argentina); and para. 30 (Venezuela).

⁷⁰ See paragraph 23 above.

⁷¹ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting, para. 52 (United States); 15th meeting, para. 98 (Argentina); 20th meeting, para. 62 (Algeria); 21st meeting, para. 5 (Slovenia), and para. 34 (India).

⁷² Short of constantly reworking the guidelines adopted, which would delay the work of the Commission considerably, those suggestions cannot be reflected until the second reading, in accordance with current practice. Nevertheless, these comments can be of great importance for the future work of the Commission, even on first reading.

⁷³ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 66 (France); and 20th meeting, para. 66 (Switzerland).

⁷⁴ Ibid., 18th meeting, para. 16 (Mexico); and 20th meeting, paras. 74–75 (Mr. Pellet).

⁷⁵ See footnote 58 above.

⁷⁶ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, especially 16th meeting, para. 77 (Czech Republic); 18th meeting, para. 29 (Venezuela); para. 57 (Tunisia); 22nd meeting, para. 45 (Greece); and para. 47 (Bosnia and Herzegovina).

⁷⁷ Ibid., 16th meeting, paras. 81–83 (Czech Republic); 21st meeting, para. 5 (Slovenia); 20th meeting, para. 67 (Switzerland); and 22nd meeting, para. 47 (Bosnia and Herzegovina).

⁷⁸ See the second report (*Yearbook ... 1996* (footnote 21 above), paras. 37–46).

⁷⁹ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 67 (France); and 18th meeting, para. 16 (Mexico).

⁸⁰ Ibid., 20th meeting, para. 66 (Switzerland); and 21st meeting, para. 17 (Bahrain).

⁸¹ Ibid., 16th meeting, para. 77 (Czech Republic).

⁸² See the third report (*Yearbook ... 1998* (footnote 2 above), pp. 249–250, paras. 148–155).

⁸³ See footnote 45 above.

⁸⁴ See footnote 46 above.

⁸⁵ See *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, inter alia, 16th meeting, para. 68 (France); 18th meeting, para. 17 (Mexico); para. 34 (Italy); 21st meeting, para. 17 (Bahrain) (Bahrain, however, expressed reservations about a point in the commentary expressly approved of by France (ibid., 16th meeting, para. 68 that will warrant consideration during the examination of the section of this report concerning the formulation of reservations); and 22nd meeting, para. 46 (Greece).

yond situations of colonialism⁸⁶ and another made some proposals for drafting changes.⁸⁷

33. Subject to the possibility of referring to notifications of succession in cases of State succession,⁸⁸ draft guideline 1.1.2 met with unanimous approval,⁸⁹ as did guidelines 1.1.4⁹⁰ and 1.1.7, with several delegations expressly stating approval of their contribution to the progressive development of international law.⁹¹

34. The several delegations which commented on the unnumbered “safeguard” draft guideline also expressed approval of it.⁹²

35. Many delegations responded to the question posed in paragraph 41 of the report of the Commission on the work of its fiftieth session.⁹³ The Committee was unanimous in its view that, as the Special Rapporteur had suggested,⁹⁴ a unilateral declaration by which a State (or an international organization) takes on obligations beyond those imposed by a treaty does not constitute a reservation;⁹⁵ however, in well-argued statements, several delegations showed that a different situation could be if the reserving State intended to substitute one obligation for another.⁹⁶

36. With regard to unilateral statements by which a State intended to increase the rights imposed on it under the treaty, the responses were more subtle, confirming the sensitivity of the problem, which the Commission had come up against at its fiftieth session in 1998.⁹⁷ The general feeling seems to be, however, that while the problem must be addressed expressly with a view to removing all ambiguity,⁹⁸ such statements do not constitute reserva-

⁸⁶ *Ibid.*, 18th meeting, para. 17 (Mexico); Mexico extended this observation to draft guideline 1.1.4.

⁸⁷ *Ibid.*, 20th meeting, para. 68 (Switzerland).

⁸⁸ *Ibid.*, 16th meeting, para. 82 (Czech Republic); and 20th meeting, para. 67 (Switzerland). See footnote 76 above.

⁸⁹ *Ibid.*, 16th meeting, inter alia, para. 68 (France); 18th meeting, para. 16 (Mexico); para. 29 (Venezuela); and 21st meeting, para. 17 (Bahrain).

⁹⁰ *Ibid.*, 21st meeting, para. 18 (Bahrain); and 22nd meeting, para. 46 (Greece).

⁹¹ *Ibid.*, 16th meeting, para. 84 (Czech Republic); 18th meeting, para. 18 (Mexico); para. 34 (Italy); 20th meeting, para. 69 (Switzerland); 21st meeting, para. 18 (Bahrain); and 22nd meeting, para. 46 (Greece).

⁹² *Ibid.*, 16th meeting, para. 70 (France); 19th meeting, para. 27 (Singapore); Bahrain, however, felt that the question of the definition could not be separated from that of the permissibility of reservations (*ibid.*, 21st meeting, para. 19); on this point see paragraph 26 above.

⁹³ *Yearbook ... 1998*, vol. II (Part Two), p. 18. The question was posed as follows:

“The Commission would welcome comments and observations by Governments on whether unilateral statements by which a State purports to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself, would or would not be considered as reservations.”

⁹⁴ *Ibid.*, vol. II (Part One) (see footnote 2 above), pp. 257–258, paras. 208–212.

⁹⁵ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 13th meeting, para. 50 (Mali); and 16th meeting, para. 69 (France).

⁹⁶ *Ibid.*, 17th meeting, para. 18 (Israel); para. 26 (Japan); and 20th meeting, para. 41 (Guatemala).

⁹⁷ See paragraph 20 above.

⁹⁸ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 69 (France); and 20th meeting, para. 70 (Switzerland) (Switzerland stressed the usefulness of draft

tions within the meaning of treaty law which is therefore not applicable to them.⁹⁹ Some delegations said that, consequently, they were subject to the application of general rules concerning unilateral acts.¹⁰⁰ It was also noted in that regard that a distinction must be made according to the customary or exclusively conventional nature of the obligation in respect of which the reservation was made.¹⁰¹

37. These elements will be particularly valuable to the Commission during its fifty-first session in 1999, when it re-examines draft guidelines 1.1.5 and 1.1.6.

38. The same will be true for the several comments which were made on the subject of draft guideline 1.1.7 (according to the numbering used by the Special Rapporteur) on “Reservations relating to non-recognition”, which the Commission will continue to examine in 1999.¹⁰² Unfortunately, there have been just a few comments; all that can be concluded from them is that, in the view of the delegations making statements, the matter should be the subject of a guideline in the Guide to Practice.¹⁰³ Two delegations believed that the matter had more to do with State recognition under international law than with treaty law.¹⁰⁴

(c) *Action by other bodies*

39. In his third report, the Special Rapporteur drew attention to another sign of the interest in the topic of reservations to treaties demonstrated by the action taken by two bodies with which the Commission had a cooperative relationship: the Council of Europe and AALCC.¹⁰⁵ These bodies continued their exploration of the topic in 1998–1999.

40. He had mentioned in the third report that AALCC had given special consideration to the question of reservations to treaties during its thirty-seventh session, held in New Delhi from 13 to 18 April 1998, under the chairmanship of Mr. P. S. Rao.¹⁰⁶ During that session, a special meeting devoted to reservations to treaties, also chaired by Mr. Rao, was held on 14 April 1998. Mr. Yamada attended on behalf of the Chairman of the Commission and the Special Rapporteur for the topic of reservations to treaties.

guideline 1.1.5, but had more doubts about guideline 1.1.6). Only two States, Austria (*ibid.*, 15th meeting, para. 16) and Sweden, on behalf of the Nordic countries (*ibid.*, 17th meeting, para. 4), saw the problem as theoretical.

⁹⁹ *Ibid.*, 16th meeting, para. 69 (France); 18th meeting, para. 18 (Mexico); para. 34 (Italy); para. 58 (Tunisia); 20th meeting, para. 10 (Islamic Republic of Iran); para. 42 (Guatemala); 21st meeting, para. 18 (Bahrain); 22nd meeting, para. 12 (Australia); and para. 42 (Slovakia).

¹⁰⁰ *Ibid.*, 20th meeting, para. 42 (Guatemala); 22nd meeting, para. 12 (Australia); and para. 42 (Slovakia).

¹⁰¹ *Ibid.*, 16th meeting, para. 69 (France); and 18th meeting, para. 58 (Tunisia).

¹⁰² See paragraphs 44–54 below.

¹⁰³ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 17th meeting, para. 18 (Israel); and para. 26 (Japan).

¹⁰⁴ *Ibid.*, 18th meeting, para. 24 (Germany); and 22nd meeting, para. 46 (Greece).

¹⁰⁵ *Yearbook ... 1998* (see footnote 2 above), p. 233, paras. 27–30.

¹⁰⁶ *Ibid.*, para. 30.

41. According to the report prepared by Mr. W. Z. Kamil,¹⁰⁷ who had been appointed rapporteur of this special meeting, the participants focused particular attention on the Commission's preliminary conclusions adopted in 1997.¹⁰⁸ Their discussions resulted in the following consensus views:

(a) The regime for reservations under the 1969 Vienna Convention has proved effective and does not need to be changed;

(b) In particular, it is sufficiently flexible and it satisfactorily ensures both the right of States to enter reservations and the necessary preservation of the object and purpose of the treaty;

(c) It would be better not to introduce differences in the regime applicable to different categories of treaties, including those on human rights; and, hence,

(d) Most of the participants opposed paragraph 5 of the preliminary conclusions.¹⁰⁹

42. For its part, the Group of Specialists on Reservations to International Treaties (DI-S-RIT), whose terms of reference were approved by the Committee of Ministers of the Council of Europe,¹¹⁰ continued its work and held a meeting in Paris from 14 to 16 September 1998, under the coordination of its Chairman, the representative of Austria. During that meeting, the Group engaged in a rapid exchange of views with the Special Rapporteur on the progress of the Commission's work, and heard a communication from Mr. Pierre-Henri Imbert, Director of Human Rights of the Council of Europe and an eminent specialist on the question of reservations to treaties. It also considered "Model-objection clauses to reservations to international treaties considered inadmissible", prepared by the delegation of Sweden, and a document submitted by the Netherlands entitled "Key issues regarding reservations at the various stages of the process of concluding treaties (negotiation, signature and ratification) and post-ratification stage".

43. At its meeting held in Vienna on 5 March 1999, the Group, which had since become the Group of Experts on Reservations to International Treaties (DI-E-RIT), adopted a draft recommendation on reactions to inadmissible reservations to international treaties, together with an explanatory memorandum, which was transmitted to the Ad Hoc Committee of the Committee of Legal Advisers on Public International Law (CAHDI).¹¹¹ If this draft is adopted, the Committee of Ministers of the Council of Europe will call upon the Governments of Member States to be guided by the model response clauses to reservations, contained in the appendix to the recommendation.¹¹²

¹⁰⁷ *AALCC Bulletin*, vol. 22, issue No. 1 (New Delhi, June 1998), pp. 12–18. This same publication contains a summary of the portion of the Commission's report on reservations.

¹⁰⁸ See paragraph 7 above.

¹⁰⁹ *AALCC Bulletin* (see footnote 107 above), pp. 15–17.

¹¹⁰ See *Yearbook ... 1998* (footnote 2 above), p. 233, para. 28.

¹¹¹ See Council of Europe, CAHDI, document DI-E-RIT (99) 6 (Strasbourg, 16 August 1999), in particular the draft recommendation addressed to the Committee of Ministers (appendix 3, p. 12).

¹¹² *Ibid.*

(d) *Reconsideration of the draft guideline relating to "statements of non-recognition"*

44. Although the Commission decided to refer draft guideline 1.1.7 on reservations relating to non-recognition¹¹³ to the Drafting Committee, the latter did not consider it. Taking into account the particular circumstances surrounding the referral and the fact that the Drafting Committee would have the responsibility of taking decisions in principle that would go considerably beyond its competence, the Special Rapporteur thought it would be useful to take up the question in this report, as he believed he had made a mistake in regard to it.

45. As mentioned above,¹¹⁴ in his third report the Special Rapporteur had proposed a draft guideline 1.1.7 on "reservations relating to non-recognition". It read as follows:

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.¹¹⁵

46. In support of this proposal, the Special Rapporteur had indicated that, in his view, statements generally known as "reservations relating to non-recognition" were actually divided into two categories:¹¹⁶ in some cases, States take a simple "precautionary step" by noting that their accession to a treaty to which an entity they do not recognize as a State is also a party does not amount to recognition, in accordance with a well-established practice; in other cases, States expressly exclude the application of the treaty between them and the non-recognized entity. While, in the first case, there can be no doubt that the statements in question, which actually have no effect on the application of the treaty, do not constitute reservations, the Special Rapporteur had initially believed that this was not true for the second category of unilateral statements. The premise for that conclusion had been that the Vienna definition¹¹⁷ does not preclude the possibility that a reservation could have an effect *ratione personae*.

47. Differing views were expressed during the Commission's discussion of the topic at its fiftieth session in 1998.¹¹⁸ Some speakers agreed with the distinction made by the Special Rapporteur.¹¹⁹ Nonetheless, the overall tone of the debate was clearly leading to a conclusion that was opposite from the one he had initially reached.

¹¹³ See *Yearbook ... 1998*, vol. I, 2551st meeting, p. 220, para. 29.

¹¹⁴ See paragraph 19 above.

¹¹⁵ *Yearbook ... 1998* (footnote 2 above), p. 253, para. 177.

¹¹⁶ *Ibid.*, pp. 250–253, paras. 154–176.

¹¹⁷ *Yearbook ... 1998*, vol. II (Part Two), p. 99, para. 540: draft guideline 1.1, interpreted by draft guideline 1.1.1, adopted (the latter, provisionally) by the Commission in 1998.

¹¹⁸ *Ibid.*, vol. I, 2550th and 2551st meetings, pp. 212 et seq., and the summary of the debates in the report of the Commission (*ibid.*, vol. II (Part Two), pp. 97–98, paras. 527–532).

¹¹⁹ *Ibid.*, vol. I, 2550th meeting, p. 215, para. 34 (Mr. Yamada who also raised the question of whether a State could exclude all contractual relations with another State that it recognized and seemed to feel that the reply to that question was "yes"); 2551st meeting, p. 219, para. 20 (Mr. Simma); see also page 218, para. 12 (Mr. Hafner).

48. It was held that:

(a) The reservations regime, particularly the regime for objections, would be extremely difficult to apply to “reservations relating to non-recognition”;¹²⁰

(b) Similarly, it follows from practice that such statements are often made in reference to a treaty that categorically excludes reservations;¹²¹

(c) Such statements excluding the application of the entire treaty between the two States concerned would not be in keeping with the Vienna definition;¹²²

(d) They do not concern the application of the treaty, but rather deny an entity the capacity to be bound by a treaty;¹²³ and

(e) They would be of a “political” nature.¹²⁴

It was also observed that the possibility that such statements could be made at any time, as implied by the Special Rapporteur’s proposed wording,¹²⁵ would give rise to serious complications and would be contrary to the general definition of reservations.¹²⁶

49. In view of these difficulties, some speakers proposed that statements of non-recognition should not be dealt with in the Guide to Practice.¹²⁷ The Special Rapporteur believes, however, that the difficulties brought out by the debate do not necessarily imply that the Guide to Practice should be silent on the nature of such statements. He believes that precisely because the problem is difficult and important a clear solution should be adopted.¹²⁸ He is, however, receptive to the argument that the main problem here is one of non-recognition, which is tangential to the law on reservations.¹²⁹ Thus, the draft guideline that the Commission adopts on this point must be strictly confined to what is necessary within that narrow context and should not “spill over” into questions relating to the recognition of States in general and the effects of non-recognition.

¹²⁰ Ibid., 2550th meeting, pp. 213–214, para. 16 (Mr. Bennouna); p. 214, paras. 21–22 (Mr. Galicki); p. 215, paras. 32–33 (Mr. Simma); and p. 216, paras. 40–41 (Mr. Mikulka).

¹²¹ Ibid., p. 216, paras. 40–41 (Mr. Mikulka); and para. 42 (Mr. Rodríguez Cedeño).

¹²² Ibid., pp. 213–214, para. 16 (Mr. Bennouna); p. 214, paras. 21–22 (Mr. Galicki); p. 215, paras. 29–31 (Mr. Economides); p. 216, para. 39 (Mr. Addo); and paras. 40–41 (Mr. Mikulka).

¹²³ Ibid., p. 214, para. 17 (Mr. Brownlie); p. 215, paras. 29–31, and 2551st meeting, p. 218, para. 10 (Mr. Economides); and p. 219, para. 17 (Mr. He).

¹²⁴ Ibid., 2550th meeting, p. 214, para. 20 (Mr. Hafner); p. 215, paras. 27–28 (Mr. Pambou-Tchivounda); p. 216, para. 43 (Mr. He); and 2551st meeting, p. 217, para. 2 (Mr. Illueca).

¹²⁵ See paragraph 45 above.

¹²⁶ *Yearbook ... 1998*, vol. I, 2550th meeting, p. 214, para. 18 (Mr. Lukashuk); paras. 21–22 (Mr. Galicki); p. 215, paras. 27–28 (Mr. Pambou-Tchivounda); paras. 29–30 (Mr. Economides); and 2551st meeting, p. 217, para. 1 (Mr. Rosenstock).

¹²⁷ Ibid., 2550th meeting, p. 215, para. 36 (Mr. Crawford); and p. 216, para. 38 (Mr. Elaraby).

¹²⁸ This view is held by Mr. Dugard (ibid., p. 214, paras. 24–26); Mr. Lukashuk (ibid., 2551st meeting, p. 217, para. 3); Mr. Economides (ibid., p. 218, para. 10); Mr. He (ibid., p. 219, para. 17); Mr. Mikulka (ibid., para. 19); and Mr. Goco (ibid., p. 220, para. 27).

¹²⁹ *Yearbook ... 1998*, vol. I, 2550th meeting, p. 214, para. 17 (Mr. Brownlie); see also 2551st meeting, pp. 218–219, para. 15.

50. What is most important in this regard is that the Commission should determine whether or not statements of non-recognition constitute reservations (or interpretative declarations). From this standpoint, it is not very useful to specify that we are dealing with *sui generis* acts:¹³⁰ apart from the fact that taking refuge in the concept of *sui generis* is always a solution of last resort and an admission of helplessness, this amounts to saying that we are not dealing with reservations, which is sufficient for the purposes of this draft. It would be different if, as was suggested,¹³¹ the question were one of interpretative declarations; this description, however, does not appear to be very convincing: such declarations are aimed at specifying or clarifying the meaning attributed by the declarant to the treaty or to certain of its provisions¹³² and this is not the case with statements of non-recognition, which have an effect on the application of a treaty but in no way interpret it.

51. The Special Rapporteur is not entirely convinced by some of the arguments against describing as statements of non-recognition reservations aimed at excluding the application of the treaty as between their author and the non-recognized entity. Thus, he does not believe that the inevitably political grounds for making such statements constitute a factor that could be used to distinguish them from reservations: the latter, too, are often politically motivated but they are reservations nonetheless. Similarly, it follows from draft guideline 1.1.1, provisionally adopted by the Commission during its fiftieth session,¹³³ that there can be “across-the-board” reservations which concern the application of the treaty as a whole; he finds this assertion hard to challenge, as that would risk calling into question an extremely widespread practice which, in itself, has never been disputed.¹³⁴ The Special Rapporteur is also well aware that, through an objection, accompanied by a clearly worded refusal to be bound by the treaty with respect to the reserving State, an objecting State can prevent the entry into force of the treaty as between itself and the reserving State, in accordance with the provisions of article 20, paragraph 4 (b), of the 1969 Vienna Convention;¹³⁵ there seems to be no prima facie reason why this could not be accomplished through a reservation as well.

52. However, the other arguments made in 1998, during the fiftieth session of the Commission regarding the use of the word “reservations” to refer to such statements, are extremely convincing.¹³⁶ One such argument involves the difficulty, and indeed the impossibility, of applying

¹³⁰ Ibid., 2550th meeting, p. 214, paras. 24–26 (Mr. Dugard); p. 216, paras. 44–45 (Mr. Al-Baharna); see also the statement by Mr. Economides, which contemplates referring to statements of non-recognition as “acts that can be classified as reservations” (p. 215, paras. 29–31); and Mr. Goco, (p. 216, para. 37).

¹³¹ Ibid., pp. 213–214, para. 16 (Mr. Bennouna).

¹³² In this connection, see the statement by Mr. Rosenstock (ibid., 2551st meeting, p. 234, para. 25). See also draft guideline 1.2 in the third report (*Yearbook ... 1998* (footnote 2 above), p. 277, para. 354).

¹³³ See paragraph 20 above.

¹³⁴ See the third report (*Yearbook ... 1998* (footnote 2 above), pp. 249–250, paras. 148–158) and the commentary to draft guideline 1.1.1 (*Yearbook ... 1998*, vol. II (Part Two), p. 99, para. 540).

¹³⁵ See the statements by Mr. Yamada and Mr. Hafner, mentioned in footnote 118 above.

¹³⁶ Although they were not pursued in the Sixth Committee’s discussions (see paragraph 38 above).

the reservation regime in such cases and the sensitive problems which would result from potential objections to them. Similarly, it would be unreasonable to conclude that such statements are prohibited under articles 19 (a) and (b) of the 1969 and 1986 Vienna Conventions if the treaty in question prohibits, or permits only certain types of, reservations.¹³⁷ Moreover, from a more theoretical point of view, such statements, unlike reservations, do not concern the treaty itself or its provisions but rather, as several Commission members have emphasized, the capacity of the non-recognized entity to be bound by the treaty.¹³⁸

53. Thus, the only reasonable solution appears to be to take a position contrary to that proposed in the third report and to specify in the Guide to Practice that statements of non-recognition, whether “precautionary declarations” or those intended to prevent application of the treaty between their author and the non-recognized entity, do not constitute either reservations or interpretative declarations.¹³⁹ Such a guideline, provisionally numbered,¹⁴⁰ might state:

“1.1.7 *bis*. Statements of non-recognition

“A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize as a State does not constitute either a reservation or an interpretative declaration, even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.”

54. The Special Rapporteur realizes that this proposition, expressed in the negative, may be somewhat “frustrating”; however, as has been noted,¹⁴¹ this is not an isolated case¹⁴² and that conclusion, reached by the great majority of the members of the Commission, corresponds to the function of the section of the Guide to Practice devoted to definitions: it makes it possible to determine whether a unilateral statement, “however phrased or named”, constitutes a reservation, subject to application of the rules applicable to reservations. This is not the case with “reservations relating to non-recognition”.

¹³⁷ Furthermore, it must be acknowledged that recognizing them as reservations is incompatible with the literal definition provided by the Vienna Conventions since the cases in which such declarations may be made cannot be limited to those covered by article 2, paragraph 1 (d) of the 1969 Vienna Convention. In the Special Rapporteur’s view, however, this argument is not conclusive since, as shown by draft guideline 1.1.2, adopted by the Committee, and by the discussion of reservations made at the time of State succession (see, *inter alia*, *Yearbook ... 1998*, vol. II (Part Two), pp. 62–63, para. 224; see also footnote 77 above), the list of cases where a reservation may be made that appears in article 2, paragraph 1 (d), of the Vienna Convention is not exhaustive.

¹³⁸ See footnote 123 above.

¹³⁹ In addition to the numerous statements mentioned above, see that of Mr. Economides (*Yearbook ... 1998*, vol. I, 2551st meeting, pp. 217–218, para. 10); see also the Special Rapporteur’s statements (*ibid.*, pp. 217–219, paras. 5, 9 and 16–21).

¹⁴⁰ Since it specifies that the statements in question are neither reservations nor interpretative declarations, it would probably be logical to insert this text after the draft guidelines on interpretative declarations.

¹⁴¹ By Mr. Galicki (*Yearbook ... 1998*, vol. I, 2551st meeting, p. 219, para. 24).

¹⁴² See, for example, draft guidelines 1.1.5 and 1.1.9 (*Yearbook ... 1998* (footnote 2 above), p. 299, para. 512).

B. General presentation of the fourth report

55. Following the consideration of the first report on reservations to treaties, the Special Rapporteur concluded that:

(b)¹⁴³ 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 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.¹⁴⁴

56. These conclusions met with general approval both in the Sixth Committee and in the Commission itself, and they were not called into question during consideration of the second and third reports.¹⁴⁵ The Special Rapporteur views the conclusions as general guidelines to be used as a basis for consideration of the topic.

57. This report has been prepared according to the general method described in the third report on reservations to treaties.¹⁴⁶ This method is

(a) Empirical (the Special Rapporteur is unable to analyse the extensive documentation on the subject¹⁴⁷ as systematically as he might wish);

(b) “Viennese” (these arguments are consistently based on the three Vienna Conventions of 1969, 1978 and 1986, whose text, preparatory work, lacunae and implementation are described as systematically as possible); and

(c) “Composite” insofar as the relevant provisions of the Vienna Conventions have been combined wherever possible into single guidelines which have been reproduced at the beginning of the various sections of the Guide to Practice.

58. The third report, devoted to the definition of reservations, covered the majority of part two of the provisional plan of the study set forth in chapter I of the second report.¹⁴⁸ Two of the planned sections, “Distinction between reservations and other procedures aimed at modifying the application of treaties” and “The legal regime of interpretative declarations”, have, however, been omitted for different reasons.

¹⁴³ Subparagraph (a) concerned the amendment of the title of the topic; the original title was “The law and practice relating to reservations to treaties”.

¹⁴⁴ *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487.

¹⁴⁵ *Yearbook ... 1997*, vol. II (Part Two), pp. 52–53, paras. 116–123.

¹⁴⁶ *Yearbook ... 1998* (see footnote 2 above), pp. 233–235, paras. 31–41.

¹⁴⁷ Despite the valuable assistance of the secretariat; the Special Rapporteur takes this opportunity to convey his deep appreciation.

¹⁴⁸ *Yearbook ... 1996* (see footnote 21 above), para. 37.

59. In the second case, the omission was deliberate. As the Special Rapporteur indicated in his third report,¹⁴⁹ the legal regime for interpretative declarations poses complex problems that could not have been solved without lengthy consideration by the Commission at the cost of delaying its discussion of the problems relating to reservations. The fact that the rules applicable to interpretative declarations can be defined only by comparison with those relating to reservations makes such an approach seem even more illogical. This is particularly true in the case of conditional interpretative declarations, which it would doubtless not be excessive to consider “quasi-reservations”¹⁵⁰ and where it must be determined to what extent they correspond to the legal regime applicable to reservations and to what extent they vary from it (if they do so at all, which is not certain). Therefore, the Special Rapporteur stated in his third report that he planned systematically to present the draft articles of the Guide to Practice relating to the legal regime of interpretative declarations at the same time as the corresponding provisions relating to reservations.¹⁵¹ This proposal met with the approval of both the members of the Commission who spoke on the matter¹⁵² and the Sixth Committee.¹⁵³ Thus, that approach will be followed in this and any subsequent report.

¹⁴⁹ *Yearbook ... 1998* (see footnote 2 above), p. 235, para. 45.

¹⁵⁰ See the discussion of this issue in the third report (*ibid.*, pp. 271–275, paras. 306–327 and 337–339, and pp. 280–281, paras. 381–391); see also the views expressed by Mr. Kateka (*Yearbook ... 1998*, vol. I, 2552nd meeting, p. 225, paras. 24–27), Mr. Illueca (*ibid.*, pp. 226–227, paras. 39–43) and Mr. Addo (*ibid.*, p. 227, para. 44).

¹⁵¹ *Yearbook ... 1998* (see footnote 2 above), p. 235, para. 46.

¹⁵² *Yearbook ... 1998*, vol. I, 2552nd meeting. See the statements made by Mr. Brownlie (p. 225, para. 32), Mr. Simma (p. 226, para. 37), Mr. Al-Baharna (p. 227, para. 45), Mr. Herdocia Sacasa (para. 46), Mr. Economides (para. 47), Mr. Bennouna (para. 48) and Mr. Galicki (para. 49). See also *Yearbook ... 1998*, vol. II (Part Two), p. 98, paras. 533–539.

¹⁵³ See paragraph 27 above.

60. The second omission mentioned in the third report, which did not comment on the distinction between reservations and other procedures purporting to modify the application of treaties, is entirely fortuitous and is simply the consequence of insufficient time. This question will therefore be the subject of chapter I of the report.¹⁵⁴

61. In accordance with the above-mentioned provisional general outline,¹⁵⁵ the following chapters will be devoted, respectively, to the formulation and withdrawal of reservations, the formulation of acceptances of reservations and the formulation and withdrawal of objections to reservations and to the corresponding rules governing interpretative declarations.

62. In addition, time permitting, the Special Rapporteur will devote a final chapter of this report to an overview of the issues raised by the effects of reservations (and of interpretative declarations), their acceptance and objections to them.

63. This report will thus be organized as follows:

- (a) Chapter I: Alternatives to reservations;
- (b) Chapter II: Formulation and withdrawal of reservations and interpretative declarations;
- (c) Chapter III: Formulation of acceptance of reservations;
- (d) Chapter IV: Formulation and withdrawal of objections to reservations and interpretative declarations;
- (e) [Chapter V: Effects of reservations, acceptances and objections—overview].

¹⁵⁴ To be reproduced in *Yearbook ... 2000*, vol. II (Part One).

¹⁵⁵ See paragraph 58 above.

ANNEX

DOCUMENT A/CN.4/478/Rev.1

BIBLIOGRAPHY

[Original: French]
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FORMAT

	<i>Page</i>
A. General studies on reservations.....	140
B. Studies on particular aspects of the problems of reservations.....	142
1. LAWFULNESS, OPPOSABILITY AND EFFECTS OF RESERVATIONS	142
(a) Pan-American practice.....	142
(b) Commentaries on the 1951 ICJ advisory opinion	142
(c) Commentaries on the work of the International Law Commission in regard to reservations.....	143
(d) Commentaries on the provisions of the Vienna Convention on the Law of Treaties	143
(e) Consolidated studies	143
2. RESERVATIONS TO SPECIFIC CONVENTIONS.....	144
(a) Reservations and human rights and humanitarian law conventions	144
(i) General problems.....	144
(ii) Reservations to particular human rights or humanitarian law conventions.....	145
a. Geneva Conventions	145
b. European Convention on Human Rights	145
c. International Covenant on Civil and Political Rights	146
d. Convention on the Elimination of All Forms of Discrimination against Women	146
e. Convention on the Rights of the Child	146
f. Other human rights conventions.....	147
(b) Reservations to other codification conventions.....	147
(i) General problems.....	147
(ii) Reservations to private international law conventions.....	147
(iii) Reservations to specific conventions.....	147
a. Law of treaties.....	147
b. Law of the sea	147
(c) Reservations to other specific conventions.....	148
(d) Reservations to the optional clause concerning compulsory jurisdiction of ICJ.....	148
3. STUDY OF PRACTICE CONCERNING RESERVATIONS	149
(a) State practice.....	149
(b) Practice of international organizations	149

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NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

[Agenda item 6]

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CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report.....	155
INTRODUCTION.....	155
<i>Chapter</i>	
I. COMMENTS AND OBSERVATIONS RECEIVED FROM GOVERNMENTS ON THE DRAFT ARTICLES ON NATIONALITY OF NATURAL PERSONS IN RELATION TO THE SUCCESSION OF STATES	156
<i>General remarks</i>	156
Argentina	156
Czech Republic	156
Finland (on behalf of the Nordic countries).....	156
France.....	156
Greece	157
Italy	158
Switzerland.....	158
<i>Form that the draft articles should take</i>	159
Czech Republic	159
Finland (on behalf of the Nordic countries).....	159
France.....	159
Switzerland.....	160
<i>Structure of the draft articles</i>	160
Argentina	160
Czech Republic	160
Switzerland.....	160
<i>Preamble</i>	160
PART I. GENERAL PROVISIONS	160
Argentina	160
<i>Article 1 (Right to a nationality)</i>	160
Argentina	160
Brunei Darussalam.....	161
Czech Republic	161
Finland (on behalf of the Nordic countries).....	161
France.....	161
Greece	161
Guatemala	161
Italy	161
Switzerland.....	161

* Incorporating document A/CN.4/493/Corr.1.

	<i>Page</i>
<i>Article 2 (Use of terms)</i>	162
Guatemala	162
Switzerland.....	162
<i>Article 3 (Prevention of statelessness)</i>	162
Argentina	162
Brunei Darussalam.....	162
Czech Republic	162
Finland (on behalf of the Nordic countries)	162
France	162
Guatemala	162
Italy.....	162
Switzerland.....	162
<i>Article 4 (Presumption of nationality)</i>	162
Brunei Darussalam.....	162
Czech Republic	163
Greece	163
Guatemala	163
Italy.....	164
Switzerland.....	164
<i>Article 5 (Legislation concerning nationality and other connected issues)</i>	164
Argentina	164
Brunei Darussalam.....	164
Czech Republic	164
France	164
Switzerland.....	164
<i>Article 6 (Effective date)</i>	165
Brunei Darussalam.....	165
Finland (on behalf of the Nordic countries)	165
Greece	165
Switzerland.....	165
<i>Article 7 (Attribution of nationality to persons concerned having their habitual residence in another State)</i> ..	165
Czech Republic	165
Finland (on behalf of the Nordic countries)	165
France	165
Guatemala	165
Switzerland.....	165
<i>Article 8 (Renunciation of the nationality of another State as a condition for attribution of nationality)</i> ...	165
Brunei Darussalam.....	165
Czech Republic	165
Finland (on behalf of the Nordic countries)	166
France	166
Greece	166
<i>Article 9 (Loss of nationality upon the voluntary acquisition of the nationality of another State)</i>	166
Czech Republic	166
France	166
Greece	166
Switzerland.....	166
<i>Article 10 (Respect for the will of persons concerned)</i>	166
Argentina	166
Brunei Darussalam.....	166
Czech Republic	166
Finland (on behalf of the Nordic countries)	166
France	166
Greece	167
Guatemala	167
Italy.....	167

	<i>Page</i>
<i>Article 11 (Unity of a family)</i>	167
Brunei Darussalam	167
Czech Republic	167
Finland (on behalf of the Nordic countries)	167
France	167
Italy	167
<i>Article 12 (Child born after the succession of States)</i>	167
Brunei Darussalam	167
Czech Republic	167
France	167
Greece	168
Italy	168
Switzerland	168
<i>Article 13 (Status of habitual residents)</i>	168
Czech Republic	168
Finland (on behalf of the Nordic countries)	168
France	168
Italy	168
Switzerland	168
<i>Article 14 (Non-discrimination)</i>	168
Argentina	168
Brunei Darussalam	168
Czech Republic	168
Finland (on behalf of the Nordic countries)	169
Greece	169
Italy	169
Switzerland	169
<i>Article 15 (Prohibition of arbitrary decisions concerning nationality issues)</i>	169
Argentina	169
Brunei Darussalam	169
Czech Republic	169
Finland (on behalf of the Nordic countries)	169
Italy	169
<i>Article 16 (Procedures relating to nationality issues)</i>	170
Czech Republic	170
Finland (on behalf of the Nordic countries)	170
France	170
<i>Article 17 (Exchange of information, consultation and negotiation)</i>	170
Czech Republic	170
Finland (on behalf of the Nordic countries)	170
<i>Article 18 (Other States)</i>	170
Czech Republic	170
Finland (on behalf of the Nordic countries)	170
France	171
Greece	171
Guatemala	171
Italy	171
Switzerland	171
PART II. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES	171
Argentina	171
Finland (on behalf of the Nordic countries)	172
France	172
Italy	172
Switzerland	172
<i>Article 19 (Application of Part II)</i>	172
Czech Republic	172

	<i>Page</i>
Greece	172
Guatemala	173
Section 1. Transfer of part of the territory	173
<i>Article 20 (Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State)</i>	173
Argentina	173
Brunei Darussalam	173
Czech Republic	173
France	173
Greece	174
Guatemala	174
Switzerland	174
Section 2. Unification of States	174
<i>Article 21 (Attribution of the nationality of the successor State)</i>	174
Greece	174
Section 3. Dissolution of a State	174
<i>Article 22 (Attribution of the nationality of the successor State)</i>	174
Brunei Darussalam	174
France	174
Greece	174
Guatemala	174
Italy	175
Switzerland	175
<i>Article 23 (Granting of the right of option by the successor States)</i>	175
Czech Republic	175
France	175
Greece	175
Guatemala	175
Section 4. Separation of part or parts of the territory	175
<i>Article 24 (Attribution of the nationality of the successor State)</i>	175
Brunei Darussalam	175
Greece	175
Guatemala	175
Switzerland	176
<i>Article 25 (Withdrawal of the nationality of the predecessor State)</i>	176
Brunei Darussalam	176
Greece	176
<i>Article 26 (Granting of the right of option by the predecessor and the successor States)</i>	176
Czech Republic	176
Greece	176
<i>Article 27 (Cases of succession of States covered by the present draft articles)</i>	176
Argentina	176
Finland (on behalf of the Nordic countries)	176
Greece	176
Switzerland	176
II. COMMENTS AND OBSERVATIONS RECEIVED FROM GOVERNMENTS ON THE QUESTION OF THE NATIONALITY OF LEGAL PERSONS IN RELATION TO THE SUCCESSION OF STATES	176
Greece	176

Multilateral instruments cited in the present report

	<i>Source</i>
Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930)	League of Nations, <i>Treaty Series</i> , vol. CLXXIX, p. 89.
Convention on the Nationality of Married Women (New York, 20 February 1957)	Ibid., vol. 309, No. 4468, p. 65.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	Ibid., vol. 360, No. 5188, p. 117.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966)	Ibid., vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, No. 14668, p. 171.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	Ibid., vol. 1144, No. 17955, p. 123.
International Convention on the Suppression and Punishment of the Crime of <i>Apartheid</i> (New York, 30 November 1973)	Ibid., vol. 1015, No. 14861, p. 243.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	Ibid., vol. 1946, No. 33356, p. 3.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	Ibid., vol. 1249, No. 20378, p. 13.
Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983)	<i>Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts</i> , vol. II (United Nations publication, Sales No. E.94.V.6).
Convention on the Rights of the Child (New York, 20 November 1989)	United Nations, <i>Treaty Series</i> , vol. 1577, No. 27531, p. 3.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990)	<i>Official Records of the General Assembly, Forty-fifth Session, Supplement No. 49, resolution 45/158, annex.</i>
European Convention on Nationality (Strasbourg, 6 November 1997)	Council of Europe, <i>European Treaty Series</i> , No. 166.

Introduction

1. On 15 December 1997, the General Assembly adopted resolution 52/156, entitled "Report of the International Law Commission on the work of its forty-ninth session". In paragraph 2 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 nationality of natural persons in relation to the succession of States adopted on first reading by the Commission¹ and urged them to submit their comments and observations in writing by 1 October 1998. In paragraph 5 of the resolution, the Assembly invited 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 Commission in deciding on its future work on that portion of the topic "Nationality in relation to the succession of States".

¹ The text of the draft articles with commentaries thereto may be found in *Yearbook ... 1997*, vol. II (Part Two), pp. 14-43.

2. By a note dated 31 December 1997, the Secretary-General invited Governments to submit their comments pursuant to paragraphs 2 and 5 of General Assembly resolution 52/156.

3. As at 4 December 1998, replies had been received from the following nine States (on the dates indicated): Argentina (13 November 1998); Brunei Darussalam (9 October 1998); Czech Republic (14 September 1998); Finland (on behalf of the Nordic Countries) (29 September 1998); France (30 October 1998); Greece (1 September 1998); Guatemala (11 June 1998); Italy (26 October 1998); and Switzerland (27 November 1997). The comments and observations relating to the draft articles on nationality of natural persons in relation to the succession of States are reproduced in chapter I below, in an article-by-article manner. Those pertaining to the question of the nationality of legal persons are reproduced in chapter II.

CHAPTER I

**Comments and observations received from Governments on the draft articles
on nationality of natural persons in relation to the succession of States**

*General remarks***Argentina**

1. Argentina considers that the draft articles on nationality of natural persons in relation to the succession of States provisionally adopted on first reading by the Commission represent a very important contribution to the process of codification and progressive development of international law. An international instrument codifying the legal framework of nationality in relation to the succession of States would supplement the codification work that began with the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws, the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

2. Many of the provisions in the draft draw on and codify existing customary rules, thus reflecting the practice of States and the interpretation of doctrine and jurisprudence.

3. The draft also takes into account more recent trends in international law, particularly in regard to the international protection of human rights.

Czech Republic

1. The Czech Republic wishes to express its appreciation to the Commission for its efforts in producing the draft articles on nationality of natural persons in relation to the succession of States adopted on first reading and commends the Commission for the quality of the work done so far and for its expediency, which enabled it to elaborate this draft while the subject matter was still topical and truly relevant to the current international situation.

2. A complete set of draft articles with commentaries, adopted over a single session of the Commission, is to be saluted as an exceptional achievement, made possible to a large extent thanks to the admirable work accomplished during the phase of the preliminary study of the topic and to the untiring efforts of the Special Rapporteur.

3. By completing this work, the Commission will make a significant contribution to the strengthening of the legal regime of the nationality of natural persons in the case of a succession of States.

4. The Czech Republic has demonstrated its interest in this subject matter by making a number of oral statements pertaining to this part of the Commission's work over the last few years in the Sixth Committee of the General Assembly. In those interventions, the Czech Republic expressed satisfaction with the main thrust of the work accomplished and presented views aimed at improving the text in some very specific areas. It is now pleased to reiterate most of those views and to present some addi-

tional observations, mainly with respect to part II of the draft.

5. When emphasizing the rights and interests of both States and individuals, the Commission has moved considerably beyond the traditional approach to the law of nationality as a matter primarily within the domain of internal law. The Czech Republic has no difficulties in following the Commission on this path, provided that the balance between the interests of States and those of individuals is maintained.

Finland

**(on behalf of the Nordic countries:
Denmark, Iceland, Norway, Sweden and Finland)**

1. The Nordic countries commend the Commission for the expediency and efficiency with which it has been able to produce a comprehensive set of articles in the relatively short time since 1993, when the topic was first inscribed on the Commission's agenda. Upon subsequent finalization, and adoption by the General Assembly, the draft articles on nationality of natural persons in relation to the succession of States will constitute a timely contribution to the development of norms in this notoriously difficult field of law. As the Commission notes in its report,¹ it is a field in which guidance is urgently needed.

2. The Nordic countries welcome the consistent human rights focus throughout the draft. With the development of human rights law since the Second World War, there is an increasing recognition that State discretion in questions relating to nationality must take into account the fundamental rights of individuals. Even though this consideration had been addressed by the Commission right from the beginning, it may not have been followed as consistently in the earlier reports.

3. The Nordic countries are pleased to note that references are made in several parts of the commentary to the new European Convention on Nationality, which was opened for signature in Strasbourg on 7 November 1997 and which, in their view, constitutes an important standard as regards questions of nationality.

¹*Yearbook... 1997*, vol. II (Part Two), p. 18, para. (10) of the commentary to the preamble.

France

1. France believes that the topic is a useful one. The draft articles supplement the 1978 and 1983 Vienna Conventions. But this is a difficult topic to deal with: there are diverging treaty regimes; customary law is unclear; there is little jurisprudence on the subject; and the applicable laws vary according to the category of succession of States concerned, as demonstrated by part II of the draft.

2. With respect to substance, the draft articles are based on three virtually unassailable principles:

(a) Cases of statelessness resulting from a succession of States are to be avoided. In this respect, article 3 is satisfactory from the viewpoint of both form and substance;

(b) States have a right to seek to prevent successions of States from leading to dual and multiple nationality. Article 7 reflects that aim;

(c) Individuals have a right of option.

3. However, some assumptions that strongly influence the draft are questionable:

(a) On the whole, the approach taken in the draft is “interventionist”, if not “dirigiste”. States must not be placed under constraints and sufficient flexibility must be preserved. This is particularly true of everything relating to the right of option. Should the right of option be imposed? It is by no means obvious that the right of option should be promoted and apply everywhere, even though it is in keeping with France’s general approach. If such a right is to be granted, what are the consequences of exercising it to be? The question arises as to whether or not the right of option should be combined with an obligation to move and consequently a repatriation obligation on the part of the predecessor State, if the persons concerned opt for the nationality of the predecessor State. Does exercising the right of option imply renunciation of the nationality of origin? In that respect, article 10, paragraph 4, would appear to be open to criticism as being too categorical. Generally speaking, these problems should be settled by means of bilateral agreements;

(b) The draft establishes a link between the issue of nationality and human rights issues. Article 1 gives the impression that the Commission is seeking to elaborate a text dealing not only with nationality but also with human rights. This article appears to reflect the aim of placing the draft articles in a “human rights perspective”. That notwithstanding, it becomes apparent that the rest of the draft does not draw any specific consequences for the individual from the right that it appears to be granting in article 1. The remainder of the text focuses on the State, not on individuals;

(c) The draft places great emphasis on the principle of the effectiveness of nationality. Even though that principle permeates French law (criteria of domicile and habitual residence), the idea that it exists in this area in international law should not be encouraged. Article 18, paragraph 1, which appears to authorize any State to contest the nationality granted to an individual by another State, is very questionable;

(d) The draft implies that an individual has the right to choose his or her nationality freely. The rights of States with respect to nationality, as compared with those of individuals, should not be limited unduly. Unlike in the case of the approach reflected in article 20, it is essential not to end up with “forum shopping” for nationality and to avoid the “privatization” of nationality, which disregards the public law status of nationality, a matter on which an individual is not free to decide. States must retain control over the attribution of nationality;

(e) Some provisions do not belong in the draft. For example, article 11 would appear to have major implications regarding the law of residence, which is not in keeping with the aim of the draft. Although there is nothing jarring about this provision in substantive terms, it really has no place in the text. Article 12 seems to have a bias towards the principle of *jus soli*. Article 13, which deals more with succession of States and the law of aliens than with nationality, is not in keeping with the goal of the draft and does not belong in the text.

4. In addition, some drafting changes are necessary: some provisions are too detailed; the wording of some articles is particularly unclear in certain instances; in some cases, the articles are not adequately linked with each other; and some binding provisions conflict with optional provisions.

Greece

1. Greece congratulates the Commission and, in particular, Mr. Václav Mikulka, the Special Rapporteur, for having provisionally adopted, in a short period of time, the draft articles on nationality of natural persons in relation to the succession of States.

2. Greece, which has undergone a number of cases of succession in its history, has some experience in this matter and, at this preliminary stage, would like to make a few comments of a general nature as well as some specific remarks.

3. Part I takes more account of recent national solutions than of international law and State practice in this respect. Thus, in this part of the text, we do not find the fundamental rule of the law of succession of States whereby, as of the date of succession, the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by this succession. Articles 4 and 6 move somewhat closer towards this rule, but do not confirm it. However, even though this rule has not been established, it is followed in the specific provisions of part II, articles 20–22 (a) and 24 (a).

4. Furthermore, in part I we do not find the traditional right of option which the successor State is required to grant within a reasonable period of time from the date of succession to certain categories of persons envisaged in the rule quoted above who have effective links with the predecessor State, or, where applicable, with other successor States (as is the case, in particular, of persons who, as a result of the succession of States, become minorities within the new State). Such persons must have the right to choose between the nationality of these States and that of the successor State which takes the initiative with regard to the right of option and organizes it. Instead, article 10, paragraph 2, envisages a limited right of option which gives no other choice to persons than that of choosing the nationality of the State granting the right of option. The above-mentioned traditional right should, however, be reflected in a text drawn up by the Commission.

5. The draft articles should focus more on the succession of States and less on the nationality of natural persons. What is of interest here are the effects of the

succession of States on the nationality of natural persons. It would therefore be worth excluding from the draft some provisions which are a matter of the general policy of States with regard to nationality or have no direct relationship with the question of the succession of States. This is the case, in particular, with articles 8–9, 12 and 25, paragraph 2, which could be omitted from the draft. It also applies to article 18, which concerns an extremely delicate matter—control of States in respect of a competence which is strictly linked to their sovereignty—and is liable to raise more problems than it will resolve.

Italy

1. Italy would first like to pay tribute to the members of the Commission, and in particular to the Special Rapporteur, for the excellent work they have done on the draft articles on nationality in relation to the succession of States.

2. The question of nationality and the question of the succession of States are two extremely important aspects of international law which, in addition to giving rise to extensive doctrinal debates, frequently arise in the daily relations between States, as the practice of recent years has demonstrated.

3. The problem of the nationality of individuals provides a good illustration of the ambiguity of their legal status under international law. The solutions offered for this problem are based on two concerns: above all, to enable a political entity—the State—to control the composition of its population and the extent of its “personal” jurisdiction, but also to accord every individual a degree of freedom of choice in order to avoid violating his or her fundamental rights.

4. The first concern is one of the classical foundations of the principle of self-determination: the principle of nationalities authorizes a group of people to make initial choices in the context of the birth of a new State. If the State already exists, this principle justifies the essential role of the public authorities in determining the criteria of nationality. The second concern echoes the efforts to recognize the right to a nationality as a fundamental human right. The 1948 Universal Declaration of Human Rights¹ proclaimed this right, but its guarantees are still very fragile. It is sufficient to point out that the 1966 International Covenant on Civil and Political Rights expressly accords the right to a nationality only to children.

5. Only the State is competent to grant nationality, and every State has that power. This principle is deeply rooted in international practice, both jurisdictional and conventional. What States are free to do, they are equally free to undo. Therefore, the loss or withdrawal of nationality likewise falls within the exclusive competence of the State.

6. However, this exclusive competence has a counterpart: while it is true that other entities may not contest the criteria for attribution of a nationality, it is equally true that they are not obliged to accept the individual consequences

of such attribution. The decisions taken by a State with respect to an individual are not subject to objection by other States, unless the criteria used are not sufficient to justify the granting of rights deriving from a personal qualification: citizenship, in the context of succession of States, must represent a social fact involving real relations.

7. As to the combined effect of internal rules in this area, there may still be cases in which an individual receives several nationalities or is denied any nationality. Such cases are referred to as conflicts of nationalities. International law seeks to reduce the two phenomena and especially the phenomenon of statelessness, in the light of the tendency to provide increasingly powerful protection for human rights, especially the right to a nationality.

8. For all these reasons, the effects of a change of sovereignty on the nationality of the inhabitants of a territory involved in a succession is one of the most difficult problems in the law of State succession. It is therefore essential to codify the law in this area since, as has been seen, even if nationality is governed principally by internal rules, it is also a matter which increasingly affects international public safety.

9. On the basis of the Special Rapporteur’s report, the Commission has adopted draft articles on nationality of natural persons in relation to the succession of States which, by virtue of their pertinence and clarity, constitute a valuable product of the Commission’s work.

10. Without eliminating the question of the attribution of nationality from the internal competence of States, the draft articles establish a series of basic principles on the topic, providing extensive codification of current customary international law in order to furnish States with guidelines for standardizing their internal rules and ensuring greater legal certainty.

11. Italy appreciates the Commission’s efforts to strike a fair balance between the rights and interests of individuals and the sovereign competence of States in determining who their nationals shall be, to prevent statelessness, to ensure continuity between different nationalities and to acknowledge the right of every individual to choose his or her nationality, as well as its avoidance of obligatory attribution of nationality, in order to protect minorities in particular.

Switzerland

1. Switzerland would like to begin by thanking the Commission and its Special Rapporteur, Mr. Václav Mikulka, for having clarified a field which has in the past given rise to much controversy, both theoretical and practical. Although not all of the questions have been answered, their parameters and implications are now much clearer than before. The set of draft articles, as a whole, appears well designed.

2. The draft articles approved by the Commission on first reading are based on five main principles, the first of which is the need to prevent the succession of States generating new cases of statelessness. The second principle, which complements the first, is that the proposed solutions must be based on an “appropriate connection” be-

¹ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

tween the State and the individual. Since such connections can be identified for almost all the persons concerned, this principle will be unlikely to generate new cases of statelessness. However, it is possible that an individual may have “appropriate connections” with more than one State concerned, a situation giving rise to the possibility of multiple nationality. This situation leads to a third principle highlighted in the commentary, the principle of the neutrality of the draft articles with respect to the phenomenon of multiple nationality. A fourth principle, which reflects a contemporary trend in State practice, is that it is necessary to try to avoid, as far as possible, the compulsory attribution of nationality. This principle, embodied in draft article 10, can be implemented, inter alia, by granting a right of option. The fifth and final principle is that distinctions must be drawn between different factual situations when regulating the consequences of the succession of States in the field of nationality, as in other fields. Questions of nationality can be resolved much more simply, for example, in the case of mergers of States than in other cases. Switzerland endorses the above five principles.

3. Switzerland wishes to note that the draft articles considered here contain no provisions relating to the peaceful settlement of disputes arising from the interpretation or application of the provisions contained therein. This solution is consistent with the Commission’s intention of proposing a draft *declaration*. If the text should ultimately take the form of a *treaty*, it is obvious that it would then be necessary to supplement it with provisions relating to the settlement of disputes.

Form that the draft articles should take

Czech Republic

1. The draft articles have been given the form of a draft declaration to be adopted by the General Assembly. Although in the previous work of the Commission this form has been used very rarely, owing to the particular characteristics of the present topic, it may for practical purposes be the best among those available. If the purpose of the future instrument is to provide the States involved in a succession with a set of legal principles but at the same time with some recommendations to be followed by their legislators when drafting nationality laws, the form of a declaration adopted by the Assembly may not only be sufficient for the achievement of this goal, but may even have some advantages, when compared to the rather rigid form of a convention, traditionally used for the finalization of the work of the Commission.

2. As is often the case with draft articles submitted by the Commission, the present articles are a combination of both existing rules of customary law and provisions aimed at developing international law. The element of development of international law is an indispensable part of the draft, which purports to cover the subject of nationality in relation to the succession of States in its entirety and to propose a legal regime more satisfactory than that which could be deduced from the already well-established principles of international law.

3. The declaration allows a broader spectrum of problems to be addressed than a convention establishing

strictly binding obligations. It also makes irrelevant the discussion about whether its provisions may or may not be invoked vis-à-vis a new State which did not participate in its adoption. And finally, if adopted by consensus, it may acquire even higher authority than a convention ratified by just a small number of States. As a consequence, the real impact of a declaration on the behaviour of States may be more important than that of a convention awaiting ratification.

Finland

**(on behalf of the Nordic countries:
Denmark, Iceland, Norway, Sweden and Finland)**

The Commission has left open the question of the final legal form to be given to the instrument. The Nordic countries have already stated their preference for a non-binding declaration which could be of immediate assistance to States dealing with problems of nationality in relation to a succession of States and, at the same time, would promote the further development of principles and norms of international law applicable to such problems. While the entry into force of a convention normally requires a lengthy period of time, a declaration of the General Assembly would provide an early and yet authoritative response to the need to have clear guidelines on the subject. The adoption of a declaration would not, on the other hand, preclude the elaboration of a convention on the same topic at a later stage.

France

1. It is essential to establish what approach is to be taken to the draft. No decision has as yet been taken as to what form the draft articles are ultimately to take.

2. Will the Commission’s work lead to guidelines, which will serve as a reference tool for States, or to a binding legal instrument? As it stands, the text looks more like a draft convention. There is even a certain “legal mimicry” on the part of the draft articles with respect to the 1978 and 1983 Vienna Conventions, which increases already-existing doubts as to the final status of the text.

3. Nonetheless, attention should be paid to the “normative drift” to be seen in some articles. Is the draft to be categorized as codification of public international law or progressive development (which is not, in itself, open to criticism)? Article 20 is a good example: some of its provisions fall within the category of codification, while others, which emphasize the right of option, fall within the category of progressive development.

4. Does the draft fall within the sphere of *lex lata* or *lex ferenda*? Draft article 13 is clearly in the sphere of *lex ferenda* and not *lex lata*.

5. It would be problematical to reject the form of a treaty for a set of draft articles modifying rules of customary origin already applied by States. Should the treaty form not be chosen, one of the goals of codification—the drafting of new conventions—will not have been achieved. Furthermore, in such a case the rules enunciated in the

draft are likely to have legal effects even though they are not treaty rules.

Switzerland

The distinction between codified customary rules and simple conventional rules is particularly important in the context of the succession of States. If the succession gives rise to one or more new actors on the international stage, they will be bound only by the provisions reflecting customary rules, i.e. those contained in part I of the draft articles. States in existence before the succession are in a different situation, for if the draft articles take the form of a convention and if these States become parties to the convention, they will be bound by the entire text. In other words, different rules will apply to different States involved in one and the same succession. That being the case, the Commission appears well advised to present its draft articles in the form of a declaration rather than as the text of a convention.¹

¹ See *Yearbook ... 1997*, vol. II (Part Two), p. 17, para. (3) of the commentary to the preamble.

Structure of the draft articles

Argentina

In general terms, Argentina agrees with the way the Commission has organized the draft articles, dividing them into part I on general principles and norms concerning nationality in relation to the succession of States and part II on principles applicable in specific situations of succession of States.

Czech Republic

The structure of the draft articles follows that of the Vienna Conventions of 1978 and 1983, the categorization of the succession itself being closer to the one adopted in the 1983 Convention. This approach is logical. While the provisions of part I relate to all categories of succession of States, part II shows differences in the application of some of the general principles to specific types of succession of States. Although part I may not be considered in its entirety as a simple reflection of existing law—it also includes recommendations—the recommendatory nature is much more evident in part II, which is mainly intended to provide guidance or inspiration to the States involved in a succession in their efforts to resolve problems of nationality. It is only wise to assume that States concerned may, by mutual agreement—whether explicit or even implicit—decide on a different technique of application of the provisions of part I in their particular case of succession. With this proviso, the Czech Republic agrees with the general outline of the draft declaration.

Switzerland

Switzerland supports the idea of splitting the draft articles into two parts, the first stating general rules, and the second containing optional rules applicable to each of the four situations of succession defined in the draft articles. If article 19, the first article in part II, is interpreted *a*

contrario, the result is that part I of the draft articles will consist of non-optional provisions. This suggests that the Commission considers that the provisions of part I reflect existing customary law and, moreover, constitute peremptory rules (*jus cogens*). It would no doubt be desirable to review all the articles in part I in order to establish whether they all do in fact have that status. The point is open to question. Articles 8–9, for example, are clearly optional; one may also wonder whether the rule attributing to a child who has no other nationality than that of the State in whose territory he was born is a peremptory rule.

Preamble

No comments were submitted on the preamble.

PART I

GENERAL PROVISIONS

Argentina

Argentina agrees on the adoption of the principles contained in part I of the draft. It is particularly important, in cases of succession of States, to protect basic human rights, including the right to a nationality, to respect the will of persons concerned resulting from the exercise of the right of option under appropriate conditions, to state the fundamental obligation of States to prevent statelessness and the prohibition of discrimination and of arbitrary decisions, to provide for the protection of the rights of children and of the unity of a family, and so on. At the same time, Argentina agrees with the Commission's general approach, which is to preserve the legitimate interests of States in legislating on the matter, bearing in mind in particular that nationality is governed by domestic law within the limits established by international law.

Article 1 (Right to a nationality)

Argentina

1. Article 1 rightly enshrines, at the outset, the right of all persons to a nationality.
2. In this respect, it should be noted that article 20, paragraph 1, of the American Convention on Human Rights provides that every person has the right to a nationality. Along the same lines, the International Covenant on Civil and Political Rights states in article 24, paragraph 3, that every child has the right to acquire a nationality.
3. In recognizing that every child has the right to a nationality, the International Covenant on Civil and Political Rights establishes that such right is so important that everyone, from the earliest age, should have a nationality. This brings to light the very personal nature of the right to nationality, which is an expression of the right to personal identity.

Brunei Darussalam

The question of multiple nationality raises a number of difficulties for Brunei Darussalam, which does not subscribe to that concept or to that of dual citizenship.

Czech Republic

1. The Czech Republic supports the concept of the right to a nationality as defined in article 1. The principle that every person who prior to the succession of States had the nationality of the predecessor State has the right to the nationality of at least one of the States involved in such succession is a sound basis on which the draft as a whole is built. The issue here is not the right to a nationality *in abstracto*, but in the exclusive context of the succession of States. Moreover, the right to a nationality is clearly subject to the provisions of the draft articles which follow.

2. The legislation of the Czech Republic and of Slovakia adopted in relation to the dissolution of Czechoslovakia, when considered jointly, provided the legal basis for the acquisition by each single national of the former Czechoslovakia of the nationality of one or the other successor State. The risk of statelessness was eliminated by the inclusion in the nationality laws of the two successor States of corresponding provisions concerning the basic criterion for the *ex lege* attribution of nationality. Thus, the result achieved by the application of these laws corresponded to the aim of articles 1 and 3 of the draft declaration. At the same time, it is worth noting that the nationality laws of the two successor States differed considerably in many respects, including the conditions for optional acquisition of nationality or the policy in matters such as dual nationality.

Finland

(on behalf of the Nordic countries: Denmark, Iceland, Norway, Sweden and Finland)

1. The Nordic countries are pleased to note that the Commission has not only reinforced the right to a nationality but has also given it a precise scope and applicability in article 1. The right to a nationality has already been incorporated in a number of international instruments. It was first stated in article 15 of the Universal Declaration of Human Rights.¹ The International Covenant on Civil and Political Rights, as well as the Convention on the Rights of the Child stipulate that every child has the right to a nationality. The European Convention on Nationality embodies the right of everyone to a nationality as one of the principles on which the States parties shall base their domestic legislation on nationality.

2. Nevertheless, because of the difficulties in determining from which State such a right can be claimed, the right to a nationality has so far been viewed mainly as a positive formulation of the duty to avoid statelessness and not as a right to any particular nationality. The Commission's draft goes further than that, building on the fact that in cases of

¹ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

State succession the States concerned can be fairly easily identified. The Nordic countries support this reasoning.

3. The words "at least" in article 1 leave open the possibility of multiple nationality. Although this should not, according to the Commission, be interpreted as an encouragement of a policy of dual or multiple nationality, it is to be noted that from the point of view of the individuals concerned, dual nationality in most cases may be less detrimental an effect of a succession of States than statelessness. However, the Nordic countries share the view that determination of the particular circumstances in which multiple nationality may be desirable goes beyond the scope of a general declaration, and welcome the fact that the draft is intended to be neutral on this issue.

France

1. Article 1 gives the impression that the Commission is seeking to elaborate a text dealing not only with nationality but also with human rights. This article appears to reflect the aim of placing the draft articles in a "human rights perspective".

2. See also "General remarks", above.

Greece

While it is essential to establish the right to a nationality, it is questionable whether it is necessary to establish the right to at least one nationality.

Guatemala

Since article 1 contains terms which are defined in article 2, Guatemala believes that the order of the two articles should be reversed.

Italy

The right to a nationality in the context of a succession of States is established in article 1, which constitutes a fundamental rule of the draft. It also marks a significant advance in the international protection of human rights and an improvement in the positive sense of the principle embodied in article 15 of the Universal Declaration of Human Rights.¹

¹ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

Switzerland

The rule in article 1 is acceptable in the view of Switzerland, even though it would appear difficult—except in the case of the unification of two States—to determine, among the States concerned, which one is under the obligation that corresponds to the right proclaimed in article 1.¹

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 19, para. (2) of the commentary to article 1.

*Article 2 (Use of terms)***Guatemala**

See comments under article 1, above.

Switzerland

Article 2 of the draft contains a series of definitions, including the definition of the “person concerned” by a succession of States (art. 2 (f)). Paragraph (6) of the commentary to this article, which concerns this term, contains a sentence which reads: “... stateless persons ... resident [in the absorbed territory] are in the same position as born nationals of the predecessor State.”¹ Taken by itself, this sentence can be misleading and should be modified.

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 20.

*Article 3 (Prevention of statelessness)***Argentina**

1. Argentina fully shares the interest of the international community in eradicating statelessness. That is why it ratified the Convention relating to the Status of Stateless Persons and the American Convention on Human Rights.

2. The American Convention on Human Rights states that every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality. It also establishes that no one shall be arbitrarily deprived of his nationality or of the right to change it (art. 20, paras. 2–3).

Brunei Darussalam

The attribution by a State of its nationality is important to prevent statelessness resulting from a succession of States. However, it appears from the commentary that the attribution of nationality should remain the sole prerogative of the State concerned.

Czech Republic

See comments under article 1, above.

Finland**(on behalf of the Nordic countries:
Denmark, Iceland, Norway, Sweden and Finland)**

The obligation of States concerned to take all appropriate measures in order to prevent statelessness from arising is a corollary of the right to a nationality. With regard to article 3, it is noted that the restrictive criterion of habitual residence which was included in the corresponding principle (b) contained in the 1996 report of the Commission¹ has been deleted. The text as well as the objective of prevention of statelessness have benefited from this change. Moreover, the obligation to avoid statelessness has been concretized and made operational in several other articles,

¹ *Yearbook ... 1996*, vol. II (Part Two), p. 75, para. 86.

such as article 6, or the savings clauses in articles 7, 8 and 18.

France

Article 3 is satisfactory from the point of view of both form and substance.

Guatemala

In view of the definition of “person concerned” given in article 2 (f), it seems appropriate to replace, in article 3, the words “persons who, on the date of the succession of States, had the nationality of the predecessor State” by the term “persons concerned”. As a result of this change, the words “such succession” at the end of article 3 should be replaced with the words “the succession”.

Italy

In order to invest the principle of the right to a nationality with the importance that it deserves, the Commission rightly included, *inter alia*, article 3. The obligation of the States involved in a succession to take all appropriate measures to prevent statelessness is a corollary of the right of the persons concerned to a nationality.

Switzerland

1. The links between article 3 and article 1 are obvious. Paragraph (6) of the commentary to article 3 stipulates that this article sets out an obligation of conduct, rather than one of result, in respect of the States concerned.¹ Given the difficulty in determining which State is bound by this obligation, one may ask whether article 3 ought not to be worded in terms of an *objective* to be attained rather than in terms of an obligation of conduct, at least if the form selected for the draft articles is that of a treaty.

2. See also comments under article 1, above.

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 22.

*Article 4 (Presumption of nationality)***Brunei Darussalam**

1. According to the commentary to article 4, the purpose of this provision is “to address the problem of the time-lag between the date of the succession of States and the adoption of legislation or, as the case may be, the conclusion of a treaty between States concerned on the question of the nationality of persons concerned following the succession”.¹ The presumption of nationality in article 4 is a rebuttable presumption.²

2. The test of habitual residence goes beyond simply residing in the territory in question. There must be a genu-

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 22, commentary to article 4, para. (1).

² *Ibid.*, para. (2)

ine link between the person and the successor State, such as loyalty.

3. This article may be of some importance for Brunei Darussalam should some territories currently under another State's administration revert to Brunei Darussalam. The question of the nationality of the local population may also be a matter of concern to Brunei Darussalam.

Czech Republic

1. The Czech Republic has serious misgivings about the appropriateness of including article 4 in the draft articles, as well as about the rationale for this provision. It is true that the presumption reflected therein, as explained in the commentary, is a rebuttable one.¹ Nevertheless, it is open to question whether the inclusion of this article in part I containing general provisions does not create more difficulties than it may resolve.

2. First, article 4 has clearly no "general" application. It makes no sense to invoke it in the case of the unification of States, where the principle according to which all persons concerned acquire the nationality of the successor State (see article 21) renders the distinction based on the place of residence within or outside the territory concerned useless.

3. Secondly, serious doubts may be raised about the function of such presumption in the case of the transfer of a part of the territory. No transfer can be lawfully accomplished other than by agreement between the States concerned. Such agreement will certainly address the issue of the nationality of persons having their habitual residence in the transferred territory. The presumption in article 4 has no meaning in this case. If the treaty provides for a change of nationality, the situation is clear. But it is also clear when the treaty remains silent on the question of nationality: in such case, the persons concerned retain their nationality. A recent example of this situation is the Treaty on a common State border between the Czech Republic and Slovakia (4 January 1996), which provided, among other things, for an exchange of certain territories between the two States. No automatic change of nationality was envisaged as a result of the territorial exchange.

4. Finally, the presumption envisaged in article 4 may not be helpful even in the cases of dissolution or separation. For example, in the case of the dissolution of a federal State or separation from a federal State of one of its component units, why should the citizenship of such unit recognized under the federal Constitution be disregarded and habitual residence be the only relevant criterion? The citizenship of a component unit of a federation is a reliable criterion for resolving the problem of nationality for those residing both inside and outside the territory concerned. On the contrary, the presumption based on habitual residence, although it may be easily applied to those living within the territory concerned, does not help to clarify the situation of those living abroad. In the case of the dissolution of a federation, this presumption would even create confusion.

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 22, commentary to article 4, para. (2).

5. Part II of the draft articles, in which the general provisions of part I are applied to specific categories of succession of States, is to a large extent based on the criterion of habitual residence. However, to suggest this criterion to the States concerned for their consideration—which is the purpose of part II—is not the same as to formulate a presumption which would determine also the behaviour of third States. Accordingly, the Commission should reconsider this problem in the light of the above comments.

Greece

See "General remarks", above.

Guatemala

1. Guatemala has serious doubts about the appropriateness of maintaining unchanged the presumption of nationality established by article 4. A natural, if not essential, aspect of the nationality of persons is the guarantee that no person possessing a nationality may lose it unless that person performs certain actions (commission of certain crimes, naturalization in a foreign country, renunciation, etc.). However, the presumption of nationality established by article 4, which can function only as a provisional nationality, would place its beneficiaries in the position of having a nationality which is subject to a decision independent of the will of the person concerned. The precariousness of this attribution of nationality will inevitably extend to such rights and advantages arising from that nationality as the person concerned may try to obtain by virtue of the possession of that nationality. As an example of this, let us imagine the case of a person who, by virtue of the presumed nationality attributed to him or her under article 4, assumes in the successor State a public office which, under the laws of that State, may be occupied only by a national. In principle, this person should be required to relinquish that office, if such person continues to occupy it, on the date on which the authorities of the successor State determine that such person does not, in fact, have the nationality he or she enjoyed by virtue of the presumption established in article 4. Is it permissible that a presumed nationality should give rise to such an outcome? Would this not violate the principle of acquired rights? To resolve difficulties of this type, the draft articles could stipulate that persons having a presumed nationality under article 4 should not enjoy, even provisionally, rights which might be exercised only by persons who normally and definitively had the nationality of the successor State. However, in this case, the presumed nationality under article 4 would be a mere fiction, since the only benefit it would provide would be the right to reside in the territory of the successor State, which persons concerned enjoy, in any case, under article 13. Alternatively, the opposite approach could be taken: the draft articles could provide that, if persons having the presumed nationality in question could, on the basis of that nationality, invoke acquired rights, then they should be allowed to become naturalized under particularly favourable conditions; or that if such persons must be allowed to opt for the nationality of the successor State in order to continue enjoying the acquired rights exercised by virtue of the presumption after having lost the benefit of the latter, then that right of option

should enable them to do so. In any case, steps must be taken to prevent such difficulties from arising.

2. According to part II, a successor State is obligated, in all cases, to attribute its nationality to the persons concerned who, at the time of succession, have their habitual residence in its territory (see articles 20–22 (a) and 24 (a)). It seems, then, that there is a general rule in this regard. However, this rule, which appears to follow from the rule established in article 4, is not set forth in part I, as would seem appropriate. This may represent a lacuna in part I that should be filled.

Italy

1. In order to invest the principle of the right to a nationality with the importance that it deserves, the Commission rightly included, *inter alia*, article 4.

2. The rebuttable presumption according to which nationality is derived from habitual residence constitutes a subsequent application of the principle of the need for a genuine link between the State and the individual in the sphere of naturalization. The legal relationship of nationality must not be based on formality or artifice but on a habitual link between the individual and the State. The criterion of habitual residence is one most frequently used in State succession to identify the initial population constituting the successor State.

Switzerland

See comments under article 12, below.

Article 5 (Legislation concerning nationality and other connected issues)

Argentina

1. Argentina agrees with the emphasis placed in article 5 on the need, in cases of succession, for the States concerned to enact without delay the relevant legislation to clarify the status of natural persons in regard to nationality and connected issues arising from the succession. It also agrees that measures should be taken to ensure that the persons concerned are duly informed about the effects of the legislation.

2. Some members of the Commission feel that this article should establish an obligation rather than merely making a recommendation.¹ Argentina supports that view and believes that the conditional form (“should”) should be replaced by the imperative (“shall”), which is more appropriate for a legal norm.

3. Since nationality is a bond that is established by domestic law, it is up to each State to legislate on the acquisition, loss and reacquisition of nationality.

4. Under chapter IV, section 75, paragraph 12, of the Constitution of Argentina, Congress has the power to enact naturalization laws. Naturalization is regulated by Act No. 346 of 1869 and Regulatory Decree No. 3213/1984 thereof.

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 24, para. (6) of the commentary to article 5.

5. It should be noted that the provisions of domestic law which govern nationality are recognized by other States to the extent that they do not affect international treaties or custom. This gives rise to many problems and conflicts in the area of nationality.

6. The principle of single nationality, i.e. the principle that each individual has one nationality, is enshrined in Argentine domestic law. Double or multiple nationality is derived from treaties. Thus, Argentina has concluded treaties on nationality with Sweden and Norway (1895), Italy (1971) and Spain (1979). It has ratified the Convention on the Nationality of Married Women, the Convention relating to the Status of Stateless Persons, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Brunei Darussalam

This article stresses the importance of domestic legislation as well as the need for States to enact legislation of which persons concerned may be apprised as soon as possible.

Czech Republic

The Czech legislation on nationality was adopted in parallel with the dissolution of Czechoslovakia itself and was in force on the very first day of the existence of the Czech Republic. The motives for such early legislation were the same as those which inspired article 5 of the draft, that is to avoid uncertainty, even if only temporary, as regards the status of persons concerned.

France

Although article 5 does not give rise to any substantive difficulties, some of the terms and expressions used in it should be changed or made clearer. For example, in the first sentence, the words “consistent with” should be replaced by the words “which will give effect to”. Greater precision could be achieved by rewording the end of the second sentence, so that it reads “on their status and their conditions”. Furthermore, the word “consequences” is too vague and should be replaced.

Switzerland

Article 5 stipulates that the States concerned “should”, without undue delay, take legislative and other necessary measures in respect of nationality and other connected issues. Switzerland fails to see why this rule should take the form of a simple recommendation. Together with the minority on the Commission, it believes that article 5 must be worded in terms of an obligation,¹ particularly as this has been done in the case of article 11, concerning the unity of a family.

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 24, para. (6) of the commentary to article 5.

*Article 6 (Effective date)***Brunei Darussalam**

This article deals with the retroactive application of legislation, so as to avoid the possibility of a person becoming temporarily stateless during the process of succession. Given its purpose, there should not be any problem in accepting this article.

Finland**(on behalf of the Nordic countries:
Denmark, Iceland, Norway, Sweden and Finland)**

See comments under article 3, above.

Greece

See “General remarks”, above.

Switzerland

According to article 6, the attribution of nationality takes effect on the date of the succession; in other words, it is usually retroactive. This retroactivity is also stipulated when the person concerned acquires a nationality by exercising a right of option, but only if, without retroactivity, the person would have been left temporarily stateless. Switzerland wonders whether this latter condition should not be extended to all cases of attribution of nationality, i.e. to the whole of article 6, instead of being limited to the case of the exercise of a right of option. The suggested amendment would have the advantage of limiting the retroactivity to the extent strictly necessary.

Article 7 (Attribution of nationality to persons concerned having their habitual residence in another State)

Czech Republic

The Commission took a major step in the direction of the development of international law by providing for a considerable role for the will of persons concerned. In this respect, the Czech Republic considers it essential to preserve the balance between provisions concerning the will of individuals (art. 10) and those ensuring certain prerogatives of States (arts. 7–9).

Finland**(on behalf of the Nordic countries:
Denmark, Iceland, Norway, Sweden and Finland)**

See comments under article 3, above.

France

1. States have a right to seek to prevent successions of States from leading to dual and multiple nationality. Article 7 reflects that aim.

2. The linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between these provisions is hard to understand.

3. See also “General remarks”, above.

Guatemala

1. In the title of the article, it might be appropriate to change the word “Attribution” to “Non-attribution” (see the title of article 14). The drafting of paragraph 2 might be improved through the addition, immediately after the word “nationality”, of the words “against their will” and the deletion of the words “against the will of the persons concerned” (see the French version of paragraph 2).

2. For reasons of logic, the following interrelated changes should be made to articles 7 and 10: at the beginning of article 7, paragraph 1, the words “Subject to the provisions of article 10” should be deleted and a reference to article 7 should be inserted at the beginning of article 10, paragraph 1, which would read: “Subject to the provisions of article 7, States concerned ...”

Switzerland

Article 7, paragraph 1, exempts the successor State from the obligation to attribute its nationality to persons having their habitual residence in another State and having the nationality of that State or a third State. The solution thus proposed is doubtless designed to reduce cases of dual nationality, even though the Commission claims to be neutral on this point. However, it places at a disadvantage those who, while having the nationality of a third State, also have “appropriate connections” other than residence with the successor State (family ties, for example). Still, to the extent that the successor State retains the *possibility* of offering its nationality to such individuals, the solution suggested in article 7, paragraph 1, would seem to be acceptable.

Article 8 (Renunciation of the nationality of another State as a condition for attribution of nationality)

Brunei Darussalam

This article provides a State with the possibility to impose the condition of renunciation of a former nationality as a prerequisite for granting its nationality. While the commentaries seem to imply that the draft is neutral on the question of dual/multiple nationality, the article allows States which have a policy of single nationality to enforce such a policy.

Czech Republic

The Commission took a major step in the direction of the development of international law by providing for a considerable role for the will of persons concerned. In this respect, the Czech Republic considers it essential to preserve the balance between provisions concerning the will of individuals (art. 10) and those ensuring certain prerogatives of States (arts. 7–9).

Finland

(on behalf of the Nordic countries:
Denmark, Iceland, Norway, Sweden and Finland)

See comments under article 3, above.

France

See “General remarks”, above.

Greece

1. It would be worthwhile to exclude from the draft some provisions which are a matter of the general policy of States with regard to nationality or have no direct relationship with the question of the succession of States. Such is the case, in particular, with article 8, which could be omitted from the draft.

2. See also “General remarks” above.

Article 9 (Loss of nationality upon the voluntary acquisition of the nationality of another State)

Czech Republic

The Commission took a major step in the direction of the development of international law by providing for a considerable role for the will of persons concerned. In this respect, the Czech Republic considers it essential to preserve the balance between provisions concerning the will of individuals (art. 10) and those ensuring certain prerogatives of States (arts. 7–9).

France

See “General remarks”, above.

Greece

1. It would be worthwhile to exclude from the draft some provisions which are a matter of the general policy of States with regard to nationality or have no direct relationship with the question of the succession of States. Such is the case, in particular, with article 9, which could be omitted from the draft.

2. See also “General remarks” above.

Switzerland

Article 9, paragraph 1, of the draft allows the predecessor State, if there is one, to withdraw its nationality from any of its nationals “who ... voluntarily acquire the nationality of a successor State”. According to paragraph 2, the successor State may in turn withdraw its nationality from persons who retain the nationality of the predecessor State. Paragraph (5) of the commentary to article 9 states that withdrawal cannot occur “before such persons effectively acquire the nationality” of the other State.¹ This stipulation is so warranted and so essential that it should be included in the actual text of the article.

¹ *Yearbook...* 1997, vol. II (Part Two), p. 26.

Article 10 (Respect for the will of persons concerned)

Argentina

1. Argentina considers it relevant that the will of the persons concerned by the succession of States should be duly taken into account and that such persons should be able to express their will through the exercise of the right of option.

2. The only nationality granted automatically under Argentine law is nationality by birth. Acquisition of nationality by option is voluntary and, like that of nationality by naturalization, involves a required procedure.

Brunei Darussalam

1. Paragraph 1 means that a person concerned is to be given a choice as to which *among* the nationalities of two or more States he or she wants. This does not seem to mean that such person has the right to choose two or more nationalities.

2. In paragraph 2, the meaning of the phrase “appropriate connection” is unclear. To what extent does a person need such “appropriate connection” with a State to be entitled to the nationality of that State?

Czech Republic

The Commission took a major step in the direction of the development of international law by providing for a considerable role for the will of persons concerned. In this respect the Czech Republic considers it essential to preserve the balance between provisions concerning the will of individuals (art. 10) and those ensuring certain prerogatives of States (arts. 7–9).

Finland

(on behalf of the Nordic countries:
Denmark, Iceland, Norway, Sweden and Finland)

Article 10 is among several articles which embody principles and rules that are intended to protect the human rights of the persons concerned. In general, these provisions take into consideration the current stage of development of human rights law.

France

1. The linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between these provisions is hard to understand.

2. Article 10, paragraph 4, would appear to be open to criticism as its provisions are too categorical. It would be preferable to say that the State whose nationality persons entitled to the right of option have renounced may withdraw its nationality from such persons only if they would thereby not become stateless.

2. See also “General remarks”, above.

Greece

See “General remarks”, above.

Guatemala

1. For reasons of logic, the following interrelated changes should be made to articles 7 and 10: at the beginning of article 7, paragraph 1, the words “Subject to the provisions of article 10” should be deleted, and a reference to article 7 should be inserted at the beginning of article 10, paragraph 1, which would read: “Subject to the provisions of article 7, States concerned ...”

2. Article 10, paragraph 3, is superfluous, in Guatemala’s view, because it is practically tautological: it is unthinkable that a State could fail to attribute its nationality to a person who has exercised a right of option in favour of that nationality, since the exercise of this right and the attribution of nationality are two sides of the same coin.

Italy

Italy endorses the choices made by the Commission with respect to the role to be assigned to manifestations of the will of persons concerned in a succession of States as regards their choice of nationality. The provision contained in article 10 reflects a sufficiently well-established conventional and internal practice of States, especially in the cases of the formation of a new State and the cession of territory, which favours the residents of the territory in question or persons originating therein.

Article 11 (Unity of a family)

Brunei Darussalam

The principle reflected in article 11 seems to be sound, but there may be difficulties as to the definition and/or interpretation of the meaning of the term “family”. It is desirable that family members should acquire the nationality of the head of the family. This can be foreseen in the case of infants and minors. But what about an extended family, e.g. including that of the eldest child who has married and has children?

Czech Republic

The Czech Republic supports the inclusion of this article.

Finland

**(on behalf of the Nordic countries:
Denmark, Iceland, Norway, Sweden and Finland)**

1. Article 11 is among several articles which embody principles and rules that are intended to protect the human rights of the persons concerned. In general, these provisions take into consideration the current stage of development of human rights law.

2. The Commission has rightly pointed out in its commentary to article 11 that acquisition of different nationalities by the members of a family should not prevent

them from remaining together or being reunited.¹ While it is highly desirable to enable members of a family to acquire the same nationality upon a succession of States, a change of nationality of one of the spouses during marriage should not automatically affect the nationality of the other spouse. Reference is made also to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, according to which a change of nationality by the husband during marriage shall not automatically change the nationality of the wife.

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 29, para. (5).

France

Article 11 would appear to have major implications regarding the law of residence, which is not in keeping with the aim of the draft. Although there is nothing jarring about this provision in substantive terms, it really has no place in the text.

Italy

Italy finds this provision particularly interesting. Article 11 goes beyond a common limit found in almost all international conventions and internal legislation on the matter providing for a simultaneous change of nationality of the family members at the time the family head changes his or her nationality. In most cases this solution entails discrimination against women, whose status is thus subordinate to that of men.

Article 12 (Child born after the succession of States)

Brunei Darussalam

From the commentary, it appears that the scope of this article is limited to the period directly following a succession of States. It is not clear for how much time after the succession this article is to apply.

Czech Republic

The Czech Republic supports the inclusion of article 12, the aim of which is in full harmony with the goal of the Convention on the Rights of the Child.

France

1. Some provisions do not belong in the draft. Article 12 seems to have a bias towards the principle of *jus soli*.

2. See also “General remarks”, above.

Greece

1. It would be worth excluding from the draft some provisions which are a matter of the general policy of States with regard to nationality or that have no direct relationship with the question of the succession of States. This is the case, in particular, with article 12, which could be omitted from the draft.

2. See also “General remarks”, above.

Italy

Italy finds this provision particularly interesting. Article 12 constitutes a useful development of article 24 of the International Covenant on Civil and Political Rights and of article 7 of the Convention on the Rights of the Child. The legal purpose of this rule is to invest the most difficult cases with a minimum of certainty in the determination and acquisition of a nationality by children involved in a succession of States.

Switzerland

Under the terms of article 12 of the draft, the child of a person concerned who is born after the succession and has not acquired any nationality has the right *jure soli* to the nationality of the State concerned on whose territory he or she was born. But does not this solution pose the risk, in certain cases, of a number of different nationalities within a single family? Given the presumption of nationality of the State of habitual residence set out in article 4, would it not be preferable to extend this notion to the situation envisioned in article 12, namely that of a child without nationality?

Article 13 (Status of habitual residents)

Czech Republic

Articles 13, 15 and 16 provide a set of guarantees for the respect of the rights of individuals and as such form a very useful part of the text.

Finland

(on behalf of the Nordic countries: Denmark, Iceland, Norway, Sweden and Finland)

The Nordic countries fully endorse the general principle, enshrined in paragraph 1, that the status of persons concerned as habitual residents should not be affected by the succession of States. The Commission may wish to consider whether it should be complemented by a more specific provision on the right of residence, i.e. the right of habitual residents of the territory over which sovereignty is transferred to a successor State to remain in that State even if they have not acquired its nationality. A reference can be made in this context both to the Declaration on the consequences of State succession for the nationality of natural persons (Venice Declaration), adopted by the European Commission for Democracy through Law in 1996,¹ according to which the exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State and their movable or immovable property located therein, as well as to article 20 of the European Convention on Nationality.

¹ "Consequences of State Succession for Nationality" (CDL-INF (97) 1) (Council of Europe, Strasbourg, 10 February 1997), pp. 3–6.

France

Article 13 is clearly in the sphere of *lex ferenda* and not *lex lata*. As it deals more with succession of States and the law of aliens than with nationality, it is not in keeping with the goal of the draft and does not belong in the text.

Italy

Italy finds this provision particularly interesting.

Switzerland

Article 13 provides that a succession of States shall not affect the status of persons concerned as habitual residents. The Commission's mandate, as it appears in the title of the draft articles, relates to the *nationality* of natural persons in relation to the succession of States; it does not cover their status as residents, notwithstanding the need to restrict as far as possible mass and forced shifts of population.

Article 14 (Non-discrimination)

Argentina

1. Both the American Convention on Human Rights and the International Covenant on Civil and Political Rights refer specifically to equality before the law and to the protection of ethnic, religious and linguistic minorities, thus prohibiting discrimination.

2. Argentina has ratified the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.

Brunei Darussalam

The scope of this article is wide, as there is no specification of grounds for discrimination. There may be a need to narrow it if it is felt that the provision deals with issues broader than the scope of the topic itself.

Czech Republic

The Commission's commentary to article 14 contains a footnote with quite an extensive, but possibly misleading, reference to the requirement of a clear criminal record.¹ A much clearer distinction should be made between, on the one hand, the situation where this requirement would exist for the purposes of determining the nationality of natural persons directly and immediately as a result of a succession of States and where it might indeed prevent the person concerned from acquiring the nationality of at least one of the successor States, thus constituting discrimination, and, on the other hand, the entirely different situation where this requirement is one of the legitimate conditions for the naturalization of persons whose nationality had been determined prior to the succession of States. Such naturalization, regardless of whether it was sought in a third State or in another successor or predecessor State, is

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 32, footnote 106.

undoubtedly beyond the scope of the draft articles, even if it occurs in effect shortly after the succession.

Finland

(on behalf of the Nordic countries Denmark, Iceland, Norway, Sweden and Finland)

Article 14 is among several articles which embody principles and rules that are intended to protect the human rights of the persons concerned. In general, these provisions take into consideration the current stage of development of human rights law.

Greece

This article should be expanded to provide also for complete equality between new and long-term nationals in respect of their status and rights in general.

Italy

Italy finds this provision particularly interesting. Article 14 addresses one of the most important and certainly most difficult aspects of the protection of minorities, as already indicated by PCIJ in connection with a dispute on the acquisition of Polish nationality.¹ On this point, Italy endorses the Commission's decision not to include an illustrative list of circumstances which might give rise to forms of discrimination but to opt instead for a general formula prohibiting discrimination regardless of the grounds therefor, in order to avoid the risk of any *a contrario* interpretation.

¹ *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7, p. 15.*

Switzerland

Article 14 enjoins States not to discriminate "on any ground" in attributing or maintaining their nationality or when granting a right of option. As the Commission's commentary explains, this prohibition is directed in particular against discrimination on the grounds of sex, religion, race, origin or language, but in order to dispel the idea that, *a contrario*, any discrimination not included in such a list would be lawful, the Commission proposes to prohibit *all* discrimination regardless of its nature.¹ However, that formulation might be too broad. Might it not, for example, prohibit any distinction, in the acquisition of the nationality of a successor State, between persons residing in the territory of that State and other persons? In other words, the use of any such criterion for attribution of nationality might, if the current wording is retained, be deemed a discriminatory practice and, therefore, in contravention of article 14. The provision should be formulated more precisely, i.e. more narrowly.

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 32, para. (3) of the commentary to article 14.

Article 15 (Prohibition of arbitrary decisions concerning nationality issues)

Argentina

1. Article 20, paragraph 3, of the American Convention on Human Rights states that no one shall be arbitrarily deprived of his nationality or of the right to change it.

2. Under chapter I, section 20, of the Constitution of Argentina, foreigners are not obliged to be naturalized, but they may do so if they meet the conditions established by law. This means that acquisition of Argentine nationality is a right, but not an obligation, for foreigners residing in the country. Foreign residents may be non-nationals of Argentina without prejudice to the exercise of their human rights, in the enjoyment of which they are on an equal footing with Argentine natives.

Brunei Darussalam

The purpose of this provision is to prevent abuses which may occur in the process of the application of legal instruments which in themselves are consistent with the draft articles.

Czech Republic

Articles 13, 15 and 16 provide a set of guarantees for the respect of the rights of individuals and as such form a very useful part of the text.

Finland

(on behalf of the Nordic countries: Denmark, Iceland, Norway, Sweden and Finland)

1. Article 15 is among several articles which embody principles and rules that are intended to protect the human rights of the persons concerned. In general, these provisions take into consideration the current stage of development of human rights law.

2. The Nordic countries wish to highlight the importance of the provisions on the prohibition of arbitrary decisions and on the procedures relating to nationality issues. It is only too often the case that treaty provisions or national citizenship laws which are generous on paper end up being considerably restricted in the phase of practical implementation. It is therefore important to expressly prohibit arbitrary decisions on nationality issues, as has been done in article 15, and to include procedural safeguards for the respect for the rule of law, such as the requirements in article 16 that decisions relating to nationality shall be issued in writing and shall be open to effective administrative or judicial review.

Italy

The rule contained in article 15 is yet another tool for protecting the right of every individual to a nationality.

*Article 16 (Procedures relating to nationality issues)***Czech Republic**

Articles 13, 15 and 16 provide a set of guarantees for the respect of the rights of individuals and as such form a very useful part of the text.

Finland**(on behalf of the Nordic countries:
Denmark, Iceland, Norway, Sweden and Finland)**

1. The Nordic countries wish to highlight the importance of the provisions on the prohibition of arbitrary decisions and on the procedures relating to nationality issues. It is only too often the case that treaty provisions or national citizenship laws which are generous on paper end up being considerably restricted in the phase of practical implementation. It is therefore important to expressly prohibit arbitrary decisions on nationality issues, as has been done in article 15, and to include procedural safeguards for the respect for the rule of law, such as the requirements in article 16 that decisions relating to nationality shall be issued in writing and shall be open to effective administrative or judicial review.

2. Reasons for such decisions should preferably also be given in writing, which is the requirement contained in article 11 of the European Convention on Nationality. The element of "reasonable fees", contained in article 13 of the same Convention, could also be added.

France

Article 16 is too detailed. It would be preferable to say that States must "take appropriate measures to process without delay" the applications referred to in article 16.

*Article 17 (Exchange of information, consultation and negotiation)***Czech Republic**

Article 17, which provides for exchange of information, consultations and negotiations between States concerned, contains a reasonably drafted provision on negotiations and the conclusion of an agreement. Such an agreement is not an indispensable means of resolving problems concerning nationality. Legislative measures of one State adopted with full knowledge of the content of the legislation of the other State involved in a succession may suffice to prevent detrimental effects of such succession on nationality.

Finland**(on behalf of the Nordic countries:
Denmark, Iceland, Norway, Sweden and Finland)**

The obligation on the States concerned, as laid down in article 17, to exchange information and to consult in order to identify possible detrimental effects of the succession of States, and to seek a solution to eliminate or mitigate

such effects, is a necessary corollary to the right to a nationality. As the Commission notes in its commentary, this obligation is instrumental in ensuring that the right to a nationality becomes an effective right.¹ It is obvious that article 17 should be read together with the other articles in the draft which are interrelated and give a content to the duty to consult and negotiate. Nonetheless, it would seem advisable to add a sentence stating explicitly that States concerned are also under the obligation to ensure that the outcome of the negotiations is in compliance with the principles and rules contained in the draft declaration.

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 33, para. (4) of the commentary to article 17.

*Article 18 (Other States)***Czech Republic**

The proposed wording of article 18 is satisfactory. Paragraph 1 reflects the general principle of non-opposability vis-à-vis third States of nationality granted without the existence of an effective link between the State and the person concerned. The proviso preventing the treatment of such person as a de facto stateless person is fully justified. Similarly, the Czech Republic understands the motives behind paragraph 2. It envisages the situation of persons who, despite the provisions of the draft articles, would become stateless. Paragraph 2 focuses exclusively on the relationship between these persons and a third State. Drafted in the form of a savings clause, this provision preserves the delicate balance between the interests of States which could be involved in a situation of this kind.

Finland**(on behalf of the Nordic countries:
Denmark, Iceland, Norway, Sweden and Finland)**

1. Even though it lies within the competence of each State to determine who will be its citizens, national laws and decisions will not necessarily have international effect. This is a principle clearly recognized in international law. According to the Convention on Certain Questions relating to the Conflict of Nationality Laws, such laws and decisions shall be recognized by other States only insofar as they are consistent with international conventions, international custom and generally recognized principles of law. Article 18, paragraph 1, basically restates this principle. As regards paragraph 2, however, it seems to have a wider application by giving third States a right to treat stateless persons as nationals of a given State even where statelessness cannot be attributed to an act of the State but where the person concerned by his or her negligence contributed to the situation, provided that such treatment is beneficial to the person. The Nordic countries welcome the commentary that this provision is to be interpreted as meaning only that other States may extend to such persons a favourable treatment granted to nationals of the State in question. Consequently, they could not, for instance, deport these persons to that State.¹ The Commission may

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 35, para. (8) of the commentary to article 18.

wish to consider whether the actual text of the draft articles can be further clarified in this respect.

2. See also comments under article 3, above.

France

Article 18, paragraph 1, which appears to authorize any State to contest the nationality granted to an individual by another State, is very questionable. Although, in its judgment rendered in 1955 in the *Nottebohm* case,¹ ICJ did indeed emphasize that nationality should be effective and that there should be a social connection between the State and the individual, the judgment in question has been criticized and has remained an isolated instance. The text in question contains an unfortunate extension of the principle of effectiveness. This extension appears to be based on the idea that a State must take an attribution of public international law as a basis for granting its nationality, whereas the opposite applies in practice.

¹ *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4.

Greece

1. It would be worth excluding from the draft some provisions which are a matter of the general policy of States with regard to nationality or have no direct relationship with the question of the succession of States. Such is the case, in particular, with article 18, which concerns an extremely delicate matter—control of States in respect of a competence which is strictly linked to their sovereignty—and is liable to raise more problems than it will resolve.

2. See also “General remarks”, above.

Guatemala

In view of the definition contained in article 2 (*e*), it might be appropriate to change the title of this article to “Third States”.

Italy

1. In article 18, the Commission addresses with great clarity one of the key functions of international law in connection with nationality, i.e. delimiting the competence of States in this area. This provision is perfectly consistent with the line of legal logic followed throughout the draft articles and limits the possibility of invoking nationality against other States, a limit consisting of the existence of an effective link between the national and the State. The link of nationality is not merely a formal one but implies a shared life and shared interests and sentiments which establish a reciprocal interplay of rights and duties between a State and its national.

2. As in the case of the occupation of a territory, the consistent concern of international law is to ensure that legal characterizations correspond as closely as possible to actual reality.

3. The Commission does not in fact address the substance of the criteria for identifying the existence of an effective link, but that point is not included in its terms of

reference, and in any event reliance on international jurisprudence (i.e. the *Nottebohm* case¹ and the *Flegenheimer* case²) can assist those called upon to deal with this issue.

¹ *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4.

² UNRIAA, vol. XIV (Sales No. 65.V.4), p. 327.

Switzerland

Paragraph 2 of article 18 allows third States to treat persons who have become stateless as a result of a succession of States as nationals of the State whose nationality they would be entitled to acquire or retain. Paragraph (6) of the commentary to article 18 points out that this paragraph is designed to correct situations resulting from discriminatory legislation or an arbitrary decision prohibited by articles 14–15.¹ Switzerland would prefer that point to be made in the text of article 18, paragraph 2, with a reference to articles 14–15.

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 35.

PART II

PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

Argentina

1. The Commission identified the following types of succession in practice: transfer of part of the territory; unification of States; dissolution of a State; separation of part or parts of the territory. Argentina supports the focus on, and treatment of, these aspects of the succession of States in the draft articles.

2. In some cases, the principle of attribution of the nationality of successor States might imply the imposition of nationality without the consent of the person concerned. In order to make that principle more flexible, the Commission's draft permits the exercise of the right of option between the existing nationality and that of the successor State; there are various modalities for the exercise of this option.

3. It is important to respect the will of the persons concerned and to guarantee to the greatest possible extent their exercise of the right of option without discrimination or coercion. It is indeed essential to guarantee the legitimate interests of the inhabitants of a territory undergoing a succession of States and to respect their way of life. However, States' interest in limiting the risk of abuse of double or multiple nationality must also be taken into consideration in a balanced manner.

4. Argentina notes that the draft does not include a special section on cases of succession of States in relation to decolonization, as do the 1978 and 1983 Vienna Conventions.

5. In this regard, Argentina holds the view that although the historical process of decolonization has, to a large extent, been completed, some colonial situations still remain,

and that, as these situations are addressed, cases might arise in which it would be necessary to apply the rules on nationality of natural persons in relation to succession of States. Decolonization may take different forms, including the achievement of independence by Non-Self-Governing Territories, the restoration of the territorial integrity of another State or the division of the territory into several States. In any case, the different possibilities can be resolved satisfactorily by applying the principles and rules contained both in part I of the draft articles and, to some extent, in part II.

Finland

(on behalf of the Nordic countries: Denmark, Iceland, Norway, Sweden and Finland)

The Nordic countries believe that part II of the draft articles, intended to serve as practical guidelines for States who are in the process of enacting their legislation or negotiating treaties on nationality issues related to a succession of States, will indeed prove helpful in such situations. The Nordic countries also agree with the decision of the Commission to simplify the typology of the 1983 Vienna Convention by omitting the category of “newly independent States”. The provisions addressing one of the other four categories of State succession would be applicable in any remaining case of decolonization in the future. At the same time, the Commission has preserved the distinction between secession and dissolution while ensuring that the provisions in both sections are identical. These solutions are consistent with the pragmatic purpose of part II, and can be endorsed as such.

France

Part II of the draft is dealt with more satisfactorily than part II of the 1978 and 1983 Vienna Conventions (for example, a clearer distinction is drawn between merger and absorption).

Italy

1. Part II of the draft articles regulates specific categories of succession of States, usually by following the choices already made in the 1978 and 1983 Vienna Conventions.

2. The categories of succession mentioned by the Commission are exhaustive, and Italy endorses its decision not to include cases of decolonization, both because of the uncertainty of the practice, which is often indistinguishable from the practice relating to other cases of succession, and because, since only a few cases of decolonization will occur in the future, it is preferable now to focus on the other categories. It should be borne in mind in this connection that categories of succession, which have been determined in theory, are often difficult to identify in practice and this factor might impair the effectiveness of the draft articles.

3. The solutions adopted in connection with the effects on nationality of specific cases of succession are entirely valid from the legal standpoint, for most of these solutions reflect current international practice or constitute the logi-

cal consequence—as in article 22, for example—of the dissolution of a State.

4. Italy also endorses the Commission’s decision to use habitual residence instead of citizenship as the main criterion for identifying the persons to whom successor States must attribute their nationality. The criterion of residence, even if less used in practice, is more concrete than the criterion of citizenship; this decision is consistent with the tendency of international law to give preference to effectiveness.

Switzerland

In the view of Switzerland, the Commission was right not to separate cases of State succession from the specific phenomenon of decolonization, first because this distinction is irrelevant in the context of the nationality of natural persons and also because the decolonization process is nearly at an end.

Article 19 (Application of Part II)

Czech Republic

The provisions of part II of the draft articles are aimed at applying the general principles of part I to different categories of succession of States. The Commission does not pretend to reflect here existing international law. Part II seems to be intended mainly as a source of inspiration for States concerned when, for example, they enter into negotiation in order to resolve nationality issues by agreement or when they are considering the adoption of national legislation for the purpose of resolving these issues. Such is at least the Czech Republic’s interpretation of article 19, in spite of the fact that the actual language of subsequent articles of part II appears fairly strong (using the auxiliary verb “shall”), as if binding rules were somehow laid down. This might actually be justified even in the framework of an instrument of a declaratory nature if general principles, for the most part soundly based on customary law, are involved, as is the case for part I of the draft articles. Such language might however prove somewhat confusing and disturbing in the context of part II, and the Commission could perhaps reconsider whether article 19 is sufficient to dissipate any possible doubts in this respect.

Greece

It might be wondered what the relationship is, from the legal point of view, between parts I and II of the draft. Article 19 seems to give more weight to the provisions of part I than to those of part II. Thus article 10, paragraph 2, provides for granting the right of option only in the case of persons who would otherwise become stateless as a result of the succession, while articles 20, 23 and 26 seem to grant a much broader right of option. In such cases where there is a difference between the provisions of part I and those of part II, should States follow the general provisions or the specific provisions?

Guatemala

1. The substance and scope of article 19 are unclear. Unfortunately, the commentary to this article sheds little or no light on its meaning or usefulness. It appears that the article's purpose is to establish differences between the nature and functions of the provisions of part II and those of part I (whose provisions are referred to in article 19 as "*preceptos*" in the Spanish version). However, nothing is said about how the provisions of the two parts are to be differentiated. The various conventions, declarations and model rules adopted by United Nations bodies are of no help in clarifying the matter, since none of these texts establishes any differences between the various parts into which they are divided in terms of their nature or normative effects. What is clear is that, apart from article 27, which, as indicated in the commentary,¹ was placed only provisionally in part II, the rules contained in part I differ from those of part II in that the provisions of the former are of a general nature, whereas those of the latter are specific. In this respect, the draft articles under consideration not only follow the pattern adopted in the 1978 and 1983 Vienna Conventions, but also, with the exception of the specific category of "newly independent States", include the same specific categories of State succession as those two Conventions.

2. The differentiation established in both those Vienna Conventions between a general part and a specific part is a characteristic of the corpora of codes with which jurists in the Romano-Germanic tradition are familiar, as it is standard in criminal law (where common law jurists are also cognizant of it) and in those parts of civil codes that concern contracts, which traditionally begin with a general part applicable to all contracts, followed by a part in which the various types of contracts are regulated individually.

3. However, in the various legal corpora mentioned above, whether national or international, this differentiation consists exclusively of the difference in degree of generality between the provisions in one part relative to those in the other. There is no difference, therefore, in the normative nature of the provisions in the two parts: those in the first part are as binding as those in the second. However, it is normal, with few exceptions, for the provisions in the second part, i.e. those that are specific, to be in harmony with those in the first part, i.e. those that are general.

4. Moreover, there are no apparent differences between part I and part II of the draft articles in respect of provisions that actually or potentially pertain to customary law or *ius cogens*, or that constitute rules of progressive development of international law. In other words, rules of any of these types may be found in both parts I and II.

5. For all the foregoing reasons, article 19 should be deleted.

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 43, para. (4) of the commentary to article 27.

SECTION 1. TRANSFER OF PART OF THE TERRITORY

Article 20 (Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State)

Argentina

Doctrine and customary law recognize the general principle that when part of the territory of a State is transferred to another State, a change occurs with regard to the nationality of the inhabitants of the territory that has been incorporated or transferred, whereby they take on the nationality of the annexing or acquiring State. According to Podestá Costa, this is so because the annexing or acquiring State could not exercise sovereignty in a territory whose inhabitants belonged entirely to another political community.¹

¹ L. A. Podestá Costa and José María Ruda, *Derecho Internacional Público*, 5th ed. (Buenos Aires, TEA, 1979), vol. I, p. 150.

Brunei Darussalam

This provision deals with the situation where the person concerned may exercise his right of option to retain the nationality of the predecessor State even though his habitual place of residence is in the territory being ceded to another State. It does not seem to apply to the situation where nationals of the predecessor State having their habitual residence outside the territory transferred to the successor State want to change their nationality so as to acquire that of the successor State.

Czech Republic

The current text of article 20 could be usefully complemented by including a reference to the obligation of the predecessor State to withdraw its nationality from the persons concerned having their habitual residence in the transferred territory only after such persons acquire the nationality of the successor State. Obviously, this results from the State's obligation to prevent statelessness in accordance with article 3, but it is preferable to have an explicit clause to that effect, also in view of the fact that such explicit clause has found a place in article 25. Such addition could be drafted along the lines of article 25, paragraph 1, *in fine*.

France

1. Some of the provisions of article 20 fall within the category of codification, while others, which emphasize the right of option, fall within the category of progressive development.

2. The draft implies that an individual has the right to choose his or her nationality freely. The rights of States with respect to nationality, as compared with those of individuals, should not be limited unduly. Unlike in the case of the approach reflected in article 20, it is essential not to end up with "forum shopping" for nationality and to avoid the "privatization" of nationality, which disregards the public law status of nationality, a matter on which an

individual is not free to decide. States must retain control over the attribution of nationality.

Greece

1. In the case of transfer of part of the territory, the right of option, in accordance with international practice, should be recognized only for persons who have effective links with the predecessor State. It is superfluous, or even naive, to seek to subject to the option procedure persons who have such links with the successor State.

2. See also “General remarks”, above.

Guatemala

1. There seems to be no reason not to apply the same regime to the transfer of part of a State’s territory as to the separation of part of a State’s territory (sects. 1 and 4, respectively, of part II of the draft articles). In effect, the only two pertinent differences between transfer and separation are that (a) on transfer the successor State predates the succession, whereas on separation the successor State is born with the succession; and (b) on transfer only part of the successor State’s territory is affected by the succession, whereas on separation the whole territory of the successor State is affected. Nevertheless, in the draft articles different regimes are applied to the two cases. This is obvious at first glance, given that the transfer of part of the territory of a State is governed by just one article, article 20, whereas three articles, articles 24, 25 and 26, apply to the separation of part or parts of the territory of a State. The latter establish a much broader and more complete regime than the one in article 20.

2. Guatemala therefore believes that article 20 should be deleted and replaced by three articles, provisionally numbered articles 20 A, 20 B and 20 C, which would differ from articles 24–26 only in that the following slight adjustments would be made: (a) in the *chapeau* of article 24 (now numbered article 20 A), the words “part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist” would be replaced by the words “a State transfers part of its territory to another State”, and the reference to “article 26” would change to “article 20 C”; (b) in article 25 (now renumbered as article 20 B), “article 24” and “article 26” would be replaced with “article 20 A” and “article 20 C”, respectively; and (c) in article 26 (now renumbered as article 20 C), “articles 24 and 25” would be replaced with “articles 20 A and 20 B”, respectively, and at the end of the article, the words “or of two or more successor States” would be deleted.

3. With these changes, not only would the overly succinct regime established by article 20 be expanded and improved, but this regime would now be comparable, *mutatis mutandis*, to the regime for the separation of parts of a State (as contained in articles 24–26), which is reasonable.

Switzerland

Article 20 addresses the case of the transfer of only part of the territory of a State. It provides that the successor State must attribute its nationality to the persons

who have their habitual residence in the transferred territory. At the same time, it guarantees such persons the right to opt for the nationality of the predecessor State. The granting of such a right of option would no doubt make it possible to respect the wishes of the individuals holding that right, but it would impose a heavy burden on the predecessor State. Furthermore, it might risk creating, in the transferred territory, a large population group holding the nationality of the predecessor State, a situation which seems undesirable. For that reason, Switzerland, together with some members of the Commission,¹ feels that the right of option granted by the predecessor State must be limited to persons who have retained links with the predecessor State. It might also be asked whether, for the sake of symmetry, the successor State should also be required to offer a right of option to nationals of the predecessor State who do not reside in the transferred territory but have links with that territory. Lastly, article 20 offers nothing to the persons concerned residing in the territory of third States. It would be desirable to allow such persons to acquire the nationality of the successor State if they have links with it.

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 37, para. (5) of the commentary to article 20.

SECTION 2. UNIFICATION OF STATES

Article 21 (Attribution of the nationality of the successor State)

Greece

See “General remarks”, above.

SECTION 3. DISSOLUTION OF A STATE

Article 22 (Attribution of the nationality of the successor State)

Brunei Darussalam

Brunei Darussalam considers that article 22 gives too much prominence to the criterion of habitual residence, in disregard of recent practice in Central and Eastern Europe where the primary criterion used was that of the nationality of the former units of federal States.

France

The linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between these provisions is hard to understand.

Greece

See “General remarks”, above.

Guatemala

The drafting of article 22 (b) (ii) could be improved by replacing “before leaving” with “on leaving” and deleting the word “last” before “habitual residence”.

Italy

See general remarks under part II above.

Switzerland

Switzerland wonders, without wishing to alter the substance of article 22, whether it would not be a good idea to combine the cases addressed in article 22 (b) (i) and (ii).

Article 23 (Granting of the right of option by the successor States)

Czech Republic

1. Article 23 is not to be read as construing the right of option as the single acceptable means of dealing with the question of the nationality of persons qualified to acquire the nationality of several successor States under the criteria of article 22. This would undoubtedly go beyond *lex lata*, and article 19 (as well as article 10, paragraph 1) make it quite clear that the granting of the right of option in this case is merely suggested or proposed to States, not imposed on them. As a matter of fact, other possible alternative approaches are conceivable and do indeed exist concerning the specific issue of persons qualified to acquire the nationality of two or more successor States. These include measures such as negotiations among the States concerned with a view to determining a harmonized single superseding criterion, either the one mentioned in article 22 (a) or one taken from article 22 (b), or even adopting a unilateral choice of a superseding criterion (obviously in such case with the proviso of granting an appropriate right of option to persons concerned who would otherwise become stateless as a result of the succession of States, in conformity with article 10, paragraph 2). Recent practice in the area of State succession has shown that a variety of such systems could work satisfactorily while being at the same time fully consistent with the fundamental protective principles set forth in part I. Moreover, it can be pointed out in this respect that the Commission, in its commentary to article 10, paragraph 1, on the will of persons concerned stated that the “expression ‘shall give consideration’ implies that there is no strict obligation to grant a right of option to this category of persons concerned”.¹ From a *de lege lata* perspective, it is therefore indisputable that international law tolerates more flexibility than article 22 together with article 23, paragraph 1, seem to admit, and it is the understanding of the Czech Republic that article 19 indeed recognizes the greater flexibility for applying the principles of part I to specific situations, including the one envisaged in section 3.

2. After careful consideration, the Czech Republic however considers that *de lege ferenda* it might be utterly desirable, with respect to persons a priori qualified to acquire several nationalities, to promote the right of option, as the most efficient means to address the issue at hand while integrating to the fullest extent possible its human rights dimension.

3. In view of these considerations and also bearing in mind the indicative nature of part II as provided for in article 19, the Czech Republic supports the text of article 23

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 28, para. (8) of the commentary to article 10.

in its current wording as a step in the right direction and a laudable attempt on the part of the Commission at the progressive development of international law.

France

The linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between those provisions is hard to understand.

Greece

It is difficult to evaluate the right of option established under article 23, paragraph 1, because it depends on unknown factors which are exclusively a matter of the domestic law of the States concerned.

Guatemala

If interpreted in an absolutely literal manner, article 23, paragraph 1, not only obliges successor States to grant a right of option to persons concerned who are qualified to acquire their nationality, it obliges all other successor States to grant that option as well. To eliminate this obvious absurdity, paragraph 1 should be worded as follows: “In cases where persons concerned covered by article 22 meet the conditions for acquiring the nationality of one or more successor States, those States shall grant a right of option to those persons.” This change, however, is not sufficient. Guatemala believes that the “conditions” mentioned in paragraph 1 cannot be any other than those set out in article 22. However, if once again the paragraph is taken literally, it implies that these are different conditions. To prevent giving this false impression, a second change should be made in paragraph 1, which would then read as follows: “If under article 22 the nationality of two or more successor States is attributable to persons concerned, those States shall grant a right of option to those persons.”

SECTION 4. SEPARATION OF PART OR PARTS OF THE TERRITORY

Article 24 (Attribution of the nationality of the successor State)

Brunei Darussalam

The meaning and scope of the phrases “appropriate legal connection” and “any other appropriate connection” are not really clear.

Greece

See “General remarks”, above.

Guatemala

The drafting of article 24 (b) (ii) could be improved by replacing “before leaving” with “on leaving” and deleting the word “last” before “habitual residence”.

Switzerland

Switzerland wonders, without wishing to alter the substance of the provision, whether it would not be a good idea to combine the cases addressed in article 24 (b) (i) and (ii).

Article 25 (Withdrawal of the nationality of the predecessor State)

Brunei Darussalam

Article 25 gives the option to the predecessor State to withdraw its nationality from persons who have acquired the nationality of the successor State. Again, the meaning and scope of the phrases “appropriate legal connection” and “any other appropriate connection” is not really clear.

Greece

1. It would be worth excluding from the draft some provisions which are a matter of the general policy of States with regard to nationality or have no direct relationship with the question of the succession of States. Such is the case, in particular, with article 25, paragraph 2, which could be omitted from the draft.
2. See also “General remarks”, above.

Article 26 (Granting of the right of option by the predecessor and the successor States)

Czech Republic

The above comments pertaining to section 3, article 23, apply mutatis mutandis to section 4, article 26.

Greece

It is difficult to evaluate the right of option established under article 26, because it depends upon unknown factors which are exclusively a matter of the domestic law of the States concerned. Moreover, it seems excessive to subject the persons envisaged in article 25, paragraph 2, to an option procedure.

Article 27 (Cases of succession of States covered by the present draft articles)

Argentina

Argentina considers that this provision is sound, and its inclusion in the draft is relevant. With regard to its position in the draft, it might be inserted in part I during the second reading.

Finland

**(on behalf of the Nordic countries:
Denmark, Iceland, Norway, Sweden and Finland)**

1. The provision limiting the application of the draft articles, in line with both the 1978 and 1983 Vienna Conventions, to successions of States occurring in conformity with international law is from a general point of view a welcome addition. The inclusion of the phrase “Without prejudice to the right to a nationality of persons concerned”, however, may give rise to conflicting interpretations and could perhaps be revisited.
2. It is understood that a decision on the final placement of the article in part I will be taken subsequently.

Greece

The phrase “Without prejudice to the right to a nationality of persons concerned” is unacceptable from all points of view. Even if the Commission wished to make the right to a nationality a rule of *jus cogens*, that right could not have a place in the context of article 27, which actually envisages the case of an international crime, a situation that allows for no exceptions.

Switzerland

Switzerland believes that article 27, which defines the scope of the draft articles, including the scope of the general provisions (arts. 1–18), should be placed at the beginning of the text. It also shares the view of some members of the Commission who feel that the opening phrase of the article renders the entire article ambiguous,¹ and considers that a provision of an international treaty or declaration by the General Assembly must be intelligible without the reader having to study the case law of ICJ.

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 43, para. (3) of the commentary to article 27.

CHAPTER II

Comments and observations received from Governments on the question of the nationality of legal persons in relation to the succession of States

Greece

With regard to the effects of the succession of States on the nationality of legal persons, Greece is awaiting with interest the initial results of the work of the Commission on this issue, which has been little studied up to now at the international level. This study should be based mainly on the practice of States which have recently experienced cases of succession.

NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

[Agenda item 6]

DOCUMENT A/CN.4/497

Memorandum by the Secretariat

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report.....	178
	<i>Paragraphs</i>
INTRODUCTION.....	1-4 179
<i>Chapter</i>	
I. GENERAL OBSERVATIONS OF STATES ON THE DRAFT ARTICLES.....	5-21 179
A. General approach.....	5-9 179
B. Human rights considerations.....	10-12 180
C. Form of the future instrument.....	13-17 180
D. Structure of the draft articles.....	18-21 181
II. OBSERVATIONS RELATING TO SPECIFIC ARTICLES.....	22-158 181
PREAMBLE.....	22 181
PART I. GENERAL PROVISIONS.....	23-116 181
Article 1. Right to a nationality.....	23-27 181
Article 2. Use of terms.....	28-31 182
Article 3. Prevention of statelessness.....	32-35 182
Article 4. Presumption of nationality.....	36-43 182
Article 5. Legislation concerning nationality and other connected issues.....	44-45 183
Article 6. Effective date.....	46-48 184
Article 7. Attribution of nationality to persons concerned having their habitual residence in another State.....	49-55 184
Article 8. Renunciation of the nationality of another State as a condition for attribution of nationality.....	56-58 184
Article 9. Loss of nationality upon the voluntary acquisition of the nationality of another State.....	59-61 185
Article 10. Respect for the will of persons concerned.....	62-73 185
Article 11. Unity of a family.....	74-81 186
Article 12. Child born after the succession of States.....	82-86 187
Article 13. Status of habitual residents.....	87-91 187
Article 14. Non-discrimination.....	92-98 188
Article 15. Prohibition of arbitrary decisions concerning nationality issues.....	99-100 188
Article 16. Procedures relating to nationality issues.....	101-102 189
Article 17. Exchange of information, consultation and negotiation.....	103-104 189
Article 18. Other States.....	105-116 189
PART II. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES.....	117-158 190
Article 19. Application of Part II.....	124-128 191
Section 1. <i>Transfer of part of the territory</i>	129-133 191
Article 20. Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State.....	129-133 191
Section 2. <i>Unification of States</i>	134 192
Article 21. Attribution of the nationality of the successor State.....	134 192

	<i>Paragraphs</i>	<i>Page</i>
<i>Section 3. Dissolution of a State</i>	135–143	192
Article 22. Attribution of the nationality of the successor State	135–138	192
Article 23. Granting of the right of option by the successor States	139–143	193
<i>Section 4. Separation of part or parts of the territory</i>	144–158	193
Article 24. Attribution of the nationality of the successor State	144–146	193
Article 25. Withdrawal of the nationality of the predecessor State	147–150	194
Article 26. Granting of the right of option by the predecessor and the successor States	151–154	194
Article 27. Cases of succession of States covered by the present draft articles	155–158	194

Multilateral instruments cited in the present report

	<i>Source</i>
Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930)	League of Nations, <i>Treaty Series</i> , vol. CLXXIX, p. 89.
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, No. 973, p. 287.
Convention on the High Seas (Geneva, 29 April 1958)	Ibid., vol. 450, No. 6465, p. 11.
Convention on the Reduction of Statelessness (New York, 30 August 1961)	Ibid., vol. 989, No. 14458, p. 176.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, No. 14668, p. 171.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	Ibid., vol. 1144, No. 17955, p. 123.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	Ibid., vol. 1946, No. 33356, p. 3.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	Ibid., vol. 1249, No. 20378, p. 13.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	Ibid., vol. 1833, No. 31363, p. 3.
Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983)	<i>Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts</i> , vol. II (United Nations publication, Sales No. E.94.V.6).
Convention on the Rights of the Child (New York, 20 November 1989)	United Nations, <i>Treaty Series</i> , vol. 1577, No. 27531, p. 3.
European Convention on Nationality (Strasbourg, 6 November 1997)	Council of Europe, <i>European Treaty Series</i> , No. 166.

Introduction

1. At its forty-ninth session, the Commission adopted on first reading a draft preamble and a set of 27 draft articles on nationality of natural persons in relation to the succession of States with commentaries thereto.¹ In accordance with articles 16 and 21 of its statute, the Commission decided to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.

2. Member States expressed their views on the draft in the Sixth Committee during the fifty-second and fifty-third sessions² of the General Assembly. Summaries of their observations are contained in the topical summaries of the discussion held in the Committee during those sessions.³

¹ The text of the draft articles with commentaries may be found in the report of the Commission on the work of its forty-ninth session, *Yearbook . . . 1997*, vol. II (Part Two), pp. 17–43.

² The following States expressed their views on the draft articles during the fifty-second and fifty-third sessions of the General Assembly: Algeria, Argentina, Bahrain, Bangladesh, Brazil, Cameroon, China, Costa Rica, Croatia, Czech Republic, Egypt, Finland (on behalf of the Nordic countries), France, Germany, Greece, Guatemala, Hungary, India, Indonesia, Israel, Italy, Japan, Libyan Arab Jamahiriya, Malawi, Mexico, Netherlands, Pakistan, Portugal, Republic of Korea, Russian Federation, Slovakia, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay and Venezuela.

³ A/CN.4/483, paras. 5–60, and A/CN.4/496, paras. 128–141.

3. On 15 December 1997, the General Assembly adopted resolution 52/156, entitled “Report of the International Law Commission on the work of its forty-ninth session”. In paragraph 2 of that resolution, the Assembly drew the attention of Governments to the importance for the Commission of having their views on the draft articles, and urged them to submit their comments and observations in writing by 1 October 1998. Such written comments on the draft by Governments are contained in document A/CN.4/493, reproduced in the present volume.⁴

4. The present report contains an overview of the comments and observations of Governments, made either orally in the Sixth Committee or in writing. It follows the structure of the draft articles. Where appropriate, attention is drawn to diverging opinions of the members of the Commission regarding specific articles as expressed during the adoption of the draft articles on first reading.

⁴ As at 1 March 1999 replies had been received from the following States (on the dates indicated): Argentina (13 November 1998); Brunei Darussalam (9 October 1998); Czech Republic (14 September 1998); Finland (on behalf of the Nordic countries, namely, Denmark, Iceland, Norway, Sweden and Finland) (29 September 1998); France (30 October 1998); Greece (1 September 1998); Guatemala (11 June 1998); Italy (26 October 1998); and Switzerland (27 November 1997).

CHAPTER I

General observations of States on the draft articles

A. General approach

5. States generally welcomed the speedy adoption of the draft articles on first reading. Such work was considered both timely and useful in providing solutions to the problems faced by States.⁵ The draft articles were considered to be a helpful supplement to the 1978 Vienna Convention on succession of States in respect of treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.⁶

6. It was recognized that the topic was a difficult one.⁷ Reference was made, in particular, to diverging treaty regimes, the lack of clarity of relevant customary law, the limited jurisprudence on the subject and the variety of applicable laws.⁸ It was observed, however, that the draft articles clarified a field which had in the past given rise

to much controversy, both theoretical and practical, and that, although not all of the questions had been answered, their parameters and implications were now much clearer than before.⁹

7. Support was expressed for the general approach adopted by the Commission.¹⁰ There was nevertheless the view that the draft was “interventionist”, if not “dirigiste”; it was argued that States should not be placed under constraints and that sufficient flexibility should be preserved.¹¹ This comment was addressed in particular to the provisions relating to the right of option: it was felt that these problems should be settled by means of bilateral agreements.

8. There was also the view that the draft articles should focus more on the effects of the succession of States on the nationality of natural persons and less on the nationality of natural persons as such and that those provisions

⁵ A/CN.4/483, para. 5; A/CN.4/496, para. 133.

⁶ A/CN.4/493 (reproduced in the present volume), comments by France under “General remarks”.

⁷ *Ibid.*, comments by France and Italy.

⁸ *Ibid.*, comments by France.

⁹ *Ibid.*, comments by Switzerland.

¹⁰ A/CN.4/496, para. 133.

¹¹ A/CN.4/493 (see footnote 6 above), comments by France; A/CN.4/496, para. 136.

which were a matter of the general policy of States with regard to nationality or had no direct relationship with the question of the succession of States should be excluded from the draft.¹² Consequently, a title such as “Effects of the succession of States on the nationality of natural persons” or “Succession of States and nationality of natural persons” would be preferable.¹³

9. The question was raised whether the draft was to be categorized as codification of public international law or progressive development.¹⁴ It was felt that, without putting into question the fact that attribution of nationality belonged to the realm of the internal competence of States, the draft articles established a series of basic principles on the topic, providing extensive codification of current customary international law reflecting the practice of States, doctrinal opinions and jurisprudence¹⁵ and furnished States with guidelines for standardizing their internal rules and ensuring greater legal certainty.¹⁶ There was also the view that, as is often the case with the drafts submitted by the Commission, the present draft articles were a combination of both existing rules of customary law and provisions aimed at developing international law. According to this view, the element of development of international law was an indispensable part of a draft purporting to cover the subject of nationality in relation to the succession of States in its entirety and to propose a legal regime more satisfactory than that which could be deduced from the already well-established principles of international law.¹⁷

B. Human rights considerations

10. The human rights approach adopted by the Commission received widespread support.¹⁸ Several States commended the Commission for taking into account more recent trends in international law, particularly in regard to the international protection of human rights.¹⁹

11. It was felt that the Commission had struck an appropriate balance between the rights and interests of both individuals and States, taking also into consideration the interests of the international community.²⁰ Even those who considered that, when emphasizing the rights and interests of both States and individuals, the Commission had moved considerably beyond the traditional approach to the law of nationality stated that they had no difficulties in following the Commission on this path, provided that the balance between the interests of States and those of individuals was maintained.²¹

¹² *Ibid.*, comments by Greece.

¹³ A/CN.4/483, para. 59.

¹⁴ A/CN.4/493 (see footnote 6 above), comments by France on the form that the draft articles should take.

¹⁵ *Ibid.*, comments by Argentina under “General remarks”.

¹⁶ *Ibid.*, comments by Italy.

¹⁷ *Ibid.*, comments by the Czech Republic on the form that the draft articles should take.

¹⁸ A/CN.4/483, para. 7.

¹⁹ A/CN.4/493 (see footnote 6 above), comments by Argentina and Finland (on behalf of the Nordic countries), under “General remarks”.

²⁰ A/CN.4/483, para. 7.

²¹ A/CN.4/493 (see footnote 6 above), comments by the Czech Republic, under “General remarks”.

12. It was also observed, however, that the Commission should not, as regards the rights of individuals, go beyond its mandate on the topic and that care should be taken to ensure that the draft articles did not impose more stringent standards on States involved in a succession.²²

C. Form of the future instrument

13. The Commission had submitted the present draft articles in the form of a draft declaration, without prejudice to the final decision on the form the draft articles should take.²³

14. Most States favoured a declaration as the final form to be given to the draft articles. It was stressed that, if the purpose of the future instrument was to provide the States involved in a succession with a set of legal principles and at the same time with some recommendations to be followed by their legislators when drafting nationality laws, not only might the form of a declaration adopted by the General Assembly be sufficient for the achievement of this goal, it might even have some advantages, when compared to the rather rigid form of a convention, traditionally used for the finalization of the work of the Commission.²⁴ It was argued that a declaration: (a) would provide a more rapid, yet authoritative, response to the need for clear guidelines on the subject, without precluding the subsequent elaboration of a convention;²⁵ (b) could address a broader spectrum of issues than a convention establishing strict obligations for States;²⁶ and (c) if adopted by consensus, might have greater authority than a convention ratified by a small number of States. It was further observed that, should the draft take the form of a treaty, States concerned that were party to it prior to the succession would be bound by the text as a whole, while new States that emerged from the succession would be bound only by provisions reflecting customary rules, hence those contained in part I of the draft articles, and, as a consequence, different rules would apply to the different actors involved in the same case of succession.²⁷

15. On the other hand, some States expressed preference for the elaboration of a convention, which was the form taken by the previous work of the Commission on the topic of State succession.²⁸ It was also stressed that it would be problematic to reject the form of a treaty for a set of draft articles modifying rules of customary origin already applied by States. Should a treaty form not be chosen, one of the goals of codification—the drafting of new conventions—would not be achieved. Furthermore, in such a case the rules enunciated in the draft were nevertheless likely to have legal effects even though they were not treaty rules.²⁹

²² A/CN.4/483, para. 7.

²³ *Yearbook ... 1997*, vol. II (Part Two), para. (3) of the commentary to the draft preamble, p. 17.

²⁴ A/CN.4/493 (see footnote 6 above), comments by the Czech Republic, on the form that the draft articles should take.

²⁵ *Ibid.*, comments by Finland (on behalf of the Nordic countries).

²⁶ *Ibid.*, comments by the Czech Republic.

²⁷ A/CN.4/483, para. 57.

²⁸ *Ibid.*, para. 58.

²⁹ A/CN.4/493 (see footnote 6 above), comments by France, on the form that the draft articles should take.

16. The view was also expressed that, as it stood, the text looked more like a draft convention and that there was even a certain “legal mimicry” on the part of the draft articles with respect to the 1978 and 1983 Vienna Conventions, which increased already-existing doubts as to the final status of the text.

17. Other options mentioned with respect to the final form of the draft articles included a set of guidelines for national legislation or model rules.³⁰

D. Structure of the draft articles

18. The structure of the draft articles elicited favourable comments.³¹ The idea of splitting the draft articles into two parts, the first stating general rules and the second containing optional rules applicable to each of the four situations of succession defined in the draft articles, received widespread support.³²

19. The view was expressed that, although part I might not be considered in its entirety as a simple reflection of

³⁰ A/CN.4/483, para. 58.

³¹ *Ibid.*, para. 6.

³² A/CN.4/493 (see footnote 6 above), comments by Argentina, the Czech Republic and Switzerland, on the structure of the draft articles.

existing law—it also included recommendations—the recommendatory nature of the text was much more evident in part II, which was mainly intended to provide guidance or inspiration to the States involved in a succession in their efforts to resolve problems of nationality. It was felt that it was only wise to assume that States concerned might, by mutual agreement—whether explicit or even implicit—decide on a different technique of application of the provisions of part I in a particular case of succession.³³

20. However, it was observed that, if article 19 were interpreted *a contrario*, then part I of the draft would consist of peremptory provisions; there was thus the suggestion to review all the articles in part I of the draft to determine whether they all actually fell into that category.³⁴

21. It was also noted that, should the text ultimately take the form of a *treaty*, it was obvious that it would then be necessary to supplement it with provisions relating to the settlement of disputes.³⁵

³³ *Ibid.*, comments by the Czech Republic.

³⁴ A/CN.4/483, para. 6; A/CN.4/493, comments by Switzerland, on the structure of the draft articles.

³⁵ A/CN.4/493 (see footnote 6 above), comments by Switzerland under “General remarks”.

CHAPTER II

Observations relating to specific articles

PREAMBLE

22. There were no specific comments or observations on the preamble as such.

PART I. GENERAL PROVISIONS

Article 1. Right to a nationality

23. It was considered that the right to a nationality in the context of a succession of States as embodied in article 1 constituted a fundamental rule of the draft which marked significant progress in the international protection of human rights and an improvement in the positive sense of the principle embodied in article 15 of the Universal Declaration of Human Rights.³⁶

24. The Commission was further commended for going beyond the traditional approach to the right to a nationality as constituting mainly a positive formulation of the duty to avoid statelessness and not a right to any particular nationality, and having given such right a precise scope and applicability building on the fact that, in cases of State

succession, the States concerned were easily identified.³⁷ It was also stressed that the issue here was not the right to a nationality *in abstracto*, but rather that right in the exclusive context of the succession of States. Moreover, the right to a nationality was clearly subject to the provisions of the draft articles which followed.³⁸ There was, however, a view that it would appear difficult—except in the case of the unification of two States—to determine, among the States concerned, which one was under the obligation that corresponded to the right proclaimed in article 1.³⁹

25. It was observed that it was justifiable to consider the right to a nationality as a human right since nationality was often a prerequisite for exercising other rights, in particular the right to participate in the political and public life of a State.⁴⁰

26. A number of States expressed satisfaction with the Commission’s neutral approach to the issue of multiple nationality. But some believed that the draft articles should elaborate further on this question, as did the European Convention on Nationality. There was also the view that dual or multiple nationality raised a number of difficulties

³⁶ *Ibid.*, comments by Italy on article 1. The Universal Declaration of Human Rights was adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

³⁷ A/CN.4/483, para. 8; A/CN.4/493 (see footnote 6 above), comments by Finland (on behalf of the Nordic countries).

³⁸ A/CN.4/493, comments by the Czech Republic.

³⁹ *Ibid.*, comments by Switzerland.

⁴⁰ A/CN.4/483, para. 8.

and should therefore be discouraged.⁴¹ The point was further made that while it was essential to establish the right to a nationality it was questionable whether it was necessary to establish the right to at least one nationality.⁴²

27. It was also noted that since article 1 contained terms which were defined in article 2, the order of the two articles should be reversed.⁴³

Article 2. Use of terms

28. Concerning the expression “succession of States”, it was suggested to define it as “the replacement of one State by another in the responsibility for the administration of the territory and its population”, since the draft articles involved, to a much greater extent than the 1978 and 1983 Vienna Conventions on which the current definition was based, the internal legal bond between a State and individuals in its territory rather than the international relations of the State.⁴⁴

29. As to the expression “person concerned”, the Commission stressed in its commentary that the definition in subparagraph (f) was restricted to the clearly circumscribed category of persons who *had* in fact the nationality of the predecessor State. The Commission indicated that it might consider at a later stage whether it was necessary to deal, in a separate provision, with the situation of those persons who, having fulfilled the necessary substantive requirements for acquisition of such nationality, were unable to complete the procedural stages involved because of the occurrence of the succession.⁴⁵ One member of the Commission expressed reservations about the definition contained in subparagraph (f), particularly on the grounds that it was imprecise. In his view, “persons concerned” were, in accordance with international law, either all nationals of the predecessor State, if it disappeared, or, in the other cases (transfer and separation), only those who had their habitual residence in the territory affected by the succession. The successor State might, of course, expand the circle of such persons on the basis of its internal law, but it could not do so automatically, since the consent of those persons was necessary.⁴⁶

30. One State referred to paragraph (6) of the commentary to this article, which contained a sentence reading “stateless persons ... resident [in the absorbed territory] are in the same position as born nationals of the predecessor State”.⁴⁷ It expressed the view that, taken by itself, the sentence could be misleading and should be modified.⁴⁸

⁴¹ A/CN.4/483, para. 9; A/CN.4/493 (see footnote 6 above), comments by Brunei Darussalam; A/CN.4/496, para. 135.

⁴² A/CN.4/493 (see footnote 6 above), comments by Greece.

⁴³ *Ibid.*, comments by Guatemala.

⁴⁴ A/CN.4/483, para. 10; A/CN.4/496, para. 137.

⁴⁵ *Yearbook ... 1997*, vol. II (Part Two), p. 21, commentary to article 2, para. (10).

⁴⁶ *Ibid.*, para. (12).

⁴⁷ *Ibid.*, p. 20, para (6).

⁴⁸ A/CN.4/493 (see footnote 6 above), comments by Switzerland on article 2.

31. The view was also expressed that it was necessary to define in article 2 the parameters of the concept of habitual residence.⁴⁹

Article 3. Prevention of statelessness

32. The importance of this provision was highlighted by several States.⁵⁰ The view was expressed⁵¹ that the text as well as the objective of prevention of statelessness had benefited from the deletion of the restrictive criterion of habitual residence which had been included in the corresponding principle (b) contained in the 1996 report of the Commission.⁵² It was noted, moreover, that the obligation to avoid statelessness had been concretized and made operational in several other articles, such as article 6, or the savings clauses in articles 7, 8 and 18.⁵³

33. The point was made that, while it was certainly necessary to prevent statelessness, the conferral of nationality should remain the sole prerogative of the State concerned.⁵⁴

34. The suggestion was made, in view of the definition of “person concerned” in article 2 (f), to replace in article 3 the words “persons who, on the date of the succession of States, had the nationality of the predecessor State” by the term “persons concerned”.⁵⁵

35. Attention was drawn to paragraph (6) of the commentary to article 3, according to which the article set out an obligation of conduct, rather than one of result, in respect of the States concerned.⁵⁶ The view was expressed in this connection that, given the difficulty in determining which State was bound by this obligation, article 3 might be worded in terms of an *objective* to be attained rather than in terms of an obligation of conduct, at least if the form selected for the draft articles was that of a treaty.⁵⁷

Article 4. Presumption of nationality

36. Some States endorsed the presumption in article 4. It was remarked that the provision constituted a useful savings clause and an innovative solution to the problem of statelessness that could arise as a result of a succession of States.⁵⁸

37. It was observed that the qualified presumption of nationality on the basis of habitual residence was a further application of the principle of the need for a genuine link between the State and the individual with respect to

⁴⁹ A/CN.4/483, para. 10.

⁵⁰ *Ibid.*, para. 11; A/CN.4/493 (see footnote 6 above), comments by Argentina, France and Italy on article 3; A/CN.4/496, para. 135.

⁵¹ A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

⁵² *Yearbook ... 1996*, vol. II (Part Two), p. 75, para. 86.

⁵³ A/CN.4/493 (see footnote 6 above), comments by Finland (on behalf of the Nordic countries) on article 3.

⁵⁴ A/CN.4/483, para. 11.

⁵⁵ A/CN.4/493 (see footnote 6 above), comments by Guatemala.

⁵⁶ *Yearbook ... 1997*, vol. II (Part Two), p. 22.

⁵⁷ A/CN.4/493 (see footnote 6 above), comments by Switzerland on article 3.

⁵⁸ A/CN.4/483, para. 12.

nationality,⁵⁹ which must not be based on formality or artifice; the criterion of habitual residence was one most frequently used in State succession to identify the initial population constituting the successor State.⁶⁰ However, there was also the view that a presumption of nationality should not be based on the sole criterion of habitual residence, but rather on the well-established principles of *jus soli* and *jus sanguinis*. It was argued in this connection that mere residence in a State was not sufficient evidence of a genuine link with that State and did not necessarily entail loyalty, which was considered crucial.⁶¹

38. The point was made that the presumption in article 4 could be rebutted not only by other provisions of the draft articles, but also by the terms of specific agreements between States concerned.⁶²

39. Certain States questioned the wisdom of including article 4, pointing out that the provision had no general application. In the case of unification of States, it was superseded by the provision in article 21 that *all* persons concerned acquired the nationality of the successor State. In the case of transfer of part of a territory, which required by definition an agreement between the States concerned, such agreement would obviously contain provisions on the nationality of persons having their habitual residence in the transferred territory, which might not necessarily be consistent with the presumption in article 4 (and when the treaty remained silent on the question of nationality, the presumption was to the contrary, i.e. in such case, the persons concerned retained their nationality).⁶³ In the case of the dissolution of a federal State or separation of one of its units, there was no reason to disregard the criterion of the citizenship of such a unit, recognized under the federal constitution, in favour of that of habitual residence, which was not helpful in clarifying the situation of persons living in a third State.⁶⁴

40. It was noted that part II of the draft articles, in which the general provisions of part I were applied to specific categories of succession of States, was to a large extent based on the criterion of habitual residence. It was felt, however, that to suggest this criterion to the States concerned for their consideration—which was the purpose of part II—was not the same as to formulate a presumption which would determine also the behaviour of third States.⁶⁵

41. The view was also expressed that, while article 4 moved somewhat closer to the fundamental rule of the law of succession of States whereby, as of the date of suc-

cession, the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by the succession, it did not confirm this rule.⁶⁶

42. There was still another view that the presumption of nationality established by article 4, which could function only as a provisional nationality, would place its beneficiaries in the position of having a nationality which was subject to a decision independent of the will of the person concerned. The precariousness of this attribution of nationality would inevitably extend to rights and public offices that the person concerned might obtain by virtue of the possession of that nationality. In principle, the person should be required to relinquish that office, on the date on which the authorities of the successor State determined that such person did not, in fact, have the nationality he or she enjoyed by virtue of the presumption established in article 4. This would violate the principle of acquired rights. The draft articles should therefore stipulate that persons having a presumed nationality under article 4 should not enjoy, even provisionally, rights which might be exercised only by persons who definitively had the nationality of the successor State. In this case, the presumed nationality under article 4 would be a mere fiction, since the only benefit it would provide would be the right to reside in the territory of the successor State, which persons concerned enjoyed, in any case, under article 13. Alternatively, the draft articles could provide that, if persons having the presumed nationality in question could, on the basis of that nationality, invoke acquired rights, they should be allowed to become naturalized under particularly favourable conditions; or that if such persons must be allowed to opt for the nationality of the successor State in order to continue enjoying the acquired rights exercised by virtue of the presumption after having lost the benefit of the latter, then that right of option should enable them to do so.⁶⁷

43. The question was raised as to whether the solution proposed in article 12 of the draft did not pose the risk, in certain cases, of a number of different nationalities within a single family and whether it would not be preferable to extend the presumption of nationality of the State of habitual residence set out in article 4 to the situation envisioned in article 12, namely, that of a child without nationality.⁶⁸

Article 5. Legislation concerning nationality and other connected issues

44. Several States expressed support for this provision.⁶⁹ Some held that the article should establish an obligation rather than merely making a recommendation, and believed that the conditional form (“should”) should be replaced by the imperative (“shall”).⁷⁰

⁵⁹ *Ibid.*, para. 14.

⁶⁰ A/CN.4/493 (see footnote 6 above), comments by Italy on article 4.

⁶¹ A/CN.4/483, para. 14; A/CN.4/493, comments by Brunei Darussalam on article 4.

⁶² A/CN.4/483, para. 13; A/CN.4/496, para. 138.

⁶³ A recent example was pointed out in this respect: the Treaty on a common State border between the Czech Republic and Slovakia (4 January 1996), which provided, among other things, for an exchange of certain territories between the two States. No automatic change of nationality was envisaged as a result of the territorial exchange (and no provision on nationality was included in the Treaty) (A/CN.4/493 (see footnote 6 above), comments by the Czech Republic on article 4.

⁶⁴ A/CN.4/483, para. 15; A/CN.4/493 (see footnote 6 above), comments by the Czech Republic on article 4.

⁶⁵ A/CN.4/493, comments by the Czech Republic on article 4.

⁶⁶ *Ibid.*, comments by Greece under “General remarks”.

⁶⁷ *Ibid.*, comments by Guatemala on article 4.

⁶⁸ *Ibid.*, comments by Switzerland on article 12.

⁶⁹ *Ibid.*, comments by Argentina, Brunei Darussalam, the Czech Republic and France, on article 5.

⁷⁰ *Ibid.*, comments by Argentina and Switzerland.

45. Several drafting suggestions were made in respect of this provision. It was thus proposed in the first sentence to replace the words “consistent with”, by the words “which will give effect to”. It was noted that greater precision could be achieved by rewording the end of the second sentence, so that it would read “on their status and their conditions”. Furthermore, the word “consequences”, in the penultimate line, was considered too vague and its replacement was therefore advocated.⁷¹

Article 6. Effective date

46. Support was expressed for this article.⁷²

47. It was noted that, according to the provision, the attribution of nationality took effect on the date of the succession; in other words, it was usually retroactive. This retroactivity was also stipulated when the person concerned acquired a nationality by exercising a right of option, but only if, without retroactivity, the person would have been left temporarily stateless. The question was raised in this connection as to whether this latter condition should not be extended to all cases of attribution of nationality, i.e. to the whole of article 6, instead of being limited to the case of the exercise of a right of option. The suggested amendment would have the advantage of limiting the retroactivity to the extent strictly necessary.⁷³

48. According to another view, while article 6 moved somewhat closer towards the fundamental rule of the law of succession of States whereby, as of the date of succession, the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by the succession, it did not confirm such rule. It was noted, however, that even though the said rule had not been established in part I, it was followed in the specific provisions of part II (arts. 20–22 (a) and 24 (a)).⁷⁴

Article 7. Attribution of nationality to persons concerned having their habitual residence in another State

49. According to the view of one member of the Commission, paragraph 1 should be drafted in such a manner as to exclude any possibility that a State might attribute its nationality *ex lege*. The majority of the Commission considered that this hypothesis was covered by paragraph 2.⁷⁵

50. Several Governments considered article 7 useful as it clearly indicated that States had certain prerogatives regarding the attribution of their nationality in relation to State succession.⁷⁶

⁷¹ Ibid., comments by France.

⁷² Ibid., comments by Brunei Darussalam on article 6.

⁷³ A/CN.4/483, para. 17; A/CN.4/493 (see footnote 6 above), comments by Switzerland on article 6.

⁷⁴ A/CN.4/493, comments by Greece.

⁷⁵ *Yearbook ... 1997*, vol. II (Part Two), p. 25, para. (4) of the commentary to article 7.

⁷⁶ A/CN.4/483, para. 18.

51. The view was expressed that the Commission had made a major step in the direction of the development of international law by providing for a considerable role for the will of persons concerned in the draft articles but that it was nevertheless essential to preserve the balance between provisions concerning the will of individuals (art. 10) and those ensuring certain prerogatives of States (arts. 7–9).⁷⁷

52. The point was made that States had a right to seek to prevent successions of States from leading to dual and multiple nationality and that article 7 reflected that aim,⁷⁸ even though the Commission claimed to be neutral on this point. However, paragraph 1 placed at a disadvantage those persons who, while having the nationality of a third State, also had “appropriate connections” other than residence with the successor State (family ties, for example). Still, to the extent that the successor State retained the *possibility* of offering its nationality to such individuals, the solution suggested in article 7, paragraph 1, would seem to be acceptable.⁷⁹

53. While some delegations endorsed the principle in paragraph 2, others expressed reservations on the grounds that it was inconsistent with the provision in article 10, paragraph 2, and that States could thus abuse the occurrence of succession to extend their jurisdiction into the territory of other States by attributing their nationality to persons concerned residing in the territory of such other States.⁸⁰

54. There was also the view that the linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between those provisions was difficult to understand.⁸¹

55. Drafting suggestions included the insertion of the prefix “Non-” at the beginning of the title of article 7 (immediately before the word “Attribution” (see the title of article 14)), and of the words “against their will” after the word “nationality” in paragraph 2, as well as the deletion of the words “against the will of the persons concerned” in the next line of that paragraph. It was further proposed to delete, at the beginning of paragraph 1, the words “Subject to the provisions of article 10” and to insert a reference to article 7 at the beginning of article 10, paragraph 1, which would thus read “Subject to the provisions of article 7, States concerned ...”⁸²

Article 8. Renunciation of the nationality of another State as a condition for attribution of nationality

56. While some States considered article 8 to be of practical significance since it enunciated clearly the relevant rights and obligations of States concerned, others felt that it dealt with issues not directly connected to a succession of States which were better left to national legisla-

⁷⁷ A/CN.4/493 (see footnote 6 above), comments by the Czech Republic on article 7.

⁷⁸ Ibid., comments by France.

⁷⁹ Ibid., comments by Switzerland.

⁸⁰ A/CN.4/483, para. 18.

⁸¹ A/CN.4/493 (see footnote 6 above), comments by France on article 7.

⁸² Ibid., comments by Guatemala.

tion, as partly recognized by the use of non-mandatory language.⁸³

57. The view was expressed that, while the commentary seemed to imply that the draft was neutral on the question of dual/multiple nationality, article 8 allowed States which had a policy of single nationality to enforce such policy.⁸⁴

58. The need was stressed to preserve the balance between provisions concerning the will of individuals (art. 10) and those ensuring certain prerogatives of States (arts. 7–9).⁸⁵

Article 9. Loss of nationality upon the voluntary acquisition of the nationality of another State

59. As was the case with article 8, some States considered article 9 to be of practical significance, while others felt that it dealt with issues not directly connected to a succession of States.⁸⁶

60. Referring to paragraph (5) of the commentary to article 9 stating that withdrawal of the nationality of the predecessor State cannot occur “before such persons effectively acquire the nationality” of the other State,⁸⁷ the view was expressed that this stipulation was so warranted and so essential that it should be included in the actual text of the article.⁸⁸

61. As was done with respect to articles 7–8, it was stressed that it was essential to preserve the balance between provisions concerning the will of individuals (art. 10) and those ensuring certain prerogatives of States.⁸⁹

Article 10. Respect for the will of persons concerned

62. Several States underscored the importance of article 10. The point was made that the right of option was a powerful instrument for avoiding grey areas of competing jurisdictions.⁹⁰ It was also underlined that article 10 ranged among those articles which embodied principles and rules that were intended to protect the human rights of the persons concerned and which took into consideration the current stage of development of human rights law.⁹¹ The view was further expressed that the provision reflected a sufficiently well-established conventional and internal practice of States, especially in the cases of the formation of a new State and the cession of territory, which favoured the residents of the territory in question or persons originating therein.⁹²

⁸³ A/CN.4/483, para. 19; A/CN.4/493 (see footnote 6 above), comments by Greece on article 9.

⁸⁴ A/CN.4/493, comments by Brunei Darussalam on article 8.

⁸⁵ *Ibid.*, comments by the Czech Republic.

⁸⁶ A/CN.4/483, para. 19; A/CN.4/493 (see footnote 6 above), comments by Greece on article 9.

⁸⁷ *Yearbook ... 1997*, vol. II (Part Two), p. 26.

⁸⁸ A/CN.4/493 (see footnote 6 above), comments by Switzerland on article 9.

⁸⁹ *Ibid.*, comments by the Czech Republic.

⁹⁰ A/CN.4/483, para. 20; A/CN.4/496, para. 136.

⁹¹ A/CN.4/493 (see footnote 6 above), comments by Finland (on behalf of the Nordic countries) on article 10.

⁹² *Ibid.*, comments by Italy.

63. According to another view, the wording should make clear that article 10 only applied to rare cases.⁹³ The point was also made that, in the past, the right of option had usually been granted to a particular group of persons on the basis of an international agreement and entailed a choice *between* nationalities, while article 10 reflected the more recent practice of a choice to acquire the nationality of a State under its internal legislation, a phenomenon more adequately reflected by the phrase “free choice of nationality”.⁹⁴

64. It was observed that it was essential to preserve the balance between provisions concerning the will of individuals (art. 10) and those ensuring certain prerogatives of States (arts. 7–9).⁹⁵

65. Paragraph 1 was interpreted as meaning that, while a person concerned was to be given a choice as to which *among* the nationalities of two or more States he or she wanted, such person did not have the right to choose two or more nationalities.⁹⁶

66. With respect to paragraph 2, some members of the Commission considered that, in the absence of objective criteria for determining the existence of an “appropriate connection”, this provision introduced an undesirable element of subjectivity. They therefore believed that there was no justification for departing from the well-established notion of “genuine link”. Others considered that what constituted an “appropriate connection” in a particular case was spelled out in detail in part II and that the use of the concept of “genuine link” in a context other than diplomatic protection raised difficulties. Still other members believed that an alternative to either expression should be found.⁹⁷

67. Several States expressed support for the provision in paragraph 2. It was felt, however, that the terms “appropriate connection” needed further clarification.⁹⁸ Moreover, a number of States expressed preference for the use, instead, of the well-established phrases “genuine link” or “effective link”, which were considered more objective standards.⁹⁹ It was further suggested to harmonize, for the sake of consistency, the text of draft articles 10 and 18 and to use the expression “genuine and effective link” in both.¹⁰⁰

68. There was also the view that persons having effective links with the predecessor State or, where applicable, with other successor States (as was the case, in particular, of persons who, as a result of the succession of States, became minorities within the new State) must have the right to choose between the nationality of these States and that of the successor State which had taken the initiative with regard to the right of option and organized it. Instead,

⁹³ A/CN.4/483, para. 20.

⁹⁴ *Ibid.*, para. 21.

⁹⁵ A/CN.4/493 (see footnote 6 above), comments by the Czech Republic on article 10.

⁹⁶ *Ibid.*, comments by Brunei Darussalam.

⁹⁷ *Yearbook ... 1997*, vol. II (Part Two), p. 28, para. (10) of the commentary to article 10.

⁹⁸ A/CN.4/493 (see footnote 6 above), comments by Brunei Darussalam on article 10.

⁹⁹ A/CN.4/483, para. 22.

¹⁰⁰ A/CN.4/496, para. 137.

article 10, paragraph 2, envisaged a limited right of option which gave no other choice to persons than that of choosing the nationality of the State granting the right of option. It was felt that the above-mentioned traditional right should, however, be reflected in the draft.¹⁰¹

69. As to paragraph 3, it was superfluous, according to one view: it was unthinkable that a State could fail to attribute its nationality to a person who had exercised a right of option in favour of that nationality, since the exercise of that right and the attribution of nationality were two sides of the same coin.¹⁰²

70. Concerning paragraph 4, it was believed that the rights of States should not be reduced excessively to the benefit of the rights of individuals and that States should retain control over the attribution of nationality. Thus, paragraph 4 was considered too restrictive¹⁰³ or too categorical; it was considered preferable to say that the State whose nationality persons entitled to the right of option had renounced might withdraw its nationality from such persons only if they would thereby not become stateless.¹⁰⁴

71. As regards paragraph 5, it was felt that it required further clarification,¹⁰⁵ in particular with respect to the use of the expression "reasonable time limit".¹⁰⁶

72. It was also considered that the linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between those provisions was difficult to understand.¹⁰⁷

73. The following interrelated changes were proposed in articles 7 and 10: at the beginning of article 7, paragraph 1, the words "Subject to the provisions of article 10" should be deleted; a reference to article 7 should be inserted at the beginning of article 10, paragraph 1, which would read, "Subject to the provisions of article 7, States concerned ..."¹⁰⁸

Article 11. Unity of a family

74. Some members of the Commission were of the view that article 11 went beyond the scope of the present topic. Others, however, believed that it was closely connected to nationality issues in relation to the succession of States, as the problem of family unity might arise in such context on a large scale.¹⁰⁹

75. Doubts were expressed by some members regarding the applicability of the principle embodied in article 11 owing to the different interpretations of the concept of "family" in various regions of the world. Others

were of the view that a succession of States usually involved States from the same region sharing the same or a similar interpretation of this concept, so that the problem did not arise.¹¹⁰

76. There were also divergent views of States on the need for the inclusion of article 11. While some States were in favour of such an approach, others felt that the article raised a broader issue which was outside the scope of the topic.¹¹¹

77. It was observed that article 11 ranged among several articles which embodied principles and rules that were intended to protect the human rights of the persons concerned and which took into consideration the current stage of development of human rights law. Agreement was voiced with the Commission's view that acquisition of different nationalities by the members of a family should not prevent them from remaining together or being reunited.¹¹² While it was highly desirable to enable members of a family to acquire the same nationality upon a succession of States, a change of nationality of one of the spouses during marriage should not automatically affect the nationality of the other spouse. Reference was also made to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, according to which a change of nationality by the husband during marriage shall not automatically change the nationality of the wife.¹¹³

78. It was also pointed out that article 11 went beyond a common limit found in almost all international conventions and internal legislations on the matter providing for a simultaneous change of nationality of the family members at the time the family head changed his or her nationality. In most cases this solution entailed discrimination against women, whose status was thus subordinate to that of men.¹¹⁴

79. It was further observed that the article should not be interpreted as meaning that all members of a family remaining together had to have the same nationality, since that would contravene the principle of respect for the will of persons concerned; but a State could consider the unity of a family as a factor for granting nationality to certain family members under more favourable terms.¹¹⁵

80. However, the point was also made that, while the principle of family unity was an important one, habitual residence ought to be considered the most important criterion in determining nationality.¹¹⁶ The remark was further made that, while the principle reflected in article 11 was sound, it might give rise to difficulties as to the definition and interpretation of the meaning of the term "family".¹¹⁷

¹⁰¹ A/CN.4/493 (see footnote 6 above), comments by Greece under "General remarks".

¹⁰² *Ibid.*, comments by Guatemala on article 10.

¹⁰³ A/CN.4/496, para. 136.

¹⁰⁴ A/CN.4/493 (see footnote 6 above), comments by France on article 10.

¹⁰⁵ A/CN.4/483, para. 24.

¹⁰⁶ A/CN.4/496, para. 137.

¹⁰⁷ A/CN.4/493 (see footnote 6 above), comments by France on article 10.

¹⁰⁸ *Ibid.*, comments by Guatemala.

¹⁰⁹ *Yearbook ... 1997*, vol. II (Part Two), p. 29, commentary to article 11, para. (6).

¹¹⁰ *Ibid.*, p. 30, para. (7).

¹¹¹ A/CN.4/483, paras. 25–26; A/CN.4/496, para. 138.

¹¹² *Yearbook ... 1997*, vol. II (Part Two), p. 29, para. (5) of the commentary to article 11.

¹¹³ A/CN.4/493 (see footnote 6 above), comments by Finland (on behalf of the Nordic countries) on article 11.

¹¹⁴ *Ibid.*, comments by Italy.

¹¹⁵ A/CN.4/483, para. 25.

¹¹⁶ A/CN.4/496, para. 138.

¹¹⁷ A/CN.4/493 (see footnote 6 above), comments by Brunei Darussalam on article 11.

81. There was also the view that article 11 appeared to have major implications regarding the law of residence which were not in keeping with the aim of the draft. Although there was nothing jarring about this provision in substantive terms, it really had no place in the text.¹¹⁸

Article 12. Child born after the succession of States

82. Support was expressed for the provision in article 12. It was observed that the granting of the nationality of the State concerned on whose territory a child was born under this article covered both options envisaged in the Convention on the Reduction of Statelessness, i.e. granting of nationality at birth by operation of law and granting of nationality upon application to the appropriate authority in the manner prescribed by national law.¹¹⁹ It was also felt that article 12 constituted a useful development of article 24 of the International Covenant on Civil and Political Rights and of article 7 of the Convention on the Rights of the Child.¹²⁰

83. However, it was noted that while it appeared from the commentary that the scope of the article was limited to the period directly following a succession of States, it was not clear for how much time after the succession the article was to apply.¹²¹

84. The question was also raised as to whether the solution proposed in article 12 of the draft did not pose the risk, in certain cases, of a number of different nationalities within a single family and whether it would not be preferable to extend the presumption of nationality of the State of habitual residence set out in article 4 to the situation envisioned in article 12.¹²² Where such presumption was not applicable, the matter would be resolved in accordance with the general obligation of the State in which the child had been born to prevent statelessness in accordance with article 3.¹²³

85. It was further suggested that the article should be adjusted so as to ensure that a child whose parents subsequently acquired, upon option, a nationality other than that of the State in which he or she had been born would be entitled to the parents' nationality. Attention was drawn specifically to the case where the parents subsequently acquired the nationality of a State which applied the principle of *jus sanguinis*.¹²⁴ Article 12 seemed, according to one view, to have a bias towards the principle of *jus soli*.¹²⁵

86. A view was also expressed that the article should be deleted as it addressed a nationality issue not directly related to a succession of States.¹²⁶

Article 13. Status of habitual residents

87. When this provision was discussed in the Commission, some members believed that international law currently allowed a State concerned to require that persons who voluntarily became nationals of another State concerned transferred their habitual residence outside its territory. Those members stressed, however, that it was important to ensure that persons concerned were provided with a reasonable time limit for such transfer of residence, as proposed by the Special Rapporteur in his third report.¹²⁷ Other members, however, felt that the requirement of transfer of residence did not take into consideration the current stage of the development of human rights law. They considered that the draft articles should prohibit the imposition by States of such a requirement. For some members, this entailed moving into the realm of *lex ferenda*.

88. Given this situation, the Commission decided not to include any provision on the matter in the draft articles, thus opting for a neutral solution. The Commission was, however, firmly of the view that a succession of States as such could not, at the end of the twentieth century, affect the status of the persons concerned as habitual residents.¹²⁸

89. Several States endorsed article 13.¹²⁹ The principle enshrined in paragraph 1 was thus considered to constitute a useful guarantee for the respect of the rights of individuals.¹³⁰ It was observed that while a change of nationality of persons habitually resident in a third State would not affect their status as permanent residents, it might affect their rights and duties.¹³¹

90. The Commission was encouraged to consider whether the article should be complemented by a more specific provision on the right of residence, i.e. the right of habitual residents of the territory over which sovereignty was transferred to a successor State to remain in that State even if they had not acquired its nationality.¹³² Reference was made in this context both to the Declaration on the consequences of State succession for the nationality of natural persons (Venice Declaration), adopted by the European Commission for Democracy through Law in 1996,¹³³ according to which the exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State and their movable or immovable property located therein; as well as to article 20 of the European Convention on Nationality.

¹²⁷ *Yearbook ... 1997*, vol. II (Part One), document A/CN.4/480 and Add.1, draft article 10, paragraph 3.

¹²⁸ *Ibid.*, vol. II (Part Two), p. 31, paras. (4)–(6) of the commentary to article 13.

¹²⁹ A/CN.4/483, para. 30; A/CN.4/493 (see footnote 6 above), comments by the Czech Republic, Finland (on behalf of the Nordic countries) and Italy, on article 13.

¹³⁰ A/CN.4/493, comments by the Czech Republic.

¹³¹ A/CN.4/483, para. 30.

¹³² *Ibid.*; A/CN.4/493 (see footnote 6 above), comments by Finland (on behalf of the Nordic countries) on article 13.

¹³³ "Consequences of State Succession for Nationality" (CDL-INF (97) 1) (Council of Europe, Strasbourg, 10 February 1997), pp. 3–6.

¹¹⁸ *Ibid.*, comments by France.

¹¹⁹ A/CN.4/483, para. 27.

¹²⁰ A/CN.4/493 (see footnote 6 above), comments by the Czech Republic and Italy on article 12.

¹²¹ *Ibid.*, comments by Brunei Darussalam.

¹²² *Ibid.*, comments by Switzerland.

¹²³ A/CN.4/483, para. 29.

¹²⁴ *Ibid.*, para. 28.

¹²⁵ A/CN.4/493 (see footnote 6 above), comments by France on article 12.

¹²⁶ A/CN.4/483, para. 29; A/CN.4/493, comments by Greece.

91. There was also the view that article 13 was clearly in the sphere of *lex ferenda* and not *lex lata*.¹³⁴ However desirable it might be to limit massive forced population transfers as much as possible, the article addressed questions which were not directly related to the Commission's mandate, as it dealt more with succession of States and the law of aliens than with nationality, and therefore did not belong in the text.¹³⁵ It was also felt that the Commission should rather have recalled the principle that State succession did not as such affect the acquired rights of natural and juridical persons.¹³⁶

Article 14. Non-discrimination

92. Some members of the Commission regretted the fact that article 14 did not address the question of the discriminatory treatment by a successor State of its nationals depending upon whether they had its nationality prior to the succession of States or they acquired it as a result of such succession. Others believed that that was a human rights issue of a more general character and therefore outside the scope of the present draft articles.¹³⁷

93. Several States expressed the view that the article was of the utmost importance.¹³⁸ It was noted that the provision addressed one of the most important and most difficult aspects of the protection of human rights,¹³⁹ in particular the rights of minorities, as already indicated by PCIJ in connection with a dispute on the acquisition of Polish nationality.¹⁴⁰ It was stressed that both the American Convention on Human Rights and the International Covenant on Civil and Political Rights referred specifically to equality before the law and to the protection of ethnic, religious and linguistic minorities, thus prohibiting discrimination.¹⁴¹

94. On the one hand, there was support for the Commission's approach not to include an illustrative list of criteria on the basis of which discrimination was prohibited,¹⁴² in order to avoid the risk of any *a contrario* interpretation.¹⁴³ On the other hand, there was the view that the current formulation was too broad, as it might, for example, prohibit any distinction, where the nationality of a successor State was being acquired, between individuals residing in the territory of that State and other persons.¹⁴⁴ It was therefore found preferable to spell out the grounds on

¹³⁴ A/CN.4/493 (see footnote 6 above), comments by France on article 13.

¹³⁵ Ibid.; A/CN.4/483, para. 31; A/CN.4/496, para. 138.

¹³⁶ A/CN.4/483, para. 31.

¹³⁷ *Yearbook ... 1997*, vol. II (Part Two), p. 32, para. (5) of the commentary to article 14.

¹³⁸ A/CN.4/483, para. 32; A/CN.4/493 (see footnote 6 above), comments by Finland (on behalf of the Nordic countries) on article 14; A/CN.4/496, para. 138.

¹³⁹ A/CN.4/493 (see footnote 6 above), comments by Italy.

¹⁴⁰ *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B*, No. 7, p. 15.

¹⁴¹ A/CN.4/493 (see footnote 6 above), comments by Argentina on article 14.

¹⁴² A/CN.4/483, para. 32.

¹⁴³ A/CN.4/493 (see footnote 6 above), comments by Italy on article 14.

¹⁴⁴ A/CN.4/483, para. 32; A/CN.4/493 (see footnote 6 above), comments by Brunei Darussalam and Switzerland.

which discrimination was prohibited, and the following were suggested for inclusion in such a list: race, colour, descent, national or ethnic origin, religion, political opinion, sex, social origin, language or property status.¹⁴⁵

95. The view was expressed that the article should also prohibit discriminatory treatment of its nationals by a successor State depending on whether they already had its nationality prior to the succession of States or had acquired it as a result of such succession.¹⁴⁶ It was further felt that this provision should be expanded to provide also for complete equality between new and long-term nationals in respect of their status and rights in general.¹⁴⁷

96. It was also observed that a clear distinction should be made between a situation in which a particular requirement, such as that of a clean criminal record, would prevent a person concerned from acquiring the nationality of at least one of the successor States and would constitute discrimination prohibited by article 14, and a situation in which such requirement constituted a condition for naturalization, which was outside the scope of the draft articles.¹⁴⁸ Reference was made, in this connection, to the Commission's commentary to article 14 containing a footnote with an extensive reference to the requirement of a clean criminal record.¹⁴⁹

97. As regards the question whether a State concerned might use certain criteria for enlarging the circle of individuals entitled to acquire its nationality, which was not addressed in article 14, the view was expressed that in such case the will of the individual must be respected.¹⁵⁰

98. There was also the view that the article addressed a broader issue which was outside the scope of the topic.¹⁵¹

Article 15. Prohibition of arbitrary decisions concerning nationality issues

99. Some States drew particular attention to the importance of this article, stressing that it constituted a useful guarantee for the respect of the rights of individuals.¹⁵² Reference was also made to article 20, paragraph 3, of the American Convention on Human Rights, stating that no one shall be arbitrarily deprived of his nationality or of the right to change it.¹⁵³

100. It was said that often treaty provisions or national citizenship laws which were generous on paper ended up being considerably restricted in the phase of practical implementation. It was therefore important to expressly prohibit arbitrary decisions on nationality issues, as has been done in article 15, and to include procedural safeguards

¹⁴⁵ A/CN.4/483, para. 32.

¹⁴⁶ Ibid., para. 34.

¹⁴⁷ A/CN.4/493 (see footnote 6 above), comments by Greece on article 14.

¹⁴⁸ A/CN.4/483, para. 33; A/CN.4/493, comments by the Czech Republic.

¹⁴⁹ *Yearbook ... 1997*, vol. II (Part Two), p. 32, footnote 106.

¹⁵⁰ A/CN.4/483, para. 35.

¹⁵¹ Ibid., para. 36.

¹⁵² Ibid., para. 37; A/CN.4/493 (see footnote 6 above), comments by the Czech Republic and Italy on article 15; A/CN.4/496, para. 138.

¹⁵³ A/CN.4/493 (see footnote 6 above), comments by Argentina.

for the respect for the rule of law, such as the requirements in article 16.¹⁵⁴

Article 16. Procedures relating to nationality issues

101. The importance of article 16 was highlighted by several States.¹⁵⁵ Attention was also drawn to the formulation in paragraph 3 of the Venice Declaration reading: “Any deprivation, withdrawal or refusal to confer nationality shall be subject to an effective remedy.”¹⁵⁶ The suggestion was made to include among the procedural guarantees “reasonable fees” and also the requirement that reasons for any decision should be given in writing, as did the European Convention on Nationality (arts. 13 and 11, respectively).¹⁵⁷

102. The view was, however, expressed that article 16 was too detailed. It was suggested to amend the text so as to provide that States must “take appropriate measures to process without delay” the applications referred to in article 16.¹⁵⁸

Article 17. Exchange of information, consultation and negotiation

103. The obligations set out in article 17 were considered necessary to ensure the effectiveness of the right to a nationality.¹⁵⁹ It was pointed out that this provision obviously should be read together with the other articles in the draft which were interrelated and gave a content to the duty to consult and negotiate. Nonetheless, it was felt that it was advisable to add a sentence stating explicitly that States concerned were also under the obligation to ensure that the outcome of the negotiations was in compliance with the principles and rules contained in the draft articles.¹⁶⁰

104. The view was expressed that agreement was not an indispensable means of solving nationality problems and that legislative measures adopted by a State concerned with full knowledge of the content of the legislation of other States concerned might be sufficient to prevent detrimental effects on nationality arising from a succession of States.¹⁶¹

Article 18. Other States

105. Some members of the Commission expressed reservations with regard to article 18 as a whole, or with either of its two paragraphs. It was stated in particular that

¹⁵⁴ Ibid., comments by Brunei Darussalam and Finland (on behalf of the Nordic countries).

¹⁵⁵ Ibid., comments by the Czech Republic and Finland (on behalf of the Nordic countries) on article 16.

¹⁵⁶ See footnote 133 above; and A/CN.4/483, para. 38.

¹⁵⁷ A/CN.4/483, para. 38; A/CN.4/493 (see footnote 6 above), comments by Finland (on behalf of the Nordic countries) on article 16.

¹⁵⁸ A/CN.4/493 (see footnote 6 above), comments by France.

¹⁵⁹ A/CN.4/483, para. 39.

¹⁶⁰ Ibid.; A/CN.4/493 (see footnote 6 above), comments by Finland, on behalf of the Nordic countries on article 17.

¹⁶¹ A/CN.4/483, para. 40; A/CN.4/493 (see footnote 6 above), comments by the Czech Republic.

it would be difficult to apply the article in practice and that the provision would allow States to take the law into their own hands.¹⁶²

106. Several States expressed support for the article. The view was expressed that the Commission had addressed with great clarity one of the key functions of international law in connection with nationality, i.e. to delimit the competence of States in this area. It was added that the provision was perfectly consistent with the line of legal logic followed throughout the draft articles.¹⁶³

107. It was also held that it would be worth excluding article 18 from the draft, as it had no direct relationship with the question of the succession of States. Moreover, it concerned an extremely delicate matter—control of States in respect of a competence which was strictly linked to their sovereignty—and was liable to raise more problems than it would resolve.¹⁶⁴

108. It was suggested that, in view of the definition contained in article 2 (*e*), it might be appropriate to change the title of article 18 to “Third States”.¹⁶⁵

109. As regards paragraph 1, some members of the Commission argued that it dealt with a problem of a more general character which need not be addressed in the specific context of the succession of States.¹⁶⁶

110. Some States felt that paragraph 1 reflected the general principle of non-opposability vis-à-vis third States of nationality granted without the existence of an effective link between the State and the person concerned. Reference was made in this respect to the Convention on Certain Questions relating to the Conflict of Nationality Laws.¹⁶⁷ The proviso preventing the treatment of a person having no effective link with a State concerned as a de facto stateless person was, however, considered to be fully justified.¹⁶⁸

111. It was noted that the Commission did not in fact address the substance of the criteria for identifying the existence of an effective link, but that point was not included in its terms of reference, and in any event reliance on international jurisprudence (i.e. the *Nottebohm* case¹⁶⁹ and the *Flegenheimer* case¹⁷⁰) could assist those called upon to deal with this issue.¹⁷¹

112. There was a view, however, that paragraph 1 over-emphasized the principle of effective nationality.¹⁷² It was

¹⁶² *Yearbook ... 1997*, vol. II (Part Two), p. 35, para. (9) of the commentary to article 18.

¹⁶³ A/CN.4/493 (see footnote 6 above), comments by Italy on article 18.

¹⁶⁴ A/CN.4/483, para. 43; A/CN.4/493 (see footnote 6 above), comments by Greece.

¹⁶⁵ A/CN.4/493 (see footnote 6 above), comments by Guatemala.

¹⁶⁶ *Yearbook ... 1997*, vol. II (Part Two), p. 35, para. (9) of the commentary to article 18.

¹⁶⁷ A/CN.4/493 (see footnote 6 above), comments by the Czech Republic and Finland (on behalf of the Nordic countries) on article 18.

¹⁶⁸ Ibid., comments by the Czech Republic.

¹⁶⁹ *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4.

¹⁷⁰ UNRIIAA, vol. XIV (Sales No. 65.V.4), p. 327.

¹⁷¹ A/CN.4/493 (see footnote 6 above), comments by Italy on article 18.

¹⁷² A/CN.4/496, para. 138.

felt that this provision, which appeared to authorize any State to contest the nationality granted to an individual by another State, was very questionable. It was pointed out that, although in its judgment rendered in 1955 in the *Nottebohm* case,¹⁷³ ICJ had indeed emphasized that nationality should be effective and that there should be a social connection between the State and the individual, the judgment had been criticized and had remained an isolated instance. The extension of the principle of effectiveness in paragraph 1 appeared to be based on the idea that a State must take an attribution of public international law as a basis for granting its nationality, whereas the opposite applied in practice.¹⁷⁴

113. It was suggested that the phrase “effective link” should be replaced either by “genuine link” used in article 5, paragraph 1, of the Convention on the High Seas and article 91, paragraph 1, of the United Nations Convention on the Law of the Sea, or by “genuine and effective link”, which covered both terms used by ICJ in the *Nottebohm* case and was contained in article 18, paragraph 2 (a), of the European Convention on Nationality. It was further proposed that the terminology in articles 10 and 18, paragraph 1, should be harmonized in this respect.¹⁷⁵

114. Concerning paragraph 2, certain members of the Commission were opposed to its inclusion as they considered that it gave too much prominence to the competence of other States. Some stated, however, that they could accept the paragraph if it were explicitly provided that other States could treat a stateless person as a national of a particular State concerned only “for the purposes of their domestic law”.¹⁷⁶

115. Several States expressed their support for the provision in paragraph 2. It was observed that it constituted a remedy for the violation of the right to a nationality. It was suggested that the actual text of the paragraph should provide a clarification of the following points made in the commentary: that the provision gave third States the right to treat stateless persons as nationals of a given State, even where statelessness could not be attributed to an act of the State but where the persons concerned had by their negligence contributed to the situation; and that it was intended to redress situations resulting from discriminatory legislation or arbitrary decisions, which were prohibited by articles 14–15, by extending to persons referred to in the paragraph the favourable treatment granted to nationals of the State in question and protecting them from possible deportation.¹⁷⁷

116. It was stressed that paragraph 2 focused exclusively on the relationship between persons who had become stateless and a third State. Drafted in the form of a savings clause, this provision preserved the delicate balance

between the interests of States which could be involved in a situation of this kind.¹⁷⁸

PART II. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

117. As regards the typology used in part II, it was considered more satisfactory than that of part II of both the 1978 and 1983 Vienna Conventions. It was noted in particular that a clearer distinction was drawn between merger and absorption.¹⁷⁹ It was also observed that the distinction between secession and dissolution was preserved while ensuring that the provisions in both sections were similar.¹⁸⁰ The point was made, however, that categories of succession which had been determined in theory were often difficult to identify in practice and that this might impair the effectiveness of the draft articles.¹⁸¹

118. The Commission did not include in this part a separate section on “newly independent States”, as it believed that one of the above four sections would be applicable, *mutatis mutandis*, in any remaining case of decolonization in the future. Some members of the Commission, however, would have preferred the inclusion of such an additional section.¹⁸²

119. Several States endorsed the above decision of the Commission not to separate cases of State succession from the specific phenomenon of decolonization, as they considered this distinction to be irrelevant in the context of the nationality of natural persons and the decolonization process to be nearly at an end.¹⁸³ It was also argued that the practice in cases of decolonization was often indistinguishable from the practice relating to other cases of succession.¹⁸⁴ The point was further made that decolonization could take different forms, including the achievement of independence by Non-Self-Governing Territories, the restoration of the territorial integrity of another State or the division of the territory into several States; these cases could be resolved satisfactorily by applying the principles and rules contained both in part I of the draft articles and, to some extent, in part II in any remaining case of decolonization in the future.¹⁸⁵

120. There was also the view that, although the historical process of decolonization had, to a large extent, been completed, some colonial situations still remained, and that as those situations were addressed, cases might arise in which it would be necessary to apply rules on national-

¹⁷⁸ A/CN.4/493 (see footnote 6 above), comments by the Czech Republic.

¹⁷⁹ *Ibid.*, comments by France on part II.

¹⁸⁰ A/CN.4/483, para. 44; A/CN.4/493 (see footnote 6 above), comments by Finland (on behalf of the Nordic countries).

¹⁸¹ A/CN.4/483, para. 44; A/CN.4/493 (see footnote 6 above), comments by Italy.

¹⁸² *Yearbook ... 1997*, vol. II (Part Two), p. 36, para. (3) of the commentary to article 19.

¹⁸³ A/CN.4/483, para. 44; A/CN.4/493 (see footnote 6 above), comments by Switzerland on part II.

¹⁸⁴ A/CN.4/493 (see footnote 6 above), comments by Italy.

¹⁸⁵ A/CN.4/483, para. 44; A/CN.4/493 (see footnote 6 above), comments by Argentina and Finland (on behalf of the Nordic countries).

¹⁷³ See footnote 169 above.

¹⁷⁴ A/CN.4/493 (see footnote 6 above), comments by France on article 18.

¹⁷⁵ A/CN.4/483, para. 41; A/CN.4/496, para. 137.

¹⁷⁶ *Yearbook ... 1997*, vol. II (Part Two), p. 35, para. (9) of the commentary to article 18.

¹⁷⁷ A/CN.4/483, para. 42; A/CN.4/493 (see footnote 6 above), comments by Finland (on behalf of the Nordic countries) and Switzerland on article 18.

ity of natural persons in relation to succession of States.¹⁸⁶ The point was made that the text should at least specify that the established regime applied *mutatis mutandis* to situations of decolonization.¹⁸⁷

121. It was observed that part II of the draft articles was intended to provide practical guidelines for States that were in the process of enacting their legislation or negotiating treaties on nationality issues related to a succession of States, and would indeed prove helpful in such situations.¹⁸⁸

122. The view was expressed that the solutions proposed in part II were entirely valid from the legal standpoint, for most of them reflected current international practice or constituted the logical consequence of a specific category of succession of States, as, for example, in article 22 dealing with the dissolution of a State.¹⁸⁹

123. The Commission's decision to use habitual residence as the main criterion for identifying the persons to whom successor States must attribute their nationality was also endorsed. This decision was considered to be consistent with the tendency of international law to give preference to effectiveness.¹⁹⁰

Article 19. Application of Part II

124. It was observed that the provisions of part II of the draft articles were aimed at applying the general principles of part I to different categories of successions of States but not at reflecting existing international law. Part II seemed to be intended mainly as a source of inspiration for States concerned when, for example, they entered into negotiation in order to resolve nationality issues by agreement or when they were considering the adoption of national legislation for the purpose of resolving these issues, in spite of the fact that the actual language of subsequent articles of part II appeared fairly strong (using the verb "shall"), as if binding rules were somehow laid down. This might be actually justified even in the framework of an instrument of a declaratory nature if general principles, for the most part soundly based on customary law, were involved, as is the case for part I of the draft articles. Such language might, however, prove somewhat confusing and disturbing in the context of part II, and the Commission could perhaps reconsider whether article 19 was enough to dissipate any possible doubts in this respect.¹⁹¹

125. The question was raised as to the relationship, from the legal point of view, between parts I and II of the draft. Article 19 seemed to give more weight to the provisions of part I than to those of part II. Article 10, paragraph 2, provided for granting the right of option only in the case of persons who would otherwise become stateless as a result of the succession, while articles 20, 23 and 26 seemed to grant a much broader right of option. In such

¹⁸⁶ A/CN.4/483, para. 44; A/CN.4/493 (see footnote 6 above), comments by Argentina.

¹⁸⁷ A/CN.4/483, para. 44; A/CN.4/496, para. 139.

¹⁸⁸ A/CN.4/493 (see footnote 6 above), comments by Finland (on behalf of the Nordic countries) on part II.

¹⁸⁹ *Ibid.*, comments by Italy.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*, comments by the Czech Republic on article 19.

cases where there was a difference between the provisions of part I and those of part II, the question was raised as to whether States should follow the general provisions or the specific provisions.¹⁹²

126. It was further considered that the substance and the scope of article 19 were unclear and that the commentary on the article shed little or no light on its meaning or usefulness. It appeared that the purpose of the article was to establish differences between the nature and functions of the provisions of part I and those of part II. Such differentiation related exclusively to the degree of generality of the provisions in one part as compared to those in the other. There was no difference, therefore, in the normative nature of the provisions in the two parts: those in part I were as binding as those in part II. However, it was normal, with few exceptions, for the provisions in part II, i.e. those that were specific, to be in harmony with those in part I, i.e. those that were general. Moreover, there were no apparent differences between part I and part II of the draft articles in respect of provisions that actually or potentially pertained to customary law or *jus cogens*, or that constituted rules of progressive development of international law. In other words, rules of any of these types were to be found in both parts I and II. For all the foregoing reasons, it was felt that article 19 should be deleted.¹⁹³

127. It was also stressed that if article 19 was interpreted *a contrario*, the result was that part I of the draft articles would consist of non-optional provisions. This suggested that the Commission considered that the provisions of part I reflected existing customary law and, moreover, constituted peremptory rules (*jus cogens*). It would no doubt be desirable to review all the articles in part I in order to establish whether they all did in fact have that status.¹⁹⁴

128. Concerning the drafting and placement of article 19, it was suggested that the phrase "in specific situations" should be replaced by "as appropriate". The view was also expressed that the article would be better placed at the end of part I.¹⁹⁵

SECTION 1. TRANSFER OF PART OF THE TERRITORY

Article 20. Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

129. It was noted that the fundamental rule of the law of succession of States whereby, as of the date of succession, the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by this succession, which was missing in part I of the draft articles, was followed in the specific

¹⁹² *Ibid.*, comments by Greece.

¹⁹³ *Ibid.*, comments by Guatemala.

¹⁹⁴ *Ibid.*, comments by Switzerland on the structure of the draft articles.

¹⁹⁵ A/CN.4/483, para. 45.

provisions of part II, including article 20.¹⁹⁶ It was further observed that, as far as the attribution of nationality was concerned, the rule in article 20 was widely recognized in the doctrine and was indeed a reflection of international law.¹⁹⁷ This rule was, moreover, justified by the fact that the successor State could not exercise sovereignty in a territory whose inhabitants remained nationals of the predecessor State.¹⁹⁸

130. The point was made that the current text of article 20 could be usefully complemented by including a reference to the obligation of the predecessor State to withdraw its nationality from the persons concerned having their habitual residence in the transferred territory only after such persons acquired the nationality of the successor State. Obviously, this resulted from the State's obligation to prevent statelessness in accordance with article 3, but it was considered preferable to have an explicit clause to that effect, also in view of the fact that such explicit clause had found a place in article 25. Such addition could be drafted along the lines of article 25, paragraph 1, *in fine*.¹⁹⁹

131. There was also the view that, while some of the provisions of article 20 fell within the category of codification, others, which emphasized the right of option, fell within the category of progressive development. The draft implied that an individual had the right to choose his or her nationality freely. It was felt that the rights of States with respect to nationality, as compared with those of individuals, should not be limited excessively. Unlike in the case of the approach reflected in article 20, it was essential not to end up with "forum shopping" for nationality and to avoid the "privatization" of nationality, which disregarded the public law status of nationality, a matter on which an individual was not free to decide. States had to retain control over the attribution of nationality.²⁰⁰

132. It was further argued that granting a right of option to all persons resident in the transferred territory would impose a heavy burden on the predecessor State and, moreover, could have the undesirable effect of creating in the transferred territory a large population having the nationality of the predecessor State; it was therefore suggested that the right of option to be granted by the predecessor State should be limited to persons who had retained effective links with the predecessor State,²⁰¹ as had also been proposed by one member of the Commission.²⁰² It was felt, moreover, that for the sake of symmetry the successor State should also be required to offer a right of option to nationals of the predecessor State who did not reside in the transferred territory, including those residing in a third State, if they had links with that territory.²⁰³

¹⁹⁶ A/CN.4/493 (see footnote 6 above), comments by Greece on article 20.

¹⁹⁷ A/CN.4/483, para. 46; A/CN.4/493 (see footnote 6 above), comments by Argentina.

¹⁹⁸ A/CN.4/493 (see footnote 6 above), comments by Argentina.

¹⁹⁹ *Ibid.*, comments by the Czech Republic.

²⁰⁰ *Ibid.*, comments by France.

²⁰¹ A/CN.4/483, para. 46; A/CN.4/493 (see footnote 6 above), comments by Greece and Switzerland.

²⁰² *Yearbook ... 1997*, vol. II (Part Two), p. 37, para. (5) of the commentary to section 1.

²⁰³ A/CN.4/483, para. 46; A/CN.4/493 (see footnote 6 above), comments by Switzerland on article 20.

133. Some members of the Commission were of the view that the provisions of section 1 concerning transfer of territory and section 4 on separation should be drafted along the same lines, as they saw no reason to apply different rules in the two situations.²⁰⁴ One State expressed a similar view, observing that the only two pertinent differences between transfer and separation were that (a) on transfer the successor State predated the succession, whereas on separation the successor State was born with the succession; and (b) on transfer only part of the successor State's territory was affected by the succession, whereas on separation the whole territory of the successor State was affected. It was suggested that article 20 should therefore be deleted and replaced by three new articles analogous to articles 24–26.²⁰⁵

SECTION 2. UNIFICATION OF STATES

Article 21. Attribution of the nationality of the successor State

134. Article 21 seems to have received general support. The only specific observation in respect of the article was that it embodied a mandatory rule under international law.²⁰⁶

SECTION 3. DISSOLUTION OF A STATE

Article 22. Attribution of the nationality of the successor State

135. It was noted that, while in part I of the draft the fundamental rule of the law of succession of States whereby as of the date of succession the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by this succession could not be found, it was followed in the specific provisions of part II, including article 22 (a).²⁰⁷

136. There was, however, also the view that article 22 gave too much prominence to the criterion of habitual residence in disregard of recent practice in Central and Eastern Europe where the primary criterion used was that of the nationality of the former units of federal States.²⁰⁸

137. Support was expressed especially for paragraph (b) of article 22.²⁰⁹ There was, however, also the view that while paragraph (a) reflected an obligation derived from international law, the rule in paragraph (b) had its source in domestic law and was discretionary in nature and was therefore applicable only with the consent of the persons concerned.²¹⁰

²⁰⁴ *Yearbook ... 1997*, vol. II (Part Two), p. 42, para. (16) of the commentary to section 4.

²⁰⁵ A/CN.4/493 (see footnote 6 above), comments by Guatemala on article 20.

²⁰⁶ A/CN.4/483, para. 47; A/CN.4/493 (see footnote 6 above), comments by Greece under "General remarks".

²⁰⁷ A/CN.4/493 (see footnote 6 above), comments by Greece under "General remarks".

²⁰⁸ A/CN.4/483, para. 49; A/CN.4/493 (see footnote 6 above), comments by Brunei Darussalam on article 22; A/CN.4/496, para. 140.

²⁰⁹ A/CN.4/483, para. 48.

²¹⁰ *Ibid.*, para. 49.

138. A proposal was made to merge the situations envisaged in subparagraphs (i) and (ii) of paragraph (b).²¹¹ According to still another view, the drafting of article 22 (b) (ii) could be improved by replacing “before leaving” with “on leaving” and deleting the word “last” before “habitual residence”.²¹²

Article 23. Granting of the right of option by the successor States

139. The view was expressed that article 23 was not to be read as construing the right of option as the single acceptable means of dealing with the question of the nationality of persons qualified to acquire the nationality of several successor States under the criteria of article 22. This would undoubtedly go beyond *lex lata*, and article 19, as well as article 10, paragraph 1, made it quite clear that the granting of the right of option in this case was merely suggested or proposed to States, not imposed on them. As a matter of fact, other possible alternative approaches were conceivable and did indeed exist concerning the specific issue of persons qualified to acquire the nationality of two or more successor States. These included measures such as negotiations among the States concerned with a view to determining a harmonized single superseding criterion—either the one mentioned in article 22 (a) or one taken from article 22 (b)—or even adopting a unilateral choice of a superseding criterion (obviously in such case with the proviso of granting an appropriate right of option to persons concerned who would otherwise become stateless as a result of the succession of States, in conformity with article 10, paragraph 2). Recent practice in the area of State succession had shown that a variety of such systems could work satisfactorily while being at the same time fully consistent with the fundamental protective principles set forth in part I. Moreover, it was pointed out in this respect that the Commission, in its commentary to article 10, paragraph 1, on the will of persons concerned, stated that the “expression ‘shall give consideration’ implies that there is no strict obligation to grant a right of option to this category of persons concerned”.²¹³ From a *de lege lata* perspective, it was therefore considered indisputable that international law tolerated more flexibility than article 22 together with article 23, paragraph 1, seemed to admit, and that article 19 indeed recognized that greater flexibility for applying the principles of part I to specific situations, including the one envisaged in section 3. However, *de lege ferenda* it might be utterly desirable, with respect to persons a priori qualified to acquire several nationalities, to promote the right of option as the most efficient means to address the issue at hand while integrating to the fullest extent possible its human rights dimension. In view of these considerations and also bearing in mind the indicative nature of part II as provided for in article 19, it was felt that the text of article 23 in its current wording represented a step in the right direction

²¹¹ Ibid., para. 48; A/CN.4/493 (see footnote 6 above), comments by Switzerland on article 22.

²¹² A/CN.4/493 (see footnote 6 above), comments by Guatemala on article 23.

²¹³ *Yearbook ... 1997*, vol. II (Part Two), p. 28, para. (8) of the commentary to article 10.

and a laudable attempt on the part of the Commission at progressive development of international law.²¹⁴

140. The point was also made that it was difficult to evaluate the right of option established under article 23, paragraph 1, because it depended upon unknown factors which were exclusively a matter of the domestic law of the States concerned.²¹⁵

141. It was suggested that paragraph 1 should be re-drafted as follows: “If under article 22 the nationality of two or more successor States is attributable to persons concerned, those States shall grant a right of option to those persons.”²¹⁶

142. It was observed that paragraph 2 was too broad and therefore inconsistent with the provision in article 10, paragraph 2, which limited the categories of persons to whom a successor State had the obligation to grant the right to opt for its nationality.²¹⁷

143. It was also stressed that the linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between those provisions was hard to understand.²¹⁸

SECTION 4. SEPARATION OF PART OR PARTS OF THE TERRITORY

Article 24. Attribution of the nationality of the successor State

144. It was noted that while in part I of the draft the fundamental rule of the law of succession of States whereby as of the date of succession the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by this succession could not be found, this rule was followed in the specific provisions of part II, including article 24 (a).²¹⁹

145. Paragraph (b) of article 24 elicited some favourable comments. The view was also expressed that, unlike paragraph (a), which reflected an obligation derived from international law, the rule in paragraph (b) had its source in domestic law and was discretionary in nature.²²⁰

146. The suggestion was made to merge the situations envisaged in subparagraphs (i) and (ii) of paragraph (b).²²¹ It was also pointed out that the meaning and scope of the phrases “appropriate legal connection” and “any other appropriate connection” were not clear.²²² It was further suggested that the drafting of article 24 (b) (ii) could be

²¹⁴ A/CN.4/493 (see footnote 6 above), comments by the Czech Republic on article 23.

²¹⁵ Ibid., comments by Greece.

²¹⁶ Ibid., comments by Guatemala.

²¹⁷ A/CN.4/483, para. 50.

²¹⁸ A/CN.4/493 (see footnote 6 above), comments by France on article 23.

²¹⁹ Ibid., comments by Greece.

²²⁰ A/CN.4/483, para. 51.

²²¹ A/CN.4/493 (see footnote 6 above), comments by Switzerland on article 24.

²²² Ibid., comments by Brunei Darussalam; A/CN.4/496, para. 137.

improved by replacing “before leaving” with “on leaving” and deleting the word “last” before “habitual residence”.²²³

Article 25. Withdrawal of the nationality of the predecessor State

147. Reservations were expressed with respect to the issue of withdrawal of nationality as addressed in this article. Attention was drawn in this respect to the European Convention on Nationality.²²⁴

148. Some members of the Commission believed that paragraph 2 of article 25 was superfluous, while others considered it necessary for the purpose of defining the categories of persons to whom a right of option between the nationality of the predecessor and the successor States should be granted.²²⁵

149. One State also suggested that paragraph 2 should be excluded from the draft, as it concerned a matter of the general policy of States with regard to nationality and had no direct relationship with the question of the succession of States.²²⁶

150. It was again observed that the meaning and scope of the phrases “appropriate legal connection” and “any other appropriate connection” were not clear.²²⁷

Article 26. Granting of the right of option by the predecessor and the successor States

151. It was stated that the comments pertaining to section 3, article 23, reflected in paragraph 139 above, also applied *mutatis mutandis* to section 4, article 26.²²⁸

152. The point was made that reliance on the criterion of habitual residence would be appropriate in most cases, but there could exist a group of persons who, while retaining habitual residence in the successor State, had other important links with the predecessor State, and vice versa; such situations might not be adequately addressed by granting a right of option.²²⁹

153. The view was also expressed that it was difficult to evaluate the right of option established under article 26, because it depended on unknown factors which were exclusively a matter of the domestic law of the States concerned.²³⁰

154. It was further remarked that the article was too broad, as it required the predecessor State to grant a right of option even to that part of its population which had not

been affected by the succession,²³¹ an opinion also voiced in the Commission.²³²

Article 27. Cases of succession of States covered by the present draft articles

155. Support was expressed for a provision explicitly limiting the scope of application of the draft articles to successions of States occurring in conformity with international law, although a question was raised as to whether there could be a succession of States that would not meet such a qualification.²³³

156. There were, however, a number of reservations, both in the Commission²³⁴ and among States,²³⁵ as regards the inclusion of the phrase “Without prejudice to the right to a nationality of persons concerned”, which was considered to render the entire article ambiguous. It was pointed out that the Geneva Convention relative to the Protection of Civilian Persons in Time of War prohibited any modification of the legal situation of persons and territories under occupation and therefore persons concerned should maintain the nationality they had before annexation or illegal occupation; the imposition by an aggressor State of its nationality on the population of a territory it had illegally occupied or annexed was unacceptable. Even if the Commission wished to make the right to a nationality a rule of *jus cogens*, that right could not have a place in the context of article 27, which actually envisaged the case of an international crime, a situation that allowed for no exceptions.²³⁶ It was accordingly suggested that the phrase could perhaps be revisited by the Commission.²³⁷

157. A view was also expressed that the article was unnecessary in a draft dealing with certain human rights issues, as such rights should be protected regardless of whether or not a succession of States had occurred in conformity with international law.²³⁸

158. As this provision was included in the draft articles at a late stage of the Commission’s work on the topic, the Commission left the decision on its final placement for the second reading.²³⁹ In this respect it was suggested that article 27, which defined the scope of the draft articles, including the scope of the general provisions (arts. 1–18), should be placed at the beginning of the text,²⁴⁰ or in part I.²⁴¹

²³¹ A/C++N.4/483, para. 53; A/CN.4/493 (see footnote 6 above), comments by Greece.

²³² *Yearbook ... 1997*, vol. II (Part Two), p. 42, para. (15) of the commentary to section 4.

²³³ A/CN.4/483, para. 54; A/CN.4/493 (see footnote 6 above), comments by Argentina on part II; A/CN.4/496, para. 141.

²³⁴ *Yearbook ... 1997*, vol. II (Part Two), p. 43, para. (3) of the commentary to article 27.

²³⁵ A/CN.4/483, para. 55; A/CN.4/493 (see footnote 6 above), comments by Finland (on behalf of the Nordic countries), Greece and Switzerland, on article 27.

²³⁶ A/CN.4/493 (see footnote 6 above), comments by Greece.

²³⁷ *Ibid.*, comments by Finland (on behalf of the Nordic countries).

²³⁸ A/CN.4/483, para. 56.

²³⁹ *Yearbook ... 1997*, vol. II (Part Two), p. 43, para. (4) of the commentary to article 27.

²⁴⁰ A/CN.4/493 (see footnote 6 above), comments by Switzerland on article 27.

²⁴¹ *Ibid.*, comments by Argentina.

²²³ A/CN.4/493 (see footnote 6 above), comments by Guatemala.

²²⁴ A/CN.4/483, para. 52.

²²⁵ *Yearbook ... 1997*, vol. II (Part Two), p. 42, para. (11) of the commentary to section 4.

²²⁶ A/CN.4/493 (see footnote 6 above), comments by Greece on article 23.

²²⁷ *Ibid.*, comments by Brunei Darussalam on article 24.

²²⁸ *Ibid.*, comments by the Czech Republic on article 26.

²²⁹ A/CN.4/483, para. 53.

²³⁰ A/CN.4/493 (see footnote 6 above), comments by Greece on article 26.

UNILATERAL ACTS OF STATES

[Agenda item 8]

DOCUMENT A/CN.4/500 and Add.1

Second report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur

[Original: French/Spanish]
[14 April and 10 May 1999]

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report.....	196
Works cited in the present report	196
	<i>Paragraphs</i>
INTRODUCTION.....	1–17 196
<i>Chapter</i>	
I. SCOPE OF THE DRAFT ARTICLES	18–37 198
A. Draft article:	
<i>Article 1. Scope of the present draft articles</i>	18 198
B. Commentary	19–37 198
II. DEFINITION OF UNILATERAL LEGAL ACTS (DECLARATIONS) OF STATES	38–64 200
A. Draft article:	
<i>Article 2. Unilateral legal acts of States</i>	38 200
B. Commentary	39–64 200
III. CAPACITY TO FORMULATE UNILATERAL LEGAL ACTS.....	65–70 203
A. Draft article:	
<i>Article 3. Capacity of States</i>	65 203
B. Commentary	66–70 203
IV. REPRESENTATIVES OF A STATE FOR THE PURPOSE OF FORMULATING UNILATERAL ACTS	71–99 203
A. Draft article:	
<i>Article 4. Representatives of a State for the purpose of formulating unilateral acts</i>	71 203
B. Commentary	72–99 204
V. SUBSEQUENT CONFIRMATION OF AN ACT FORMULATED WITHOUT AUTHORIZATION	100–108 206
A. Draft article:	
<i>Article 5. Subsequent confirmation of a unilateral act formulated without authorization</i>	100 206
B. Commentary	101–108 206
VI. VALIDITY OF UNILATERAL LEGAL ACTS: EXPRESSION OF CONSENT AND CAUSES OF INVALIDITY	109–141 207
A. Draft articles:	
<i>Article 6. Expression of consent</i>	109 207
<i>Article 7. Invalidity of unilateral acts</i>	109 207
B. Commentary	110–141 207
VII. A COMMENT ON RESERVATIONS AND CONDITIONS IN RELATION TO UNILATERAL ACTS AND ON THE NON-EXISTENCE OF UNILATERAL ACTS.....	142–146 210
VIII. FUTURE WORK OF THE SPECIAL RAPPORTEUR	147–150 211

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Introduction

1. The topic of international unilateral legal acts of States was taken up in 1998 at the fiftieth session of the Commission, which at the time had before it the first report of the Special Rapporteur.¹ After differentiating acts that could be regarded as autonomous or independent—hence subject to the elaboration of specific rules governing their operation—from acts that should be excluded from the scope of the study, the report set out the constituent elements of a definition of unilateral legal acts of States which produce international effects.

2. On the basis of the first report of the Special Rapporteur, the report of the Working Group established by the Commission² and the comments made by representatives of States in the Sixth Committee of the General Assem-

bly at its fifty-third session,³ held in 1998, the Commission arrived at the conclusion that the Special Rapporteur should submit a second report. That report would contain draft articles on the scope of the draft articles and on the definition (use of terms) and conditions of validity of the unilateral acts (declarations) of States, including, inter alia, the question concerning the organs competent to commit the State unilaterally on an international plane and the question concerning possible grounds of invalidity regarding the expression of the will of the State.⁴

3. Before presenting the texts in question with their respective commentaries, the Special Rapporteur should make some specific points concerning certain questions raised by Governments in the Sixth Committee in 1998 in commenting on the report of the Commission on this topic, namely: the relationship between the unilateral acts

¹ *Yearbook ... 1998*, vol. II (Part One), p. 319, document A/CN.4/486.

² “Unilateral acts of States: report of the Working Group” (A/CN.4/L.558); see also *Yearbook ... 1998*, vol. II (Part Two), pp. 58–59, paras. 192–200.

³ “Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-third session” (A/CN.4/496, sect. C).

⁴ *Yearbook ... 1998*, vol. II (Part Two), p. 59, para. 200.

that are the subject of this study and the international responsibility of States; unilateral acts and estoppel; and unilateral acts relating to international organizations, particularly State acts addressed to such organizations.

4. In the first report the Special Rapporteur stated that while acts relating to the international responsibility of States were not without interest, they should also be excluded from the scope of the study to be undertaken. It was actually stated at the time that “acts contrary to international law and acts which, although in conformity with international law, may engage the international responsibility of a State” should be excluded, since the Commission was already dealing with those topics separately.⁵ Some representatives in the Sixth Committee also suggested in 1998 that acts of that nature should be excluded from the scope of the study for the same reason, namely, that the Commission was considering the topic separately.

5. Other delegations, on the other hand, stated on the same occasion that acts relating to international responsibility should not be excluded from the study undertaken by the Commission. The representative of France indicated that he did not agree with the Special Rapporteur’s proposal to exclude acts which gave rise to State responsibility: “... the question of whether, and to what extent, a unilateral act might entail State responsibility was of great interest; ... [and] fell logically within the scope of the Commission’s study.”⁶

6. There is unquestionably a certain relationship between the unilateral acts by which States engage their international responsibility and the unilateral acts that are the subject of the present study; they cannot, a priori, be separated clearly and distinctly. Rather, the proposal not to refer expressly to responsibility related to methodology, since the Commission considers the topic of responsibility on the basis of a report presented by the Special Rapporteur on the topic. That report examines internationally wrongful acts of States as acts giving rise to their international responsibility.

7. The question that arises is whether the unilateral acts by which States engage their international responsibility are strictly unilateral acts, which therefore fall within the scope of consideration of this specific category of acts, or, on the other hand, whether they fall within the realm of treaty relations.

8. It is a valid assertion that the acts of States which give rise to their international responsibility are unilateral legal acts in terms of form, be they of individual or collective origin. The acts that are of interest to the Commission in the present study, however, are legal acts which, in addition to being unilateral in form, are autonomous or strictly unilateral—in other words, not linked to a pre-existing norm, be it of treaty or customary origin. Acts relating to international responsibility do not by definition appear to be autonomous.

9. It seems difficult to conceive of an act which gives rise to the international responsibility of a State without being linked to the violation of a pre-existing norm, particularly the primary norm which the act in question is alleged to violate.

10. Whatever the case, the question of the relationship between internationally wrongful acts and unilateral acts of States is complex and should not be debated until further progress has been made on the topic of the international responsibility of States, which is being studied by the Commission. In the final analysis, two different regimes are involved, one relating to the international responsibility of States and the other to autonomous unilateral acts.

11. A second question that was referred to when the topic was considered in the Sixth Committee in 1998 was that of estoppel. Some representatives insisted that acts relating to estoppel should be examined in this study.

12. The first report submitted on the topic concluded that “[t]here is ... a clear difference between declarations which may found an estoppel [in a trial] and declarations of a strictly unilateral nature”.⁷

13. It is true that there is a certain relationship between strictly unilateral acts and estoppel, which is basically procedural. As indicated in the previous report, the nature of the primary obligations of a State, which oblige it to maintain a specific pattern of conduct, is not based, as in the case of a promise, on the actual declaration of intent 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.⁸ Accordingly, there is a clear difference between declarations which may found an estoppel in a trial, and declarations of a strictly unilateral nature, which have very specific characteristics.

14. It must be emphasized that a State formulates a unilateral legal act with the express intention of creating a new legal relationship, including, as has been indicated, obligations for that State. Such obligations are autonomous when they produce effects irrespective of their acceptance by the addressee State or of any subsequent attitude or conduct which may signify such acceptance. In estoppel, as the prevailing doctrine rightly points out, there is no creation of rights or obligations; rather, it becomes impossible to avail oneself of already existing rights and obligations in the context of a given proceeding.⁹

15. A third question that has arisen in the debate on the topic concerns acts relating to international organizations. This question should be considered from two different points of view: first, in the context of the formulation of the act, and, secondly, in the context of its legal effects in relation to other subjects of international law.

⁵ *Ibid.*, vol. II (Part One) (see footnote 1 above), para. 47.

⁶ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 53.

⁷ *Yearbook ... 1998* (see footnote 1 above), p. 334, para. 131.

⁸ *Ibid.*

⁹ Cahier, “Le comportement des États comme source de droits et d’obligations”.

16. It is clear that the study undertaken by the Commission has as its subject unilateral legal acts of States which produce international effects, that is, legal acts formulated by States. A large number of representatives in the Sixth Committee in 1998 suggested that acts of international organizations should be excluded from the scope of the study, although it was noted that such acts could be genuine unilateral legal acts. It was emphasized that such acts were very specific and therefore required special rules, so that they fell outside the mandate of the Commission.¹⁰

17. In accordance with the debate on the topic in the Commission and the Sixth Committee, this report presents

¹⁰ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, statements by Italy (18th meeting, para. 31); Bahrain (21st meeting, para. 14); Switzerland (17th meeting, para. 38); Germany (18th meeting, para. 21); and the United States of America (14th meeting, para. 48).

several draft articles together with their commentaries, concerning, inter alia:

- (a) Scope of the draft articles;
- (b) Definition of unilateral legal acts (declarations) of States;
- (c) Capacity to formulate unilateral acts;
- (d) Representatives of a State who can engage the State by formulating unilateral acts;
- (e) Subsequent confirmation of acts formulated without authorization;
- (f) Expression of consent;
- (g) Formulation of reservations and conditional unilateral acts.

CHAPTER I

Scope of the draft articles

A. Draft article

18. The Special Rapporteur proposes the following article:

Article 1. Scope of the present draft articles

The present draft articles apply to unilateral legal acts formulated by States which have international effects.

B. Commentary

19. Article 1 of the draft articles on unilateral acts should follow to a large extent the methodology of the 1969 Vienna Convention on the Law of Treaties, in which article 1 states expressly that the Convention applies only to treaties between States, thus excluding agreements other than treaties and treaties in which other subjects of international law, specifically, international organizations, participate.

20. The present draft article 1 should stipulate that the articles apply to unilateral legal acts (declarations) formulated by a State, thus excluding other subjects of international law, including international organizations.

21. The term “unilateral acts of States” should be clarified in article 2, as shall be seen below, following, here too, the structure of the 1969 Vienna Convention, in which the term “treaty” is clarified in article 2 on the use of terms in the Convention.

22. The draft articles apply to unilateral acts formulated by States, whether individually or collectively, which have international legal effects. They thus exclude acts of a political character and acts which, while also unilateral and legal, do not produce international effects.

23. As noted in the first report and in the debate on this topic in the Commission, distinguishing political acts from legal acts is a truly complex matter. While abundant State practice exists, it has not been studied systematically, which creates certain difficulties.¹¹ In order for an

¹¹ State practice is very important in relation to the formulation of such unilateral acts or declarations, which still present difficulties in terms of their interpretation and identification. A case in point would be unilateral declarations made by nuclear-weapon States aimed at providing certain guarantees of security to non-nuclear-weapon States.

Can such arrangements—whose content, furthermore, varies and is subject to certain conditions in most cases—positively constitute unilateral legal declarations or acts in the sense with which the Commission is concerned, or are they simply political declarations or acts which engage their authors on that level?

Some of these declarations were made publicly outside the framework of international bodies and others in the framework of the Conference on Disarmament. This would appear to be the case with regard to the similar declarations made by China (A/50/155-S/1995/265, annex), the Minister for Foreign Affairs of the Russian Federation (A/50/151-S/1995/261, annexes I and II) and the Secretary of State of the United States on 5 April 1995 (A/50/153-S/1995/263, annex), and the declarations made by France (A/50/154-S/1995/264, annex) and the United Kingdom of Great Britain and Northern Ireland (A/50/152-S/1995/262, annex) in the Conference on Disarmament on 6 April 1995, by which they undertook not to use nuclear weapons against non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, with a number of conditions limiting the scope of the declarations.

In his statement, the United States representative to the Conference on Disarmament, reiterating a statement made by the President of the United States, declared that “[t]he United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State” (A/50/153-S/1995/263, annex).

While the nuclear-weapon States considered such acts as binding, credible and reliable, the non-aligned countries belonging to the Group of 21 at the Conference considered that such acts or declarations did not engage the countries making them and therefore did not have a legal

international judge to be able to determine the nature of such acts, it is fundamental to determine the intention of the State formulating them.

24. Jurisprudence has been clear-cut with regard to classifying such acts as legal or political. Thus, as ICJ stated in its well-known judgments in the *Nuclear Tests* cases,¹² for example, the unilateral declarations made by representatives of France were unilateral acts of a legal nature. In the case of the territorial dispute between Burkina Faso and Mali, however, the Court ruled out the possibility that the statement made by the Head of State of Mali on 11 April 1975 might be a legal act.¹³

25. In the *Nuclear Tests* cases, ICJ 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.¹⁴

26. In the case of the territorial dispute between Burkina Faso and Mali, the Court concluded that such declarations might certainly have the effect of creating legal obligations for the State on whose behalf they are made, but only when it was the intention of the State making the declaration that it should become bound according to its terms.¹⁵

27. It should be made clear, moreover, that the act which the State formulates may be addressed to other subjects of international law, including international organizations. As stated earlier, a distinction should be drawn between the elaboration of the act, which is attributable to the State, and the legal relationship that might be created

character. In this respect, the representative of Indonesia, speaking on behalf of the Group of Non-Aligned Countries, stated on 11 April 1995 in New York (see S/PV.3514, pp. 16–18) that such acts did not satisfy the long-standing demands of the non-aligned countries, it being understood, as the representative of the Islamic Republic of Iran indicated on that same date (*ibid.*, pp. 6–7), that such guarantees must take the form of a negotiated and legally binding international instrument. The non-aligned countries members of the Group of 21 in the Conference on Disarmament continue to hold this view.

The question that arises is whether such declarations legally engage the States which make them even if they are subject to reservations and conditions that limit their scope and content, or, on the other hand, whether they are simply political positions that can only engage the international political responsibility of States in the event of non-compliance.

Stress should be laid on the need to distinguish between the legal force of such acts and their effectiveness, given the conditions that are incorporated into such declarations, a question that, regrettably, has not been addressed, much less defined in the Conference on Disarmament.

Such declarations, made publicly, with a specific purpose, addressed to a group of non-nuclear-weapon States and giving rise to expectations on their part, and probably prompting certain attitudes or types of conduct on their part, could be international legal engagements on the part of the declarant States. The ambiguity as to their nature is precisely one of the characteristics of such declarations that should be examined with great care. This further underscores the need to establish clear rules that may be able to regulate the operation of such international legal acts of States.

¹² *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253; and *ibid. (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 457.

¹³ *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554.

¹⁴ *I.C.J. Reports 1974*, p. 267, para. 43; and *ibid.*, p. 472, para. 46 (see footnote 12 above).

¹⁵ *I.C.J. Reports 1986* (see footnote 13 above), p. 573, para. 39.

by means of such acts with other subjects of international law, including subjects other than States, which would depend on the effects of the acts in question.

28. The unilateral legal act which the State formulates can be addressed to another State, several States, the international community as a whole or any other subject of international law. The legal relationship between the State formulating the act and the addressee subject probably cannot exclude other subjects of international law, specifically, international organizations.

29. Some representatives stated in the Sixth Committee in 1998 that they saw no reason to exclude from the scope of the study acts formulated in relation to other subjects of international law, especially considering that such acts might in practice be addressed both to States and to international organizations.¹⁶

30. If international organizations are to be considered at this stage within the scope of the study that the Commission has undertaken, it should only be in this context, that is, as already indicated, in relation to acts that might be addressed to them. For the time being, that question would not be of interest to the study being undertaken, since only the question of the formulation of such acts has been addressed up to now.

31. As delegations noted when the 1969 Vienna Convention was being drafted, acts of international organizations are complex. The fact that they were not included within the scope of application of the Convention did not mean that they did not exist, that they were not important in international practice, and that they did not have legal effects.

32. Consideration of legal acts elaborated by international organizations as part of the study of unilateral legal acts is a complex undertaking. It would encompass not only acts emanating from the organs of international organizations, which would require consideration of their competence and rules of decision-making, but also acts of officials charged with representing the organization in its international relations, an equally complex matter. While unilateral as to their form, such acts can be autonomous and can comprise autonomous obligations for the organization in its relations with States, other organizations or the international community as a whole.

33. Since an international organization, represented by its highest-ranking administrative officer, can in most cases conclude treaties with one or more States or with another international organization, it must be assumed that such an organization, represented by such an officer, can, in accordance with its internal rules, formulate unilateral legal acts which would no doubt be considered to belong to the category of acts that the Commission is now studying.

34. Another question that should be considered in due course in relation to acts formulated by an international organization is the difficulty posed by the lack of a legal regime common to international organizations, that is, a

¹⁶ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, statements by Italy (18th meeting, para. 31); Switzerland (17th meeting, para. 40) and Portugal (20th meeting, para. 31).

general constitutional law of international organizations. Admittedly, however, it can be recognized that there are certain common principles and that the law of the United Nations, or of certain international organizations, does exist. It must also be recognized that there are common special regimes, at least within the United Nations system, that are very important in practice, such as those relating to the international civil service or to the United Nations pension system.

35. The diversity of the rules, especially those relating to the functioning and competence of the various organs and the rules governing the adoption of their recommendations and decisions (resolutions), further complicates the question. There are terminological uncertainties and conceptual and logical ambiguities which render the world of such acts difficult to comprehend, identify and systematize.¹⁷

The arguments based on the principle of sovereignty that are put forth in relation to State acts cannot simply be transposed to acts of international organizations. It is necessary to take into account the limited competence of the organizations and the fact that such acts affect States

¹⁷ Arbué Vignali, Jiménez de Aréchaga and Puceiro Ripoll, *Derecho internacional público*, p. 276.

both as members of the organization (autonormative acts) and as autonomous subjects (heteronormative acts). The opposability of unilateral acts of organizations depends on a more complex set of factors than does the opposability of unilateral acts of States.¹⁸

36. This does not, however, exclude the legal acts which a State formulates in the framework of international organizations and international conferences, such as, for example, unilateral declarations concerning negative security guarantees made in writing by certain States in the framework of the Conference on Disarmament.¹⁹

37. Whatever the case, the Commission should not, as some delegations stated in the Sixth Committee in 1998, rule out permanently the possibility of considering such acts in the future, although it is concentrating at present on the study of unilateral legal acts of States.

¹⁸ Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, p. 356.

¹⁹ See footnote 11 above.

CHAPTER II

Definition of unilateral legal acts (declarations) of States

A. Draft article

38. The Special Rapporteur proposes the following article:

Article 2. Unilateral legal acts of States

For the purposes of the present draft articles, “unilateral legal act (declaration)” means an unequivocal, autonomous expression of will, formulated publicly by one or more States in relation to one or more other States, the international community as a whole or an international organization, with the intention of acquiring international legal obligations.

B. Commentary

39. The 1969 Vienna Convention contains an article relating to the use of terms which is not a definition of the various terms used in the Convention, including “treaty”.

40. As the term “unilateral acts of States” will be used throughout the draft, its meaning must be clear, hence a provision is needed to clarify it.

41. Regardless of whether or not it will be necessary to clarify other terms in a specific article like article 2 of

the 1969 Vienna Convention, the draft articles on unilateral acts of States should contain a specific provision that would clarify the meaning of the term “unilateral acts” without being an actual definition of it. By way of analogy, article 2, paragraph 1 (a), of the 1969 Vienna Convention, concerning the term “treaty”, is not a definition either.

42. In the first report submitted on the topic,²⁰ the Special Rapporteur attempted to separate the formal act from the material act and concluded that a declaration was a formal legal act that was more easily subject to the elaboration of specific rules governing its operation. He asserted, in fact, that the formal declaration was the means by which a State most often formulated unilateral acts, irrespective of their content and scope. It was stated at the time that in the context of the law of unilateral acts, the declaration was the instrument by which a State most often assumed international obligations, in the same way that in the context of international treaty law, the treaty was the most common instrument by which States made international legal engagements. Some representatives in the Sixth Committee in 1998 shared this view.²¹

²⁰ See footnote 1 above.

²¹ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, statements by Bahrain (21st meeting, para. 14); Austria (15th meeting, para. 10); and Venezuela (18th meeting, paras. 27–28).

43. Not all, however, endorsed this assertion. Some representatives pointed out that it was restrictive, and that to replace the term “unilateral act” by “unilateral declaration” could allow for the exclusion of specific acts. The observer for Switzerland, in particular, indicated in the Sixth Committee that a (unilateral) act usually took the form of a declaration, but perhaps not always. The expression “declaration” seemed to him unduly restrictive; he therefore preferred the term “act”.²² For his part, the representative of France indicated that it was necessary to avoid an overly broad or abstract definition of a unilateral act, and that it was unnecessary, on the other hand, to confine the topic within overly narrow limits.²³

44. In the view of the Special Rapporteur, the definition of a unilateral act should revolve around a formal act, that is, a declaration, as a generic act distinct from the material act that the declaration may comprise. It is necessary to separate the *instrumentum* from the *negotium*, which may, for its part, be varied. This makes it somewhat difficult to establish common rules applicable to all possible types of *negotia*.

45. Nevertheless, in view of the differences of opinion which exist at present with regard to the acceptance of a formal act as a generic act, the Special Rapporteur will use the term “unilateral legal act” as a synonym for the expression “unilateral declaration”. Admittedly, the assimilation of these two terms does not fully coincide with reality. It coincides, rather, with a question of a practical nature that may be superseded once it is determined whether in fact, in addition to declarations, there are other formal acts, and whether the rules that can be elaborated to govern their operation can take all those acts into consideration.

46. An autonomous unilateral legal act (declaration) or strictly unilateral act was defined in the first report 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”.²⁴

47. In the Sixth Committee there was support for the idea that a unilateral act is an autonomous (unequivocal) expression of will by a State which produces international legal effects.²⁵ Reference was also made to the autonomy of a unilateral act in the sense that it can produce legal effects under international law without it being necessary for one or more other States or subjects of international law to which it may be addressed to accept it or react to it in any other way.²⁶ The Special Rapporteur considers

these observations to be very important for the elaboration of the definition of such acts.

48. In order to provide a basis for the drafting of this article, it is deemed advisable to refer, however briefly, to what the Special Rapporteur considers to be the constituent elements of the definition of unilateral legal acts of States.

49. In the first report it was emphasized that the expression of will must be demonstrated unequivocally and publicly. The intention of the State which performs the act is fundamental to determining the nature of the act and the scope of the obligation which it intends to acquire by means of the act. This is consistent with several ICJ judgments²⁷ and with the general opinion reflected in international doctrine.

50. It is essential that the State formulate the act (declaration) in the proper manner, that is, unequivocally and publicly. The terms “unequivocal” and “public” satisfy the need to limit unilateral acts to acts formulated with the intention of acquiring legal obligations and to prevent other acts from being attributed to the State. They are also consistent with the restrictive approach that must be maintained vis-à-vis the formulation and interpretation of legal acts of States. The Court, in relation to interpretation in particular, noted that “[w]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for”.²⁸

51. The author of the act must express unequivocally the will to create a juridical norm comprising an obligation for the author and rights for other subjects.²⁹ That will must, moreover, be expressed freely, as the unvitiated normative will of the author, as shall be seen below when the consent of the author State is considered.

52. The clear and very specific purpose of the declaration is fundamental to the determination of the declarant State’s intention to make an engagement and acquire an obligation. It is necessary above all that the purpose of the unilateral engagement be sufficiently clear, as ICJ indicated in its judgments in the *Nuclear Tests* cases.³⁰

53. The lawfulness of the purpose is also essential in the identification of the unilateral State act with which the Special Rapporteur is concerned, a question that will be examined later when the conditions of validity of the act are examined.

54. The act must, moreover, be given sufficient publicity to enable it to produce effects. In that connection, the Special Rapporteur should recall that when the topic was considered in the Commission in 1998, it was indicated that, in accordance with at least one judicial decision, publicity was not a prerequisite in order for unilateral acts

²² Ibid., statement by Switzerland (17th meeting, para. 40).

²³ Ibid., statement by France (16th meeting, para. 55).

²⁴ *Yearbook ... 1998* (see footnote 1 above), p. 338, para. 170.

²⁵ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, statements by France (16th meeting, para. 56); Switzerland (17th meeting, para. 38); Venezuela (18th meeting, para. 27); Tunisia (ibid., para. 59) and Germany (ibid., para. 21).

²⁶ Ibid., statements by Venezuela (18th meeting, para. 27) and Tunisia (ibid., para. 59).

²⁷ *I.C.J. Reports 1974* (see footnote 12 above), p. 267, paras. 43–44; and *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 472, para. 46.

²⁸ Ibid., p. 267, para. 44, and *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 473, para. 47.

²⁹ Sicault, “Du caractère obligatoire des engagements unilatéraux en droit international public”, p. 665.

³⁰ *I.C.J. Reports 1974* (see footnote 12 above), p. 267, para. 43, and *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 474, para. 51.

to be legally effective, and that a promise could, for example, legally engage the State which formulated it even if it did so behind closed doors.³¹ It was also stated that publicity was related to the proof of the act's existence and to the identification of its addressee. This question will, however, be addressed in further detail at a later stage.

55. In the view of the Special Rapporteur, however, publicity is a defining element of a unilateral act. In that connection, a unilateral act must be performed publicly, that is, the addressee State must be made aware of it, as ICJ indicated in its 1974 decisions in the *Nuclear Tests* cases referred to earlier. In point of fact, a State act acquires its meaning and final form when it is made public, or at least when the addressee State or States are made aware of it. Otherwise, the act would be without legal force.

56. A declaration may, of course, be made *erga omnes*, meaning that it may not necessarily be addressed to any one State in particular, as can be seen in the ICJ judgment in the above-mentioned *Nuclear Tests* case.³²

57. Whatever the case, a unilateral act must be formulated in relation to a specific addressee, be it one or more States or the international community as a whole, and not in a vacuum. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, ICJ did not consider the declaration made by the Junta of National Reconstruction of Nicaragua to OAS to be a legal engagement. It explained that it had to be very cautious when faced with a unilateral declaration having no specific addressee.³³

58. It should be made clear, moreover, that a unilateral act (declaration) may be formulated by a State or by several States, as a single expression of will. It may be formulated by means of an individual, a collective or a joint act, in relation to one or more other subjects that have not participated in its elaboration; this is the basis of the view that the act in question is a heteronormative one.

59. This situation must also be differentiated from the one arising from the adoption of so-called collateral agreements, as referred to in articles 34 et seq. of the 1969 Vienna Convention, and to which the first report³⁴ referred extensively.

60. In referring to the origin of the act, the definition uses the term "formulated", which is considered to be

more appropriate than "elaborated", the term used more frequently in treaty law and in relation to joint acts.

61. The definition makes it clear that what is being dealt with is an autonomous expression of will that can comprise obligations only for the State or States formulating it, since a State cannot impose obligations on other States without their consent. This is consistent with an established principle of international law, namely, *pacta tertius nec nocent nec prosunt*.

62. Of course, the unilateral acts in question are autonomous or independent of pre-existing juridical norms, for, as noted in the first report on this topic, a State can adopt unilateral acts in the exercise of a power conferred on it by a pre-existing treaty or customary norm. This appears to be the case with regard to, inter alia, unilateral legal acts adopted in connection with the establishment of an exclusive economic zone. Such acts, while of domestic origin, produce international effects, specifically, obligations for third States which did not participate in their elaboration. Naturally, such acts go beyond the scope of strictly unilateral acts and fall within the realm of treaty relations.

63. The definition does not expressly mention the fact that such unilateral acts do not require either the acceptance of the addressee subject or any other conduct which may signify acceptance on the subject's part. It is therefore understood that such acts are characterized precisely by the lack of the need for such acceptance, despite its having been included in the previous definition. This obviates the need for an express clarification in the draft article on definition.

64. Lastly, with regard to the form in which consent is expressed by the State, the Special Rapporteur should note that it appears unnecessary to specify in the definition of the act (declaration) whether the acts or declarations in question are made in writing or orally, so long as it is understood that the form of expression has no bearing on the intention to make an engagement. The State or its agent can make an engagement by means of either a written or an oral declaration. In this connection, ICJ, in its 1974 decision in the *Nuclear Tests* cases referred to earlier, stated 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.³⁵

³⁵ *I.C.J. Reports 1974* (see footnote 12 above), pp. 267–268, para. 45; and *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 473, para. 48.

³¹ *Yearbook ... 1998*, vol. II (Part Two), p. 56, para. 171.

³² *I.C.J. Reports 1974* (see footnote 12 above), p. 269, para. 50.

³³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 132, para. 261.

³⁴ See footnote 1 above.

CHAPTER III

Capacity to formulate unilateral legal acts**A. Draft article**

65. The Special Rapporteur proposes the following article:

Article 3. Capacity of States

Every State possesses capacity to formulate unilateral legal acts.

B. Commentary

66. The fundamental conditions that must be met for a legal act to be valid are the imputability of the act to a subject of law and the observance of the rules relating to the formation of will. It must be reiterated that while the procedure of elaborating the act is regulated by domestic law, the validity of its effects pertain to international law.

67. When the 1969 Vienna Convention was in the drafting stage, the Commission discussed very carefully the draft article on capacity to conclude treaties, taking into account not only the report of the Special Rapporteur, but also the views of States. After a long debate, the discussion ended in the drafting of article 4 of the Convention. It simply restates the principle that all States have the capacity to conclude treaties, based, in turn, on the principle of the legal and sovereign equality of States.

68. In the case of the draft articles on unilateral acts, based on the discussion in the Commission, it was deemed advisable to submit an equally simple article that would merely reflect the capacity of States to formulate unilateral legal acts (declarations). That would avoid rehashing the debate held on the question at the time.

69. This provision, like article 6 of the 1969 Vienna Convention, must be limited to States. It should be recalled that originally, when the Convention was in the drafting stage, wording was proposed in the Commission that would include “other subjects of international law”, as well as the question of the capacity of the entities within a federal State. At one point in the Commission’s debate, it was even suggested that a provision on State capacity should be eliminated, as was done in the 1961 Vienna Convention on Diplomatic Relations, although that had not been raised at the United Nations Conference on Diplomatic Intercourse and Immunities, held in Vienna from 2 March to 14 April 1961.

70. While it was unnecessary to include such an article in the 1961 Vienna Convention, it was deemed important to include it when the 1969 Vienna Convention was being drafted. It would now appear necessary to include a provision of this nature in the present draft articles. As Mr. El-Erian stated in the Commission in 1965:

Capacity to establish diplomatic relations had not been regulated in the draft articles on diplomatic relations because of the different context in which it had been raised; there had been a controversy as to whether the establishment of diplomatic relations was a right or an attribute of international personality.³⁶

For his part, Sir Humphrey Waldock, Special Rapporteur on the topic of the law of treaties, noted in his first report³⁷ that the question of capacity was much more important in the context of the law of treaties than in the context of diplomatic relations; it was therefore important and desirable to include a provision on that subject.³⁸

³⁶ *Yearbook ... 1965*, vol. I, 779th meeting, p. 26, para. 54.

³⁷ *Yearbook ... 1962*, vol. II, p. 27, document A/CN.4/144.

³⁸ *Ibid.*, vol. I, 640th meeting, p. 64, para. 2.

CHAPTER IV

Representatives of a State for the purpose of formulating unilateral acts**A. Draft article**

71. The Special Rapporteur proposes the following article:

Article 4. Representatives of a State for the purpose of formulating unilateral acts

1. Heads of State, Heads of Government and ministers for foreign affairs are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf.

2. A person is also considered as representing a State for the purpose of formulating unilateral acts on its behalf if it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes.

3. Heads of diplomatic missions to the accrediting State and the representatives accredited by that State to an international conference or to an international organization or one of its organs are also considered as representatives of the State in relation to the jurisdiction of that conference, organization or organ.

B. Commentary

72. A treaty operation is by its very nature complex and differs from an operation involving unilateral acts of States. Adoption, a State's decision to consent to be bound by a treaty, international notification of that decision and entry into force are the fundamental stages of a treaty operation. In the sphere of unilateral acts of States, however, the formulation of such acts is based on the unilateral intention to make an engagement and acquire unilateral obligations at the international level. The formulation of the unilateral acts with which we are concerned could, in that sense, be regarded as less rigid.

73. The State is represented at the international level by the bodies competent for that purpose. International law determines the conditions under which these bodies can engage the State vis-à-vis other States or other subjects of international law and indicates the privileges and immunities necessary for the exercise of their international functions. Within its own sphere, domestic law regulates the respective jurisdictions.³⁹ The expression of a State's consent is, in fact, regulated by domestic law, while the effects of the legal act concluded or formulated would appear to be regulated by international law. It is important to underscore this point before examining the present article.

74. Unilateral acts must be performed (formulated) by a body qualified to act on behalf of the State in the sphere of international law, whether in general, in a particular sphere or in a given matter. In order for the act to comprise obligations for the State, the organ from which it emanates must have the power to engage the State at the international level.⁴⁰

75. The structure of article 7 of the 1969 Vienna Convention should guide the drafting of the present draft article on unilateral acts, taking into account certain peculiarities to which reference should be made. It should, of course, be stated that in the Convention, article 7, concerning full powers, was considered separately from article 46 (draft art. 31) relating to the domestic legal provisions connected with the capacity to conclude treaties, and from article 47 (draft art. 32) relating to the specific restriction of the power to express a State's consent, despite the fact that, as some members of the Commission noted at the time,⁴¹ they were apparently closely related. In reality, as others indicated on that same occasion,⁴² the questions involved were completely different: article 7 (draft art. 4) dealt with the powers of the negotiating body, while articles 46 and 47 (draft arts. 31–32) referred to the validity of a treaty in the context of the capacity to conclude treaties, which was determined by domestic rules.

76. Admittedly, as noted earlier, a restrictive approach is called for where it is a question of unilateral acts of States, particularly with regard to their elaboration, interpretation and effects.

77. In the law of treaties, international engagements and the obligations flowing therefrom emerge from generally complex negotiations from which mutual benefits are derived. Generally speaking, the parties involved in such negotiations propose that reciprocity be applied with regard to such benefits. In the case of unilateral acts, the State which makes an engagement and assumes certain obligations adopts an act in whose formulation it alone participates. This makes it a particular act.

78. It should also be noted that the State has recourse to the modality of formulating unilateral acts, in particular, where circumstances so require, especially where a negotiation with one or more other subjects of international law seems difficult. This would appear to be the case with regard to the unilateral declarations formulated by the French Government in the *Nuclear Tests* cases⁴³ which, moreover, form a whole, as ICJ stated. A similar situation arose in the case of the declarations formulated by nuclear-weapon States which contained negative security guarantees addressed to non-nuclear-weapon States.⁴⁴

79. States can be engaged at the international level only by their representatives, as that term is understood in international law, that is, those persons who by virtue of their office or other circumstances are qualified for that purpose.

80. In the case of unilateral acts it must first be recognized that, as in the law of treaties, Heads of State, Heads of Government and ministers for foreign affairs are presumed to be able to engage the State in its external relations, as confirmed by doctrine, international jurisprudence and the Commission itself at the time when it prepared the draft articles on the law of treaties.

81. In its 1966 report to the General Assembly, the Commission, in commenting on article 6 of the draft articles on the law of treaties which became article 7 of the 1969 Vienna Convention, stated that:

*Paragraph 2 sets out three categories of case in which a person is considered in international law as representing his State without having to produce an instrument of full powers. In these cases, therefore, the other representatives are entitled to rely on the qualification of the person concerned to represent his State without calling for evidence of it.*⁴⁵

The qualification of such persons is inherent in their office, as accepted by doctrine and jurisprudence and in practice and embodied in the Convention, in the article referred to above.

82. The qualification of a State's minister for foreign affairs to engage the State at the international level has been confirmed not only by doctrine but by international tribunals, as in the *Legal Status of Eastern Greenland* case, for example, where PCIJ stated that "a [verbal] reply ... given by the Minister for Foreign Affairs on behalf of his Government ... in regard to a question falling within his province, is binding upon the country to which the Minister belongs".⁴⁶

³⁹ Podestá Costa and Ruda, *Derecho internacional público*.

⁴⁰ Skubiszewski, "Unilateral acts of States", p. 230, para. 47.

⁴¹ *Yearbook ... 1965*, vol. I, 780th meeting, statements by Mr. Yasseen (paras. 29 and 53–54) and Mr. Rosenne (para. 30).

⁴² *Ibid.*, statements by Mr. Ago (paras. 31 and 60) and Mr. Amado (para. 32).

⁴³ See footnote 12 above.

⁴⁴ See footnote 11 above.

⁴⁵ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, part II, p. 193, para. (4) of the commentary to article 6.

⁴⁶ *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 71.

83. The same statement is made with respect to the President and to the Head of Government, or Prime Minister, who unquestionably have the capacity to engage the State without having to produce full powers. ICJ, in a case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, confirmed that basic assumption of international relations when it stated:

According to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations (see for example the Vienna Convention on the Law of Treaties, Art. 7, para. 2 (a)).⁴⁷

84. In addition to Heads of State, Heads of Government and ministers for foreign affairs, other high-ranking State officials can formulate unilateral acts and legally engage the State in spheres or specific areas of interest to the States concerned.

85. Owing to the technical character of certain questions, persons other than those mentioned above may be qualified to engage the State in those areas. As Cahier notes, such bodies are provided with full powers which allow other States to know that they have the capacity to engage the State which they represent.⁴⁸

86. On several occasions, the Court has considered acts and patterns of conduct of State officials, adopting interesting positions regarding their representativeness. In the *Temple of Preah Vihear* case, for example, the Court considered certain acts emanating from certain officials in deciding to which State the temple belonged.⁴⁹ In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, the Court considered that a letter emanating from an official of the Bureau of Land Management of the United States Department of the Interior relating to a technical question did not constitute an official declaration by the United States Government concerning its international maritime boundaries.⁵⁰

87. In the *Nuclear Tests* cases, the Court concluded that the statements made by the President of France

and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.⁵¹

88. There appears to be no doubt that in the sphere of unilateral acts there are certain high-ranking officials, other than the Head of State or Government and the minister for foreign affairs, who are permanently qualified to engage the State in specific areas under their jurisdiction.

⁴⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 622

⁴⁸ *Loc. cit.*, p. 243.

⁴⁹ *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, pp. 25 and 30–31.

⁵⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, pp. 307–308, para. 139.

⁵¹ *I.C.J. Reports 1974* (see footnote 12 above), p. 269, para. 49; and *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 474, para. 51.

89. Without dispensing with the restrictive character that should be attributed to unilateral acts, it seems necessary for such officials to be able to represent the State in specific areas of international relations, as would be the case for national officials who participate in international negotiations concerning the exploitation and use of common spaces.

90. International practice has not been examined in great detail, much less systematically, in order to determine whether the acts of certain high-ranking officials can engage the State. It does not seem easy to determine whether States recognize, at least in the treaty sphere, that a State acquires engagements through the formulation of acts other than an agreement signed by persons qualified in accordance with the 1969 Vienna Convention.

91. As the Commission has noted, confidence in international relations is undoubtedly crucial to the maintenance of harmonious relations and international peace and security. The declarations which officials make in given areas should guarantee to the one or more other subjects of international law to which they are addressed the necessary confidence in their mutual relations.

92. In that connection, the representatives whom the States concerned recognize as their representatives in given areas can engage the State. In view of the restrictive character of unilateral acts, referred to above, this should exclude acts performed by officials who do not have such capacity. It can then be accepted that representatives of a State at a given level and in given areas can engage the State by virtue of such permanent inherent capacity. This would be the case for high-ranking officials, namely, ministers and special technical representatives in given areas, which might include ministers or high-ranking officials taking part in negotiations involving a common interest, such as common spaces and resources.

93. This is perhaps one of the crucial questions that should be decided in order to identify persons qualified to engage the State in its external relations and to acquire obligations on behalf of their State. While certain persons can be considered as falling into this category, it is also necessary to exclude those not considered to have the permanent inherent power mentioned earlier.

94. In foreign affairs, officials of technical ministries generally exercise powers relating to their spheres of jurisdiction (foreign trade, transport and communications, health, labour, and so on). In short, many State organs now participate in the conduct of foreign affairs, and this situation is necessarily reflected in the sphere of unilateral acts.⁵²

95. The principle of good faith is important with respect to acts formulated by persons who are understood to be inherently qualified to engage the State. According to Skubiszewski, except in cases where there is a blatant violation of domestic norms involving a fundamental rule, the addressee of the unilateral act can invoke the principle of good faith in considering the State organ to be qualified.⁵³

⁵² Skubiszewski, *loc. cit.*, p. 230.

⁵³ *Ibid.*

96. Following the structure of article 7 of the 1969 Vienna Convention, the present draft article provides that representatives of a State to another State or to an international organization with which their State maintains relations and representatives of a State to a conference, as well as certain persons, would be qualified to engage the State if it appears from the practice of the States concerned or from other circumstances that the intention of those States was to consider those persons as representing the State for such purposes.

97. A different approach should be taken to the question of full powers in the case of unilateral acts from that in the case of the law of treaties. It is true that the State grants full powers to certain persons to enable them to represent it in concluding a treaty, that is, to empower them so that they may therefore be competent to engage the State in a given negotiation. In the context of unilateral acts, however, full powers should be understood in a different sense. They would not be extended in order to enable a person

to represent the State in the elaboration of a treaty, but rather to enable a person to act in a broader context, that is, either within or outside the framework of a negotiation, but in any case in relation to a given question. The State would implicitly grant permanent full powers to an official to enable him to conduct foreign affairs on a given issue.

98. While in the law of treaties the extension of full powers is essential in certain cases in order to be able to engage the State, in the sphere of unilateral acts it does not appear to be necessary to refer to such powers.

99. As stated, the circumstances in which a unilateral act is formulated, the form it takes (generally speaking, a declaration) and the obligations that flow from it differ substantially from a treaty operation. The specific nature of the unilateral acts that the Commission is now studying means that full powers need not be considered as part of the qualification of persons who are able to represent or act on behalf of the State.

CHAPTER V

Subsequent confirmation of an act formulated without authorization

A. Draft article

100. The Special Rapporteur proposes the following article:

Article 5. Subsequent confirmation of a unilateral act formulated without authorization

A unilateral act formulated by a person who cannot be considered under article 4 as authorized to represent a State for that purpose and to engage it at the international level is without legal effect unless expressly confirmed by that State.

B. Commentary

101. Article 7 of the 1969 Vienna Convention specifies the persons qualified to engage the State at the international level because of their office, because such qualification results from practice or because full powers have been assigned to them for that purpose, as referred to above, with the exception of the full powers that would not appear to be necessary in the context of unilateral acts of States.

102. Article 8 of the 1969 Vienna Convention raises the possibility that a State can subsequently confirm, implicitly or explicitly, an act relating to the conclusion of a treaty when the act is performed by a person other than the persons mentioned in article 7 of the Convention.

103. When the draft articles on the law of treaties were elaborated, major questions were raised in the Commission concerning the link between international and do-

mestic law. The conclusion was reached that the elaboration of the act was governed by domestic law, although its formulation was of interest to international law. In the sphere of unilateral acts, the principles and concepts underlying the 1969 Vienna Convention continue to apply, although, as stated earlier, the question should be examined from a more restrictive standpoint, given the special characteristics already mentioned of this category of legal acts of States.

104. Two different situations should be envisaged in relation to such acts: (a) where the act is formulated by a person not qualified to engage the State, and (b) where, although the act is formulated by a person qualified to represent the State in the international sphere, his actions exceed his jurisdiction. While these are two different situations, the basic issue is the same: the actions of a person not qualified to engage the State in the formulation of a given act.

105. When the draft articles on the law of treaties were discussed in the Commission, one member indicated that the validity of an act formulated by an unqualified body was doubtful; nevertheless, if neither the executive body nor the parliament expressed disagreement immediately after receiving information about the treaty, it was implicitly confirmed.⁵⁴ There would appear to be a greater need for that rule in the law of treaties than in the context of unilateral acts of States.

⁵⁴ *Yearbook... 1963*, vol. I, 674th meeting, statement by Mr. Verdross, p. 3, para. 7.

106. During the United Nations Conference on the Law of Treaties a draft amendment,⁵⁵ submitted by Venezuela, stated that an act relating to the conclusion of a treaty, executed by a person who could not be considered under article 6 as authorized to represent a State for that purpose, would have effect only if it was subsequently expressly confirmed by that State. As the proposal was rejected, the issue was resolved, and it was decided that the act could be confirmed both implicitly and explicitly, as provided in article 8 of the 1969 Vienna Convention.

107. In the context of unilateral acts it would seem appropriate, given their characteristics, that they be expressly confirmed if they are to have legal effect. This further

⁵⁵ *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, document A/CONF.39/14, p. 121, para. 82 (c).

guarantees the real intention of the State which formulates the act, affording greater security in international relations, an aim that is still the basis for the elaboration of the present draft articles. The express nature of the confirmation undoubtedly avoids misunderstandings as to the will of the State which formulates the act. To be sure, an act which was invalid could only be confirmed expressly, as a representative rightly indicated at the United Nations Conference on the Law of Treaties.⁵⁶

108. The draft article being commented on here states also that it is referring to a person not authorized to engage the State at the international level. This is not the case with respect to the 1969 Vienna Convention, although it can be inferred.

⁵⁶ *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), 14th meeting of the Committee of the Whole, p. 76, para. 5, statement by Mr. Carmona (Venezuela).

CHAPTER VI

Validity of unilateral legal acts: expression of consent and causes of invalidity

A. Draft articles

109. The Special Rapporteur proposes the following draft articles:

Article 6. Expression of consent

The consent of a State to acquire an obligation by formulating a unilateral act is expressed by its representative when making an unvitiated declaration on behalf of the State with the intention of engaging it at the international level and assuming obligations for that State in relation to one or more other subjects of international law.

Article 7. Invalidity of unilateral acts

A State may invoke the invalidity of a unilateral act:

(a) If the expression of the State's consent to formulate the act was based on an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound by the act. The foregoing shall not apply if the State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error;

(b) If a State has been induced to formulate an act by the fraudulent conduct of another State;

(c) If the expression of a State's consent to be bound by a unilateral act has been procured through the corruption of its representative directly or indirectly by another State;

(d) If the expression of a State's consent to be bound by a unilateral act has been procured by the coercion of its representative through acts or threats directed against him;

(e) If the formulation of the unilateral act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations;

(f) If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law;

(g) If the expression of a State's consent to be bound by a unilateral act has been in clear violation of a norm of fundamental importance to its domestic law.

B. Commentary

110. The Commission, in its report submitted to the General Assembly in 1998, stated, in relation to the future work of the Special Rapporteur: "He could also proceed further with the examination of the topic, focusing on aspects concerning the elaboration and conditions of validity of the unilateral acts [declarations] ..."⁵⁷ During the discussion of the report of the Commission on this topic in the Sixth Committee in 1998, some representatives also suggested that the Commission should concentrate in the future on questions relating to the elaboration and conditions of validity of unilateral acts.⁵⁸

⁵⁷ *Yearbook ... 1998*, vol. II (Part Two), p. 59, para. 200.

⁵⁸ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, statements by Austria (15th meeting, para. 10) and Romania (18th meeting, para. 3).

111. Generally speaking, in order for a legal act to be valid in international law and to have legal effect, certain conditions must be met. First, the act must be attributable to a subject of international law and the representative of the State concerned must have the capacity to represent it, that is, be qualified to engage the State at the international level. As indicated above, this is regulated by domestic legal norms, particularly constitutional norms, a question that was considered when draft articles 3–4 were commented on.

112. As in the law of treaties, the source of unilateral acts of States resides in the expression of will, which must be free of irregularities. As is well known, a legal act can have effect only if it is valid. In case of invalidity, a unilateral act can be declared void and will therefore be without legal effect, as stipulated in article 69, paragraph 2, of the 1969 Vienna Convention, relating to the consequences of invalidity of a treaty.

113. The expression of will must also be formulated in the proper manner, at least by the one or more subjects of international law who are its addressees or beneficiaries. This is related to its public character (although for some, this would be related to proof of the existence of the act and not to its existence *per se*).

114. Moreover, in order for the act to be legally valid and to have legal effect, its object must be lawful. This is related to acceptance of the existence of international public order and to peremptory or *jus cogens* norms, as shall be seen below.

115. Without doubt, the lawful object of unilateral legal acts of States must be consistent with the norms of so-called international public order, or, as Scelle calls it,⁵⁹ international common law, in order for such acts to be considered valid and, consequently, to have legal effect. It should be stated that the literature is not entirely consistent in accepting the existence of a higher legal order. Thus, Rousseau, for instance, in indicating that the requirement that the act be lawful occupies only a secondary place in the theory of international law, notes that “international law is intrinsically valid without any reference to a higher, metalegal or extrajudicial order”.⁶⁰

116. Moreover, in order for a unilateral legal act of a State, in particular, to be valid, it “must conform to substantive rules of international law on the subject with which it deals . . . The same is true of the relation between treaties and unilateral acts; the latter must comply with treaty commitments of their authors.”⁶¹

117. The expression of will by the author of the legal act is, as stated, essential to the creation of the act and to the effects which the act is intended to produce. The expression of will is so important that a portion of the literature defines a legal act as an expression of will, which vindicates the importance attached to irregularities capable of invalidating it, and to the interpretation of the act.

⁵⁹ Scelle, *Précis de droit des gens: principes et systématique*, pp. 15 et seq., cited in Nguyen Quoc Dinh, Pellet and Daillier, *op. cit.*, p. 200.

⁶⁰ Rousseau, *Droit international public*, pp. 142–143.

⁶¹ Skubiszewski, *loc. cit.*, p. 230, para. 44.

118. In the context of the law of treaties, the means of expressing consent to be bound by a treaty are set out in articles 11 et seq. of the 1969 Vienna Convention. They provide that a State can express its consent by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, or any other means which States may deem appropriate.

119. The question of expression of will in the case of unilateral acts of States is also essential. What is fundamental here is the moment of expression, that is, the moment when the author, by means of a declaration, expresses his intention to make an engagement and acquire obligations. The moment should, of course, be viewed in a broad sense and be equated with the process of formulation, the context. This is consistent with the rules of interpretation accepted and reflected in the 1969 Vienna Convention.

120. The expression of will and the intention of the State to make an engagement and acquire obligations are inseparable. The representative of the State can express a will on its behalf with the intention of engaging the State at the international legal level, for otherwise the Special Rapporteur would be dealing with acts which should be excluded from the scope of his study, as noted on several previous occasions.

121. Intention is fundamental to the interpretation of the State act. It should be noted that, while the 1969 Vienna Convention states that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, such terms should be given a special meaning if it is established that the parties so intended (art. 31). This question will, however, be addressed at a later stage.

122. The expression of will demonstrates the author’s intention to create a legal obligation. As Jacqué rightly states, if this intention does not exist, there is no legal act.⁶² The author of the act must express the intention to assume an obligation vis-à-vis the addressee.

123. On several occasions, ICJ has considered intention, as a universally recognized basic principle applicable to both domestic and international law,⁶³ to be the fundamental element of interpretation. In the *Nuclear Tests (Australia v. France)* case, the Court stated 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. An undertaking of this kind, if given publicly, and with an intent to be bound . . . is binding.⁶⁴

Further in that same decision, the Court stated:

Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.⁶⁵

⁶² Jacqué, *Eléments pour une théorie de l’acte juridique en droit international public*, p. 121.

⁶³ *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, separate opinion of Judge Van Wyk, pp. 84–85; *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, dissenting opinion of Judge Armand-Ugon, p. 123; and *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 9.

⁶⁴ *I.C.J. Reports 1974* (footnote 12 above), p. 267, para. 43.

⁶⁵ *Ibid.*, p. 269, para. 49.

124. It may be said that we are in the presence of a will to create a legal act

once the goal to be attained by the addressee of the act is sufficiently clear that any conduct not consistent with the norm may be identified. This is the circumstance in which a legal norm exists, not merely a political desire.⁶⁶

125. The intention to make an engagement must be clear and unequivocal, and must also be formulated, as shall be seen, in the proper manner. Intention is a term “which is used in connection with the interpretation of legal acts and which designates what the author or authors of an act really intended to agree on, do, obtain or avoid, whether this is shown by the act itself or by other factors”.⁶⁷

126. It should also be noted that lack of clarity does not signify lack of intention, a point that is directly related to the degree of obligation, if that term is acceptable. Once again the question arises of the nature of the obligation, that is, whether the obligation involved is one of behaviour or conduct or one of result, a point that the literature discusses in depth.⁶⁸ The question of international obligations is examined in great detail by the Commission in connection with the topic of international responsibility, which has an important relationship to the law of treaties and the law of unilateral acts, particularly where the State’s conduct differs from what is required under the obligation it assumes by means of some unilateral acts.

127. These obligations can be obligations of conduct, that is, those which determine the behaviour or conduct which the State must assume, without prejudging the outcome. On the other hand, they can be obligations of result, which leave the State free to choose the means it will use to obtain the result in question.

128. The intention, which must always be clear if it is to be the basis of the engagement made by the State, may be express or implicit, a question that is for the body charged with its interpretation to determine. In that connection, the Special Rapporteur should recall the judgment rendered by ICJ in the *Nuclear Tests* case, in which the Court concluded that the intention of the declarant State was to legally bind itself at the international level.⁶⁹

129. The expression of consent must be free of irregularities, as stipulated expressly in articles 48 to 52 of the 1969 Vienna Convention.

130. The question of the validity of a legal act requires the Special Rapporteur to examine the regime governing the invalidity of legal acts in international law, which is essential in order to determine the validity of the act and its legal effect.

131. Without doubt, the rules applicable to treaty acts are largely applicable to unilateral legal acts of States. For this reason, the comments on the present draft article should take into consideration the rules laid down on the

subject in relation to treaty acts, with special reference to treaties under the 1969 Vienna Convention.

132. In the case of unilateral acts, error, fraud, corruption of the State’s representative, violence committed against the State or its representative and the peremptory norms of international law or *jus cogens* should also be taken into account in this sphere, although probably under different circumstances, depending on the specific nature of such acts.

133. In the first place, a State may invoke the invalidity of a unilateral act where the act has been formulated on the basis of an error of fact or a situation which was assumed by that State to exist at the time of its formulation, if it formed an essential basis of its consent. This question was discussed extensively when the 1969 Vienna Convention was being drafted.

134. A State may not invoke an error of fact if it contributed by its conduct to the error, as stipulated in article 48, paragraph 2, of the 1969 Vienna Convention. ICJ has in the past considered this to be a well-established principle of international law.⁷⁰

135. Moreover, as in the 1969 Vienna Convention, a State may invoke the invalidity of an act if it has been induced to formulate the act by the fraudulent conduct of another State. In spite of the rarity of such a situation in a treaty context⁷¹ and the doubts expressed by the Special Rapporteur, Sir Humphrey Waldock, as to whether fraud should be included as a cause of invalidity of a treaty, the Convention includes it in article 49. The Special Rapporteur indicated at the time that he had doubts as to whether fraud could occur in a treaty context. While the possibility existed, there had never been a specific instance of its having induced a State to consent to a treaty.⁷²

136. In spite of certain misgivings, fraud should be included in the present draft article as a cause of invalidity. If the situation can arise in a treaty context, then it can also arise in the context of the formulation of a unilateral act. Fraud can even occur through omission, as when a State which has knowledge of certain realities does not convey it, thus inducing another State to formulate a legal act.

137. A State may invoke invalidity of a unilateral act if the act has been formulated by means of corruption of or violence against the State’s representative or a threat directed against the State by one or more other States. Undoubtedly, such causes of invalidity, provided for in the 1969 Vienna Convention, are also applicable to unilateral acts of States. In all such cases, the acts formulated are void, which also raises the question of whether these acts are absolutely or relatively void.

138. A unilateral act is also void if it is formulated under the threat or use of force in violation of the principles of the Charter of the United Nations, a question that was raised in the same terms in the 1969 Vienna Convention.

139. A unilateral act is also void if it is contrary to a State’s own previous norms or to a peremptory or

⁶⁶ Jacqué, *op. cit.*, p. 127.

⁶⁷ *Dictionnaire de la terminologie internationale* published under the auspices of the Union académique internationale (Paris, Sirey, 1960), p. 341.

⁶⁸ See, for example, Reuter, “Principes de droit international public”, p. 472.

⁶⁹ See footnote 64 above.

⁷⁰ *I.C.J. Reports 1962* (see footnote 49 above), p. 26.

⁷¹ Rousseau, *op. cit.*, p. 147.

⁷² See *Yearbook ... 1963*, vol. I, 678th meeting, p. 27, para. 3.

jus cogens norm, the latter being understood as a norm accepted and recognized by the international community, as stated in the 1969 Vienna Convention. This definition gave rise to an interesting doctrinal debate.

140. Some norms of international law may be derogated from by the parties; this is accepted under international law. It is also accepted, however, that some of these norms may not be derogated from. It is beyond all doubt that such norms, while difficult to identify, have emerged gradually, with benefits for the organization of international society, since the question was first raised at the time of the elaboration of the 1969 Vienna Convention. At issue is the distinction between norms of *jus dispositivum* and *jus cogens*. The latter are a constraint on the capacity to formulate unilateral legal acts; this would include some norms deriving from the Charter of the United Nations

and others contained in basic conventions, such as those relating to slavery and genocide, among many others. These are peremptory norms of general international law which admit of no exceptions.⁷³

141. Lastly, the fact that an act as formulated may be contrary to domestic legal norms—specifically, constitutional norms—may invalidate it if the State invokes its invalidity. There can be no doubt that the rule set out in article 46 of the 1969 Vienna Convention is fully applicable to unilateral acts. The State representative, as indicated above, should be qualified to represent the State in its international relations, and, furthermore, the act formulated may not be contrary to constitutional norms. Indeed, the representative who formulates the act must act within his sphere of jurisdiction if the act is to have legal effect.

⁷³ Ibid., 683rd meeting, statement by Mr. Ago, p. 66, para. 74.

CHAPTER VII

A comment on reservations and conditions in relation to unilateral acts and on the non-existence of unilateral acts

142. The formulation of reservations and the laying down of conditions are possible in the treaty sphere. This would not, however, appear to be the case in the sphere of unilateral acts of States.

143. While it is true that a State can formulate reservations or certain conditions when performing a unilateral act, in such cases the Special Rapporteur would no longer be dealing with an autonomous unilateral act of the kind that is of interest to the Commission at present. By their very nature, such unilateral acts would have to take place within the treaty sphere. Indeed, once the acceptance of reservations or conditions comes into play, such acts are no longer autonomous in the sense in which the term is understood in the present draft. The necessity of acceptance of reservations or conditions by the addressee State turns such acts into treaty acts. The question is important; however, it was deemed advisable not to adopt a definitive position on it until the Commission had concluded its consideration of reservations, a topic which was being studied separately.

144. Another important question which arises in connection with the law of unilateral acts and which should be examined in the present draft relates to the non-exist-

ence of the act. The issue is not whether an act is valid or invalid or whether it can or cannot be invalidated for the reasons set forth above.

145. The question of the object of treaties should be viewed from two angles: first, with regard to the lawfulness of the object, which is related to the question of invalidity, and secondly, with regard to the existence of the object. A unilateral act is simply non-existent if its object does not exist.

146. It should also be stated that an act is non-existent if not formulated in the proper manner. This question is inherent in the very existence of the act, although, admittedly, it can strengthen the evidence that such an act has been formulated. An act performed in secret may have no legal force. In order for such an act to have legal effect, the addressee or beneficiary State or States must necessarily be aware of it. As Sicault notes, “[this] is a prerequisite, for, so long as a subject of law keeps a unilateral engagement to itself, it can modify it as it wishes”.⁷⁴ It should be stated at the outset, however, that this question has certain restrictions in the context of unilateral acts of States.

⁷⁴ Loc. cit., p. 671.

CHAPTER VIII

Future work of the Special Rapporteur

147. If the Commission so decides, the Special Rapporteur could elaborate and address in a third report all questions relating to the observance, application and interpretation of unilateral acts, as well as the question of whether the author of an act can amend, revoke or suspend the application of such acts, thus following the recommendations submitted by the Working Group in 1997.⁷⁵

148. In relation to observance, a provision should be elaborated on *acta sunt servanda*, as referred to in the first report,⁷⁶ in which the binding nature of such State acts was examined.

⁷⁵ *Yearbook ... 1997*, vol. II (Part Two), pp. 66–67, paras. 214–216.

⁷⁶ *Yearbook ... 1998* (see footnote 1 above), p. 337, para. 157.

149. As regards application, such questions as the non-retroactivity and the territorial scope of unilateral acts, and the relationship between a unilateral act and obligations previously assumed by the State formulating the act, could be addressed.

150. In addition, all questions relating to the interpretation of such acts—following to a large extent the general rules applicable to treaty acts and the question of whether and under what circumstances a State can modify, amend or revoke unilateral acts (a question which differs substantially from those raised by the law of treaties)—could be addressed.

CHECKLIST OF DOCUMENTS OF THE FIFTY-FIRST SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/478/Rev.1	Fourth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur, annex: Bibliography	Reproduced in the present volume.
A/CN.4/492	State responsibility: comments and observations received from Governments	Idem.
A/CN.4/493 [and Corr.1]	Nationality in relation to the succession of States: comments and observations from Governments	Idem.
A/CN.4/494 and Add.1-2	Filling of casual vacancies (article 11 of the statute): note by the Secretariat	Idem.
A/CN.4/495	Provisional agenda	Mimeographed. For agenda as adopted, see <i>Yearbook ... 1999</i> , vol. II (Part Two), pp. 14-15, para. 12.
A/CN.4/496	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-third session of the General Assembly	Mimeographed.
A/CN.4/497	Nationality in relation to the succession of States: memorandum by the Secretariat	Reproduced in the present volume.
A/CN.4/498 and Add.1-4	Second report on State responsibility, by Mr. James Crawford, Special Rapporteur	Idem.
A/CN.4/499	Fourth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	Idem.
A/CN.4/500 and Add.1	Second report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	Idem.
A/CN.4/501	Second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur	Idem.
A/CN.4/L.572	Nationality in relation to the succession of States: report of the Working Group	Mimeographed.
A/CN.4/L.573 [and Corr.1]	Nationality in relation to the succession of States. Titles and texts of draft articles adopted by the Drafting Committee on second reading	Text reproduced in <i>Yearbook ... 1999</i> , vol. I, summary record of the 2579th meeting, pp. 81-84, para. 4.
A/CN.4/L.574 [and Corr.1 and 3]	State responsibility. Titles and texts of draft articles adopted by the Drafting Committee: articles 16 to 26 <i>bis</i> (chapter III), 27 to 28 <i>bis</i> (chapter IV) and 29 to 35 (chapter V)	Idem, summary record of the 2605th meeting, pp. 275-276, para. 4.
A/CN.4/L.575	Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee: guidelines 1.1.1 [1.1.4], 1.1.5 [1.1.6], 1.1.6, 1.2, 1.2.1 [1.2.4], 1.2.2 [1.2.1], 1.3 [1.3.1], 1.3.1 [1.2.2], 1.3.2 [1.2.3], 1.4, 1.4.1 [1.1.5], 1.4.2 [1.1.6], 1.4.3 [1.1.7], 1.4.4 [1.2.5], 1.4.5 [1.2.6], 1.5, 1.5.1 [1.1.9], 1.5.2 [1.2.7], 1.5.3 [1.2.8] and 1.6	Idem, summary record of the 2597th meeting, pp. 213-214, para. 1.
A/CN.4/L.576	Report of the Working Group on jurisdictional immunities of States and their property	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/54/10)</i> . The final text appears in <i>Yearbook ... 1999</i> , vol. II (Part Two), annex, p. 149.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.577 and Add.1	Report of the Planning Group: programme, procedures and working methods of the Commission, and its documentation	Mimeographed.
A/CN.4/L.578 [and Corr.1]	Draft report of the International Law Commission on the work of its fifty-first session: chapter I (Organization of the session)	Idem. For the adopted text, see <i>Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/54/10)</i> . The final text appears in <i>Yearbook ... 1999</i> , vol. II (Part Two), p. 13.
A/CN.4/L.579	Idem: chapter II (Summary of the work of the Commission at its fifty-first session)	Idem, p. 16.
A/CN.4/L.580	Idem: chapter III (Specific issues on which comments would be of particular interest to the Commission)	Idem, p. 18.
A/CN.4/L.581 and Add.1	Idem: chapter IV (Nationality in relation to the succession of States)	Idem, p. 19.
A/CN.4/L.582 and Add.1-4	Idem: chapter V (State responsibility)	Idem, p. 48.
A/CN.4/L.583 and Add.1-5	Idem: chapter VI (Reservations to treaties))	Idem, p. 89.
A/CN.4/L.584 and Add.1	Idem: chapter VII (Jurisdictional immunities of States and their property)	Idem, p. 127.
A/CN.4/L.585 and Add.1	Idem: chapter VIII (Unilateral acts of States)	Idem, p. 129.
A/CN.4/L.586	Idem: chapter IX (International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)).	Idem, p. 140.
A/CN.4/L.587 and Add.1	Idem: chapter X (Other decisions and conclusions of the Commission)	Idem, p. 142.
A/CN.4/L.588	Unilateral acts of States: report of the Working Group	Mimeographed.
A/CN.4/L.589	Long-term programme of work: interim report of the Working Group	Idem.
A/CN.4/SR.2565–A/CN.4/SR.2611	Provisional summary records of the 2565th to 2611th meetings	Idem. The final text appears in <i>Yearbook ... 1999</i> , vol. I.