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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 ... 1999*).

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-second 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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ABBREVIATIONS

AALCC	Asian-African Legal Consultative Committee
CAHDI	Ad Hoc Committee of Legal Advisers on Public International Law
CFCs	chlorofluocarbons
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
IAEA	International Atomic Energy Agency
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
ISO	International Organization for Standardization
ITLOS	International Tribunal for the Law of the Sea
NAFO	Northwest Atlantic Fisheries Organization
NATO	North Atlantic Treaty Organization
OAU	Organization of African Unity (now African Union (AU))
PCIJ	Permanent Court of International Justice
UNCC	United Nations Compensation Commission
WCO	World Customs Organization (formerly Customs Co-operation Council)
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>
ILM	<i>International Legal Materials</i> (Washington, D.C.)
ILR	<i>International Law Reports</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 B</i>	PCIJ, <i>Collection of Advisory Opinions</i> (Nos. 1–18: up to and including 1930)
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.

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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.4/502

Note by the Secretariat

[Original: English]
[29 November 1999]

1. Following the death of Mr. Doudou Thiam on 6 July 1999 and the election of Mr. Awn Al-Khasawneh to the International Court of Justice on 3 November 1999, two 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 two members to be elected by the Commission will expire at the end of 2001.

STATE RESPONSIBILITY

[Agenda item 3]

DOCUMENT A/CN.4/507 and Add. 1–4*

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

[Original: English]

[15 March, 15 June, 10 and 18 July and 4 August 2000]

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

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General Act of the Conference at Berlin (Berlin, 26 February 1885)	<i>British and Foreign State Papers, 1884–1885</i> , vol. LXXXVI, p. 4.
Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919)	<i>Ibid.</i> , 1919, vol. CXII (London, HM Stationery Office, 1922), p. 1.
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Geneva, 27 July 1929)	League of Nations, <i>Treaty Series</i> , vol. 118, No. 2733, p. 303.
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, <i>Treaty Series</i> , vol. 55, No. 814, p. 187.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	<i>Ibid.</i> , vol. 75, Nos. 970–973, pp. 31 et seq.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)	<i>Ibid.</i> , 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)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994)	<i>Ibid.</i> , vol. 2061, No. 2889, p. 7.
Treaty establishing the European Community (Rome, 25 March 1957), as amended by the Treaty of Amsterdam (2 October 1997)	<i>Official Journal of the European Communities</i> , No. C 340, vol. 40 (10 November 1997), p. 173.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	United Nations, <i>Treaty Series</i> , vol. 500, No. 7310, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	<i>Ibid.</i> , vol. 596, No. 8638, p. 261.
Convention on the settlement of investment disputes between States and nationals of other States (Washington, D.C., 18 March 1965)	<i>Ibid.</i> , vol. 575, No. 8359, p. 159.
International Covenant on Economic, Social and Cultural Right (New York, 16 December 1966)	<i>Ibid.</i> , vol. 993, No. 14531, p. 3.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i>
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
Convention on international liability for damage caused by space objects (London, Moscow, Washington, 29 March 1972)	<i>Ibid.</i> , vol. 961, No. 13810, p. 187.
Convention for the protection of the world cultural and natural heritage (Paris, 16 November 1972)	<i>Ibid.</i> , vol. 1037, No. 15511, p. 151.
Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974), as amended by the Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 11 April 1980)	<i>Ibid.</i> , vol. 1511, No. 26121, p. 99.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , vol. 1833, No. 31363, p. 3.

	<i>Source</i>
Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia (Brussels, 24 January 1983)	<i>Official Journal of the European Communities</i> , No. L 41, p. 2.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)	United Nations, <i>Treaty Series</i> , vol. 1513, No. 26164, p. 293.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987)	United Nations, <i>Treaty Series</i> , vol. 1522, No. 26369, p. 3.
Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994)	Ibid., vols. 1867–1869, No. 31874.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	Ibid., vol. 2187, No. 38544, p. 3.

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Introduction¹

A. Programme for completion of the second reading

1. At its fifty-first session in 1999, the International Law Commission completed the review of part one of the draft articles on second reading, which it had begun in 1998. Articles 1–35 have been considered by the Drafting Committee and reported to the plenary.² Since their consideration, some further comments have been forthcoming from

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

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

Governments within the framework of the debates in the Sixth Committee of the General Assembly.³ There have also been relevant developments in the jurisprudence.⁴ As a matter of impression, it may be said that the changes provisionally made to part one in 1998 and 1999 have on the whole been welcomed as a simplification and clarification of the original intent of that part. The underlying conception of part one (setting out the framework of general secondary rules of international law for determining whether a State has committed an internationally wrongful act) has remained essentially unchallenged, and each of the existing chapters of part one has been retained.

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

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

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

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

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

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

(d) The possible insertion of a further circumstance precluding wrongfulness, viz., the exception of non-performance (*exceptio inadimpleti contractus*), as proposed by the Special Rapporteur in 1999.⁸

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

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

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

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

⁷ *Ibid.*, p. 88, para. 448.

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

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

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

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

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

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

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

5. As adopted on first reading, part two¹⁰ deals with a wide range of issues:

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

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

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

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

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

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

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

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

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

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

¹³ See also paragraph 42 below.

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

(c) *Rights and remedies: the problem of discretion.* There is a related point. The formulation of part two in terms of rights not only tends to exclude aspects of reparation such as declaratory relief; it also requires the draft articles to be formulated in terms which suggest that the appropriate form of reparation is predetermined by international law. The truth is that international courts and tribunals have shown considerable flexibility in dealing with issues of reparation.¹⁸ In a system in which rules of responsibility can be formulated in terms of powers or judicial discretions, this is no great problem. In a system

in which everything has been conceived in terms of rights and obligations,¹⁹ the position is different, and it is one of the reasons why part two has been criticized alternately for excessive rigidity and unhelpful vagueness.²⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Chapter III, dealing with countermeasures, does not seem to be concerned so much with the “content, forms or degrees” of State responsibility as with the reactions that may lawfully follow a breach of an international obligation so far as the injured State is concerned. The notion that countermeasures are instrumental, and are concerned

not with punishing the responsible State but with inducing it to comply with its obligations of cessation and reparation, is expressed in article 47 and was endorsed by ICJ in the *Gabčíkovo-Nagymaros Project* case.²⁴ It implies that the provisions on countermeasures might be better located in a part (hereinafter referred to as part two bis) dealing with the implementation of responsibility;²⁵

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

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

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

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

Chapter I. General principles

Chapter II. The forms of reparation

[Chapter III. Cases involving a plurality of States]

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

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

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

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

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

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

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

PART TWO BIS. THE IMPLEMENTATION OF
STATE RESPONSIBILITY

Chapter I. Invocation of the responsibility of a State

Chapter II. Countermeasures

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

PART FOUR. GENERAL PROVISIONS

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

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

CHAPTER I

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

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

A. Chapter I. General principles

1. TITLE AND CONTENT OF CHAPTER I

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

Article 36. *Consequences of an internationally wrongful act*

Article 37. *Lex specialis*

Article 38. *Customary international law*

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

Article 40. *Meaning of injured State*

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

14. It is nonetheless appropriate that part two, chapter I, should set out general principles as to the legal consequences of an internationally wrongful act of a State, just as, part one, chapter I does as to the requirements for the existence of an internationally wrongful act. In that respect, articles 41 and 42, paragraph 1, seem to state general principles, which could be included in this chapter alongside article 36, leaving the specific forms of

reparation to be addressed in chapter II. The issues raised by article 40 also raise questions of general principle; the placement of that article can only be resolved in the context of a discussion of those questions.

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

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

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

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

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

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

These will be dealt with in turn.

2. THE GENERAL PRINCIPLE OF REPARATION²⁹

(a) *Current provisions*

(i) *Article 36, paragraph 1*

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

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

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

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

According to the commentary, its "sole object" is "to mark the transition, and the link" between parts one and two.³⁰ The commentary also notes that article 36, paragraph 1, "does not exclude that an internationally wrongful act entails legal consequences in the relationships between States and *other** 'subjects' of international law".³¹ That is of course true, and it follows from article 1 itself, which covers all international obligations of the State and not only those owed to other States. Thus the draft articles cover, for example, human rights violations—that is to say, cases where the primary beneficiary of the obligation is not a State.³² On the other hand, part two does not address the invocation of responsibility by a non-State entity such as an international organization³³ (or even a private entity, in those cases where such invocation is possible³⁴), or the reparation available to the primary victim or beneficiary in such cases. This apparent discrepancy will be discussed further in the context of the definition of "injured State" under article 40.

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

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

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

19. In conjunction with article 36, paragraph 1, it is also necessary to consider article 42. Paragraph 2 deals with the attenuation of responsibility on account of the neg-

ligence or wilful act or omission of the victim, i.e. with cases of contributory fault. That concept should probably find a place in the more detailed provisions of chapter II rather than as a general principle, and it will be discussed subsequently. The remaining provisions of article 42 are as follows:

Article 42. Reparation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.

...

3. In no case shall reparation result in depriving the population of a State of its own means of subsistence.

4. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

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

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

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

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

³¹ *Ibid.*, para. (4).

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

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

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

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

³⁶ *Ibid.*

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

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

³⁹ *Ibid.*, para. (4).

⁴⁰ *Ibid.*, para. (6).

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

(b) *A proposed general principle*

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

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

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

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

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

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

⁴⁵ *Ibid.*, comments on article 42, paragraph 3.

⁴⁶ *Ibid.*

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

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

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

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

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

(i) *Reparation as obligation or right?*

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

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

⁴⁸ *Ibid.*, p. 17, as the Court noted.

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

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

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

As it happened, the articles on reparation on first reading were discussed on the footing that only breaches of bilateral obligations were involved, and were not reconsidered in the context, for example, of articles 51–53.⁵²

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

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

27. The proposed general article should also specify that the subject matter of reparation is, globally, the situation resulting from and ascribable to the wrongful act.⁵⁵ As noted in the commentary to part one, State responsibility is not determined simply on the basis of "factual causality".⁵⁶ Rather, the allocation of harm or loss to a wrongful act is, in principle, a legal and not a merely historical or causal process. That principle is not limited to compensation. It applies, at least,

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

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

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

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

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

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

to restitution in kind and probably to other forms of reparation as well, and it is too important to be stated, as at present, only in the commentary to article 44.

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

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

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

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

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

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

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

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

Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that “It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained”.

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.⁶⁴

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

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

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

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

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

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

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

⁶² *Yearbook...1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 70, para. (13).

⁶³ The reduction of compensation in cases of contributory fault, which is envisaged in article 42, paragraph 2, occurs not because the internationally wrongful act of the State is not an efficient cause of the injury, but out of considerations of equity. The default of the victim in contributing to the injury limits the reparation to which it would otherwise be entitled. There is no inference to be drawn for the general question of concurrent causes.

⁶⁴ See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 250. It should be pointed out, however, that Albania did not appear at this stage, so that possible counter-vailing factors may not have been put to the Court.

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

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

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

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

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

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

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

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

In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.⁷¹

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

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

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

(c) *Article 42, paragraphs 3–4*

38. Article 42, paragraph 3, states that reparation must not “result in depriving the population of a State of its own means of subsistence”. According to the commentary, this provision was intended to address extreme cases where the demand for reparation would result in destitution for the population of the responsible State, and was evidently aimed at such cases as the massive demands for

war reparations made against Germany at the end of the First World War. It notes further that:

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

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

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

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

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

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

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

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

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

⁷⁵ See paragraph 22 above.

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

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

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

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

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

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

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

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

⁸¹ See paragraph 7 (a), above.

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

3. CESSATION AND RELATED ISSUES

(a) Current provisions

44. As adopted on first reading, the draft articles contain two provisions dealing with the related questions of the impact of a breach of an international obligation on its continued performance, and with the cessation of such a breach. These are articles 36, paragraph 2, and 41.⁸⁴

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

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

The commentary notes that:

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

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

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

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

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

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

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

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

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

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

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

48. Article 41 has attracted very few comments from Governments, probably because it seems largely uncontroversial. In the view of Venezuela, the obligation to cease a wrongful conduct appears as “the first necessity”.⁹⁰ The United Kingdom suggests an addition to the commentary to that provision making it clear that, when a circumstance precludes the wrongfulness of a particular conduct, the State concerned “remains under a duty to act in accordance with its international obligations and is internationally responsible if it fails to do so immediately when the circumstances generating the defence cease to obtain”.⁹¹ France proposes the deletion of article 41, the substance of which would be embodied in a new version of article 36, paragraph 1.⁹²

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

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

50. The main doubt raised about article 41 is that the cessation of a continuing wrongful act can be seen as a function of the obligation to comply with the primary norm. On that view, it is not a secondary consequence of a breach of an international obligation and it has no place in

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

⁸⁸ *Ibid.*, p. 56, para. (6).

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

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

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

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

the draft articles. The Special Rapporteur does not agree with this analysis, for reasons that can be rather summarily stated:

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

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

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

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

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

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

(c) *Question of placement and formulation*

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

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

1. A State which has committed an internationally wrongful act is bound, with respect to the injured State, to perform the obligation it has breached or to cease any wrongful conduct having a continuing character.

2. This obligation is without prejudice to the legal consequences of an internationally wrongful act as set out in this part.⁹⁴

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

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

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

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

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

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

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

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

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

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

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

55. The commentary goes on to describe the different forms which assurances and guarantees may take, including for example the repeal of the legislation which al-

lowed the breach to occur.⁹⁸ But while the commentary “recognizes that the wrongdoing State is under an obligation to provide such guarantees subject to a demand from the injured State and when circumstances so warrant”,⁹⁹ the article itself makes no attempt to specify the content of such an obligation, taking refuge in the phrase “where appropriate”. This implies that the obligation to provide guarantees and assurances is a weak or even illusory one, in the absence of some third party competent “to determine if the conditions for the granting of ... an exceptional remedy are met and also to deny abusive claims which would impair the dignity of the wrongdoing State”.¹⁰⁰

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

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

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

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

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

⁹⁹ *Ibid.*, p. 83, para. (5).

¹⁰⁰ *Ibid.*

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

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

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

¹⁰⁴ *Ibid.*, p. 151.

¹⁰⁵ *Ibid.*, p. 145.

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

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

⁹⁷ *Ibid.*, p. 82, para. (2).

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

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

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

4. OTHER LEGAL CONSEQUENCES UNDER CUSTOMARY INTERNATIONAL LAW

60. Article 38 provides that:

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

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

61. The brief commentary warns that part two “may well not be exhaustive as to the legal consequences of internationally wrongful acts”.¹⁰⁸ But the only two examples it gives relate to the validity or termination of treaties. These examples are, first, the invalidity of a treaty procured by an unlawful use of force (1969 Vienna Convention,

art. 53) and, secondly, the exclusion of reliance on fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party (1969 Vienna Convention, art. 62, para. 2 (b)). The commentary notes that “[t]hese types of legal consequences will not be dealt with in part 2”.¹⁰⁹ The reason is that they are not consequences within the field of the draft articles at all.

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

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

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

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

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

¹⁰⁹ Ibid, para. (1).

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

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

¹¹² See paragraph 8 above.

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

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

¹⁰⁷ For the formulation proposed, see paragraph 119 below.

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

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

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

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

5. THE INJURED STATE

(a) Article 40. Meaning of injured State

(i) The preparatory work

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

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

¹¹⁵ For the formulation proposed, see paragraph 119 below.

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

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

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

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

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

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

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

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

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

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

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

"Rather than consider each and every instance in which a State was deemed to be injured, at the risk of overlooking some possibilities, the Commission could define the injured State as the State which had suffered material or moral prejudice as a result of an internationally wrongful act attributable to another State."

(*Yearbook ... 1984*, vol. I, 1867th meeting, pp. 315–316, para. 9).

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

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

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

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

The purpose of article 5 was neither to define primary rules of international law, nor to provide an exhaustive list of situations in which a State could claim to be injured. It provided a general rule in paragraph 1, an indicative list in paragraph 2 and dealt with the rather special case of international crimes in paragraph 3.¹²⁴

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

the need for precision.¹²⁹ On the other hand, "[a]rticle 5 (e), by referring to 'all other States' as being injured States in connection with international crimes, did not mean that all those States were injured to the same degree or that each of them could take any action it saw fit".¹³⁰ The point was echoed by the Chairman of the Drafting Committee, who noted that:

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

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

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

(ii) Article 40 and its commentary

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

Article 40. Meaning of injured State

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

2. In particular, "injured State" means:

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

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

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

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

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

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

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

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

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

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

¹²⁹ *Ibid.*, p. 317, para. 26.

¹³⁰ *Ibid.*, para. 28.

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

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

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

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

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

- (i) The right has been created or is established in its favour;
- (ii) The infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or
- (iii) The right has been created or is established for the protection of human rights and fundamental freedoms;

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

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

74. The commentary to article 40¹³⁴ notes that the question which State is responsible for an internationally wrongful act is answered in principle by part one of the draft articles, which defines an internationally wrongful act

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

Likewise, in his second report on State responsibility, Mr. Roberto Ago had postulated that there was always “a correlation between a legal obligation on the one hand and a subjective right on the other”. According to this view, it was “perfectly legitimate, in international law, to regard the idea of the breach of an obligation as the exact equivalent of the idea of the impairment of the subjective rights of others”.¹³⁶ This “exact” equivalence is expressed in a few crucial words in article 40, paragraph 1.¹³⁷ Thereafter part two of the draft articles speaks of the rights of “the” injured State, rather than the obligations of the State responsible for internationally wrongful conduct (hereinafter referred to as the responsible State).

75. Article 40 thus operates as the hinge of the entire draft, the connecting element between the treatment of obligations in part one and the treatment of rights in part

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

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

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

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

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

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

two. Paragraph 1 having announced the exact correlation of obligations and rights, paragraph 2 then goes on to identify, in a non-exclusive way, cases where a State or States may be considered to have a right which is the correlative of an obligation breached. These cases vary from the dyadic right-duty relationship of a bilateral treaty or a judgement of an international court, to cases where the right arises under a rule of general international law or a multilateral treaty and all or many of the States bound by the rule or party to the treaty may be considered “injured”. It also stipulates that in the case of “international crimes”, all other States are injured and have a right to act.

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

(iii) *Comments of Governments on article 40*

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

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

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

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

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

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

78. It is true that some States support the general approach taken by the Commission on first reading. Germany, for example, points out that “the nature of the ‘primary’ rules of international law and the circle of States participating in their formation are relevant to the indication of the State or States ‘injured’ by the breach of an obligation under such ‘primary rules’”.¹⁴³ But the majority of Governments commenting on draft article 40 express serious concerns as to the wording and content of paragraph 2 (e) and (f), and paragraph 3. A first issue relates to the “absurd results” to which these provisions could lead if they were to establish “a competitive or cumulative competence of States to invoke legal consequences of a violation”.¹⁴⁴ Support has thus been given to the proposed distinction¹⁴⁵ between States specifically injured by an internationally wrongful act and States having a legal interest in the performance of the obligation.¹⁴⁶ The former would have the right to seek reparation in their own right, whereas the latter could only claim the cessation of the wrongful conduct and for reparation to be made to the specifically injured State.¹⁴⁷ Moreover, in the opinion of the United Kingdom, the Commission should consider whether “the right of States to consider themselves ‘injured’ ... should be modified if the State principally injured has indicated that it has decided freely to waive its

rights arising from the breach or if the State consents to the ‘breach’”.¹⁴⁸

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

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

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

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

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

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

(Footnote 141 continued.)

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

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

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

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

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

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

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

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

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

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

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

¹⁵² *Ibid.*, United Kingdom.

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

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

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

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

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

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

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

(b) *Some preliminary issues*

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

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

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

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

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

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

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

83. An initial question is the identification for all purposes of responsibility with the subjective rights of an injured State or States. This was rooted in earlier theories of State responsibility (especially Anzilotti’s), based on the paradigm of bilateral relations as characteristic of international law. At the time of his second report¹⁶³ (issued in the same year as the Court’s dictum in the *Barcelona Traction* case¹⁶⁴), Mr. Ago, Special Rapporteur, had only just begun to formulate the idea of responsibility to the international community as a whole. For this purpose it matters little whether the language of article 19 (“international crimes”) is used or that of the Court itself when it referred to an obligation held towards the international community as a whole (*erga omnes*).¹⁶⁵ In either case, there is a problem in the immediate identification of that responsibility with the “subjective” rights of particular States.

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

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

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

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

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

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

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

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

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

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

(ii) *The treatment of human rights obligations*

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

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

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

(Footnote 169 continued.)

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

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

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

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

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

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

is injured and States parties to the human rights obligation have a general interest in compliance.

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

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

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

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

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

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

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

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

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

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

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

a. Integral obligations

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

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

But of the three provisions of the 1969 Vienna Convention mentioned in the commentary,¹⁸⁰ only article 60, paragraph 2 (c) actually deals with questions which are cognate to responsibility.¹⁸¹ Article 60, paragraph 2 (c),

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

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

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

¹⁸¹ Article 60, paragraph 2, provides as follows:

“2. A material breach of a multilateral treaty by one of the parties entitles:

“(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State; or

(ii) as between all the parties;

“(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

“(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in

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

b. Obligations *erga omnes partes*

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

whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.”

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

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

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

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

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

c. Specially affected States

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

(iv) *Consequences of identifying multiple “injured States”*

94. Under article 40, all “injured States” are apparently treated in exactly the same way. Each State injured by an internationally wrongful act is entitled to seek cessation and reparation¹⁸⁷ and to take countermeasures if cessation and reparation are not provided.¹⁸⁸ This may be appropriate where the “subjective” or individual rights of States are concerned. A State whose right has been breached is entitled to protest, to insist on restitution or (even where restitution may be possible) to decide that it would prefer compensation. It may insist on the vindication of its right or decide in the circumstances to overlook it and waive the breach. But the position where the obligation is a multilateral one may well be different. For example, the particular beneficiary of a substantive obligation (e.g. the individual whose right has been violated contrary to a human rights obligation, the people whose right to self-determination has been denied or even the State actually harmed by a breach of an obligation *erga omnes*) may validly prefer compensation to restitution. By what right could others, even with a recognized legal interest in compliance, countermand that preference?

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

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

¹⁸⁷ See articles 41–42.

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

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

(v) *Conclusion on article 40*

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

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

(b) In its apparent assumption that all responsibility relations are to be assimilated to classical bilateral right-duty relations (an assumption contradicted by ICJ in the *Barcelona Traction* case¹⁸⁹), or alternatively in its failure to spell out the ways in which multilateral responsibility relations differ from bilateral ones;

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

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

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

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

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

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

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

¹⁸⁹ See footnote 164 above.

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

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

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

...

Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so.¹⁹¹

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

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

(i) *Article 40 and bilateral obligations*

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

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

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

¹⁹³ See paragraph 7 above.

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

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

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

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

(a) Only the State which is the obligor is “injured” by a breach;

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

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

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

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

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

¹⁹⁵ See paragraph 73 above.

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

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

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

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

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

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

105. No doubt there is room for some element of solidarity, even in purely bilateral contexts. In diplomatic practice it is not unusual for third States to take note of an evident breach and to remind the responsible State of their concerns. It seems, however, that this will not amount to the invocation of State responsibility by a third State, and that it does not need to be regulated in the draft

articles. It should be sufficient for the commentary to reflect that the definition of “injured State” is concerned with the invocation of responsibility, and does not affect informal diplomatic exchanges with third States for the purpose of expressing concern and assisting in the resolution of conflicts.¹⁹⁷

(ii) *Article 40 and multilateral obligations*

a. Types of multilateral obligations

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

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

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

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

¹⁹⁸ See paragraph 97 above.

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

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

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

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

affected” by a breach of a multilateral obligation ought to be entitled to invoke the responsibility of the State concerned in respect of that breach.

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

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

²⁰⁰ See paragraph 92 above.

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

²⁰² As Switzerland observes (para. 80 above).

²⁰³ See paragraph 115 below.

Table 1

States entitled to invoke responsibility in respect of multilateral obligations

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

b. Permissible responses by “injured States”

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

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

110. Thus, in addition to distinguishing between the States entitled to rely on or invoke a multilateral responsibility, it may be necessary to differentiate between the

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

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

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

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

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

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

²⁰⁶ See footnote 194 above.

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

²⁰⁸ See paragraphs 77–80 above.

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

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

114. In particular, both the analogy of article 60, paragraph 2, of the 1969 Vienna Convention, and the analogy of collective self-defence suggest the need for some regime of “collective countermeasures” in cases where States are acting in some collective interest rather than on account of any particular injury to themselves. Under article 60, paragraph 2, States which are not specially affected by a breach of a multilateral treaty (not involving an integral obligation) cannot individually take action to suspend or terminate the treaty; they can only do so collectively. It will be a matter for consideration in relation to part two bis, to what extent States may take countermeasures in the collective interest. To the extent that they may do so, the principle of proportionality should presumably apply collectively to the action taken by all of them. In cases where a State is the primary obligee (and in conformity with the Court’s approach to collective self-defence in the *Military and Paramilitary Activities in and against Nicaragua* case²¹¹), countermeasures could only be taken at the request of that State. This may be contrasted with the existing provisions of part two, which allow each individual State to take countermeasures in the collective interest without regard to the position of the victim, of any other “injured State” or of the cumulative effect of such countermeasures on the target State. It may be that, in case of a breach of a multilateral obligation where there is no specially affected State, all other States parties will be able to call for cessation and for restitution, but that further collective measures would require the authorization of a competent international organization, or would have to be agreed between the States concerned.²¹² But whatever solutions may be adopted in the framework of part two bis, it seems clear that the first step is to distinguish between the different groups of injured and interested States. The proposed reconsideration of article 40 will not answer all the questions raised by part two. But at least it should allow the right questions to be asked.

115. If article 40 is reconsidered along these lines, a further question will arise. This is whether the changes outlined here sufficiently respond to those cases where all States in the world are faced with the egregious breach of certain fundamental obligations (e.g. genocide or aggression). One problem, which article 19 clearly did not resolve, is that the seriousness of the breach of an obligation does not necessarily equate with the fundamental

character of the obligation itself. There can, for example, be isolated acts of torture which do not warrant exceptional treatment, whereas it is difficult to conceive of a minor case of genocide.²¹³ There seems to be a good case for allowing countermeasures to be taken in response to egregious breaches of multilateral obligations, without imposing the requirement of unanimity among the “injured States”. Otherwise, the more universal the obligation breached (e.g. at the level of an obligation *erga omnes*), the more difficult it would be to meet the requirements for countermeasures, since there would be a larger number of States whose agreement to those measures would be required. Exactly where the threshold should be set for countermeasures to be taken by individual States, acting not in their own but in the collective interest, is a difficult question. There is an issue of “due process” so far as concerns the target State, since at the time collective countermeasures are taken, its responsibility for the breach may be merely asserted, not demonstrated, and issues of fact and possible justifications are likely to have been raised and left unresolved. Some formula such as a “gross and reliably attested breach” is called for.

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

(iii) *Issues of drafting and placement*

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

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

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

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

²¹¹ See footnote 207 above.

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

Table 2

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

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

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

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

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

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

118. Two questions arise at this stage:

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

(b) *Location of proposed article.* The second question is whether that article belongs in part two, chapter I, or elsewhere. This depends on whether it is possible and desirable to express the secondary obligations, specified in more detail in later articles of part two, without reference to the concept of “injured State”. It has already been concluded that the basic principles of cessation and reparation which

are now to be stated in chapter I, should be expressed in terms of the obligations of the responsible State. In the Special Rapporteur’s view, it would be desirable to express the remaining articles in part two in the same way, in effect as forms which the basic obligation of reparation may take depending on the circumstances. This would allow the proposed article to be located in part two bis as the key aspect of the invocation of responsibility. Indeed its location there might be thought to be implicit in the recognition that different States are differently affected or concerned, from a legal point of view, by the breach of an international obligation, and that the range of permissible responses must likewise vary.

6. CONCLUSIONS AS TO PART TWO, CHAPTER I

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

“PART TWO

“LEGAL CONSEQUENCES OF AN
INTERNATIONALLY WRONGFUL ACT
OF A STATE

“CHAPTER I

“GENERAL PRINCIPLES

“*Article 36. Content of international responsibility*

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

“*Article 36 bis. Cessation*

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

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

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

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

“*Article 37 bis. Reparation*

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

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

“*[Article 38.²¹⁵ Other consequences of an internationally wrongful act*

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

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

“*Article 40 bis²¹⁶ Right of a State to invoke the responsibility of another State*

“1. For the purposes of these draft articles, a State is injured by the internationally wrongful act of another State if:

“(a) The obligation breached is owed to it individually; or

“(b) The obligation in question is owed to the international community as a whole (*erga omnes*), or to a group of States of which it is one, and the breach of the obligation:

“(i) Specially affects that State; or

“(ii) Necessarily affects the enjoyment of its rights or the performance of its obligations.

“2. In addition, for the purposes of these draft articles, a State has a legal interest in the performance of an international obligation to which it is a party if:

“(a) The obligation is owed to the international community as a whole (*erga omnes*);

“(b) The obligation is established for the protection of the collective interests of a group of States, including that State.

“3. This article is without prejudice to any rights, arising from the commission of an internationally wrongful act by a State, which accrue directly to any person or entity other than a State.”

B. Chapter II. The forms of reparation

1. GENERAL CONSIDERATIONS

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

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

²¹⁷ See paragraph 84 above.

121. Chapter II as adopted on first reading identified two general principles (cessation and reparation) which it is now proposed be included as such in chapter I, and four forms of reparation, viz. restitution, compensation, satisfaction, and assurances and guarantees against repetition (regarded however as *sui generis*). For reasons already given, it is better to treat assurances and guarantees as an aspect of cessation and future performance, since like cessation but unlike reparation they assume the continuation of the legal relationship breached.²¹⁸ That leaves three major forms of reparation. Mr. Arangio-Ruiz, Special Rapporteur, had also proposed a separate article dealing with interest; this was subsumed by the Commission in a fleeting reference in article 44 (Compensation). In addition, chapter II should deal with the question of contributory fault, previously included in article 42, paragraph 2.²¹⁹

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

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

- (a) Restitution in kind (existing art. 43);
- (b) Compensation (existing art. 44);
- (c) Satisfaction (existing art. 45);
- (d) Interest (referred to in article 44, but no actual article);
- (e) Mitigation of responsibility (present art. 42, para. 2).

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

2. RESTITUTION

(a) Existing article 43

124. Article 43 provides:

Restitution in kind

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

- (a) Is not materially impossible;

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

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

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

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

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

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

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

²²² *Ibid.*, para. (2).

²²³ *Ibid.*, pp. 62–63, para. (3).

²²⁴ *Ibid.*, p. 63, para. (4).

²¹⁸ See paragraph 54 above.

²¹⁹ See paragraphs 19 and 33 above.

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

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

127. The commentary does discuss a different issue, viz. the distinction sometimes drawn between material restitution (e.g. the return of persons, property or territory) and juridical restitution (e.g. the annulment of laws). There are many examples in State practice of both kinds. Iraq’s withdrawal from Kuwait following the invasion of 1990 is an example of partial material restitution, but it was also accompanied by forms of legal restitution, including the annulment of the Iraqi decree proclaiming Kuwait a province of Iraq. Combined forms of restitution may also be negotiated on a without prejudice basis as part of the settlement of a dispute, without any admission of responsibility: for example the dispute concerning the seizure by Canada of the Spanish fishing vessel, the *Estai*, led to a complex settlement.²²⁵ Given the tendency for different types of measure (legal and factual) to be combined in restitution, the commentary concludes that there is no need for a formal distinction between “material” and “juridical” restitution to be made in the article itself.²²⁶ Nor is it necessary for the article to deal explicitly with the question of restitution made on the international legal plane, e.g. by the annulment of an international claim to jurisdiction or territory. In the context of dispute settlement, such measures may well be achieved by the grant of a declaration as to the true legal position, even if this is formally binding only on the parties to the proceedings. Despite the terms of article 59 of the ICJ Statute, the practical effect of such a declaration may well be to establish the sovereignty of the State concerned over its territory, or

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

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

its jurisdiction over maritime resources, on a more general basis.²²⁷ Such a legal status is sometimes said to be “opposable *erga omnes*”, but this is not to be confused with the question of obligations *erga omnes*, as discussed earlier in this report.²²⁸ The commentary concludes that

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

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

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

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

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

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

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

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

²²⁸ See paragraphs 97 and 106 above.

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

²³⁰ *Ibid.*, p. 66, para. (11).

²³¹ *Ibid.*, para. (12).

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

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

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

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

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

(d) The fourth exception to restitution involves another “catastrophic” scenario, not unlike the contingency, envisaged in article 42, paragraph 3, as adopted on first reading, that full reparation may deprive a people of its

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

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

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

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

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

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

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

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

²³⁹ See paragraphs 38–42 above.

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

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

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

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

²⁴⁴ *Ibid.*, p. 147.

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

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

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

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

(i) *Cessation and restitution*

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

132. For example in the “*Rainbow Warrior*” arbitration, New Zealand sought the return of the two agents to detention on the island of Hao, since (as the Tribunal held) the circumstances relied on by France to justify their continued removal either did not exist or were no longer operative. According to New Zealand, France was thus obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The Tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was thus no question of cessation.²⁴⁹ The question might

still be asked: assuming the correctness of this view as a matter of the interpretation of the primary obligation, what was New Zealand’s entitlement as a matter of restitution? It is not the case that restitution is only available when the obligation breached is still in force (even though that is true for cessation). The Tribunal avoided answering the question, holding that New Zealand’s request was only for cessation. But New Zealand, while it had expressly renounced any demand for compensation, sought the return of the two agents to the island, and apparently did so under the form of restitution even if (as happened) the Tribunal were to hold that questions of cessation of wrongful conduct no longer arose.

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

134. Two lessons may be drawn from this episode. First, while it may be appropriate (as France itself proposes²⁵⁰) to define restitution as the “re-establishment of the pre-existing situation” as distinct from the mere return of persons, property or territory, a return to the status quo ante may be of little or no value if the obligation breached does not remain in force. Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not (or not alone) competent to release it from such performance. Both positively and negatively, the distinction in theory between cessation and restitution may have important consequences in terms of the obligations of the States concerned and the remedial options open to them. The second lesson is of a more general character: in practice, dispute settlement bodies act flexibly in their interpretation of the positions of States parties, and in selecting one remedy over another. It seems that no set of rules dealing with the consequences of internationally wrongful acts can exclude such flexibility, no matter how categorical a preference may be stated for one form of reparation over another.

(ii) *Restitution and compensation*

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

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

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

²⁴⁸ See paragraphs 44–52 above.

²⁴⁹ UNRIIAA (footnote 17 above), cited in paragraph 47 above.

²⁵⁰ Para. 129 above.

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

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

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

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

138. In the *Consular Relations* case,²⁵⁷ Paraguay sought and was granted provisional measures in an attempt to

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

²⁵² See especially Gray, “The choice between restitution and compensation”.

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

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

²⁵⁵ Ibid., p. 19, para. 31.

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

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

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

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

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

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

Reports 1998, p. 248.

²⁵⁸ Ibid., p. 254, para. 18.

²⁵⁹ Ibid., p. 256, para. 30.

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

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

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

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

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

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

143. In the opinion of the Special Rapporteur, these qualifications and understandings of the principle of restitution can be accommodated by the careful formulation of article 43 and of the exceptions set out in it, and by appropriate explanations in the commentary. The question is whether, on this basis, the principle of the primacy of restitution should be retained. On balance it should be. It is true that the authority usually relied on for that primacy—the *Chorzów Factory* case²⁶⁵—does not actually decide the point, since by the time of the decision Germany sought only compensation and not the return of the property. It is also true that courts and tribunals have been reticent about the award of full-scale restitution, and that the decision perhaps most associated with the idea of restitution—the decision of Sole Arbitrator Dupuy in the

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

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

²⁶⁵ Cited above in paragraph 24.

Texaco arbitration²⁶⁶ has been widely criticised²⁶⁷ and has not been followed in later mixed arbitrations.²⁶⁸ But these were, precisely, mixed arbitrations, where the right of eminent domain of the responsible State (and its sovereignty over its natural resources) has to be balanced against the obligations it has assumed for the protection of those resources, whether by treaty or otherwise. In the context of State to State relations, restitution plays a vital role in principle, especially because of its close relation to the question of the performance of international obligations. A second reason for preserving the principle is that there is little call from Governments to abandon it. Despite doubts expressed by one or two Governments,²⁶⁹ article 43 as adopted on first reading, which does express a qualified priority for restitution, has been generally well received. Indeed most of the comments that have been made are directed at reducing the number and scope of the exceptions to the principle, rather than overturning it. And thirdly, the abandonment of the principle would require the Commission to formulate, against the background of a legal presumption in favour of compensation, those cases where restitution is exceptionally required. The United States notes that restitution is particularly significant in cases involving "illegally seized territory or historically or culturally valuable property",²⁷⁰ but it is certainly not limited to such cases. Moreover expressing the point in the form of an exception might tend to imply that, in cases not covered, States may, after the event, purchase the freedom not to respect their international obligations. The principle of the priority of restitution should be retained, subject to defined exceptions.

(c) *Exceptions to restitution*

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

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

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

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

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

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

²⁶⁹ See paragraph 129 above.

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

²⁷¹ See paragraph 128 above.

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

²⁷³ See paragraph 128 and footnote 237 above.

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

(c) *Restitution disproportionately onerous.* In accordance with article 43 (c), restitution need not be provided if the benefit to the injured State of obtaining restitution (as distinct from compensation) is substantially outweighed by the burden for the responsible State of providing it. This might have applied, for example, in the *Great Belt* case²⁷⁹ if the bridge had actually been built before the issue of the right of passage had been raised by Finland. Where the cost to the responsible State of dismantling a structure is entirely disproportionate to the benefits for the injured State or States of doing so, restitution should not be required. The United States, while not opposing subparagraph (c), calls for further clarification of the phrase "a burden out of all proportion to the benefit which the injured State would gain". But as with other expressions of the principle of proportionality, it is difficult to

²⁷⁴ See paragraph 129 above.

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

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

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

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

²⁷⁹ See paragraphs 136–137 above.

be more precise in the text itself.²⁸⁰ One useful clarification might be to stress that the notion of proportionality here is not only concerned with cost and expense but that the significance of the gravity or otherwise of the breach, relative to the difficulty of restoring the status quo ante, must also be taken into account. It seems sufficient to spell this out in the commentary;

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

(d) *The formulation of article 43*

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

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

"Restitution

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

"(a) Is not materially impossible; ...

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

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

²⁸¹ See paragraphs 38–42 above.

3. COMPENSATION

(a) Existing article 44

147. Article 44 provides:

Compensation

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

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

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

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

[C]ompensation for *lucrum cessans* is less widely accepted in the literature and in practice than is reparation for *damnum emergens*. If loss of profits is to be awarded, it would seem inappropriate to award interest on the profit-earning capital over the same period of time, simply because the capital sum cannot be earning interest and* be notionally

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

²⁸³ *Ibid.*, p. 68, para. (3).

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

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

²⁸⁶ *Ibid.*, para. (17).

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

²⁸⁸ See paragraphs 195–214 below.

employed in earning profits at one and the same time ... The essential aim is to avoid ‘double recovery’ in all forms of reparation.²⁸⁹

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

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

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

150. Government comments on article 44 raise a number of important questions. The first is whether a more detailed provision is needed. Some Governments are of the view that, given the complexity and importance of the issues involved, further guidance on the standard of compensation under customary international law would be welcome—in particular so far as concerns “the assessment of pecuniary damage”, including interest and loss of profits.²⁹¹ France criticises the “overly concise” drafting of article 44 (all the more so if compared to the detailed treatment of articles 45–46) and advocates a return “to a more analytical version” based on the work done by Mr. Arangio-Ruiz in his second report on State responsibility²⁹² and on international practice and jurisprudence.²⁹³ By contrast, others stress the need for some flexibility in dealing with specific cases; in their view it is sufficient to set out the general principle of compensation in article 44. They also note that “detailed and comprehensive consideration of the law on reparation and compensation would take considerable time and would delay the completion of the Commission’s work”.²⁹⁴

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

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

²⁹⁰ *Ibid.*, p. 76, para. (39).

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

²⁹² *Yearbook ... 1989* (see footnote 21 above).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁰² See paragraphs 195–214 below.

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

154. In his second report, Mr. Arangio-Ruiz discussed “reparation by equivalent” in some detail, proposing two alternative articles, one shorter and one rather more detailed. As its commentary implies, the Commission preferred the shorter version, which became article 44.³⁰³ In consequence, some of the issues discussed by Mr. Arangio-Ruiz in his report—the distinction between moral injury to individuals and to the State, the distinction between lawful and unlawful expropriation, methods of assessing the value of property taken, especially where this is done on a “going concern” basis—are only dealt with briefly, if at all, in article 44 and its commentary.

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

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

Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary’s

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³¹¹ For reviews of the Tribunal's jurisprudence on valuation and compensation see, inter alia, Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, chaps. 5–6 and 12; Brower and Brueschke, *The*

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

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

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

(e) UNCC is a non-judicial body established by the Security Council to deal with compensation claims against Iraq arising “directly” from its invasion of Kuwait in 1990.³¹⁶ The UNCC mandate is to decide upon the liability of Iraq “under international law”,³¹⁷ and UNCC has laid down guidelines for the award of compensation which are subject to the approval of the Governing Council (consisting of the members of the Security Council). These guidelines have been applied to the processing of a very large number of claims.³¹⁸

Iran-United States Claims Tribunal, chaps. 14–18; Pellonpää, “Compensable claims before the Tribunal: expropriation claims”; and Stewart, “Compensation and valuation issues”.

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

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

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

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

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

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

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

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

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

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

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

(Continued on next page.)

157. Whenever a particular tribunal or other body is established with competence to deal with claims for State responsibility and to award compensation, the question arises whether the resulting decisions form part of a “special regime” for reparation, amounting to a *lex specialis*. There are no doubt, to a greater or lesser degree, elements of a *lex specialis* in the work of the bodies mentioned above (as well as in relation to the WTO dispute settlement mechanism, the focus of which is firmly on cessation rather than reparation³¹⁹). In principle, States are free to establish mechanisms for the settlement of disputes which focus only on certain aspects of the consequences of responsibility, in effect waiving or leaving to one side other aspects. But there is a presumption against the creation of wholly self-contained regimes in the field of reparation, and it is the case that each of the bodies mentioned in the preceding paragraph has been influenced to a greater or lesser degree by the standard of reparation under general international law. Moreover practice in this field is notably dynamic, though it is significant that appeal is still being made to the *Chorzów Factory* principle³²⁰ as well as to the work of this Commission. For example the leading decision of the Inter-American Court of Human Rights on the question of reparation contains the following passage:

Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.

As to emotional harm, the Court holds that indemnity may be awarded under international law and, in particular, in the case of human rights violations. Indemnification must be based upon the principles of equity.

(Footnote 318 continued.)

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

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

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

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

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

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

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

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

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

³²⁰ See footnote 49 above.

...

Article 63 (1) of the American Convention ... does not refer to or limit the ability to ensure the effectiveness of the means of reparation available under the internal law of the State Party responsible for the violation, so [the Court] is not limited by the defects, imperfections or deficiencies of national law, but functions independently of it.

This implies that, in order to fix the corresponding indemnity, the Court must rely upon the American Convention and the applicable principles of international law.³²¹

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

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

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

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

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

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

³²³ See footnote 49 above.

³²⁴ See footnote 322 above.

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

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

159. Despite these considerations, it can be argued that, if there do exist clear and more detailed rules in relation to the assessment of compensation that can be stated—either as a matter of pure codification or progressive development—then they should be stated. The difficulty is that it is very unclear whether there are such rules, as distinct from the general principles stated in articles 42 and 44.³²⁶ The decisions reflect the wide variety of factual situations, the influence of particular primary obligations,³²⁷ evaluations of the respective behaviour of the parties (both in terms of the gravity of the breach and their subsequent conduct), and, more generally, a concern to reach an equitable and acceptable outcome. As Aldrich observes, “when [international judges] are making a complex judgment such as one regarding the amount of compensation due for the expropriation of rights ... equitable considerations will inevitably be taken into account, whether acknowledged or not”.³²⁸ Experience in this and other contexts shows that, while illustrations can be given of the operation of equitable considerations and of proportionality in international law, the attempt to specify them in detail is likely to fail.

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

(c) *Limitations on compensation*

161. One question that does need consideration, however, is that of limiting compensation. Legal systems are generally concerned to avoid creating liabilities in an indeterminate amount in respect of an indeterminate class, and the special context of inter-State relations if anything aggravates such concerns. There are no *general* equivalents in international law to the limitation of actions or the limitation of liability which are used in national law for this purpose. The State is not a limited liability corporation, and there is no formal mechanism for dealing with

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

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

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

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

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

³³⁰ Paras. 215–222 below.

issues of State insolvency. Given the capacity of States to interfere in the life of peoples and in economic relations, and the growth of substantive international law affecting both, the potential for indeterminate liability undoubtedly exist even if it has usually not arisen in practice.³³¹

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

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

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

(d) *Conclusion*

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

“Compensation

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

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

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

³³² See paragraphs 38–42 above.

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

³³⁴ See paragraphs 195–214 below.

minor in character. First, consistently with other articles in this part, article 44 is expressed as an obligation of the responsible State. The invocation of that responsibility by the injured State or States will be dealt with in part two *bis*. Evidently each State would only be entitled to invoke the obligation to pay compensation to the extent that it has itself suffered damage, or to the extent that it is duly claiming for damage suffered by its nationals.³³⁵ Secondly, the two paragraphs of former article 44 have been subsumed into a single paragraph, covering all economically assessable damage. There is no need to mention loss of profits as a separate head of damage, especially since any such mention will inevitably have to be qualified (giving rise to the “decodifying” effect which some Governments complained of in the earlier text³³⁶). Compensation for loss of profits is available in some circumstances and not others, but to attempt to spell these out would contradict the underlying strategy of article 44 as a general statement of principle. The commentary can deal with the different heads of compensable damage (including loss of profits) in a more substantial way. The subject of interest will be dealt with in a separate article.³³⁷

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

4. SATISFACTION

(a) Existing article 45

167. Article 45 provides:

Satisfaction

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

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

(a) An apology;

(b) Nominal damages;

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

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

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

³³⁶ See paragraphs 149 and 152 above.

³³⁷ See paragraphs 195–214 below.

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

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

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

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

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

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

³³⁹ *Ibid.*, para. (5).

³⁴⁰ *Ibid.*, para. (6).

³⁴¹ *Ibid.*, pp. 78–79, para. (9).

³⁴² *Ibid.*, p. 79, para. (10).

³⁴³ *Ibid.*, para. (12).

³⁴⁴ *Ibid.*, pp. 79–80, para. (13).

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

criminal conduct whether from officials or private parties and to serious misconduct of officials”.³⁴⁶

172. More generally it is necessary to impose some limit on the measures that can be sought by way of satisfaction, in the light of earlier abuses, inconsistent with the principle of the equality of States.³⁴⁷ This is the point of paragraph 3.³⁴⁸

173. None of the Governments which have commented on article 45 question its relevance and necessity: all support the view that satisfaction is an important and well-grounded form of reparation in international law.³⁴⁹ The three paragraphs of the provision have nevertheless been subject to many remarks both of substance and form. As to paragraph 1, the main concern relates to the notion of moral damage. Japan comments that the words “in particular moral damage” are too unclear and should be deleted.³⁵⁰ On the other hand, both Germany and the United States agree that reparation for moral damage is well established in State practice. But both Governments consider that “moral damage is equivalent to the harm of mental shock and anguish suffered and [that] reparation will regularly consist of monetary compensation”: accordingly, the provision on moral damage should in their view be moved to article 44.³⁵¹

174. As to article 45, paragraph 2, the first issue raised by Governments concerns the notion of “punitive damages”, alluded to in paragraph 2 (c). Several Governments argue that the punitive function of reparation is not supported by State practice or international jurisprudence and propose deleting the related provision in article 45.³⁵² On the other hand, the Czech Republic believes that the Commission “could reconsider the question of punitive damages in respect of crimes”.³⁵³ Given the *sui generis* character of international responsibility, the absence of the notion of punitive damages in some national legal systems is not an insurmountable problem for the Czech Republic. In addition to the fact that punitive damages have been awarded in a few international cases, “it is not as a rule

³⁴⁶ *Ibid.*, p. 80, para. (15).

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

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

³⁴⁹ Mongolia describes article 45 as “highly important” (*Yearbook ... 1998* (footnote 35 above), p. 148).

³⁵⁰ *Yearbook ... 1999* (see footnote 43 above), p. 109 (see also A/CN.4/504 (footnote 3 above), p. 19, para. 72, where it is “suggested that the term ‘moral damage’ ... be defined”).

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

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

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

easy to distinguish between real punitive damages, that is, those that go beyond simple reparation, and a ‘generous’ award of compensation for mental suffering extensively evaluated”.³⁵⁴ Moreover, “[i]ntroducing the concept of punitive damages in the draft articles would make it possible to attribute to the regime for ‘crimes’ a valuable a priori deterrent function”.³⁵⁵

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities. The whole matter is valuably and extensively discussed by Professor Arangio-Ruiz in his second report (1989) ... He demonstrates wide support in the writing as well as in judicial and State practice of satisfaction as “the special remedy for injury to the State’s dignity, honour and prestige” (para. 106).

Satisfaction in this sense can take and has taken various forms. Arangio-Ruiz mentions regrets, punishment of the responsible individuals, safeguards against repetition, the payment of symbolic or nominal damages or of compensation on a broader basis, and a decision of an international tribunal declaring the unlawfulness of the State’s conduct ...

It is to the last of these forms of satisfaction for an international wrong that the Tribunal now turns. The Parties in the present case are agreed that in principle such a declaration of breach could be made—although France denied that it was in breach of its obligations and New Zealand sought as well a declaration and order of return. There is no doubt both that this power exists and that it is seen as a significant sanction.³⁶²

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

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

181. So far as it concerns individuals, the term “moral damage” (a term itself not known to all legal systems) is generally understood to cover non-material damage such as pain and suffering, loss of loved ones, as well as the affront to one’s sensibilities associated with an intrusion on one’s person, home or private life. These are clear forms of human loss which (if the act causing them is recognized by the relevant legal system as wrongful) can be compensated for in monetary terms, even though their assessment will always be a conventional and highly ap-

proximate matter. By contrast, the notion of “moral damage” so far as it concerns States is less clear. No doubt there are cases of per se injury to States where no actual material loss is suffered—for example, a brief violation of its territorial integrity by aircraft or vessel belonging to another State. But much of what is subsumed under the term “moral damage” for States really involves what might be described as non-material legal injury, the injury involved in the fact of a breach of an obligation, irrespective of its material consequences for the State concerned. To avoid confusion with the notion of moral damage as it concerns individuals, it is proposed to avoid the term “moral damage” in article 45 and to use “non-material injury” (“*préjudice immatériel*”) instead.³⁶⁶ On this basis no more detailed definition of satisfaction seems to be required.

(c) *Specific forms of satisfaction*

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

(i) *Declarations*

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

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

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

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

³⁶² See footnote 17 above.

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

³⁶⁴ See paragraph 173 above.

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

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

[T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.

This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.³⁷¹

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

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

³⁶⁹ The original proposal contained the following paragraph:

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

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

³⁷⁰ See paragraph 175 above.

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

³⁷² See paragraph 178 above.

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

(ii) *Nominal, exemplary and punitive damages*

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

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

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

³⁷⁴ See Walker, *The Oxford Companion to Law*, p. 883. Awards such as US\$ 500 for 24 hours’ imprisonment, or US\$ 100 for the brief detention of a vessel, do not constitute nominal damages in this sense, especially having regard to the value of money at the time. See respectively the *Moke* case, decision of 16 August 1871 (Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, p. 3411; and the *Arends* case (1903), UNRIAA, vol. X (Sales No. 1960.V4), pp. 729–730, as cited by Mr. Arangio-Ruiz, *Yearbook ... 1989* (footnote 21 above), p. 35, para. 115.

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

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

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

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

By clear inference the Committee (whose approach the Commission endorsed) rejected the concept of punitive damages for the purposes of article 45.³⁷⁹ To that extent the present Special Rapporteur fully agrees with the position taken in 1992. There is no authority and very little justification for the award of punitive damages properly so-called, in cases of State responsibility, in the absence of some special regime for their imposition.³⁸⁰ Whether

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

³⁷⁷ *Yearbook ... 1989* (see footnote 21 above), p. 56, para. 191, and also pp. 40–41, paras. 136–144.

³⁷⁸ *Yearbook ... 1992*, vol. I, 2288th meeting, p. 221, para. 57.

³⁷⁹ The availability of punitive damages is not one of the special consequences of “international crimes” in part two, chapter IV, either, as the present Special Rapporteur has pointed out in his first report (*Yearbook ... 1998* (see footnote 23 above), p. 11, para. 51).

³⁸⁰ See the cases cited in the first report (*ibid.*), pp. 14–15, para. 57. See further Wittich, “Awe of the gods and fear of the priests: punitive damages and the law of State responsibility”; and Jørgensen, “A reappraisal of punitive damages in international law”.

such a regime can and should be established is a matter for consideration in discussing articles 19 and 51–53.

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

(iii) *Disciplinary or other action against individuals*

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

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

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

(e) *Conclusion on article 45*

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

³⁸¹ *Yearbook ... 1992*, vol. I, 2288th meeting, p. 221, para. 59.

³⁸² *Yearbook ... 1998* (see footnote 35 above), p. 150.

³⁸³ See paragraph 176 above.

³⁸⁴ See, for example, paragraph 172 above. These excessive demands themselves used the unsatisfactory and subjective language of the “dignity” of the injured State.

“Satisfaction

“1. The State which has committed an internationally wrongful act is obliged to offer satisfaction for any non-material injury occasioned by that act.

“2. In the first place, satisfaction should take the form of an acknowledgement of the breach, accompanied, as appropriate, by an expression of regret or a formal apology.

“3. In addition, where circumstances so require, satisfaction may take such additional forms as are appropriate to ensure full reparation, including, *inter alia*:

“[(a) Nominal damages;]

“(b) Damages reflecting the gravity of the injury;

“(c) Where the breach arose from the serious misconduct of officials or from the criminal conduct of any person, disciplinary or penal action against those responsible.

“4. Satisfaction must be proportionate to the injury in question and should not take a form humiliating to the responsible State.”

5. INTEREST

(a) *The question of interest in the draft articles*

195. Article 44, paragraph 2, deals fleetingly with interest. It says only that “compensation ... may include interest”. The commentary to article 44, paragraph 2, is a little more expansive, reflecting the more substantial treatment given to the issue by Mr. Arangio-Ruiz in his second report.³⁸⁵ There he had supported a general rule of entitlement to interest, covering the time from which the claim arose until the time of actual payment, and not limited to claims for a liquidated sum. Furthermore, in his view, “compound interest should be awarded whenever it is proved that it is indispensable in order to ensure full compensation for the damage suffered by the injured State”.³⁸⁶ On the other hand his proposed article 9 on interest did not state any general rule of entitlement to simple (as distinct from compound) interest, and was limited to specifying the period of time to be covered by interest due “for loss of profits ... on a sum of money”.³⁸⁷ This implied that interest payments were limited to liquidated claims, and even, perhaps, to claims for loss of profits (although this may have been a matter of expression only).

³⁸⁵ *Yearbook ... 1989* (see footnote 21 above), pp. 23–30, paras. 77–105.

³⁸⁶ *Ibid.*, p. 30, para. 105.

³⁸⁷ *Ibid.*, p. 56, para. 191. His proposed article read:

“1. Where compensation due for loss of profits consists of interest on a sum of money, such interest:

“(a) shall run from the first day not considered, for the purposes of compensation, in the calculation of the amount awarded as principal;

“(b) shall run until the day of effective payment.

“2. Compound interest shall be awarded whenever necessary in order to ensure full compensation, and the interest rate shall be the one most suitable to achieve that result.”

If the basic principle is, however, that an injured State is entitled to interest on a claim to the extent necessary to ensure full reparation, it is not clear how such limitations can be justified a priori.

196. In the first reading debate, the discrepancy between the argument in favour of interest in the report and proposed article 9 was pointed out, and concerns were expressed as to the acceptability of a detailed treatment of the issues covered.³⁸⁸ The Drafting Committee deleted the article, on the ground that “it would be extremely difficult to arrive at specific rules on such issues that would command a large measure of support”. In its view, it was sufficient “to state a general principle, couched in quite flexible terms, and leave it to the judge or the third party involved in the settlement of the dispute to determine in each case whether interest ... should be paid”.³⁸⁹

197. Article 44, paragraph 2, is certainly drafted in “quite flexible” terms; the difficulty with it is that it states no “general principle” of any kind, but merely refers to a possibility. According to the commentary, the language was intended to make it “clear that there is no automatic entitlement to the payment of interest and no presumption in favour of the injured State”,³⁹⁰ although it notes that State practice “seems to be in support of awarding interest in addition to the principal amount of compensation”.³⁹¹ The Drafting Committee evidently sought to draw a distinction in the language of paragraph 2 between the award of interest and of damages for loss of profit. Since the latter is only available “where appropriate”, the inference is that interest should be more generally available.³⁹² But the inference is neither strong nor persuasive; all the article says is that compensation “may” include interest. However the commentary is on stronger ground in expressing the view “that the determination of *dies a quo* and *dies ad quem* in the calculation of interest, the choice of the interest rate and the allocation of compound interest are questions to be solved on a case-by-case basis”.³⁹³

198. As noted in paragraph 152 above, some Governments supported the rather reticent treatment of the topic of interest in article 44, paragraph 2; others were strongly critical, noting that it tended to destabilize the established

³⁸⁸ *Yearbook ... 1990*, vol. I, 2169th meeting, pp. 149–50, paras. 10–11; p. 153, paras. 29–30; 2170th meeting, p. 156, para. 10; 2171st meeting, p. 158, para. 10; p. 161, para. 31; pp. 166–167, paras. 69–71; 2172nd meeting, p. 169, para. 13; p. 172, para. 33; p. 175, para. 62; 2173rd meeting, p. 177, para. 11; pp. 178–179, para. 23; p. 183, para. 60; p. 184, para. 69; 2174th meeting, p. 187, para. 11; pp. 188–189, para. 23; p. 190, para. 34; pp. 190–191, para. 42; p. 193, para. 64; and 2175th meeting, p. 199, para. 36. To judge from the debate, the Commission would have been willing to accept a proposal focusing on the *general* entitlement to interest as necessary to provide full reparation, but was concerned that proposed article 9 “dealt with only a secondary problem”, on which there was a divergence of practice (*ibid.*, 2170th meeting, p. 156, para. 10) (Mr. Tomuschat); cf. 2171st meeting, p. 158, para. 10 (Mr. Ogiso: “too detailed rules on such issues as the rate of interest and compound interest, on which international law was not clear”).

³⁸⁹ *Yearbook ... 1992*, vol. I, 2288th meeting, p. 220, para. 48.

³⁹⁰ *Yearbook ... 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 73, para. (24).

³⁹¹ *Ibid.*, para. (25).

³⁹² *Yearbook ... 1992*, vol. I, 2288th meeting, p. 220, para. 49 (Mr. Yankov, Chairman of the Drafting Committee).

³⁹³ *Yearbook ... 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 73, para. (26).

principle that interest should be awarded where necessary to compensate an injured party for loss arising from an internationally wrongful act. In this context it should be noted that neither the Special Rapporteur nor any member of the Commission in the first reading debate denied that principle; indeed almost all who spoke on the subject specifically supported it.

(b) *The role of interest in relation to reparation*³⁹⁴

199. Having regard to the comments made by Governments and to other criticisms of the draft articles, two questions arise. The first is the actual role of awards of interest as an aspect of reparation for an internationally wrongful act; the second is whether it is desirable to include a provision concerning interest in the draft articles.

(i) *A general principle?*

200. Turning to the first question, Mr. Arangio-Ruiz's second report³⁹⁵ contains a useful review of precedents and doctrine. The existence of at least a general rule favouring the award of interest where necessary to achieve full reparation is also supported by more recent jurisprudence.

201. It should be noted that on the first (as it turned out, the only) occasion on which PCIJ actually quantified the compensation due for an international wrong, it included an award of interest. In the *S.S. "Wimbledon"* case, the Court awarded simple interest at 6 per cent as from the date of judgement, apparently on the basis that interest was only payable "from the moment when the amount of the sum due has been fixed and the obligation to pay has been established".³⁹⁶ Although compensation was quantified by reference to the actual costs of diversion of the French ship, this was a public-law claim for breach of a treaty.³⁹⁷ In the *Corfu Channel* case,³⁹⁸ another State-to-State claim, no question of interest was raised.

202. Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and in cases of inter-State claims properly so-called.³⁹⁹ In this respect the experience of the Iran-United States Claims Tribunal is

worth noting.⁴⁰⁰ In *The Islamic Republic of Iran v. The United States of America* (case A/19), the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related "to the exercise ... of the discretion accorded to them in deciding each particular case".⁴⁰¹ On the issue of principle the Tribunal said:

Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by Article V of the Claims Settlement Declaration to decide claims "on the basis of respect for law". In doing so, it has regularly treated interest, where sought, as forming an integral part of the "claim" which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as "compensation for damages suffered due to delay in payment"... Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal's authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.⁴⁰²

The Tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.⁴⁰³ It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.⁴⁰⁴

203. Decision 16 of the UNCC Governing Council deals with the question of interest. It provides:

1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.

2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.

3. Interest will be paid after the principal amount of awards.⁴⁰⁵

Again we see the combination of a decision in principle in favour of interest where necessary to compensate a claimant, with flexibility in terms of the application of that principle; at the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

204. Awards of interest are also sometimes made, or at least envisaged, by human rights courts and tribunals, even though the compensation practice of these bodies is

³⁹⁴ On interest as a matter of general international law, see, for example, Brownlie, *op. cit.*, pp. 227–229; Barker, *The Valuation of Income-Producing Property in International Law*, chap. 7 and works there cited. On the comparative and private international law experience, see, for example, Hunter and Triebel, "Awarding interest in international arbitration"; Gotanda, "Awarding interest in international arbitration" and *Supplemental Damages in Private International Law*, chaps. 2–3.

³⁹⁵ *Yearbook ... 1989* (see footnote 21 above).

³⁹⁶ *S.S. "Wimbledon"* (see footnote 201 above), p. 32. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to "the present financial situation of the world and ... the conditions prevailing for public loans" (*ibid.*).

³⁹⁷ PCIJ also envisaged interest as payable in the *Chorzów Factory* case (see footnote 49 above). No award was actually made since the amount of compensation was subsequently agreed between the parties.

³⁹⁸ *I.C.J. Reports 1949* (see footnote 69 above), p. 244.

³⁹⁹ In its first case on assessment of compensation, the International Tribunal on the Law of the Sea awarded interest at different rates in respect of different categories of loss (*M.V. "Saiga" (No. 2)* (see footnote 315 above), p. 66, para. 173).

⁴⁰⁰ See Aldrich, *op. cit.*, pp. 474–479; and Brower and Brueschke, *op. cit.*, chap. 18.

⁴⁰¹ *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1988), vol. 16, p. 290. As Aldrich, *op. cit.*, pp. 475–476, points out, the practice of the three Chambers has not been entirely uniform.

⁴⁰² *Iran-United States Claims Tribunal Reports* (see footnote 401 above), pp. 289–290.

⁴⁰³ See Brower and Brueschke, *op. cit.*, pp. 626–627, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

⁴⁰⁴ See Aldrich, *op. cit.*, pp. 476–477. And see the detailed analysis of Chamber Three (Virally, Brower, Ansari) in *McCullough and Company, Inc. v. Ministry of Post, Telegraph and Telephone, Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1988), vol. 11, pp. 26–31.

⁴⁰⁵ S/AC.26/1992/16 (see footnote 318 above).

relatively conservative and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time, i.e. it takes the form of moratory interest.⁴⁰⁶

205. In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.⁴⁰⁷

206. Although the trend is towards greater availability of interest as an aspect of full reparation, even proponents of awards of interest admit that there is no uniform approach, internationally, to questions of quantification and assessment of the amount of interest actually awarded.⁴⁰⁸ Thus, according to Gotanda:

Among international tribunals, there exists no uniform approach for awarding interest. As a result, interest awards have varied greatly. There has been little agreement on the circumstances warranting the payment of interest, and the rates at which interest has been awarded have varied from 3% to 20%.⁴⁰⁹

(ii) The question of compound interest

207. An aspect of the question of interest is the possible award of compound interest. At least as a matter of progressive development, Mr. Arangio Ruiz favoured the award of compound interest “whenever it is proved that it is indispensable in order to ensure full compensation for the damage suffered by the injured State”.⁴¹⁰ The Commission did not, however, retain his proposal to that effect, and the commentary says only that questions of compound interest are “to be solved on a case-by-case basis”.⁴¹¹

208. In fact the general view of courts and tribunals has been against the award of compound interest, and this

⁴⁰⁶ See, for example, the *Velásquez Rodríguez v. Honduras* case (footnote 321 above), para. 57. The European Court of Human Rights now adopts a similar approach: see, e.g., the *Papamichalopoulos* case (footnote 322 above), pp. 60–61, para. 39. In that case interest was payable only in respect of the pecuniary damage awarded. See further Shelton, *op. cit.*, pp. 270–272.

⁴⁰⁷ Barker, *op. cit.*, pp. 209 and 237–238. See, for example, the Foreign Compensation (People’s Republic of China), Order, Statutory Instrument No. 2201 (1987) (London, HM Stationery Office), para. 10, giving effect to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the People’s Republic of China Government concerning the Settlement of Mutual Historical Property Claims of 5 June 1987 (*Treaty Series*, No. 37 (1987)) (London, HM Stationery Office) in respect of claims arising in 1949.

⁴⁰⁸ It should be noted that a number of Islamic countries, influenced by the sharia, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example payment of interest is prohibited by the Iranian Constitution (principles 43 and 49), but the Council of the Guardians of the Constitution has held that this injunction does not apply to “foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited” (see Gotanda, *op. cit.*, pp. 39–40, with references).

⁴⁰⁹ Gotanda, *op. cit.*, p. 13 (references omitted).

⁴¹⁰ *Yearbook ... 1989* (see footnote 21 above), p. 30, para. 105.

⁴¹¹ *Yearbook ... 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 73, para. (26).

is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R. J. Reynolds Tobacco Company v. The Government of the Islamic Republic of Iran, Iranian Tobacco Company*, the Tribunal failed to find:

any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, “[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable” ... Even though the term “all sums” could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest.⁴¹²

Consistent with this approach the Tribunal has read down contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit “wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal”.⁴¹³

209. The preponderance of authority thus continues to support the view expressed by the arbitrator, Max Huber, in the *British Claims in the Spanish Zone of Morocco* case:

[A]rbitration case-law in regard to compensation to be awarded by one State to another for damage sustained by the latter State’s nationals on the former State’s territory other—after all a particularly rich case-law—is unanimous ... in dismissing compound interest. In the circumstances, particularly strong and quite special arguments need to be advanced to accept this type of interest.⁴¹⁴

The same is equally true for compound interest in respect of State-to-State claims.

210. Nonetheless several authors (notably Mann) have argued for a reconsideration of this principle, on the ground that “compound interest reasonably incurred by the injured party should be recoverable as an item of damage”.⁴¹⁵ This view has also been supported by an ICSID tribunal in the *Compañía del Desarrollo de Santa Elena S. A. v. Republic of Costa Rica* case:

⁴¹² Case No. 35 (1984), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1986), vol. 7, pp. 191–192, citing Whiteman, *Damages in International Law*, p. 1997.

⁴¹³ *Anaconda-Iran, Inc. v. The Government of the Islamic Republic of Iran* (1986), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1988), vol. 13, p. 235. See also Aldrich, *op. cit.*, pp. 477–478.

⁴¹⁴ UNRIAA (1924), vol. II (Sales No. 1949.V.1), p. 650, cited by Mr. Arangio-Ruiz, *Yearbook ... 1989* (see footnote 21 above), pp. 29–30, para. 101. The report cites several later cases in which awards of compound interest were made or at least not ruled out in principle. A more recent example is the *Aminoil* arbitration, where the interest awarded was compounded for a period without any reason being given. This accounted for 15 per cent of the total final award (Barker, *op. cit.*, p. 233, footnote 119). See *Government of Kuwait v. American Independent Oil Company (Aminoil)* (1982), ILR, vol. 66, p. 613 (Reuter, Hamed Sultan and Sir Gerald Fitzmaurice).

⁴¹⁵ Mann, “Compound interest as an item of damage in international law”, p. 383. With characteristic enthusiasm, Mann argues that this proposition “should not only be English law, but should be accepted wherever damages are allowed and should, therefore, be treated as a general principle of law” (*ibid.*). See also Gotanda, *loc. cit.*, p. 61, proposing quarterly compounding (again, *de lege ferenda*).

[W]hile simple interest tends to be awarded more frequently than compound, compound interest certainly is not unknown or excluded in international law. No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal.

In particular, where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.

In the instant case, an award of simple interest would not be justified, given that ... for almost twenty-two years, [the Claimant] has been unable either to use the Property for the tourism development it had in mind when it bought Santa Elena or to sell the Property. On the other hand, full compound interest would not do justice to the facts of the case, since [the Claimant], while bearing the burden of maintaining the property, has remained in possession of it and has been able to use and exploit it to a limited extent.⁴¹⁶

In fact the Tribunal awarded a lump sum by way of compensation for property affected by measures taken 23 years earlier. Moratory interest was awarded on a simple interest basis after a short grace period to pay.

211. To summarize, although compound interest is not generally awarded under international law or by international tribunals, special circumstances may arise which justify some element of compounding as an aspect of full reparation. Care is however needed since allowing compound interest could result in an inflated and disproportionate award, with the amount of interest greatly exceeding the principal amount owed.

(iii) *Issues of interest rate and the period of account*

212. The third question relates to the actual calculation of interest: this raises a complex of issues concerning the starting date (date of breach, date on which payment should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). As noted already, there is no uniformity at present in the treatment of these issues. In practice the circumstances of each case and the conduct of the parties strongly affect the outcome. Although Mr. Arangio-Ruiz's proposed article 9⁴¹⁷ took the date of the breach as the starting date for calculation of the interest term, there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run.⁴¹⁸ In any event, the failure to make a timely claim for payment is relevant in deciding whether or not to allow interest.

⁴¹⁶ Case No. ARB/96/1 (Fortier, Lauterpacht, Weil) (see footnote 20 above), p. 202, paras. 103–105.

⁴¹⁷ *Yearbook ... 1989* (see footnote 21 above), p. 56, para. 191.

⁴¹⁸ The date of formal demand was taken as the relevant date by PCIJ in the *Russian Indemnity* case (footnote 80 above), p. 442, by analogy from the general position in European municipal law systems.

As to moratory (post-award) interest, some cases allow a grace period for payment (of the order of six weeks up to three months), before interest begins to run, others do not. There is much wisdom in the Iran-United States Claim Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise ... of the discretion accorded to [individual tribunals] in deciding each particular case".⁴¹⁹ On the other hand the present anarchical state of the decisions and of practice suggests that it may be useful to establish a presumption which would apply unless the parties otherwise agree or there are specific considerations pointing the other way.

(c) *A provision on interest?*

213. The Special Rapporteur agrees with the criticism that article 44, paragraph 2, as currently formulated does not reflect present international law with respect to compensatory interest. In principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent necessary to ensure full reparation.⁴²⁰ Though an aspect of compensation, this entitlement is treated in practice as a separate element of damages, and this alone suggests that it should be reflected as a separate article in chapter II. The article should not be limited (as Mr. Arangio-Ruiz's proposal was apparently limited) to amounts awarded by way of loss of profits. In the present state of the authorities, it is, however, too much to suggest that there is any entitlement to compound interest. The commentary should note that in special circumstances an award of compound interest may be made, to the extent necessary to provide full reparation. The commentary should also make it clear that the proposed article deals only with compensatory interest. The power of a court or tribunal to award moratory (post-judgement) interest is better regarded as a matter of its procedure, and is thus outside the scope of the draft articles.

214. Accordingly the Special Rapporteur proposes the following article 45 bis:

"Interest

"1. Interest on any principal sum payable under these draft articles shall also be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be those most suitable to achieve that result.

"2. Unless otherwise agreed or decided, interest runs from the date when compensation should have been paid until the date the obligation to pay compensation is satisfied."

⁴¹⁹ See paragraph 202 and footnote 401 above.

⁴²⁰ Thus interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration (footnote 375 above), pp. 252–253.

6. MITIGATION OF RESPONSIBILITY

215. Turning from the question of the extent of responsibility to its mitigation, two questions arise. One, dealt with in article 42, paragraph 2, as adopted on first reading, concerns cases where the State invoking responsibility has itself materially contributed to the loss suffered. The second concerns cases where, although that loss may be attributable to the responsible State, the former State has failed to take steps reasonably available to it to mitigate its loss.

(a) *Contributory fault*

216. What is now article 42, paragraph 2, deals with contributory fault and mitigation.⁴²¹ It is not appropriate to place it, alongside article 42, paragraph 1, as a general principle in chapter I, but it does need to be dealt with as a qualification to the forms of reparation in chapter II.

217. Article 42, paragraph 2, provides as follows:

In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:

(a) The injured State; or

(b) A national of that State on whose behalf the claim is brought; which contributed to the damage.

218. What is now article 42, paragraph 2, was originally proposed by Mr. Arangio-Ruiz specifically in the context of reparation by equivalent, i.e. compensation. One of his alternatives contained a provision allowing for compensation to be reduced in the case of concurrent causes “including possibly the contributory negligence of the injured State”.⁴²² The Drafting Committee rejected his theory of concurrent causes, but maintained the specific provision dealing with contributory fault, on the ground that it was equitable that this be taken into account in determining the form and extent of the obligation of reparation.⁴²³

219. The commentary to article 42, paragraph 2, notes that contributory fault “is widely recognized both in doctrine and in practice as relevant to the determination of reparation”.⁴²⁴ This is particularly so in the context of compensation, but it is also relevant to other forms of reparation and even possibly to the choice between them.⁴²⁵ It notes that “the phrase ‘the negligence or the wilful act or omission ... which contributed to the damage’ is borrowed from article VI, paragraph 1, of the Convention on International Liability for Damage caused by Space Objects”.⁴²⁶

⁴²¹ The subject has not been much discussed in the literature, but see Bederman, “Contributory fault and State responsibility”; and Salmon, “La place de la faute de la victime dans le droit de la responsabilité internationale”.

⁴²² *Yearbook ... 1989* (see footnote 21 above), draft art. 8, para. 5, p. 56, and for the discussion, see pages 15–16 (*ibid.*).

⁴²³ See *Yearbook ... 1992*, vol. I, 2288th meeting, p. 217, paras. 20–26.

⁴²⁴ *Yearbook ... 1993*, vol. II (Part Two), commentary to article 6 *bis* [present art. 42], p. 59, para. (7), with references to authorities.

⁴²⁵ *Ibid.*, pp. 59–60, para. (7).

⁴²⁶ *Ibid.* Under article VI, paragraph 1, of the Convention, the launching State is exonerated from liability for damage “to the extent that [it] establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons

220. Those Governments which have specifically commented on article 42, paragraph 2,⁴²⁷ do not expressly call for its deletion but are generally concerned by the drafting and the underlying conceptions of the provision. While it agrees that the factors taken into account in article 42, paragraph 2, “are not themselves controversial”, the United Kingdom wonders why negligence and wilful conduct are singled out; other elements, such as “[t]he nature of the rule that has been violated and of the interest that it is intended to protect” also deserve “express mention”. In view of the fact that the provision applies to reparation and not merely to compensation, the United Kingdom is “concerned that this reference to what appears to be a doctrine of contributory fault or negligence is attempting to settle as a general principle of State responsibility a question that is properly an aspect of particular substantive rules of international law”.⁴²⁸ The United States also questions the intent of article 42, paragraph 2. In its view, it is unclear whether the provision embodies “a concept of contributory negligence, which under a common law approach might completely negate the responsibility of the wrongdoer, or whether it foresees some partial deviation from the ‘full reparation’ standard”.⁴²⁹ For the United States, the former concept would be unacceptable. As to the adoption of a “comparative fault principle”, the United States considers that it would introduce in the draft articles an “imprecise” standard, not established in the existing law of State responsibility and “susceptible to abuse by wrongdoing States”.⁴³⁰ At the same time, the “United States appreciates the difficulties posed by the circumstance where an injured State or national bears some responsibility for the extent of his damages”⁴³¹ and acknowledges that an injured State “might in some circumstances be under a duty to mitigate its damages, analogous to the rules of contract law”.⁴³² France suggests that paragraph 2 (b) should be limited to the case of diplomatic protection and should thus read “a national of the State exercising diplomatic protection”.⁴³³

221. It may be admitted that article 42, paragraph 2, has some element of progressive development, especially in the context of State-to-State obligations (as distinct from diplomatic protection). On the other hand, it is reasonable that the conduct of the injured State be taken into account in assessing the form and extent of reparation due, and in practice it is taken into account in a variety of ways. The Special Rapporteur proposes that the paragraph be maintained as a separate article dealing with mitigation of responsibility. That title would help to allay the

it represents”. Quite apart from the burden of proof, this represents a stricter standard of exoneration than article 42, paragraph 2, albeit in the context of a regime of strict liability for an ultrahazardous activity.

⁴²⁷ For the summary of comments by Governments on article 42, see paragraph 22 above.

⁴²⁸ *Yearbook ... 1998* (see footnote 35 above), p. 145.

⁴²⁹ *Ibid.*, p. 146.

⁴³⁰ *Ibid.* See also A/CN.4/496 (footnote 3 above), p. 19, para. 125, and the comments by Japan, according to which article 42, paragraph 2, should clearly provide that “a contribution to damage ... does not automatically release the wrongdoing State from its obligation to make full reparation” (*Yearbook ... 1999* (see footnote 43 above), p. 108).

⁴³¹ *Yearbook ... 1998* (see footnote 35 above), p. 146.

⁴³² *Ibid.*, footnote 3.

⁴³³ *Ibid.*, p. 145.

fears expressed by one Government that the conduct of the victim could negate the responsibility of the perpetrator entirely. The only situation in which this would be so would be where the loss in question could not be attributed at all to the conduct of the responsible State, but was entirely due to the intervening act of the “victim”, or of a third party. That situation can occur, but it is covered by the general requirement of proximate cause and not by the present provision.

(b) *Mitigation of damage*

222. A related issue, already briefly discussed,⁴³⁴

is the so-called duty of an injured State to mitigate its damage. As ICJ pointed out in the case concerning the *Gabčíkovo-Nagymaros Project*, this is not an independent obligation but a limit on the damages which the injured State could otherwise claim.⁴³⁵ Although related to the notion of “contributory negligence” or “comparative fault”, it is analytically a distinct idea: it is not that the injured party contributes to the damage, rather that measures reasonably available to it which would have reduced the damage were not taken. Especially given concerns about limiting to a reasonable extent the burden of reparation,⁴³⁶ such a principle should also be included in the proposed article.

7. SUMMARY OF CONCLUSIONS AS TO PART TWO,
CHAPTER II

223. For these reasons, part two, chapter II, should be formulated as follows.

“CHAPTER II

“THE FORMS OF REPARATION

“*Article 43. Restitution*

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

“(a) Is not materially impossible;

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

⁴³⁴ In paragraph 30 above.

⁴³⁵ *I.C.J. Reports 1997* (see footnote 18 above), p. 55, para. 80, cited in paragraph 30 above.

⁴³⁶ See paragraph 161 above.

“*Article 44. Compensation*

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

“*Article 45. Satisfaction*

“1. The State which has committed an internationally wrongful act is obliged to offer satisfaction for any non-material injury occasioned by that act.

“2. In the first place, satisfaction should take the form of an acknowledgement of the breach, accompanied, as appropriate, by an expression of regret or a formal apology.

“3. In addition, where circumstances so require, satisfaction may take such additional forms as are appropriate to ensure full reparation, including, inter alia:

“[(a) Nominal damages;]

“(b) Damages reflecting the gravity of the injury;

“(c) Where the breach arose from the serious misconduct of officials or from the criminal conduct of any person, disciplinary or penal action against those responsible.

“4. Satisfaction must be proportionate to the injury in question and should not take a form humiliating to the responsible State.

“*Article 45 bis. Interest*

“1. Interest on any principal sum payable under these draft articles shall also be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be those most suitable to achieve that result.

“2. Unless otherwise agreed or decided, interest runs from the date when the principal sum should have been paid until the date the obligation to pay compensation is satisfied.

“*Article 46 bis. Mitigation of responsibility*

“In determining the form and extent of reparation, account shall be taken of:

“(a) The negligence or the wilful act or omission of any State, person or entity on whose behalf the claim is brought and which contributed to the damage;

“(b) Whether the injured party has taken measures reasonably available to it to mitigate the damage.”

CHAPTER II

Structure of the remaining parts of the draft articles

224. In earlier sections of the present report, the general principles and forms of reparation were proposed, based largely on the draft articles adopted on first reading, but with modifications in response to later developments and to the comments of Governments. The Commission has also tentatively supported some ideas put forward by the Special Rapporteur for the structure of the remaining parts and chapters.⁴³⁷ These involve, inter alia:

(a) A new part two bis, dealing with the invocation of responsibility, which would include the articles on countermeasures;

(b) Possible provisions on the plurality of injured States;

(c) Further consideration of the category of serious breaches of obligations to the international community as a whole;

(d) Deferring consideration of the form of the draft articles, and of the related question of settlement of disputes (present part three);

(e) A new part four, bringing together the various savings clauses and other general provisions.

⁴³⁷ See paragraphs 5–10 above.

225. Against this background, the present section of the report considers questions of the invocation of responsibility in what may be described as the “normal” case, i.e. the invocation of responsibility by an injured State (as defined in the proposed article 40 bis, or in a similar way⁴³⁸) against a responsible State. The section then considers the question of the invocation of responsibility in cases where there is a plurality of responsible States, or of injured States.

226. In a further section of this report the articles on countermeasures are considered, in terms of both the taking of countermeasures by an injured State and the more complex situation where there are several or many States claiming to take countermeasures; this involves the key remaining issue: what difference it makes if what is at stake is a serious breach of an obligation to the international community as a whole. Finally, the report considers the question of a general part (part four) containing savings clauses and any other general provisions applicable to the draft articles as a whole (including articles 37 and 39 as adopted on first reading).

⁴³⁸ See paragraph 119 above.

CHAPTER III

Invocation of responsibility by an injured State**A. General considerations**

227. Proposed part two bis is predicated upon a distinction between the secondary consequences which flow by operation of law from the commission of an internationally wrongful act and the various ways in which those consequences can be brought to bear or (for that matter) waived or reduced. One of the problems with part two as adopted on first reading was that it appeared to conceive of all the corollaries of an internationally wrongful act as arising by operation of law, i.e. as part of the new secondary legal relationship which arises immediately upon the commission of such an act. On this assumption, it was necessary to define those consequences a priori and in terms which apparently allowed for no element of choice or response on the part of other States, or indeed on the part of the responsible State itself. On this assumption, countermeasures are as much a part of the secondary legal relation as reparation. Yet the way the regime of responsibility is worked out in practice will depend upon the subsequent conduct of the parties involved. To take a simple example, in the case of breach of a normal bilateral inter-State obligation, it is open to the injured State in effect to forgive the breach, or to waive the right to invoke its

consequences, or to elect to receive compensation rather than restitution, or to focus only on cessation and future performance. A text which defines restitution as the normal consequence of an internationally wrongful act, but fails to make it clear that the injured State in such cases may validly elect to prefer compensation does not reflect international law or practice.

228. Accordingly there are good reasons for distinguishing between the consequences that flow as a matter of law from the commission of an internationally wrongful act (part two) and those further consequences which depend upon the subsequent reactions of the parties, whether they take the form of a refusal to make reparation (leading to the possibility of countermeasures) or of waiver by the injured State (leading to the loss of the right to invoke responsibility), or to various intermediate possibilities. The latter are the subject of part two bis.

229. It is proposed that the title to part two bis should be “The implementation of State responsibility”. There is no need for the French term “*mise en œuvre*” to be included in brackets in the English text, although it is a suitable equivalent of the term “implementation” and can be included in the French text.

230. The Special Rapporteur has already foreshadowed that former article 40 (new art. 40 bis) should be placed at the beginning of this part.⁴³⁹ If, as has been suggested, proposed article 40 bis is subdivided into two or three articles, they should be distributed as appropriate within the part. In what follows, the focus will be on the “injured State” as that term is proposed to be defined in article 40 bis.

231. In the first place, evidently, each injured State on its own account is entitled to invoke responsibility.⁴⁴⁰ However a number of issues arise as to the modalities of and limits upon such invocation, and these are candidates for inclusion in a first general chapter of this part.⁴⁴¹ They include the following:

(a) The right of the injured State to elect the form of reparation (e.g. to prefer compensation to restitution);

(b) Minimum formal requirements for the invocation of responsibility (e.g. a demand in writing);

(c) Questions associated with the admissibility of claims (e.g. exhaustion of local remedies, nationality of claims);

(d) Limits on the rights of the injured State as concerns reparation (e.g. the *non ultra petita* rule, the rule against double recovery);

(e) Loss of the right to invoke responsibility.

These are dealt with in turn.

1. THE RIGHT OF THE INJURED STATE TO ELECT THE FORM OF REPARATION

232. In general, an injured State is entitled to elect as between the available forms of reparation. Thus it may prefer compensation to the possibility of restitution, as Germany did in the *Chorzów Factory* case,⁴⁴² or as Finland eventually chose to do in its settlement of the case concerning the *Great Belt*.⁴⁴³ Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. In the first reading text, the right to elect as between the forms of reparation was accepted. It was reflected in the formula “The injured State has the right ...”. That formula is not proposed for the various articles which embody the principle of full reparation. For reasons given above, these should be expressed in terms

⁴³⁹ See paragraphs 9 and 117–119 above.

⁴⁴⁰ See paragraphs 102 and 107 above. See paragraphs 279–281 below for consideration of cases where responsibility is invoked by more than one injured State in respect of the same act.

⁴⁴¹ The 1969 Vienna Convention deals with analogous issues separately in relation to each particular subject. For example, the procedure regarding reservations is dealt with in article 23, following the articles dealing with the formulation of reservations and their legal effect. Part V, section 1, brings together a number of provisions dealing with the invocation of grounds for invalidity, suspension or termination of a treaty (see, for example, articles 44 (Separability of treaty provisions) and 45 (Loss of a right to invoke a ground for invalidating ... a treaty)). Further issues of procedure are dealt with in section 4 of the same part, and section 5 deals with the consequences of such invocation.

⁴⁴² See paragraph 23 and footnote 47 above.

⁴⁴³ See paragraphs 136–137 and footnote 254 above; and for the terms of the settlement, Koskenniemi, “L’affaire du passage par le Grand-Belt”, especially pp. 940–947.

of the obligation(s) of the responsible State.⁴⁴⁴ But in any event it is desirable to spell out the right of election expressly, the more so since the position of third States interested in (but not specifically injured by) the breach will be affected by any valid election of one remedy rather than another by an injured State.

233. The question whether there are any limitations on the right of election of the injured State has already been referred to.⁴⁴⁵ There are certainly cases where a State could not, as it were, pocket the compensation and walk away from an unresolved situation, especially one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. However, such situations on analysis seem to concern questions of cessation, or of the continuing performance of obligations, and not questions of reparation properly so called. Reparation is concerned with the wiping out of *past* injury and harm. Insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations. These refinements can, however, be reflected in the language of the text and referred to in the commentary. By analogy with article 29 (Consent), it is sufficient to refer to a “valid” election by an injured State in favour of one of the forms of reparation rather than another, leaving the conditions of validity to be determined by general international law. Under the draft articles, such an election should be given effect.

2. FORMAL REQUIREMENTS FOR THE INVOCATION OF RESPONSIBILITY

234. Although the secondary legal relationship of responsibility may arise by operation of law on the commission of an internationally wrongful act, in practice it is necessary for any other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation, through formal protest, consultations, etc. Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or extinctive prescription.

235. There is an analogy with article 65 of the 1969 Vienna Convention, which provides that:

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

⁴⁴⁴ See paragraphs 25–26 above.

⁴⁴⁵ See paragraph 134 above.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

236. Care needs to be taken not to overformalize the procedure, or to imply that the normal consequence of the non-performance of an obligation is the lodging of a statement of claim. In many cases quiet diplomacy may be more effective in ensuring performance, and even reparation. Nonetheless an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

237. It is not the function of the draft articles to specify in detail the form which an invocation of responsibility should take. In practice claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. Moreover, ICJ has sometimes been satisfied with rather informal modes of invocation. For example, in the case concerning *Certain Phosphate Lands in Nauru*, Australia argued that Nauru's claim was inadmissible because "it ha[d] not been submitted within a reasonable time".⁴⁴⁶ That raised two issues: first, when the claim had actually been submitted; secondly, whether the lapse of time before its submission (or, indeed, the subsequent lapse of time before Nauru had done anything effective to pursue its claim) was fatal. The Court dismissed the objection. It referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to "press reports" that the claim had been mentioned by the Nauruan Head Chief on the day of declaring independence, as well as, inferentially, in subsequent correspondence and discussions with Australian ministers. However the Court also noted that:

It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position".⁴⁴⁷

The Court summarized the communications between the parties as follows:

The Court ... takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time.⁴⁴⁸

It seems from this passage that the Court did not attach much significance to formalities. It was sufficient that the respondent State was aware of the claim as a result of

communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence. But despite its flexibility and its reliance on the context provided by the relations between the two States concerned, the Court does seem to have had regard to the fact that the claimant State had effectively notified the respondent State of the claim.

238. In the Special Rapporteur's view, this approach is correct as a matter of principle. There must be at least some minimum requirement of notification by one State against another of a claim of responsibility, so that the responsible State is aware of the allegation and in a position to respond to it (e.g. by ceasing the breach and offering some appropriate form of reparation). No doubt the precise form the claim takes will depend on the circumstances. But the draft articles should at least require that a State invoking responsibility should give notice thereof to the responsible State. In doing so, it would be normal to specify what conduct on its part is required by way of cessation of any continuing wrongful act, and what form any reparation sought should take. In addition, since the normal mode of inter-State communication is in writing, it seems appropriate to require that the notice of claim be in writing.⁴⁴⁹

3. CERTAIN QUESTIONS AS TO THE ADMISSIBILITY OF CLAIMS

239. If a State having protested at a breach is not satisfied by any response made by the responsible State, it is entitled to invoke the responsibility of that State by seeking such measures of cessation, reparation, etc. as are provided for in part two. Presumably the draft articles should say so, by analogy with articles 23, paragraphs 2–4, and 65, of the 1969 Vienna Convention. The question is whether any provision in part two bis should address issues of the admissibility of claims of responsibility.

240. In general the draft articles are not concerned with questions of the jurisdiction of international courts and tribunals, or of the conditions for the admissibility of cases. Rather they define the conditions for establishing the international responsibility of States, and for the invocation of that responsibility by States. Thus it is not the function of the draft articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as *lis alibi pendens* or *electa una via* as they may affect the jurisdiction of one international tribunal over another.⁴⁵⁰ By

⁴⁴⁹ See the 1969 Vienna Convention, arts. 23 (reservations, express acceptances of reservations and objections to reservations "must be formulated in writing"), and 67 (notification of invalidity, termination or withdrawal from a treaty must be in writing).

⁴⁵⁰ For a discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see *Abi-Saab, Les exceptions préliminaires dans la procédure de la Cour internationale: étude des notions fondamentales de procédure et des moyens de leur mise en œuvre*; Fitzmaurice, *The Law and Procedure of the International Court of Justice*, especially vol. II, chap. VII,

(Continued on next page.)

⁴⁴⁶ *I.C.J. Reports 1992* (see footnote 307 above), p. 253, para. 31.

⁴⁴⁷ *Ibid.*, p. 254, para. 35.

⁴⁴⁸ *Ibid.*, pp. 254–255, para. 36.

contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character: they are conditions for invoking the responsibility of a State in the first place. The most obvious examples are the requirements of exhaustion of local remedies and nationality of claims.

(a) *Exhaustion of local remedies (art. 22)*

241. The exhaustion of local remedies rule was already embodied as article 22, adopted on first reading, and it was discussed by the Commission at its fifty-first session in 1999 on the basis of the Special Rapporteur's second report.⁴⁵¹ As adopted on first reading, article 22 embodied what has been termed the "substantive" understanding of the exhaustion of local remedies, according to which, in any case in which the exhaustion of local remedies applies, the breach does not occur until local remedies have been exhausted. But there are certainly cases in which this is not so: for example, an individual victim of police torture has to exhaust local remedies, but torture is a breach both of human rights and of the minimum standard of treatment of aliens. The Special Rapporteur had proposed that, in lieu of article 22, a savings clause should be inserted either at the end of part one, chapter III, or in the proposed part two bis, reserving cases covered by the exhaustion of local remedies rule.⁴⁵² On further consideration he believes that the appropriate place for such a clause is part two bis. The savings clause should be in quite general terms: it should cover any case to which the exhaustion of local remedies rule applies, whether under a treaty or under general international law. Correspondingly it should not be limited, as former article 22 was limited, to cases of diplomatic protection, i.e. to cases "concerning the treatment to be accorded ... to foreign nationals or corporations".⁴⁵³ It is not necessary to define in any detail in the draft articles the modalities of the application of the rule. Nor is it necessary to deal with such questions as: (a) whether the rule applies to injuries inflicted outside the territory of the respondent State; (b) whether it applies to injuries inflicted, for example, in commercial or economic fields (*iure gestionis*), on foreign States and their organs; (c) whether particular remedies are to be considered as "available" for this purpose; and (d) what amounts to exhaustion. In the context of

(Footnote 450 continued.)

pp. 427–575; and Rosenne, *The Law and Practice of the International Court, 1920–1996*, vol. II, *Jurisdiction*.

⁴⁵¹ *Yearbook ... 1999* (see footnote 8 above), pp. 39–41, paras. 138–150, and for an account of the discussion, see *Yearbook ... 1999*, vol. II (Part Two), pp. 67–68, paras. 223–243.

⁴⁵² For the proposed text, see the Special Rapporteur's second report, *Yearbook ... 1999* (footnote 8 above), p. 43, para. 158.

⁴⁵³ *Ibid.* Under article 41, paragraph 1 (c) of the International Covenant on Civil and Political Rights, inter-State communications concerning breaches of human rights may only be dealt with by the Human Rights Committee "after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law". See also the Optional Protocol to the Covenant, art. 2, and the equivalent provisions of the regional human rights conventions.

the work on the topic of diplomatic protection, such matters will no doubt be dealt with in more detail.

(b) *Nationality of claims*

242. A second possible ground of inadmissibility which could be included in part two bis is the nationality of claims. Again it should be noted that the detailed elaboration of the nationality of claims rule is a matter for the topic of diplomatic protection. But since the nationality of claims rule is a general condition for the invocation of responsibility, and is not only concerned with the jurisdiction or admissibility of claims before judicial bodies, it seems desirable to treat it in a similar way to the rule of exhaustion of local remedies. A simple provision to that effect is accordingly proposed.⁴⁵⁴

4. LIMITS ON THE RECOVERY OF REPARATION

243. Limitations applicable to the principle of full reparation should be embodied in part two, which defines the obligations of the responsible State in that regard, and which takes into account such issues as contributory fault. Within the context of the invocation of responsibility, however, certain additional limitations may exist. Two matters should be mentioned.

(a) *The non ultra petita principle*

244. International courts and tribunals quite frequently apply, or at least refer to, the *non ultra petita* principle, that is, the principle that a State will not be awarded by way of reparation more than it has actually claimed. For example, in the *Corfu Channel* case, the United Kingdom claimed £700,087 for the replacement value of the destroyer "Saumarez", sunk by mines. The ICJ experts assessed the true replacement cost at a slightly higher figure (£716,780). The Court awarded the lower figure, stating that "[i]t cannot award more than the amount claimed in the submissions of the United Kingdom Government".⁴⁵⁵ The Court has applied such a principle in a range of cases, sometimes accounting for it as a function of the procedural rules associated with the formal submissions of the parties,⁴⁵⁶ sometimes regarding it as inherent in the judicial process.⁴⁵⁷

⁴⁵⁴ For the text of the provision, see paragraph 284 below.

⁴⁵⁵ *I.C.J. Reports 1949* (see footnote 69 above), p. 249. By contrast the Court awarded the full claim for repairs for the second damaged ship, the "Volage", notwithstanding that the experts' assessment was slightly lower (*ibid.*).

⁴⁵⁶ As in the *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950*, p. 402 (referring to "the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions"). In fact the Statute of the Court focuses on the "claim" of the applicant State (see especially Article 53). It is the Rules of Court which treat the formal submissions as embodying and limiting this claim (arts. 49, 60, para. 2, 79, para. 2, 95, para. 1; similarly for counter-claims: art. 80, para. 2).

⁴⁵⁷ As in *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, pp. 207–208, para. 87.

245. The rule that the claim of an injured State imposes a limit upon the form and quantum of reparation that can be awarded is supported also by arbitral jurisprudence. For example, in the *British Claims in the Spanish Zone of Morocco* case, there was a British demand for compound interest at 7 per cent; Spain's position was that only simple interest at 5 per cent was payable. The Rapporteur, Max Huber, stated:

The rate of 5 per cent would certainly be too low. By contrast one could well envisage in certain cases a rate higher than 7 per cent. That being so, one must nevertheless respect the judicial principle according to which it is impermissible to go beyond the claims of the parties. Despite the special character of the inquiry with which he has been entrusted, the Rapporteur considers ... that as far as possible he should take account of the principles governing judicial procedure. That is why he adopts a rate of 7 per cent as the maximum as well as the minimum.⁴⁵⁸

To say the least, this was a rather mechanical application of the principle. The United Kingdom had sought a rate of 7 per cent compounded, and to separate the interest rate from the method of its calculation seems quite unjustified. A higher rate of interest calculated as simple interest would not have been beyond the scope of the amounts actually sought by the United Kingdom as interest.⁴⁵⁹

246. It is established that the *non ultra petita* principle represents, as it were, an outer limit to the final award or decision open to a court or tribunal, and does not limit the grounds of its decision within that limit. Thus ICJ has always asserted the freedom not merely to choose on which grounds it will decide a case, but also to characterize the essence of the applicant State's claim.⁴⁶⁰ Difficulties can, however, arise where a party seeks to circumscribe its claims or submissions with a view to limiting the Tribunal, for example, to restitution rather than compensation. In the "*Rainbow Warrior*" arbitration, New Zealand sought only the return of the two agents to the island, and specifically disavowed any claim to compensation in lieu.⁴⁶¹ The Tribunal appears to have accepted this as a constraint upon its powers of decision, although the relevant passage is not free from ambiguity. It said:

New Zealand has not however requested the award of monetary compensation—even as a last resort should the Tribunal not make the declarations and orders for the return of the agents. The Tribunal can understand that position in terms of an assessment made by a State of its dignity and sovereign rights. The fact that New Zealand has not sought an order for compensation also means that France has not addressed this quite distinct remedy in its written pleadings and oral arguments, or even had the opportunity to do so. Further, the Tribunal itself has

⁴⁵⁸ See footnote 414 above.

⁴⁵⁹ A rather more flexible approach, still upholding the basic principle, was that of the Roumano-German Mixed Arbitral Tribunal in *Dame R. S. Gologan et al. v. Germany* (1926), *Annual Digest of Public International Law Cases, 1925–1926* (London, Longmans, Green and Co., 1929), vol. 3, p. 419.

⁴⁶⁰ See, for example, the review of the case law offered by the Court in *Nuclear Tests (Australia v. France)*, *Judgment of 20 December 1974*, *I.C.J. Reports 1974*, pp. 262–263, para. 29 (*Australia v. France*); and *ibid.* (*New Zealand v. France*) (footnote 305 above), pp. 466–467, para. 30).

⁴⁶¹ See paragraph 132 above.

not had the advantage of the argument of the two Parties on ... relevant matters, such as the amount of damages.⁴⁶²

The Tribunal accordingly decided "not to make an order for monetary compensation".⁴⁶³ But it did make a recommendation to similar effect, in effect evading the rule.

247. In the Special Rapporteur's view, the *non ultra petita* rule is, in effect, the procedural complement of the more basic principle that an injured State is entitled to elect from among the remedies available to it in the context of full reparation. Assuming that the underlying right of election of the injured State is clearly expressed in part two bis, there is no need for the principle to be spelled out in any further detail. Moreover, to do so may limit the flexibility of international tribunals in deciding on the combination of remedies appropriate to the particular case, especially if, as the Rapporteur, Max Huber, did, in the *British Claims in the Spanish Zones of Morocco* case,⁴⁶⁴ it is applied severally to the different aspects of reparation sought. The error of doing so should be explained in the commentary, but no separate article embodying the principle is necessary.

(b) *The rule against double recovery*

248. A second possible limitation on the invocation of responsibility is the rule against double recovery. It is generally accepted that the award of compensatory damages should not lead to a situation of "double recovery", i.e. to the recovery by the injured party of more than its assessed damage or injury. The need to "arrive at a just appreciation of the amount, and avoid awarding double damages" was treated as axiomatic, for example, by PCIJ in the *Chorzów Factory* case.⁴⁶⁵ That principle has been reaffirmed by other international tribunals⁴⁶⁶ and in State practice.⁴⁶⁷ In some contexts it affects the quantum of compensation itself, and thus concerns issues already dealt with in part two, chapter II. For example, compensation for loss of profits and for interest on the capital sum which earns those profits cannot be awarded in respect of the same period.⁴⁶⁸ But in other cases, there may be a po-

⁴⁶² UNRIIAA (see footnote 17 above), p. 272, para. 119.

⁴⁶³ *Ibid.*, para. 120.

⁴⁶⁴ See footnote 414 above.

⁴⁶⁵ PCIJ (see footnote 49 above), p. 49. See also page 45, where the Court observed that in the circumstances "there seems to be no doubt that Poland incurs no risk of having again to pay the value of the factory to the Reparation Commission, if, in accordance with Germany's claim, she pays this value to that State".

⁴⁶⁶ See, for example, *Harza v. Islamic Republic of Iran, Iran-United States Claims Tribunal Reports* (footnote 404 above), pp. 88–89, para. 30; *Itel Corporation v. Islamic Republic of Iran* (1992), *ibid.* (Cambridge, Grotius, 1996), vol. 28, pp. 172–173, paras. 31–32; and *Seaco, Inc. v. Islamic Republic of Iran*, *ibid.*, pp. 214–215, paras. 55–56.

⁴⁶⁷ This can be seen, for example, from the practice of national compensation commissions, which in distributing lump-sum payments by way of compensation are required to have regard to any amounts received or which (if the individual claimant had exercised due diligence) would have been received in respect of the loss in question from any other source; see, for example, Foreign Compensation (Egypt) Order, Statutory Instrument No. 2104 (1971) (London, HM Stationery Office), art. 10, para. 2 (b); and Foreign Compensation (Romania) Order, Statutory Instrument No. 1144 (1976), *ibid.*, art. 10.

⁴⁶⁸ See, for example, *Uiterwyk Corporation v. Islamic Republic of Iran* (1988), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1989), vol. 19, pp. 158–159, para. 188.

tential entitlement of the claimant State to full reparation, which has to be qualified at the level of invocation in order to avoid double recovery. This will often be so where different persons or entities are entitled to bring what is effectively the same claim before different forums. Again the *Chorzów Factory* case provides an example, since the property in question there was the subject at the same time of claims by the (former) owners before mixed arbitral tribunals, and of a claim by Germany before PCIJ. The Court rejected a Polish argument that this circumstance made the German claim inadmissible, on the formal ground that the parties were not the same, and on the substantive ground that Germany's complaint related to property seized in breach of a treaty, whereas the tribunals' jurisdiction related to properties lawfully expropriated. However, it is quite clear that any compensation payable to the companies would have been taken into account in assessing the amount of compensation payable to Germany.

249. For most purposes the principle against double recovery is subsumed in the general principle of full (equitable) reparation, which generally implies that reparation should be no more than necessary to compensate the injured State for the loss, and not be inequitable in the circumstances. In one case, however, it may be necessary to make the principle explicit, i.e. where the same claimant is entitled to reparation as against several States responsible for essentially the same damage. This concerns the question of a plurality of responsible States, and it is dealt with below in that context.⁴⁶⁹

5. LOSS OF THE RIGHT TO INVOKE RESPONSIBILITY

250. Finally, under the rubric of the invocation of responsibility by an injured State, the question arises of the loss of the right to invoke responsibility. Again an analogy is provided by article 45 of the 1969 Vienna Convention, which deals with loss of the right to invoke a defect in a treaty. It provides that:

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty ... if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

This deals with issues such as waiver of a material breach. It suggests that a similar provision in part two bis may be useful.

251. The question is what elements this should include. In the first place it seems necessary to distinguish between the position of an injured State and other States concerned. Thus, for example, a valid waiver or settlement of the responsibility dispute between the responsible State and the injured State (or, if there is more than one, all the injured States) may preclude any claim for reparation or threat of countermeasures by other States.

252. Even in the bilateral context, however, issues of loss of the right to invoke responsibility can arise. Possible

grounds include: (a) waiver; (b) delay; (c) settlement; and (d) the termination or suspension of the underlying obligation breached. There is room for the view that all these legal categories (including delay) are modes of waiver, and that a general provision along the lines of article 45 of the 1969 Vienna Convention would be sufficient to cover the field. Before reaching that conclusion, a brief review may be made of the various possibilities.

(a) Waiver

253. The first and most obvious ground for loss of the right to invoke responsibility is that the injured State has waived either the breach itself, or its consequences. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State. No doubt as with other forms of State consent, questions of validity could arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter arising perhaps from a misrepresentation of those facts by the responsible State. Such questions should be resolved in the same way as with the proposed article 29 dealing with consent as a circumstance precluding wrongfulness.⁴⁷⁰ Thus reference should be made to a "valid waiver", leaving to the general law the question of what amounts to a valid waiver in the circumstances.

254. The question may be raised as to whether there is a difference between subsequent consent as to the breach itself and consent to waive the consequences of the breach. According to the commentary to article 29 as adopted on first reading, "if the consent is given only after the commission of the act (*ex post facto*), it will simply be a waiver of the right to assert responsibility and the claims arising therefrom. But with such a waiver, the wrongfulness of the prior act still remains".⁴⁷¹ Of course, where the waiver postdated the act in question, that act will by definition have been unlawful at the time of the breach. But it is not clear why (at least in respect of obligations owed only as between the waiving State and the responsible State) the former cannot consent retrospectively to the conduct in question, thus effectively legitimizing it for all purposes. On the other hand, the case envisaged in the commentary certainly could occur: a State might be willing to overlook the consequences of a breach—as it were, prospectively—without going so far as to excuse the conduct from its inception. In either case, it seems reasonable that a valid and unqualified waiver should entail the loss of the right to invoke responsibility.

255. In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum (corresponding to the capital amount of a loan), without any reference to interest or damages for delay. Turkey having paid the sum demanded, the Tribunal held that this conduct amounted to the abandonment of any other claim arising from the

⁴⁷⁰ For a discussion of article 29, see the Special Rapporteur's second report, *Yearbook ... 1999* (footnote 8 above), pp. 60–64, paras. 232–243.

⁴⁷¹ *Yearbook ... 1979*, vol. II (Part Two), p. 113, para. (16) of the commentary to article 29.

⁴⁶⁹ See paragraph 279 below.

loan.⁴⁷² The decision relates as much to the effect of settlement as to waiver in the general sense, but clearly, any formulation of the principle of waiver should allow for the waiver of part of a claim in this way.⁴⁷³

256. Although it may be possible to infer a waiver from the conduct of the States concerned, or from a unilateral statement, the conduct or statement must be clear and unequivocal. In the *Certain Phosphate Lands in Nauru* case, Australia argued that the Nauruan authorities before independence had waived the rehabilitation claim: (a) by concluding the Agreement relating to the Nauru Island Phosphate Industry 1967; and (b) by statements made at the time of independence. As to the former, it was true that that Agreement met a key Nauruan demand for control over the phosphate industry as from independence, but the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements included the remark that future royalties “would ... make it possible to solve the [rehabilitation] problem”.⁴⁷⁴ ICJ rejected the Australian argument. As to the Agreement, it said:

The Court does not deem it necessary to ... consider whether any waiver by the Nauruan authorities prior to accession to independence is opposable to the Republic of Nauru. It will suffice to note that in fact those authorities did not at any time effect a clear and unequivocal waiver of their claims.⁴⁷⁵

As to the statement by the Nauruan Head Chief, it noted that “[n]otwithstanding some ambiguity in the wording, the statement did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations”.⁴⁷⁶ The context of the negotiations, and the de facto inequality of the parties, emphasized the need for any waiver to be clear and unequivocal: in case of doubt, a waiver is not to be presumed.⁴⁷⁷ The proposed provision should equally make this clear.

(b) *Delay*⁴⁷⁸

257. Somewhat more controversial is the question of loss of the right to invoke responsibility arising from delay in the bringing of a claim. The existence of a principle of extinctive prescription as a ground for the inadmissibility of a claim of responsibility seems to be generally accepted. It was endorsed, for example, by ICJ in the *Certain Phosphate Lands in Nauru* case, in the following passage:

⁴⁷² UNRIAA (see footnote 80 above), p. 446.

⁴⁷³ In this sense, some cases of waiver are cognate to the settlement of a claim by the offer and acceptance of partial reparation. See paragraph 259 below.

⁴⁷⁴ *I.C.J. Reports 1992* (see footnote 307 above), p. 249, para. 17.

⁴⁷⁵ *Ibid.*, p. 247, para. 13.

⁴⁷⁶ *Ibid.*, p. 250, para. 20.

⁴⁷⁷ In a different context, see the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, *I.C.J. Reports 1994*, p. 24, where the Court held that the language of the relevant treaty was clear and unequivocal.

⁴⁷⁸ For a useful review see Ibrahim, “The doctrine of laches in international law”, with references to jurisprudence and the literature. Earlier accounts include Pinto, “Prescription in international law”, pp. 438–448.

The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.⁴⁷⁹

The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru’s application was not inadmissible on this ground.⁴⁸⁰

258. *Certain Phosphate Lands in Nauru* involved a State-to-State claim, but many of the judicial decisions on this question concern diplomatic protection claims pursued some or even many years after the incidents giving rise to them. The effect of these authorities may be summarized as follows:

(a) The first element that must be present before any question of undue delay can arise is obviously the lapse of a considerable period of time. But no generally accepted time limit, expressed in terms of years, has ever been laid down. The Swiss Federal Political Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.⁴⁸¹ Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.⁴⁸² None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.⁴⁸³ Indeed, it would be practically impossible to establish any single limit, given the variety of situations, obligations and conduct likely to give rise to a particular claim;

(b) There are of course many cases where time limits are laid down for specific categories of claim arising under specific treaties,⁴⁸⁴ notably in the field of private law.⁴⁸⁵ By contrast it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limit;

(c) Once a claim has been notified to the respondent State, delay in its prosecution (e.g. before an international tribunal) will not usually be regarded as rendering it in-

⁴⁷⁹ *I.C.J. Reports 1992* (see footnote 307 above), pp. 253–254, para. 32.

⁴⁸⁰ *Ibid.*, p. 255, para. 36. The relevant passage is cited in paragraph 237 above. Judge Oda dissented, on the ground that Nauru’s silence (as he regarded it) about its claim for more than 15 years after independence “makes it inappropriate for the Court to entertain it ... if only on grounds of judicial propriety” (*ibid.*, p. 324, para. 28).

⁴⁸¹ Communiqué of 29 December 1970, reproduced in Caflisch, “La pratique suisse en matière de droit international public 1975”, p. 153.

⁴⁸² Fleischhauer, “Prescription”, p. 1107.

⁴⁸³ A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides the *Certain Phosphate Lands in Nauru* case (footnote 307 above), see, for example, the *Gentini* case (1903), UNRIAA (footnote 374 above), p. 561; and the *Ambatielos Claim*, (1956), *ibid.*, vol. XII (Sales No. 63.V.3), pp. 103–104.

⁴⁸⁴ For example, the six-month time limit for individual applications under article 35, paragraph 1, of Protocol No. 11 to the European Convention on Human Rights. This does not, it seems, apply to inter-State cases brought under article 33.

⁴⁸⁵ For example, in the field of commercial transactions and international transport. See the Convention on the Limitation Period in the International Sale of Goods. By contrast in the field of individual crimes against international law, the tendency is to avoid time limits on prosecution; see Weiss, “Time limits for the prosecution of crimes against international law”.

admissible.⁴⁸⁶ Thus, in the *Certain Phosphate Lands in Nauru* case, ICJ held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.⁴⁸⁷ In the *Tagliaferro* case, the Umpire, Ralston, likewise held that despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred;⁴⁸⁸

(d) Indeed, international practice suggests that the lapse of time *as such* is not sufficient to render a claim inadmissible. A significant concern of the rules on delay seems to be the additional difficulties caused to the respondent State due to the lapse of time (e.g. as concerns the collection and presentation of evidence). Thus in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness were advanced.⁴⁸⁹ In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not establish the existence of any prejudice on its part;⁴⁹⁰

(e) The distinction between the notification of a claim and the commencement of proceedings before an international court or other body arises in part because of the absence of any general availability of third-party dispute settlement in international law. Often the only way in which a State's responsibility could be invoked was by the bringing of a claim through diplomatic channels, without any possibility of compulsory resort to any third party. Evidently it would be unfair to prejudice a claimant by holding a claim to be stale when the claimant (or the claimant's State) had done everything possible to prosecute the claim. But even when that State at all relevant times had an international forum available to it, the distinction has still been applied. For example, in the *LaGrand* case, ICJ accepted the German application for interim protection and indicated a stay of execution.⁴⁹¹ The Court made its order although Germany had taken legal action literally at the last minute, six and a half years after the breach had become known to Germany.⁴⁹²

259. The overall picture is one of considerable flexibility. A case will not be held inadmissible on grounds of delay unless the respondent State has been clearly disadvantaged and international courts have engaged in a flexible weighing of relevant circumstances in the given case,

⁴⁸⁶ For statements of the distinction between notice of claim and commencement of proceedings, see, for example, Jennings and Watts, eds., *Oppenheim's International Law*, p. 527; and Rousseau, *Droit international public*, p. 182.

⁴⁸⁷ See paragraph 256 above.

⁴⁸⁸ *Tagliaferro* case (1903), UNRIAA (see footnote 374 above), p. 593.

⁴⁸⁹ See the *Stevenson* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 385; and the *Gentini* case, *ibid.*, vol. X (footnote 374 above), p. 557.

⁴⁹⁰ See, for example, the *Tagliaferro* case (footnote 488 above); similarly the actual decision in the *Stevenson* case, UNRIAA (footnote 489 above), pp. 386–387.

⁴⁹¹ See footnote 261 above.

⁴⁹² Germany's application was filed on 2 March 1999. Owing to the time constraints, the provisional measures phase was restricted to a meeting of the parties with the President of the Court. In a separate opinion, President Schwebel noted that "Germany could have brought its Application years ago, months ago, weeks ago, or days ago" and added that he had "profound reservations about the procedure followed ... by the Applicant" (*I.C.J. Reports 1999* (see footnote 261 above), p. 22).

including, for example, the conduct of the respondent State and the importance of the right involved.⁴⁹³ Contrary to what may be suggested by the expression "delay", international courts have not engaged in a mere exercise of measuring the lapse of time and applying clear-cut time limits. Rather, the decisive factor is whether the respondent could have *reasonably* expected that the claim would no longer be pursued.⁴⁹⁴ Because of this, the distinction between delay on the one hand, and implied waiver or the more general idea of acquiescence on the other, is a relative one. Indeed, it is arguable that all the instances of non-admissibility discussed here could be treated as aspects of a general principle of waiver or acquiescence. For the purposes of the draft articles, however, it is proposed to adopt the traditional separation between waiver and delay. Moreover, given modern means of communication and the increased availability of third-party remedies in many cases, a somewhat more rigorous approach to the pursuit of available remedies seems justified, even in the context of inter-State claims. It is proposed that the draft articles provide that the responsibility of a State may not be invoked in respect of a claim if the claim was not notified to the responsible State within a reasonable time after the injured State had notice of the injury, and in the circumstances the responsible State could reasonably have believed that the claim would no longer be pursued. Such a provision strikes a fair balance between the interests of the injured State and the allegedly responsible State, and reflects the relevance of the idea of "reasonable expectation" in the context of delay.

(c) Settlement

260. A third clear basis of loss of the right to invoke responsibility arises where the responsible State offers some form of reparation in settlement of the claim and that offer is accepted. This may be the better explanation of the decision in the *Russian Indemnity* case: the arbitral tribunal laid some emphasis on the fact that, after several years of Russian insistence on repayment of the capital sum, without any reference to moratory interest or damages for delay, the sum demanded was actually paid.⁴⁹⁵ In the circumstances, the Tribunal was prepared to find that the tender and acceptance of the capital amounted to a full and final settlement, even in the absence of an express provision to that effect in a settlement agreement.⁴⁹⁶ In-

⁴⁹³ The importance of the right to life was no doubt highly relevant in the *LaGrand* case (see footnote 261 above).

⁴⁹⁴ Another relevant factor has been the influence of private-law analogies and of domestic rules concerning limitation of actions or laches. Where the underlying claim (e.g. in contract) is governed by some national system of law and the claim is prescribed, extinguished or barred under that law, there is no reason why a diplomatic protection claim by the State of nationality should be in a better position. But there is also the possibility that national limitation periods may be applied by analogy, and the general (though not universal) tendency has been towards shorter limitation periods, and the treatment of limitation periods as substantive rather than procedural. For a general review, see Hondius, "General report", especially pp. 22–25.

⁴⁹⁵ See paragraph 212 above.

⁴⁹⁶ For cases of express provisions, see, for example, the General Agreement on the Settlement of Certain ICJ and Tribunal Cases of 9 February 1996, attached to the Joint Request for an Arbitral Award on Agreed Terms by order of the Iran-United States Claims Tribunal (22 February 1996) (ILM, vol. XXXV, No. 3 (May 1996)), and the Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning

deed there may be circumstances where a full and final settlement could be inferred from a combination of unilateral acts on the part of the two States concerned.⁴⁹⁷ On the other hand, for a settlement to be reached there has to be action by both States, or at the least clear acquiescence by one State in the action of the other taken with a view to the settlement of the dispute. Unilateral action by one State cannot be enough.⁴⁹⁸

261. Arguably such cases of tender and acceptance or other forms of settlement can be subsumed under the category of waiver. Plainly where a State requests that a case be discontinued “with prejudice”, it waives the claim in question. On the other hand, it will often be unclear who is waiving what, as the frequent resort to formulas such as “without prejudice” in settlement agreements suggests. The question is whether a specific provision should be included, to the effect that the tender and acceptance of reparation entails the loss of any further right to invoke responsibility in respect of the claim concerned unless otherwise stipulated or agreed between the parties. In accordance with such a provision, a State accepting a tender of reparation would be required to make it clear if it does so only by way of partial settlement. In the alternative, the unqualified acceptance of reparation tendered by the responsible State, even on a without-prejudice basis, could be mentioned as a species of waiver in that subparagraph. On balance the Special Rapporteur prefers the second alternative as the more economical one.

(d) *Termination or suspension of the obligation breached*

262. Finally, it is necessary to say something about the situation where the primary obligation, the breach of which is invoked, has terminated or been suspended. This is more likely to occur with treaty than non-treaty obligations, but it cannot be entirely excluded even in relation to the latter. For example, an area previously subject to the regime of the high seas might come within the jurisdiction of a coastal State as a result of processes of claim and recognition, but questions of responsibility for seizure of foreign fishing vessels might be raised and remain live in respect of the “interim” period, before the questions of jurisdiction have been resolved.⁴⁹⁹ Other similar situa-

tions can be envisaged. So far as the law of treaties is concerned, article 70 of the 1969 Vienna Convention provides that:

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

...

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.⁵⁰⁰

It is true that article 73 of the Vienna Convention also provides that its provisions “shall not prejudice any question that may arise in regard to a treaty ... from the international responsibility of a State”; moreover, article 70, paragraph 1 (b), addresses situations of the “execution” or performance of a treaty rather than its non-performance. Nonetheless, if the breach of an international obligation gives rise immediately to a secondary right to reparation in favour of an injured State, it is hard to see how such a right would be affected by the termination of the primary obligation breached. The Arbitral Tribunal expressly so held in the “*Rainbow Warrior*” affair, where the bilateral treaty obligation terminated by effluxion of time after and notwithstanding its breach.⁵⁰¹ In such cases, far from the termination of the primary obligation producing a loss of the right to invoke responsibility, *prima facie* the secondary right to reparation continues to exist. The question is whether, by analogy with article 70, paragraph 1 (b) of the Vienna Convention, it is desirable to say so. On balance this does not seem necessary: the matter would seem to be covered, by inference at least, by articles 18 and 24 of the draft articles as provisionally adopted on second reading. Admittedly, article 18 is now formulated simply in negative terms.⁵⁰² But when it is read with article 24, paragraph 1,⁵⁰³ it is clear that the breach of an international obligation is perfected at the time the act occurs, and the consequences referred to part two, chapters I and II, would follow automatically. No provision spelling this out seems to be required, though the point should be made clear in the commentary. In particular, in the case

zures] to subsequent settlement if it should arise” (*ibid.*, p. 126). Similarly in one of the *Fisheries Jurisdiction* cases, the request for compensation for interference with fishing vessels was not maintained; see *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 7, para. 12. In the other (*ibid. (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175), the request was maintained but in such an abstract form that ICJ declined to act on it (*ibid.*, pp. 203–205, paras. 71–76).

⁵⁰⁰ See also articles 71, paragraph 2 (b), and 72, paragraph 1 (b).

⁵⁰¹ UNRIAA (see footnote 17 above), p. 266, para. 106, citing the dissenting opinion of Lord McNair in *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 63. The majority in that case did not have to deal with the issue.

⁵⁰² It provides that:

“An act of a State shall not be considered a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”

(*Yearbook ... 1999* (see footnote 2 above), p. 275)

⁵⁰³ As provisionally adopted, article 24, paragraph 1 (*ibid.*), provides that:

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

Certain Phosphate Lands in Nauru (Nauru, 10 August 1993) (United Nations, *Treaty Series*, vol. 1770, No. 30807, p. 379).

⁴⁹⁷ See, for example, the apology issued by the United States on 4 November 1998 in respect of breach of article 35, paragraph 2, of the Vienna Convention on Consular Relations in the *Consular Relations* case (footnote 257 above) (Statement of the United States of America concerning the failure of consular notification in the case of Angel Breard, reproduced in *Digest of United States Practice in International Law 1991–1999*, Sally Cummins and David Stewart, eds. (Washington, D.C., Office of the Legal Adviser, United States Department of State), chap. 2, document No. 18). This coincided with Paraguay’s request to discontinue the case “with prejudice”; see *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 10 November 1998, I.C.J. Reports 1998*, p. 427.

⁴⁹⁸ Thus in the *Certain Phosphate Lands in Nauru* case (see footnote 307 above), the three partner Governments expressed the view that “the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement”; cited in *I.C.J. Reports 1992*, p. 248, para. 15. ICJ held that this view was not opposable to Nauru in the absence of clear acceptance on its part. See paragraph 256 above.

⁴⁹⁹ See *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116. In fact the parties “had agreed to leave this question [of compensation for sei-

of a continuing wrongful act, it should be recalled that the breach ceases, by definition, with the termination or suspension of the obligation, without prejudice to the responsibility already incurred.

B. Cases involving a plurality of injured or responsible States

263. One matter not expressly dealt with in the draft articles adopted on first reading is the general topic of claims of responsibility relating to the same act or transaction but involving a plurality of States. This is a different problem from that of multilateral obligations, though it overlaps with it to a degree. The legal basis for asserting the responsibility of each of the States involved in a particular conduct might well be different, and even if it was the same, the obligation in question might be owed severally by each of the States responsible for the conduct to each of the States injured by it. The question is what difference does it make to the responsibility of one State, if another State (or indeed several other States) is also responsible for the very same conduct, or is also injured by it.⁵⁰⁴

264. The commentaries refer to the problem rather frequently. For example, the commentary to article 44 states that:

[W]here there is a plurality of injured States, difficulties may arise if the injured States opt for different forms of remedy. This question is part of a cluster of issues which are likely to come up whenever there are two or more injured States which may be equally or differently injured. It has implications in the context of both substantive and instrumental consequences of internationally wrongful acts and the Commission intends to revert to it in due course.⁵⁰⁵

265. Unfortunately, this “due course” never eventuated, and because the subject was not included in the draft articles adopted on first reading, it has not been the subject of detailed written comments by Governments. In the debate in the Sixth Committee during the fifty-fourth session of the General Assembly in 1999, however, a number of Governments supported the inclusion of provisions dealing with a plurality of States. One Government, while supporting this course of action, noted “the scarcity of established international law on the subject”.⁵⁰⁶ Several Governments suggested that it would be sufficient to deal with the issue in the commentaries.⁵⁰⁷

⁵⁰⁴ In the literature this problem is often referred to using municipal law analogies, e.g. of joint and several liability. See Brownlie, *op. cit.*, pp. 189–192 (“Joint responsibility”); Noyes and Smith, “State responsibility and the principle of joint and several liability”; and for a general review, Padellietti, *Pluralità di Stati nel fatto illecito internazionale*. But more than usual care is needed in the use of municipal law analogies here. Different legal traditions have developed in their own ways, subject to their own historical influences. For examples of earlier studies in different legal systems, see, for example, Williams, *Joint Obligations*; Planiol, *Traité élémentaire de droit civil conforme au programme officiel des Facultés de droit*; and for a useful comparative review, Weir, *loc. cit.*

⁵⁰⁵ *Yearbook ... 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 71, para. (15).

⁵⁰⁶ A/CN.4/504 (see footnote 3 above), para. 12.

⁵⁰⁷ *Ibid.*

1. OVERVIEW OF THE LEGAL ISSUES

266. It is necessary to consider separately the question of the plurality of injured and of responsible States.

(a) *Plurality of responsible States*⁵⁰⁸

267. Under the draft articles as they stand, a number of specific aspects of the problem are already dealt with or at least referred to:

(a) Article 9 deals with the attribution to the State of the conduct of organs placed at its disposal by another State.⁵⁰⁹ Where the organ is under the control of the receiving State and acts in the exercise of that State’s separate authority, the receiving State is responsible for its acts. The implication is that in any other circumstance the sending State (or possibly both States) will be responsible;

(b) Article A (proposed in lieu of article 13 as adopted on first reading) would exclude from the scope of the draft articles any question of the responsibility of an international organization or of a State for the conduct of an international organization.⁵¹⁰ There is, however, a distinction between conduct performed by an international organization as such (e.g. the conclusion of a treaty or contract by an organization, or its commission of a civil wrong or of some internationally wrongful act) and conduct performed by State organs within the framework of or at the instigation of an international organization. The conduct of a State organ does not lose that quality because that conduct is, for example, coordinated by an international organization, or is even authorized by it;⁵¹¹

(c) Part one, chapter IV, deals with a number of cases where one State is responsible in respect of the act of another State.⁵¹² These cases involve, respectively, aid or assistance (art. 27), direction and control (art. 27 bis) and coercion (art. 28). These articles all proceed on the basis that, generally speaking, State A is not responsible for acts attributable to State B, but that in certain circum-

⁵⁰⁸ For a preliminary discussion, see the Special Rapporteur’s second report, *Yearbook ... 1999* (footnote 8 above), pp. 45–47, paras. 161–164, and pp. 55–56, paras. 212–213.

⁵⁰⁹ See *Yearbook ... 1998*, vol. II (Part One) (footnote 23 above), pp. 44–47, paras. 221–233, and for consideration on second reading, *ibid.*, vol. II (Part Two), pp. 84–85, paras. 412–415 and 422–424, and p. 87, para. 447.

⁵¹⁰ *Ibid.*, vol. II (Part One) (footnote 23 above), pp. 51–52, paras. 258–264, and for consideration on second reading, *ibid.*, vol. II (Part Two), p. 84–85, paras. 414 and 424 and p. 87, para. 446. The location of article A is undecided; it may be better included in the proposed part four.

⁵¹¹ Generally for the question of responsibility of member States for the acts of international organizations, see the reports of Ms. Rosalyn Higgins to the Institute of International Law, “The legal consequences for Member States of the non-fulfilment by international organizations of their obligations toward third parties”, *Yearbook of the Institute of International Law*, vol. 66–I (1995), p. 249, and the Institute’s resolution thereon, *ibid.*, vol. 66–II (1996), p. 444. See also Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, pp. 426–524.

⁵¹² See *Yearbook ... 1999* (footnote 8 above), pp. 45–57, paras. 159–214, and for consideration on second reading, *ibid.*, vol. II (Part Two), pp. 69–73, paras. 244–278.

stances the principle that each State is responsible only for its own acts may be set aside. Chapter IV is stated to be without prejudice to the international responsibility of the acting State (art. 28 bis); thus a State which is assisted, directed or even coerced to perform an act which injures a third State will be responsible for that act, although at least in the case of coercion it may be able to plead force majeure as a circumstance precluding the wrongfulness of its conduct.

More fundamentally, the draft articles implicitly deal with the general issue, in the sense that as things stand *each* injured State can hold to account *each* responsible State for internationally wrongful conduct, even though in respect of the same conduct there may be several injured States and several States to which the conduct is attributable. This position is set out in the commentary to article 27, where joint conduct is distinguished from participation of one State in the wrongful act of another. As the commentary makes clear:

There can be no question ... of the participation of a State in the internationally wrongful act of another State in cases where identical offences are committed in concert, or sometimes even simultaneously, by two or more States, each acting through its own organs ... A similar conclusion is called for in cases of parallel attribution of a single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts.⁵¹³

268. This seems to reflect the position under general international law, at least in the absence of agreement to the contrary between the States concerned. In the *Corfu Channel* case, the United Kingdom recovered to the full extent of the injuries suffered by its ships damaged by mines in transiting Albanian waters. ICJ held that Albania was responsible to the United Kingdom for these losses on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.⁵¹⁴ The mines themselves, however, had not been laid by Albania (which had no mine-laying capacity at the time); they had in all probability been laid by a Yugoslavian vessel, as the Court briefly noted. It is probable that in the (inferred) circumstances Yugoslavia would also have been responsible to the United Kingdom for the damage caused to the vessels by its mines. Yet no one suggested that Albania's responsibility for failure to warn was thereby reduced, let alone precluded. This was a standard case where two different States were each responsible for the direct consequences of their own conduct in respect of a single incident. Many other similar cases can be envisaged.⁵¹⁵

⁵¹³ *Yearbook ... 1978*, vol. II (Part Two), commentary to article 27 (as adopted on first reading), p. 99, para. (2).

⁵¹⁴ *I.C.J. Reports 1949* (see footnote 17 above), pp. 22–23.

⁵¹⁵ Nicaragua commenced three cases against neighbouring States in respect of the damage done to it by the activity of the *contras*, on the basis that the *contras'* actions were directed and supported by those States as well as by the United States. The three cases were eventually discontinued, although only after the Court had upheld its jurisdiction vis-à-vis Honduras (*Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports*

269. In such cases, the responsibility of each participating State would have to be determined individually, on the basis of its own conduct. For example, in the *Corfu Channel* case, the question of Yugoslavia's responsibility for laying the mines was a different question from that of Albania's responsibility for failure to warn of their presence, even though the injury and damage to the United Kingdom arose from the same event. The question is whether the position is any different where the responsible States are acting together in a joint enterprise, or indeed where one is acting on the joint behalf of several others.⁵¹⁶

270. That issue was raised in the case concerning *Certain Phosphate Lands in Nauru*.⁵¹⁷ Australia, the sole respondent in that case, was one of three States parties to the Trusteeship Agreement for Nauru. Under article 2 of the Agreement, three Governments (Australia, New Zealand and the United Kingdom) were designated as "the joint Authority which will exercise the administration of the Territory". It was agreed that the Administering Authority so designated was not a separate legal person, but was nothing else than the three Governments acting jointly as provided for in the Agreement. Under article 4 of the Agreement, it was recognized that Australia "on behalf of the Administering Authority" would "exercise full powers of legislation, administration and jurisdiction in and over the Territory". Thus Australia administered the Territory under the Agreement on behalf of all three States.⁵¹⁸ As one of its preliminary objections, Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. One reason was procedural: any determination of Australia's responsibility would necessarily entail that of the other two States. They were necessary parties to the case and in accordance with the principle formulated in the *Monetary Gold* case,⁵¹⁹ the claim against Australia alone was inadmissible. But there was a second reason: the responsibility of the three States making up the Administering Authority was "solidary" and a claim could not be made against only one of them.

271. ICJ rejected both arguments, and upheld its jurisdiction. On the question of "solidary" responsibility it said:

Australia's preliminary objection in this respect appears to contain two branches, the first of which can be dealt with briefly. It is first contended by Australia that, in so far as Nauru's claims are based on the conduct of Australia as one of the three States making up the Administering Authority under the Trusteeship Agreement, the nature of the responsibility in that respect is such that a claim may only be brought against the three States jointly, and not against one of them individually. In this connection, Australia has raised the question whether the liability of the three States would be "joint and several" (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering

1988, p. 69). The United States was held responsible for certain acts of the *contras*, and for its own actions in supporting them. The question of the quantum of United States responsibility was, however, not determined, as the case was discontinued (see footnote 309 above).

⁵¹⁶ It was not necessary in the *Corfu Channel* case (see footnote 17 above) to find the existence of a joint enterprise between Albania and Yugoslavia, since Albania's responsibility was sufficiently established by reference to its failure to warn. In any event ICJ could not have found Yugoslavia responsible since it was not a party to the case.

⁵¹⁷ *I.C.J. Reports 1992* (see footnote 307 above).

⁵¹⁸ *Ibid.*, pp. 257–258, para. 45.

⁵¹⁹ *Monetary Gold Removed from Rome in 1943*, *Judgment*, *I.C.J. Reports 1954*, p. 19.

Authority, and not merely a one-third or some other proportionate share. This is a question which the Court must reserve for the merits; but it is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.⁵²⁰

It was careful to add, however, that its decision on jurisdiction

does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems ... and, in particular, the special role played by Australia in the administration of the Territory.⁵²¹

In fact the Court never had to resolve those issues. The case was withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement.⁵²²

272. The extent of responsibility for conduct carried on in conjunction by a group of States is occasionally addressed in treaties. Perhaps the most interesting example is the Convention on international liability for damage caused by space objects. Article IV provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Paragraph 2 then provides:

In all cases of joint and several liability referred to in paragraph 1 of this Article, the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.

Similarly, article V provides for joint and several liability where two or more States jointly launch a space object which causes damage: the State from whose territory or facility a space object is launched is regarded as a participant in the joint launching. Article V, paragraph 2, provides that:

A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching. The participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable. Such agreements shall be without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.

⁵²⁰ *I.C.J. Reports 1992* (see footnote 307 above), pp. 258–259, para. 48.

⁵²¹ *Ibid.*, p. 262, para. 56.

⁵²² For the removal of the list of the Court, see the Order of 13 September 1993 (footnote 307 above), and for the Settlement Agreement, footnote 496 above.

This is, no doubt, a *lex specialis*—but at the same time it is a useful indication of what the regime of "joint and several" liability might amount to, so far as an injured State is concerned. Moreover, the incidents of "joint and several liability" as reflected in the Convention generally correspond to the notion of joint and several liability in the common law, from which the term comes. At common law, persons who are jointly and severally liable (e.g. partners or trustees) are each responsible for the whole damage caused to third parties by the partnership or in breach of trust, and may each be sued for the full amount without any requirement to join the other partners or trustees. Their liability is "joint" in that they take responsibility for each other's wrongful conduct vis-à-vis third parties; it is "several" in that they can be severally, i.e. separately, sued. Historically, however, there were other forms of liability at common law, including strict joint liability where the persons jointly liable normally had to be sued as a group and were not separately responsible for the actions of the group. Similarly in civil law systems, there are different forms of solidary responsibility, depending on the context.⁵²³

273. A possible example of "joint" inseparable responsibility under international law was the responsibility of the Four Powers for Germany as a whole and Berlin prior to 1990. In a series of cases, courts refused to hold that individual States could be sued alone for conduct arising from the quadripartite arrangements.⁵²⁴

274. Another "special case" is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name but responsibility for performance is distributed between them in ways not determined a priori. The most elaborate formulation of this responsibility so far is that set out in annex IX to the United Nations Convention on the Law of the Sea. Under these arrangements, responsibility for performance is allocated as between the Union and member States, though the basis for that allocation can change over time. There is provision by which other States can ascertain which of the Union and member States accepts responsibility at a given time; joint and several liability only arises in the case of "[f]ailure to provide this information within a reasonable time or the provision of contradictory information".⁵²⁵

275. The sources of international law as reflected in Article 38, paragraph 1, of the ICJ Statute do not include analogy from national legal systems, and while such analogies may have a certain role to play, it is clearly subsidiary.⁵²⁶ Particular care is needed with analogies from rules or concepts which are not widely shared and which depend in their national setting on historical considerations or on the powers and procedures of courts; this is certainly true of concepts such as "joint and several" or "solidary" responsibility. By contrast, what matters at the

⁵²³ See Weir, *loc. cit.*, pp. 43–44, paras. 79–81. For the German law, see Markesinis, *op. cit.*, pp. 904–907, with references to the literature.

⁵²⁴ See the cases cited in the Special Rapporteur's first report, *Yearbook ... 1998* (footnote 23 above), p. 46, para. 229, footnote 300.

⁵²⁵ Annex IX, art. 6, para. 2. Generally on mixed agreements, see, for example, Rosas, "Mixed Union—mixed agreements".

⁵²⁶ See *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 148 (separate opinion by Sir Arnold McNair).

international level are the actual terms of any agreement or arrangement, interpreted in the light of the principles of consent, the independence of States and the *pacta tertiis* rule.

276. Before considering what, if any, provision should be made in the draft articles, several cognate issues need to be briefly mentioned:

(a) *Responsibility of member States for the conduct of an international organization*. This raises sensitive issues relating to the structure and functioning of international organizations which it is not appropriate to deal with in the context of the draft articles. As noted above, it is excluded from the scope of the draft articles by the proposed article A;⁵²⁷

(b) *Application of the Monetary Gold*⁵²⁸ *principle*. The *Monetary Gold* principle, as explained by the Court in the *Certain Phosphate Lands in Nauru* case⁵²⁹ and applied by it in the case concerning *East Timor*,⁵³⁰ is a procedural barrier to the admissibility of a claim before an international court and not as such, part of the law of State responsibility. It arises because a court or tribunal exercising judicial power cannot determine the legal responsibility of a State not a party to the proceedings, nor has it the power to order that a necessary third party be joined. Lacking such powers, it cannot make a finding of responsibility against State A, which is a party to a case, if in order to do so it is necessary first to make a determination as to the responsibility of State B, which is not a party;

(c) *Existence of special rules of responsibility for "common adventures"*. Where two persons jointly engage in a common adventure causing loss to another, it is usually held that the victim can recover its total losses against either of the participants, on the common sense ground that the victim should not be required to prove which particular elements of damage were attributable to each of them. International tribunals have reached similar results by reference to considerations of "equity" or by requiring a State responsible for wrongful conduct to show what consequences flowing from the breach should not be attributed to it,⁵³¹

(d) *Contribution as between several States in cases of joint activity*. Where two or more States engage in a common activity and one of them is held responsible for damage arising, it is natural for that State to seek a contribution from the others on some basis. Such a contribution is specifically envisaged in articles IV, paragraph 2, and V, paragraph 2, of the Convention on international liability for damage caused by space objects.⁵³² As noted already, a contribution was actually made by the United Kingdom and New Zealand to Australia in respect of its settlement of the *Certain Phosphate Lands in Nauru* case.⁵³³ On the other hand, there may be cases where as a matter of equity a court disallows any contribution, e.g. on the basis of the

maxim *ex turpi causa non oritur actio*. In such cases the victim is compensated, but as between the joint wrongdoers the loss lies where it falls.

277. This brief review of the current law suggests the following conclusion. In principle the normal rule appears to be that each State is separately responsible for conduct attributable to it under the rules set out in part one, chapters II and IV, and that this responsibility is not diminished or reduced by the fact that some other State (or States) is also responsible for the same conduct. This was the conclusion tentatively reached by Judge Shahabuddeen in his separate opinion in the *Certain Phosphate Lands in Nauru* case. Referring to the work of this Commission, he said:

It is not necessary to enter into the general aspects of the difficult question carefully examined by the Commission as to when a State is to be regarded as participating in the internationally wrongful act of another State. It suffices to note that the Commission considered that, where States act through a common organ, each State is separately answerable for the wrongful act of the common organ. That view, it seems to me, runs in the direction of supporting Nauru's contention that each of the three States in this case is jointly and severally responsible for the way Nauru was administered on their behalf by Australia, whether or not Australia may be regarded technically as a common organ.

Judicial pronouncements are scarce. However, speaking with reference to the possibility that a non-party State had contributed to the injury in the *Corfu Channel* case, Judge Azevedo did have occasion to say:

"The victim retains the right to submit a claim against one only of the responsible parties, *in solidum*, in accordance with the choice which is always left to the discretion of the victim, in the purely economic field; whereas a criminal judge cannot, in principle, pronounce an accomplice or a principal guilty without at the same time establishing the guilt of the main author or the actual perpetrator of the offence." (*I.C.J. Reports 1949*, p. 92.)

On the facts, the *Corfu Channel* case allows for a number of distinctions. However, it is to be observed that Judge Azevedo's basic view of the general law was that the right to sue "one only of the responsible parties, *in solidum*" was available to the injured party "in accordance with the choice which is *always* left to the discretion of the victim, in the purely economic field ..." (emphasis added). This approach would seem to be consistent with the view that Nauru does have the right to sue Australia alone.⁵³⁴

However, there is no need to identify this situation with "joint and several liability" as it is understood in certain national legal systems. States are free to incorporate that principle into their agreements, but (apart from specific arrangements and the *lex specialis* principle) the normal case of responsibility arises because conduct attributable to a State under the principles set out in part one, chapters II or IV, is a breach of an international obligation of the State concerned vis-à-vis another State which is also a party to, or entitled to the benefit of, that obligation.

278. Apart from authority (admittedly sparse), a number of considerations support this conclusion:

(a) In each case it will be necessary to consider the position of each respondent State, for example, to determine whether any circumstance precluding wrongfulness applies to that State. If State A coerces State B to join it in committing an internationally wrongful act vis-à-vis State C, it may be possible for State B to rely on the coer-

⁵²⁷ See paragraph 267 above.

⁵²⁸ See footnote 519 above.

⁵²⁹ *I.C.J. Reports 1992* (see footnote 307 above), p. 259, para. 50.

⁵³⁰ *I.C.J. Reports 1995* (see footnote 205), p. 102, para. 29.

⁵³¹ See paragraph 35 above.

⁵³² See paragraph 272 above.

⁵³³ See paragraph 271 above.

⁵³⁴ *I.C.J. Reports 1992* (see footnote 307 above), pp. 284-285.

cion as a circumstance precluding wrongfulness, but this will not be so for State A;⁵³⁵

(b) Similarly the legal position of the two co-participant States may be different in terms of the applicable legal rules. For example, one co-participating State may be bound by a particular rule (e.g. in a bilateral treaty with the injured State) whereas the other co-participant is not. Only in very limited circumstances could the latter State be responsible for the former's breach.⁵³⁶

(b) *Plurality of injured States*

279. Turning to the question of the plurality of injured States, for reasons explained above the problem with article 40 was significant. This was because, in the case of multilateral obligations, a large number of States were designated as "injured" and there was apparently no differentiation in the legal positions of any of them, irrespective of whether it was the primary victim of the breach or a concerned State seeking to ensure compliance in the "public" interest.⁵³⁷ Now that it is proposed to distinguish between "injured" and other States, and to give priority to the reactions of the former, e.g. in terms of the choice of compensation over restitution, the problem is much reduced.

280. In practice, of course, several States could still qualify as "injured" under the proposed definition in respect of a single breach of a multilateral obligation. For example, all the States parties to an integral obligation would be injured by its breach, just as they would all be entitled to suspend a treaty for material breach of such an obligation by virtue of article 60, paragraph 2 (c), of the 1969 Vienna Convention.⁵³⁸ In such a case the Convention allows each State to take action on its own account, or all of them to do so together. Only in the latter case can the action result, in effect, in the expulsion of the responsible State from the treaty arrangement; otherwise the remedy, if it is one, lies in individual suspension of the treaty.⁵³⁹

281. Turning to the invocation of responsibility, where several States are harmed (e.g. because each is specially affected) by a single internationally wrongful act, there is no difficulty with each claiming cessation, or compensation in respect of the injury to itself (but for respect of the rule against double recovery).⁵⁴⁰ Nor is there any difficulty in principle with each seeking satisfaction in respect of the wrongful act (i.e. wrongful so far as it is concerned).

⁵³⁵ See the Special Rapporteur's second report, *Yearbook ... 1999* (footnote 8 above), p. 55, para. 207.

⁵³⁶ *Ibid.*, paras. 181–184.

⁵³⁷ See paragraphs 85 and 109 above.

⁵³⁸ See paragraphs 91 and 111 above.

⁵³⁹ As noted above, the suspension of a treaty may not help the injured State at all, and is not in general terms a "remedy" for a breach.

⁵⁴⁰ In the *S.S. "Wimbledon"* case (see footnote 201 above), four States brought proceedings in respect of a British ship under charter to a French company carrying munitions from Italy to Poland. Only France claimed compensation, no doubt because under the charter arrangements the French carrier bore the loss associated with the delay and rerouting.

The only problem that might arise would be if the injured States disagreed over whether to accept compensation in lieu of restitution, assuming restitution to be possible. In theory it could be argued that, given the principle of the priority of restitution over compensation, the applicable remedy is restitution unless all the injured States otherwise agree. In practice, however, the situation is likely to be the reverse. Thus in the *Forests of Central Rhodopia* case, the arbitrator declined to order restitution instead of compensation in a complex situation where several other persons had legal interests but had not claimed restitution.⁵⁴¹ Overall it does not seem that the situation where there are several injured States in respect of the same wrongful act has caused difficulties in practice, such as to require specific regulation in the draft articles.

2. PROPOSED PROVISIONS

282. To summarize, in the absence of a specific solution to the problem of the plurality of injured or responsible States, opposable by treaty or otherwise, the general position taken by international law seems to be a straightforward one. Each State is responsible for its own conduct in respect of its own international obligations. Each injured State (defined in the strict sense proposed) is entitled to claim against any responsible State for reparation in respect of the losses flowing from and properly attributable to the act of that State. Such claims are subject to the provisos, on the one hand, that the injured State may not recover from any source more compensation than the loss it has suffered, and on the other hand, that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. A complicating factor in claims involving a plurality of responsible States is the *Monetary Gold*⁵⁴² rule, but that is a rule of judicial admissibility, not a determinant of responsibility as such.⁵⁴³ These questions are quite distinct from the issue whether or in what circumstances member States may be held responsible for the acts of international organizations; that is properly considered part of the law relating to international organizations and is outside the scope of the draft articles.

283. The question is whether it is necessary to spell out these propositions in the draft articles, or whether an explanation in the commentary would suffice. In the Special Rapporteur's view, some clarification is desirable, in view of the frequency with which these issues arise, their importance and the uncertainty that has surrounded them. Provisions to that effect are accordingly proposed.

C. Conclusions as to part two bis, chapter I

284. For these reasons, the Special Rapporteur proposes the following draft articles in part two bis, chapter I:

⁵⁴¹ See paragraph 128 and footnote 237 above.

⁵⁴² See footnote 519 above.

⁵⁴³ See paragraph 240 above for the distinction between admissibility of responsibility claims and admissibility of judicial proceedings.

“PART TWO BIS

“THE IMPLEMENTATION OF STATE
RESPONSIBILITY

“CHAPTER I

“INVOCATION OF THE RESPONSIBILITY OF
A STATE“*Article 40 bis. Right to invoke the responsibility
of a State*⁵⁴⁴“*Article 46 ter. Invocation of responsibility
by an injured State*

“1. An injured State which seeks to invoke the responsibility of another State under these articles shall give notice of its claim to that State and should specify:

“(a) What conduct on the part of the responsible State is in its view required to ensure cessation of any continuing wrongful act, in accordance with article 36 bis;

“(b) What form reparation should take.

“2. The responsibility of a State may not be invoked under paragraph 1 if:

“(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

“(b) The claim is one to which the rule of exhaustion of local remedies applies, and any effective local remedies available to the person or entity on whose behalf the claim is brought have not been exhausted.

“*Article 46 quater. Loss of the right to invoke
responsibility*

“The responsibility of a State may not be invoked under these articles if:

“(a) The claim has been validly waived, whether by way of the unqualified acceptance of an offer of reparation, or in some other unequivocal manner;

“(b) The claim is not notified to the responsible State within a reasonable time after the injured State had notice of the injury, and the circumstances are such that the responsible State could reasonably have believed that the claim would no longer be pursued.

“*Article 46 quinquies. Plurality of injured States*

“Where two or more States are injured by the same internationally wrongful act, each injured State may on its own account invoke the responsibility of the State which has committed the internationally wrongful act.

“*Article 46 sexies. Plurality of States responsible for
the same internationally wrongful act*

“1. Where two or more States are responsible for the same internationally wrongful act, the responsibility of each State is to be determined in accordance with the present draft articles in relation to the act of that State.

“2. Paragraph 1:

“(a) Does not permit any State, person or entity to recover by way of compensation more than the damage suffered;

“(b) Is without prejudice to:

“(i) Any rule as to the admissibility of proceedings before a court or tribunal;

“(ii) Any requirement for contribution as between the responsible States.”

D. Countermeasures by an injured State

285. The remaining issue concerning invocation of responsibility by an injured State relates to the taking of countermeasures. Consistently with the approach so far taken to the invocation of responsibility (part two bis), it is proposed to deal first with the taking of countermeasures in what may be regarded as the “normal” case, i.e. where an injured State confronts the responsible State (as it were alone or severally). In a subsequent section of the present report, the broader range of cases involving countermeasures with respect to multilateral obligations will be discussed, as an aspect of the broad group of issues associated with former articles 19, 40, and 51–53.

1. INTRODUCTION

286. Currently located in part two, chapter III, the provisions on countermeasures were the subject of extensive debate in the period 1992–1995, on the basis of the detailed reports of Mr. Arangio-Ruiz.⁵⁴⁵ So far as the second reading process is concerned, initial discussion took place in 1999, at the fifty-first session, on the basis of the present Special Rapporteur’s second report, which raised a number of general issues.⁵⁴⁶ The outcome of the debate was summarized in the report of the Commission on the work of its fifty-first session as follows:

[A] minority in the Commission preferred retaining the linkage between countermeasures and part three. However, even they did not defend the inequality that existed in the relationship between the taking of countermeasures and dispute settlement. Instead, a close relationship was supported out of concern for the danger of possible abuse inherent in countermeasures and the need to control them as much as possible.

⁵⁴⁵ See his fourth, sixth and seventh reports (footnote 21 above). For the summary of the debates, see *Yearbook ... 1992*, vol. II (Part Two), pp. 18–40, paras. 117–276; *Yearbook ... 1994*, vol. II (Part Two), pp. 142–144, paras. 275–288, and pp. 151–152, paras. 347–353; and *Yearbook ... 1995*, vol. II (Part Two), p. 61, paras. 340–343.

⁵⁴⁶ See *Yearbook ... 1999* (footnote 8 above), p. 3; and for a summary of the debate, see *Yearbook ... 1999*, vol. II (Part Two), pp. 86–88, paras. 426–453.

⁵⁴⁴ For the text of article 40 bis as proposed by the Special Rapporteur, see paragraph 119 above.

... [The] proposal to delink the two did not prejudice the position that issues arising out of the resort to countermeasures could be the subject of dispute settlement. Yet, it was untenable to make compulsory dispute settlement procedure in the draft articles available only to the State which had committed the internationally wrongful act.

... [T]he call for equality in treatment between States within the existing arrangement, was really a call for a general system of dispute settlement in relation to the draft articles ... [This] implied that the draft articles would have to take the form of a draft convention, which had not yet been decided.⁵⁴⁷

Pending a solution to questions of countermeasures raised by articles 47–50, the Commission did not, at its fifty-first session in 1999, adopt a precise formulation of article 30, under which the unlawfulness of conduct taken by way of countermeasures is precluded.⁵⁴⁸

287. Following the preliminary debate, held at the fifty-first session of the Commission in 1999, the Special Rapporteur believes that the provisions on countermeasures should be included in part two bis, but without any special linkage to dispute settlement. The reason for inclusion in part two bis is that in general, countermeasures should be seen as performing an instrumental function of ensuring compliance, and not as punitive measures or sanctions. The reason for de-linking countermeasures and dispute settlement is, in short, that such a linkage gives a one-way right to the target State (*ex hypothesi*, the State which has committed an internationally wrongful act) to invoke third-party settlement, yet such a right must equally be given to the injured State, in lieu of taking countermeasures. If countermeasures are dealt with in detail in part two bis, a simple reference to them in part one, chapter V, as circumstances precluding wrongfulness will suffice.

288. This view appears to command general support in the Commission, at least as a first hypothesis. On the other hand, if no agreement can be reached as to the content of the provisions dealing with countermeasures (in particular, so far as they concern the regime of countermeasures in respect of multilateral obligations), other alternatives may have to be considered. Of these, the most obvious would be the further specification of the conditions for countermeasures in part one, chapter V.

289. It should be noted that the ICJ treatment of countermeasures in the case concerning the *Gabčíkovo-Nagymaros Project* was generally supportive of the balance in the draft articles, while clarifying a number of issues. The Court, in a bilateral context in which no issue of prohibited countermeasures were at stake, endorsed four distinct elements of the law of countermeasures: (a) the countermeasure must be taken in response to an unlawful act;⁵⁴⁹ (b) it must be preceded by a demand for compliance by the injured State;⁵⁵⁰ (c) the countermeasure must be proportionate, in the sense of “commensurate with the injury suffered, taking account of the rights in question”;⁵⁵¹ and (d) the countermeasure must have as its purpose “to induce the wrongdoing State to comply with

its obligations under international law, and that the measure must therefore be reversible”.⁵⁵² In particular, the Court accepted the conception of countermeasures underlying article 47. It also endorsed the requirement of proportionality, but added useful clarifications in relation to the latter, adopting a stricter approach than the language of article 49 might imply.

290. The comments of Governments on countermeasures addressed both the general question whether articles 47–50 should be retained, and specific questions of drafting and balance.⁵⁵³ At a general level, Governments have referred to:

(a) The difficulty of distinguishing in practice between countermeasures and “interim measures of protection” as referred to in article 48, paragraph 1;

(b) The question whether the countermeasures should have some nexus to the breach (i.e. the notion of reciprocal countermeasures);

(c) The eventuality of collective measures and of countermeasures in case of breach of multilateral or *erga omnes* obligations;

(d) The impact of the distinction between “crimes” and “delicts” on the regime of countermeasures, and more generally the question whether countermeasures have a punitive function;

(e) The impact of countermeasures on the economic situation of the target State and on human rights in that State, as well as possible impacts on third States;

(f) The unbalanced nature of countermeasures, which favour only the most powerful States.

291. In the Special Rapporteur’s view, while these criticisms and queries need to be addressed, they do not lead to the conclusion that the draft articles should be deleted. In his view, countermeasures are properly considered as aspects of the invocation of State responsibility (i.e. as “instrumental consequences”, to adopt the terminology of Mr. Arangio-Ruiz). A balanced regime of countermeasures is more likely to be of use in controlling excesses than silence on a vitally important subject, one to which, moreover, the Commission is otherwise unlikely to be able to contribute. In addition, it may be said that in general the response to the Commission’s work on the subject so far has been positive. For these reasons it is proposed to consider, in this section, the existing articles and the comments made on them, and to do so from the perspective of countermeasures taken by an injured State (as that term is proposed to be defined in article 40 bis, paragraph 1). Countermeasures in respect of multilateral obligations, where the State or States taking the countermeasures are not themselves injured States, present altogether more difficult problems, which can only be dealt with once the basic issues of countermeasures taken by an injured State in the strict sense have been resolved.

⁵⁴⁷ *Yearbook ... 1999*, vol. II (Part Two), p. 88, paras. 450–452.

⁵⁴⁸ *Ibid.*, p. 78, para. 332.

⁵⁴⁹ *I.C.J. Reports 1997* (see footnote 18 above), pp. 55–56, para. 83.

⁵⁵⁰ *Ibid.*, p. 56, para. 84. The Court did not mention any requirement of prior negotiations. In that case there had been exhaustive negotiations, so the point did not arise.

⁵⁵¹ *Ibid.*, para. 85.

⁵⁵² *Ibid.*, pp. 56–57, para. 87.

⁵⁵³ See the Special Rapporteur’s second report, *Yearbook ... 1999* (footnote 8 above), pp. 92–93, paras. 376–381.

2. REVIEW OF EXISTING CHAPTER III (ARTS. 47–50)

292. Articles 47–50 presently form a rather integrated group, and it is not possible to deal with issues affecting, for example, article 47 without considering later articles. Accordingly, it is proposed to summarize the content of, and Government comments upon, all four articles first, before turning to discuss in a thematic way the issues raised thereby.

(a) *Article 47 (Countermeasures by an injured State)*

293. Article 47 provides:

1. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured State that it do so.

2. The taking of countermeasures is subject to the conditions and restrictions set out in articles 48 to 50.

3. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified under this chapter as against the third State.

Thus article 47 is a hybrid, giving a “definition” of countermeasures, referring to the limitations on countermeasures provided for articles 48–50, and dealing with the position of third States in respect of countermeasures.

294. According to the commentary, article 47 specifies “the entitlement of the injured State” to take “lawful countermeasures”.⁵⁵⁴ By contrast, the ostensive definition in paragraph 1 refrains from saying that the injured State is entitled to take countermeasures, or that they are lawful. It simply says what they are. Their unlawfulness is precluded not by article 47 but by virtue of article 30. This is, however, somewhat evasive: the justification for dealing with countermeasures in former part two is that they are measures which can be taken, in certain circumstances, to induce a State in breach of an international obligation to comply with its “secondary” obligations of cessation and reparation. And the commentary treats them on this footing, while at the same time stressing the limitations on their use. In particular: (a) countermeasures can only be taken in response to conduct actually unlawful; a “good faith belief” in its unlawfulness is not enough;⁵⁵⁵ (b) their purpose is limited to “the pursuit by the injured State of cessation and reparation”; in particular it is not punitive but instrumental;⁵⁵⁶ (c) they “may be applied only as a last resort where other means ... have failed or would clearly be ineffective in inducing the wrongdoing State to comply with its obligations”;⁵⁵⁷ (d) they may only be applied to the extent they are necessary for that purpose;⁵⁵⁸

⁵⁵⁴ *Yearbook ... 1996*, vol. II (Part Two), commentary to article 47, p. 67, para. (1).

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*, para. (2). In this respect the conception of countermeasures in part two is narrower than that in article 30 as adopted on first reading, which included certain “sanctions”.

⁵⁵⁷ *Ibid.*, para. (4).

⁵⁵⁸ *Ibid.*, para. (5).

and (e) in assessing their necessity the injured State must take account of “the wrongdoing State’s response to its demands”, thus implying a dialogue between the injured State and the target State on the questions of cessation and reparation.⁵⁵⁹ Obviously countermeasures only legitimize the conduct in question as between the injured State and the target State, although this does not exclude the possibility, “in an interdependent world where States are increasingly bound by multilateral obligations”, of “incidentally affecting the position of third States”.⁵⁶⁰ According to the commentary, this is “of particular relevance in cases of possible violation by the injured State of rules setting forth *erga omnes* obligations”.⁵⁶¹ But, despite this reference, the articles on countermeasures pay almost no attention to the issue of *erga omnes* obligations: the world of articles 47–50 is that of the injured State facing the responsible State *à deux*. As noted already, it is appropriate to consider this situation first, before turning to the more complex issues of collective obligations and collective countermeasures. But the point may be made that it is odd even to contemplate the injured State breaching an obligation *erga omnes* by way of a countermeasure taken vis-à-vis a single State.

295. Only a few Governments have commented generally on article 47. Apart from France, which considers that “article 47 is something of an amalgam”—the definition in paragraph 1 having apparently “no link with the other two paragraphs”⁵⁶²—they are generally supportive of it and favour the reinforcement and clarification of some of the principles it embodies. Some Governments call for the Commission not only to codify the existing customary law on countermeasures but also “to develop clear rules limiting the circumstances” under which they can be resorted to.⁵⁶³ For example, one Government suggests that “only States directly injured by a wrongful act should have the right to react and even then they should have to prove that they have suffered harm”.⁵⁶⁴

296. Paragraphs 1 and 3 have given rise to more specific observations. As to paragraph 1, a number of Governments express concern as to the potentially punitive function of countermeasures, although this view was not universal. Thus Greece suggests that chapter III as a whole “would appear to be more appropriate for breaches characterized as delicts than for breaches that constitute international crimes”; it further suggests that the language of chapter III should better reflect that distinction.⁵⁶⁵ By contrast, other Governments firmly assert that “countermeasures should not be punitive in nature, but should be aimed at restitution and reparation or compensation”.⁵⁶⁶ In order to avoid any doubt on the issue, Ireland suggests that the sentence “It does not include the taking of measures of

⁵⁵⁹ *Ibid.*, p. 68, para. (6).

⁵⁶⁰ *Ibid.*, para. (7).

⁵⁶¹ *Ibid.*, para. (8).

⁵⁶² *Yearbook ... 1998* (see footnote 35 above), p. 155.

⁵⁶³ A/CN.4/496 (see footnote 3 above), p. 18, para. 121.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Yearbook ... 1999* (see footnote 43 above), p. 109. See, for a different view, Mongolia (*Yearbook ... 1998* (footnote 35 above), p. 153).

⁵⁶⁶ A/CN.4/504 (see footnote 3 above), p. 20, para. 74. Singapore criticizes the “apparent contradictions” between the commentaries to articles 30 and 47 in that respect (*Yearbook ... 1998* (footnote 35 above), p. 154).

a punitive nature” be added to paragraph 1.⁵⁶⁷ Like all the other Governments which have commented on article 47,⁵⁶⁸ Ireland also agrees with the principle embodied in paragraph 3 on the protection of third States, but suggests “a slight amendment” to it. “Since other international persons and bodies, such as intergovernmental organizations, may be injured by a countermeasure directed at a State, Ireland proposes that the term “third State” be replaced by the term “third party”.⁵⁶⁹

297. France and Denmark (on behalf of the Nordic countries) do not question the substance of paragraph 3, but consider that it would be better dealt with in a separate provision.⁵⁷⁰ Indeed Denmark supports a more general redrafting of article 47, in keeping “with a cautious approach” aimed at limiting the entitlement of resorting to countermeasures. It thus proposes to merge articles 47–49 into a single article entitled “Conditions of resort to countermeasures”, which would first state that resort to countermeasures is unlawful unless some conditions are fulfilled, and then go on with the enumeration of the relevant conditions.⁵⁷¹

(b) *Article 48 (Conditions relating to resort to countermeasures)*

298. Article 48 lays down certain procedural conditions for the taking of countermeasures, or for their continuation in force. It was by far the most controversial of the four articles adopted on first reading. It provides:

1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in article 54. This obligation is without prejudice to the taking by that State of interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this chapter.

2. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under part three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.

3. Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith by the State which has committed the inter-

⁵⁶⁷ *Yearbook ... 1998* (see footnote 35 above), p. 155.

⁵⁶⁸ See A/CN.4/496, p. 18, para. 121 and A/CN.4/504, p. 20, para. 74 (footnote 3 above). Singapore considers that paragraph 3 “may not go far enough” and that the draft articles “may need to address concerns on abuses against and contingencies for innocent third States” (*Yearbook ... 1998* (footnote 35 above), p. 154).

⁵⁶⁹ *Yearbook ... 1998* (see footnote 35 above), p. 155.

⁵⁷⁰ *Ibid.* For France, this principle is “hardly appropriate in this article (a State A can obviously not take vengeance on State C for what State B has done to it)”.

⁵⁷¹ *Ibid.* According to Denmark, on behalf of the Nordic countries, these conditions are as follows:

“(a) The actual existence of an internationally wrongful act;

“(b) The prior submission by the injured State of a protest combined with a demand of cessation/reparation;

“(c) Refusal of an offer to settle the dispute through amicable settlement procedures, including binding third-party procedures;

“(d) Appropriate and timely communication by the injured State of its intention to resort to countermeasures;

“(e) Proportionality, i.e. the measures taken by the injured State shall not be out of proportion to the gravity of the internationally wrongful act and the effects thereof.”

nationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure.

299. The commentary notes a central disagreement within the Commission on article 48. While all agreed that peaceful means for the settlement of the dispute should be pursued, the question was to what extent this should be a necessary prerequisite for taking countermeasures, given (a) the possibilities for a State to prolong negotiations and engage in dilatory procedures; and (b) the fact that “some forms of countermeasures (including some of the most readily reversible forms, for example, the freezing of assets) can only be effective if taken promptly”.⁵⁷² The tension between maintaining the effectiveness of countermeasures and preventing premature resort to them is sought to be resolved by a distinction between “interim countermeasures” (described as “interim measures of protection”) and other measures. According to the commentary, “interim measures” are those which are “necessary ... to preserve [the] legal rights” of the injured State. By contrast “full-scale countermeasures”—a term not used in the articles themselves—may not “be taken without an initial attempt to resolve the dispute by negotiation”.⁵⁷³ Interim measures are said to be inherently reversible: thus “the comparison is between the temporary detention of property and its confiscation, or the suspension of a licence as against its revocation”.⁵⁷⁴

300. A second way of striking a balance between the interests of the State taking countermeasures and the target State is to require that countermeasures be suspended in certain conditions, specified in paragraphs 3–4. A significant point here is that the provisions of articles 47–50 are associated with arrangements for the compulsory third-party settlement of disputes concerning countermeasures, proposed on first reading and referred to already.⁵⁷⁵ The commentary summarizes the effect of these provisions as follows:

[I]f the basic conditions for countermeasures laid down in article 47 are met and if initial negotiations have failed to produce a solution, the injured State may take countermeasures without any prior resort to third party dispute settlement procedures. But if it does take countermeasures, the State against whom they are taken may resort to binding arbitration ... or to other applicable binding third party settlement of the dispute. If the allegedly wrongdoing State does resort to such a procedure, and implements it in good faith, and provided the wrongful act itself has ceased, the countermeasures must be suspended.⁵⁷⁶

This suspension is however conditional; if the target State fails to cooperate in third-party dispute settlement, or fails to honour an order or indication of provisional measures issued by a third party, the suspension may be lifted.⁵⁷⁷ The commentary expresses the view that “this system

⁵⁷² *Yearbook ... 1996*, vol. II (Part Two), commentary to article 48, p. 69, para. (2).

⁵⁷³ *Ibid.*, para. (3).

⁵⁷⁴ *Ibid.*, para. (4).

⁵⁷⁵ See paragraph 265 above.

⁵⁷⁶ *Yearbook ... 1996*, vol. II (Part Two), commentary to article 48, p. 70, para. (11).

⁵⁷⁷ *Ibid.*, para. (12), summarizing the effect of article 48, paragraph 4.

marks an important advance on the existing arrangements for the resolution of disputes involving countermeasures”, in particular by tending to “reduce that element of the system of countermeasures which tended to a spiralling of responses”.⁵⁷⁸

301. The Czech Republic and Ireland note the “debate and controversy in the Commission” over article 48.⁵⁷⁹ Government comments on it equally reflect a broad range of differing, sometimes conflicting, views. On the one hand, Switzerland, for example, is “satisfied with the provisions on the settlement of disputes with respect to countermeasures”.⁵⁸⁰ Other Governments consider that article 48 should be substantially amended, if not omitted altogether. France for example suggests an entirely new formulation for the provision,⁵⁸¹ while the United States is of the view that it should “at the least, be placed in an optional dispute settlement protocol”.⁵⁸² Without prejudice to its general position as to the treatment of countermeasures in the draft articles, the United Kingdom proposes the addition of a provision “corresponding to article 45 of the 1969 Vienna Convention, barring recourse to countermeasures by a State after it has acquiesced in a breach of its rights”;⁵⁸³ particular attention should also be given to the situation where “[s]everal States may take countermeasures, but the State principally affected may decide to take none, or even to consent to the breach”.⁵⁸⁴

302. Apart from these general observations and suggestions, Government comments mostly focus on paragraphs 1–2. Two main issues are discussed as far as para-

⁵⁷⁸ *Ibid.*, para. (13).

⁵⁷⁹ *Yearbook ... 1998* (footnote 35 above), p. 156; in this context Ireland “doubts the wisdom of linking the conditions relating to countermeasures to [the] provisions” on dispute settlement.

⁵⁸⁰ *Ibid.*. See also Japan, which considers that “articles 48 to 50 are, generally speaking, well drafted in that they would prevent abuse of countermeasures by imposing not only procedural but also substantive restrictions” (*Yearbook ... 1999* (footnote 43 above), p. 109).

⁵⁸¹ The French proposition reads as follows:

“1. An injured State which decides to take countermeasures shall, prior to their entry into force:

“(a) Submit a reasoned request calling upon the State which has committed the act alleged to be internationally wrongful to fulfil its obligations;

“(b) Notify that State of the nature of the countermeasures it intends to take;

“(c) Agree to negotiate in good faith with that State.

“2. However, the injured State may, as from the date of such notification, implement provisionally such countermeasures as may be necessary to preserve its rights.

“3. When the internationally wrongful act has ceased, the injured State shall suspend countermeasures, provided that the parties have initiated a binding dispute settlement procedure under which orders binding on the parties may be issued.

“4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour an order emanating from the dispute settlement procedure.”

(*Yearbook ... 1998* (see footnote 35 above), pp. 155–156)

⁵⁸² *Ibid.* The same State adds that “[a]s a mandatory system of conditions, [article 48] is without foundation under customary international law” (see also A/CN.4/496 (footnote 3 above), pp. 18–19, para. 121).

⁵⁸³ *Yearbook ... 1998* (see footnote 35 above), p. 156. For the United Kingdom, the Commission should limit itself to article 30 and omit articles 47–50 (*ibid.*, p. 154).

⁵⁸⁴ *Ibid.*, p. 154.

graph 1 is concerned. The first relates to the obligation to negotiate, which must be fulfilled prior to the taking of full-scale countermeasures. Some Governments clearly support this provision, on the assumption that countermeasures are a solution of “last resort”⁵⁸⁵ and “not a direct and automatic consequence of an internationally wrongful act”.⁵⁸⁶ Others do not deny the existence of the obligation to negotiate, but interpret it rather narrowly. Japan argues for example that, when countermeasures are aimed at inducing the wrongdoing State to restore the pre-existing situation as quickly as possible, “there is not enough time to negotiate”; accordingly, the prevailing interpretation should be that “the injured State is permitted to take countermeasures if the wrongdoing State has not made any specific response to its proposal within a reasonable period of time”.⁵⁸⁷ Other Governments oppose the inclusion of such a provision, mainly on the ground that the obligation to negotiate prior to the taking of countermeasures is not part of customary international law, unlike the prior demand for cessation and reparation.⁵⁸⁸ For the United Kingdom, for example, “[p]aragraph 1 proposes a novel and unjustified restraint upon States which is impractical and utopian in the fast-moving modern world”.⁵⁸⁹ The United States goes further, stating that “the draft articles should reflect the fundamental customary rule that countermeasures are permissible prior to and during negotiations”.⁵⁹⁰

303. The second issue raised in respect of paragraph 1 relates to the reference to “interim measures of protection”. With the exception of Denmark (on behalf of the Nordic countries), which proposes that “[t]he concept of interim measures of protection ... be singled out for special mention”,⁵⁹¹ other Governments consider that it will be difficult in practice “to distinguish interim measures from countermeasures proper”.⁵⁹² For Argentina, interim

⁵⁸⁵ *Ibid.*, p. 151. Argentina proposes that the text “reverse the presumption of the lawfulness of countermeasures”, considered “as an act merely tolerated” by international law; see also A/CN.4/496, p. 18, para. 120, and A/CN.4/504, p. 20, para. 74 (footnote 3 above).

⁵⁸⁶ *Yearbook ... 1998* (footnote 35 above), p. 157, comments by the Czech Republic, adding that “[t]he purpose of these preconditions is to reduce the likelihood of premature, and thus improper, resort to countermeasures”. Austria and France—the latter believing that “the taking of countermeasures should, as far as possible, be associated with a process for the peaceful settlement of disputes”—also favour the prior obligation to negotiate (*ibid.*; see also A/CN.4/496 (footnote 3 above), p. 18, para. 121).

⁵⁸⁷ *Yearbook ... 1999* (see footnote 43 above), p. 109. In a similar vein, Ireland considers that the State willing to take countermeasures “should normally negotiate with the wrongdoing State in order to obtain ... cessation and ... reparation”, but that managing to impose upon them “any more wide-ranging obligation prior to taking countermeasures” is unlikely (*Yearbook ... 1998* (footnote 35 above), p. 156).

⁵⁸⁸ United States and Germany, the latter believing it “quite unreasonable to expect the injured State to refrain from taking (peaceful) countermeasures” before exhausting all means of friendly dispute settlement (*Yearbook ... 1998* (footnote 35 above), p. 157; see also A/CN.4/504 (footnote 3 above), p. 20, para. 74).

⁵⁸⁹ *Yearbook ... 1998* (footnote 35 above), p. 157.

⁵⁹⁰ *Ibid.*, p. 158.

⁵⁹¹ *Ibid.*, p. 157. The Czech Republic seems also to endorse the notion of interim measures, by noting that their suspension “would render the countermeasures meaningless” (*ibid.*; see also A/CN.4/496 (footnote 3 above), p. 18, para. 121).

⁵⁹² Germany, adding that “the new category of ‘interim measures’ may open the way to attempts to circumvent the limitations tradi-

measures “would appear to differ from countermeasures not in their nature but in their degree or duration”.⁵⁹³ The United Kingdom vigorously denounces “an unfortunate use of language which may suggest a conceptual link, which it considers entirely misconceived, with interim measures in ICJ”.⁵⁹⁴ The United States questions whether interim measures “would, like countermeasures, be unlawful without the precipitating wrongful act”; if not, they would appear “unnecessary” in its view, but if they are, “it is unclear how in concrete circumstances the term might be applied”.⁵⁹⁵

304. As far as article 48, paragraph 2, is concerned, even those Governments which support in principle the existence of a link between the taking of countermeasures and the dispute settlement regime embodied in part three of the draft, express some doubts concerning its wording and underlying conception. The Czech Republic for example, although “not unsympathetic to the idea of monitoring, at least a posteriori, the lawfulness of countermeasures”, considers that paragraph 2 “introduces a relatively rigid organic link between parts two and three” and thus pre-judges the question of the binding nature of that latter part to the detriment of the “substantive rules concerning countermeasures”.⁵⁹⁶ For the United States, “[p]aragraph 2 contains two flaws with respect to the draft’s system of arbitration”. First, the system of compulsory arbitration proposed in article 58, paragraph 2, “is not supported by customary international law, would be unworkable in practice” and would create “a serious imbalance in the treatment of injured and wrongdoing States”, imposing “an unacceptable cost” on the former.⁵⁹⁷ Secondly, the reference to “any other binding dispute settlement procedure in force” between the parties could “be misinterpreted as constituting consent to resort to dispute settlement procedures where the existing procedure requires mutual consent”.⁵⁹⁸ At the same time, it has been suggested by another Government that, even if no link is established between the taking of countermeasures and the dispute settlement procedure, resorting to countermeasures should be made conditional upon the “refusal by the wrongdoing State of an offer to settle the matter through a binding third-party procedure”.⁵⁹⁹

305. As to paragraph 3, Japan supports the provision but finds its wording “rather vague”: it suggests that, if the procedure mentioned is judicial, “this should be clearly

(Footnote 592 continued.)

tionally attached to the taking of reprisals” (*Yearbook ... 1998* (footnote 8 above), p. 157). See also Ireland, fearing that the distinction may “merely fuel further disagreement between States” (*ibid.*, p. 156), and Japan, calling for a clearer definition of interim measures (*Yearbook ... 1999* (footnote 43 above), p. 109; see also A/CN.4/504 (footnote 3 above), p. 21, para. 76).

⁵⁹³ *Yearbook ... 1998* (footnote 8 above), p. 151.

⁵⁹⁴ *Ibid.*, p. 157.

⁵⁹⁵ *Ibid.*, pp. 157–158.

⁵⁹⁶ *Ibid.*, p. 158.

⁵⁹⁷ *Ibid.* See also A/CN.4/504 (footnote 3 above), p. 20, para. 75, where it is suggested that the State taking countermeasures and the target State “should have the same possibilities of recourse to means of peaceful settlement”, and Japan (*Yearbook ... 1999* (footnote 43 above), p. 109).

⁵⁹⁸ *Yearbook ... 1998* (footnote 35 above), p. 158.

⁵⁹⁹ A/CN.4/504 (footnote 3 above), p. 20, para. 75.

stated”.⁶⁰⁰ The United States considers that the requirement embodied in paragraph 3 “may lead to further delay and abuse by the wrongdoing State”.⁶⁰¹

(c) Article 49 (Proportionality)

306. Article 49 lays down the basic requirement of proportionality as a condition for a legitimate countermeasure. It provides that:

Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

307. The commentary described “the principle of proportionality as a general requirement for the legitimacy of countermeasures or reprisals ... a crucial element in determining the lawfulness of a countermeasure in the light of the inherent risk of abuse as a result of the factual inequality of States”.⁶⁰² The question is not the existence of the requirement but the rigour with which it is to be applied. It justifies the negative formulation of article 49 (“not ... out of proportion”) by reference to formulations in decided cases such as the *Naulilaa*⁶⁰³ and *Air Service Agreement* cases.⁶⁰⁴ The requirement of proportionality is thus flexible, allowing to be taken into account both the gravity of the wrongful act and its effects on the injured State.⁶⁰⁵ In particular, it is not intended

unduly [to] restrict a State’s ability to take effective countermeasures in respect of certain wrongful acts involving obligations *erga omnes*, for example violations of human rights. At the same time, a legally injured State, as compared to a materially injured State, could be more limited in its choice of the type and the intensity of measures that would be proportional to the legal injury it has suffered.⁶⁰⁶

308. All Governments which commented on article 49 agree that the principle of proportionality of countermeasures is part of customary international law;⁶⁰⁷ some see it as an element “of crucial importance”,⁶⁰⁸ or as “one of the fundamental conditions to be met if the resort to countermeasures is to be legitimate”.⁶⁰⁹ A few express

⁶⁰⁰ *Yearbook ... 1999* (footnote 43 above), p. 109.

⁶⁰¹ *Yearbook ... 1998* (footnote 35 above), p. 158.

⁶⁰² *Yearbook ... 1995*, vol. II (Part Two), commentary to article 13 [present art. 49], pp. 64–65, para. (2).

⁶⁰³ *Portuguese Colonies* case (Naulilaa incident), UNRIIAA, vol. II (Sales No. 1949.V.1), p. 1028 (excluding “reprisals out of all proportion to the act motivating them”). The case concerned armed reprisals and not countermeasures in the sense of chapter III.

⁶⁰⁴ *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIIAA, vol. XVIII (Sales No. E/F.80.V.7) (“not ... clearly disproportionate when compared to [the action] taken by France”), p. 444, para. 83.

⁶⁰⁵ *Yearbook ... 1995* (see footnote 602 above), pp. 65–66, paras. (6)–(8).

⁶⁰⁶ *Ibid.*, p. 66, para. (9). The text of the draft articles as adopted on first reading, however, makes no distinction between “legal injury” and “material injury”.

⁶⁰⁷ See, for example, Germany (*Yearbook ... 1998* (footnote 35 above), p. 159, referring to *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226); Ireland (*ibid.*), the United States (*ibid.*, pp. 159–160); and A/CN.4/504 (footnote 3 above), p. 20, para. 74.

⁶⁰⁸ *Yearbook ... 1998* (see footnote 35 above), Austria (p. 158).

⁶⁰⁹ *Ibid.*, p. 159, the Czech Republic.

concerns as to the drafting of article 49,⁶¹⁰ but none doubt the relevance of the reference to the “degree of gravity of the internationally wrongful act”.⁶¹¹ The Czech Republic considers that the “function of the principle of proportionality becomes even more important in the case of countermeasures taken in response to a crime”; in its view, “[t]he effects of a crime may be felt by the community of States to varying degrees, and the principle of proportionality should therefore be applied by each injured State individually”.⁶¹²

309. The question raised by States in respect of article 49 is rather whether the provision should be refined by adding other relevant elements in the determination of proportionality. Austria for example, emphasizing the “regulating effect” provided by the principle of proportionality, calls for further refinement of the concept, at least in the commentary to the article.⁶¹³ Both Ireland and the United States consider it possible to define the notion more comprehensively in the draft article itself, even though “[p]roportionality is a matter of approximation, not precision, and requires neither identity nor exact equivalency in judging the lawfulness of a countermeasure”.⁶¹⁴ These Governments criticize in particular the fact that the purpose of a countermeasure is not taken account of in the assessment of proportionality. Referring to the recent application of the concept of proportionality by international human rights bodies such as the European Court of Human Rights, Ireland declares that “both the particular aim of the countermeasure [i.e. cessation and/or reparation] and the particular form of reparation sought, if any, may indeed be relevant to the question of the proportionality of a countermeasure”.⁶¹⁵ Similarly, for the United States, “[p]roportionality means principally that countermeasures should be tailored to induce the wrongdoer to meet its obligations under international law, and that steps taken towards that end should not escalate but rather serve to resolve the dispute”.⁶¹⁶

310. Two other points are raised with respect to article 49. Ireland questions the distinction drawn in the commentary between a legal and a material injury: it notes that “in many instances of human rights violations the material injury will be to nationals of the State committing

the internationally wrongful act”, so that “limitation of consideration of the effects of [the] act to the legal injury suffered by an injured State [might] be too restrictive”. In such cases, “the classic understanding of proportionality in the context of countermeasures as a relationship between a wrongdoing and a wronged State may be inappropriate”.⁶¹⁷ Secondly, in discussions in the Sixth Committee, it was suggested that “consideration should be given to the issue of State responsibility in the case of reprisals out of proportion to the original breach”.⁶¹⁸

(d) *Article 50 (Prohibited countermeasures)*

311. Article 50 specifies five categories of conduct which are prohibited as countermeasures. It provides:

An injured State shall not resort by way of countermeasures to:

(a) The threat or use of force as prohibited by the Charter of the United Nations;

(b) Extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act;

(c) Any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) Any conduct which derogates from basic human rights; or

(e) Any other conduct in contravention of a peremptory norm of general international law.

312. The extensive commentary to article 50 begins by noting the overlap between subparagraph (e) and subparagraphs (a) and (d), which are justified because of the need to avoid arguments about the peremptory character of these particular norms.⁶¹⁹ It goes on to deal in turn with the specific exclusions:

(a) Armed reprisals or countermeasures involving a use of armed force are specifically excluded by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,⁶²⁰ as well as by modern doctrine and practice,⁶²¹

(b) The commentary goes into more detail in justifying the exclusion of “extreme economic or political measures [which] may have consequences as serious as those arising from the use of armed force”.⁶²² The problem here, however, is that countermeasures are by definition coercive: they are taken in order to induce a State to do something it is obliged but unwilling to do. To the extent that certain extreme measures are excluded by the Charter of the United Nations, they cannot of course be legitimized by the draft articles: to the extent they are not (and provided they meet the other requirements of the draft articles,

⁶¹⁰ Ibid. Ireland endorses “the negative formulation of [the] condition, but “France proposes replacing the phrase ‘out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State’ by the phrase ‘out of proportion to the effects of the internationally wrongful act on the injured State and the degree of gravity thereof’” (ibid.).

⁶¹¹ Ibid., Germany, for example. For the United States, however, the formulation adopted on first reading “gives undue emphasis” to “a vague concept of ‘gravity’”, which “reflects only one aspect of customary international law” (ibid., p. 160).

⁶¹² Ibid., p. 159.

⁶¹³ Ibid., p. 158. For Germany, “an assessment of proportionality has to involve consideration of all elements deemed to be relevant in the specific circumstances” (ibid., p. 159).

⁶¹⁴ Ibid., p. 160, the United States, adding that “a degree of response greater than the precipitating wrong may be appropriate to bring the wrongdoing State into compliance with its obligations”; see also Ireland (ibid., p. 159).

⁶¹⁵ Ibid., p. 159.

⁶¹⁶ Ibid., p. 160. Accordingly, the United States considers that “a rule of proportionality should weigh the aims served by the countermeasure in addition to the importance of the principle implicated by the antecedent wrongful act” (ibid.).

⁶¹⁷ Ibid., p. 159.

⁶¹⁸ A/CN.4/504 (see footnote 3 above), p. 20, para. 74.

⁶¹⁹ *Yearbook ... 1995* (see footnote 602 above), commentary to article 14 [present art. 50], p. 66, para. (1).

⁶²⁰ Annexed to General Assembly resolution 2625 (XXV) of 24 October 1970.

⁶²¹ *Yearbook ... 1995* (see footnote 602 above), pp. 66–67, para. (2), citing General Assembly resolution 2625 (XXV), annex, first principle, sixth paragraph.

⁶²² *Yearbook ... 1995* (see footnote 602 above), commentary to article 14 [present art. 50], p. 68, para. (5).

especially proportionality), their *point* is to be coercive. The commentary attempts to address the point. It notes that “if formulated too broadly, subparagraph (b) might amount to a quasi-prohibition of countermeasures”, but argues that article 50 limits “prohibited conduct to ‘extreme economic or political coercion’”; moreover, “the term ‘designed’ ... connotes a hostile or punitive intent and excludes conduct capable of remotely and unintentionally endangering the territorial integrity or political independence of the State”;⁶²³

(c) As to diplomatic inviolability, the commentary notes that this is confined to “those rules of diplomatic law which are designed to guarantee the physical safety and inviolability of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict”.⁶²⁴ This protection is of particular importance where the two States are at loggerheads, as may well be the case when countermeasures are threatened or taken;

(d) As to the prohibition of countermeasures affecting basic human rights, the commentary notes that this has its historical origin in the prohibition of reprisals against persons protected by international humanitarian law, and was extended subsequently to cover the protections afforded individuals by non-derogable norms of human rights. The problem here, however, is that countermeasures against a State by definition cannot permit the violation of non-derogable human rights, the beneficiaries of which are by definition third parties in relation to the target State, even if they are its nationals. Rather the question is that of “inhumane consequences [which are] ... the indirect result of measures aimed at the wrongdoing State”.⁶²⁵ The commentary cites instances of boycotts and other measures which exempt “articles intended to relieve human suffering” or activities “aimed at humanitarian assistance”.⁶²⁶ Again the difficulty is that such exemptions do not necessarily involve conduct by the injured State which is legally required of it under human rights norms: however consistent with humanitarian considerations such exemptions may be, a State is not in general obliged by human rights law to allow humanitarian activities to be carried out by its nationals or officials on the territory of another State. A more persuasive justification for subparagraph (d) is the point that countermeasures are “essentially a matter between the States concerned” and that such measures should “have minimal effects on private parties in order to avoid collective punishment”;⁶²⁷

(e) Finally, as to the residual exclusion of conduct derogating from other peremptory norms, the commentary attempts no examples: indeed it notes “that subparagraph (e) may not be strictly necessary since, by definition, *jus cogens* rules may not be departed from by way of countermeasures or otherwise”. The reference to peremptory norms will, however “ensure the gradual adjustment of the articles in accordance with the evolution of the law in this area and would therefore serve a useful purpose”.⁶²⁸

⁶²³ Ibid., p. 70, para. (12).

⁶²⁴ Ibid., para. (14).

⁶²⁵ Ibid., pp. 72–73, para. (20).

⁶²⁶ Ibid., p. 73, para. (21).

⁶²⁷ Ibid., para. (22).

⁶²⁸ Ibid., p. 74, para. (26).

313. Those Governments commenting on article 50 appear rather divided as to its general purpose and content. On the one hand, some (the Czech Republic and Ireland for example) stressed that “the interests of the international community required that certain categories of countermeasures be prohibited”,⁶²⁹ and they accordingly supported the enumerated prohibitions, “most of which relate to *jus cogens*”.⁶³⁰ Even though it is not in agreement with some specific elements of the list, Ireland notes in particular that there has been in the last few decades “increasing recognition that there is conduct on the part of a State which should be prohibited under all circumstances and which logically therefore should not be permitted even in response to a prior unlawful act of another State”.⁶³¹ Some Governments, on the other hand, are of the view that article 50 does not generally reflect State practice or customary international law.⁶³² Among others, Singapore criticizes article 50 for not addressing “the key issue of whether the measures taken should be related or have some nexus to the right infringed”.⁶³³ The United States finds it “unnecessary” to the extent that “the rule of proportionality in draft article 49 would generally limit the range of permissible countermeasures and would, in most circumstances, preclude resort to the measures enumerated in article 50”.⁶³⁴ It is also concerned that this provision “may add layers of substantive rules to existing regimes without clarifying either the specific rules or the law of State responsibility”, taking as an example the rules on diplomatic and consular relations.⁶³⁵

314. Subparagraph (a) has not been subject to many comments by Governments, although France finds that its drafting is “strange” and suggests a formulation based on article 52 of the 1969 Vienna Convention.⁶³⁶ Recalling that, according to General Assembly resolution 2625 (XXV), States have a duty to refrain from acts of reprisals involving the use of force, Ireland “fully agrees with the limitation on countermeasures specified in this subparagraph”, which “implicitly recognizes the role of the United Nations and its organs in this area”.⁶³⁷

315. Opinions as to subparagraph (b), by contrast, are divided. Among its supporters are, at least implicitly, those States which are generally critical of the use of coun-

⁶²⁹ A/CN.4/496 (see footnote 3 above), p. 18, para. 121.

⁶³⁰ *Yearbook ... 1998* (see footnote 35 above), p. 160, the Czech Republic. Similarly, Ireland “strongly endorses the itemization in draft article 50 of substantive limits to the measures which may lawfully be taken by way of countermeasures” (ibid., p. 161). Denmark, on behalf of the Nordic countries, would retain a provision on prohibited countermeasures “along the lines of draft article 50” (ibid.)

⁶³¹ Ibid., p. 161.

⁶³² Ibid., the United States, adding that it “may serve to magnify rather than resolve disputes”; see also Singapore (ibid., p. 153) and A/CN.4/496 (footnote 3 above), p. 18, para. 120.

⁶³³ *Yearbook ... 1998* (see footnote 35 above), p. 153; see also the United States (ibid., p. 161).

⁶³⁴ Ibid., p. 161.

⁶³⁵ Ibid.; the United Kingdom asserts that the limitations set in article 50 “are not satisfactory” (ibid.).

⁶³⁶ Ibid.; the provision would read as follows: “The threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

⁶³⁷ Ibid.; see also A/CN.4/504 (footnote 3 above), p. 20, para. 74, where it is stressed that “armed countermeasures [are] prohibited under Article 2, paragraph 4, of the Charter of the United Nations, which ha[s] become a customary rule of international law”.

measures, on the ground that they “favour more powerful States and ... potentially undermine any system based on equality and justice”.⁶³⁸ As Singapore puts it:

An economically or politically more powerful State is bound to be in a better position to impose effective countermeasures than weaker States, especially developing and less developed States. Similarly, the impact of countermeasures against weaker States will generally be far more detrimental than for more powerful States.⁶³⁹

On the other hand, some Governments are very much opposed to the subparagraph. France considers that it has “no basis in customary law” and should be deleted.⁶⁴⁰ Japan fears that it “would prohibit virtually all countermeasures”.⁶⁴¹ The United Kingdom and the United States both criticize its vague and subjective language,⁶⁴² the United Kingdom adding that “if the original wrong were the application of ‘[e]xtreme economic or political coercion’ to the injured State, it is hard to see why that State should not respond in kind against the wrongdoing State”.⁶⁴³ Ireland and Switzerland are more supportive of the subparagraph. For Ireland, there is some State practice supporting it, although doubts remain as to “whether there would be universal agreement that such conduct is prohibited in all circumstances”: the provision accordingly is *lex ferenda*.⁶⁴⁴ Moreover, it considers that “some such limitation on the taking of countermeasures is desirable”, even if the term “extreme” lacks precision. In its view the problem might be addressed by focusing on the protection of “the vital interests of the population of a wrongdoing State as opposed to the vital interests of the State itself”: in particular, in its view, countermeasures should not have the result of “depriving the people of a State of their means of subsistence”.⁶⁴⁵ In a similar vein, Switzerland wonders why the prohibition of subparagraph (b) is not extended to “other types of coercion, for example environmental countermeasures”, and suggests deleting the words “economic or political”.⁶⁴⁶

316. Few comments have been made as to subparagraph (c). Ireland again considers it as *de lege ferenda*, to the extent that “the inviolability of diplomatic and consular agents, premises, archives and documents” may not exist “in all circumstances”: however, it clearly supports the provision, noting that:

There are other measures which may lawfully be taken as a response to an internationally wrongful act in relation to diplomatic and consular personnel and property and which would not be as deleterious to the functioning of the international legal system, for example, a rupture of the diplomatic relations between the wronged and the wrongdoing State.⁶⁴⁷

⁶³⁸ *Yearbook ... 1998* (see footnote 35 above), p. 154, Singapore; see also Argentina (*ibid.*, p. 151); and A/CN.4/496 (footnote 3 above), p. 18, para. 120.

⁶³⁹ *Yearbook ... 1998* (see footnote 35 above), p. 154.

⁶⁴⁰ *Ibid.*, p. 161.

⁶⁴¹ *Yearbook ... 1999* (see footnote 43 above), p. 109.

⁶⁴² *Yearbook ... 1998* (see footnote 35 above), p. 162; for the United Kingdom, “there is in any case no obvious way in which a definition of ‘extreme’ measures might be approached”.

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid.*; see also Singapore, referring to the “ironic” suffering possibly caused by a countermeasure to a population “already ... suffering from a repressive regime” (*ibid.*, p. 154).

⁶⁴⁶ *Ibid.*, p. 162.

⁶⁴⁷ *Ibid.*

The United States is likewise “strongly” in favour of subparagraph (c) which, however, “should not be misinterpreted to preclude actions taken on the basis of reciprocity”.⁶⁴⁸

317. Subparagraph (d) raises a similar debate as subparagraph (b). For some States, its language, especially the phrase “basic human rights”, is not “clearly defined”,⁶⁴⁹ and is likely to create problems as “there are very few areas of consensus, if any, as to what constitutes ‘basic human rights’”.⁶⁵⁰ The United Kingdom finds it also “difficult to grasp and unacceptably wide”, even though it “strikes a sympathetic chord”. Noting that “most countermeasures are not directed at individuals, but are measures taken by one State against another State”, the United Kingdom wonders “how any recognizable countermeasure in the understood sense of the term could amount to ‘conduct which derogates from’ fundamental rights”, or even from “other generally recognized human rights”. In its opinion, subparagraph (d) raises “issues of substantive law” and this confirms that no “detailed regulation” of countermeasures should be attempted in the draft articles.⁶⁵¹ Ireland, on the other hand, “agrees with the general thrust of the limitation” for basic human rights. Like the other Governments, it considers “the phrase ‘basic human rights’ as too general and imprecise”, but believes it “possible to identify certain such rights from which no derogation is permissible”, even in time of war or other public emergency. Ireland refers in that regard to the “large degree of concordance” existing among various human rights treaties as to the list of non-derogable rights.⁶⁵² Relying in particular on article 4 of the International Covenant on Civil and Political Rights, it suggests that the list there laid down be included in draft article 50. Accordingly, it recommends that:

[C]ountermeasures involving a derogation from any of the rights specified in article 4, paragraph 2, of the International Covenant on Civil and Political Rights as well as countermeasures which are discriminatory on any of the grounds mentioned in article 4, paragraph 1, should be expressly prohibited.⁶⁵³

318. As to subparagraph (e), Ireland suggests that it be deleted. While there is, in its view, “widespread acceptance of the concept of a peremptory norm of general international law, there is not the same degree of consensus with respect to the identification and formulation of specific norms”, and the provision thus cannot be sufficiently specified.⁶⁵⁴ The United States similarly notes that “the content of peremptory norms is difficult to determine outside the areas of genocide, slavery and torture”,⁶⁵⁵ and France also supports the deletion of the subparagraph,

⁶⁴⁸ *Ibid.*, p. 161, footnote 1.

⁶⁴⁹ Japan, recommending the deletion of the provision, if it cannot be further clarified (*Yearbook ... 1999* (see footnote 43 above), p. 109).

⁶⁵⁰ *Yearbook ... 1998* (see footnote 35 above), p. 163, the United States.

⁶⁵¹ *Ibid.*; the United Kingdom also notes that some issues dealt with in the commentary (such as the exclusion from “embargoes of items necessary for basic subsistence and humanitarian purposes”) are currently subject to controversy within the Security Council and the General Assembly.

⁶⁵² *Ibid.*, p. 162.

⁶⁵³ *Ibid.*, p. 163.

⁶⁵⁴ *Ibid.*

⁶⁵⁵ *Ibid.*

consistent with its current approach to the concept of *jus cogens*.⁶⁵⁶ By contrast, it has been suggested that the Commission should “consider the measures adopted in recent years against ‘pariah’ States which were guilty of violating the fundamental norms of international law”.⁶⁵⁷

319. Finally, France, seeking to “emphasize the essentially conditional and provisional nature of countermeasures”, proposes adding a new article 50 bis on the cessation of countermeasures, which would read as follows:

Countermeasures shall cease as soon as the obligations breached have been performed and full reparation has been obtained by the injured State.⁶⁵⁸

3. RECASTING THE PROVISIONS ON COUNTERMEASURES BY AN INJURED STATE

320. Against this background, five basic issues can be identified, as follows:

- (a) The definition of countermeasures;
- (b) Obligations not subject to the regime of countermeasures;
- (c) Conditions for taking and maintaining countermeasures;
- (d) The termination of countermeasures;
- (e) The formulation of article 30.

These will be considered in turn.

(a) *Definition of countermeasures*

321. Article 47, as noted already, is a hybrid provision “defining” countermeasures taken by an injured State and specifying the limitation that countermeasures may not affect the rights of third States.⁶⁵⁹ It has attracted a significant number of comments and proposals from Governments. Underlying these is a concern as to the dual character of the draft articles on countermeasures. Their inclusion in part two (or part two bis) is justified because countermeasures are a means—sometimes the only means—of inducing a responsible State to comply with its obligations of cessation and reparation and are, to that extent, allowed by international law. But their focus is on the regulation of countermeasures, and this corresponds to the focus of much governmental concern, viz. the possible abuse of countermeasures. The inelegance of the “definition” of countermeasures in article 47 arises because the Commission was not prepared to say, in so many words, that countermeasures which meet the specified conditions are a lawful (or “legitimate”) response to the breach of an international obligation. It is entirely proper to seek to prevent the abuse of countermeasures, but this is a necessary by-product of their inclusion here, not its *raison d’être*.

322. Paradoxically, some of the concerns as to the breadth of permitted countermeasures and as to the hybrid character of article 47 could be addressed by a more forthright formulation. The essential point is that countermeasures, which are by definition measures otherwise in breach of the obligations of the injured State to the responsible State, are only legitimate or permitted in the relations between those two States, i.e. in a relative sense.⁶⁶⁰ If it says this at all, article 47 says it only implicitly, and the references in article 47, paragraph 3, to breaches of obligations to third States, and in article 50 (d) to breaches of human rights, further tend to obscure the point. Rather than a purported definition, article 47 would be better expressed as a statement of the entitlement of an injured State to take countermeasures against a responsible State for the purpose and under the conditions specified in the relevant articles.⁶⁶¹

323. But there are still problems in the underlying conception of countermeasures. Two in particular need to be mentioned. The first is the relationship between non-compliance with an obligation and the suspension of that obligation. The second is the question of the essential scope of countermeasures: should they be (as article 47 apparently implies) at large, or should they be limited in some way—either by reference to “reciprocal” countermeasures (taken in relation to the same or a closely related obligation) or at least by reference to some criterion of reversibility.

(i) *Countermeasures and suspension of obligations, especially treaty obligations*

324. Difficulty has sometimes arisen because of (perhaps understandable) confusion between the taking of countermeasures otherwise in breach of an international obligation and the suspension of an obligation. Commentators have stressed the significant constraints on the suspension of treaties under the 1969 Vienna Convention, and have asked how these can be seemingly evaded by reliance on countermeasures.⁶⁶² By implication, the taking of countermeasures is seen as equivalent to the suspension of an obligation. ICJ seems to have given credence to this position in the case concerning the *Gabčíkovo-Nagymaros Project*, when it said that:

The Court cannot accept Hungary’s argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the

⁶⁶⁰ In the words of ICJ in the *Gabčíkovo-Nagymaros Project* case, countermeasures must be “directed against” the responsible State, *I.C.J. Reports 1997* (see footnote 18 above), p. 55, para. 83.

⁶⁶¹ Correspondingly, the question of the effect on third States can be dealt with in the context of article 50. The very definition of countermeasures excludes measures targeted at third States. The problem is rather one of the *consequences* of countermeasures on third States. See paragraphs 347–348 below.

⁶⁶² Thus a treaty can only be suspended in whole or in part for “material” breach, but the cardinal requirement for taking countermeasures is proportionality, not materiality: see, for example, Greig, *loc. cit.*, p. 359, who treats suspension of treaties as a “remedy” and argues that the limitations in articles 42, paragraph 2, and 60, of the 1969 Vienna Convention are rendered a “dead letter” if one allows countermeasures for non-material breaches.

⁶⁵⁶ *Ibid.*

⁶⁵⁷ A/CN.4/496 (see footnote 3 above), p. 18, para. 121.

⁶⁵⁸ *Yearbook ... 1998* (see footnote 35 above), p. 164.

⁶⁵⁹ See paragraphs 271–275 above.

provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as "single and indivisible".⁶⁶³

It is clear that Hungary indicated its unwillingness to comply with some of the provisions of the Treaty from 1989, through the suspension of works required by the Treaty; it is also clear that, once the reasons given by Hungary for its action were held to be legally insufficient, this refusal entailed its responsibility for breach of those very provisions. It may also be that in substance what Hungary sought to do in 1989–1990 (though it never said so in such terms) was to suspend those parts of the Treaty of which it disapproved. But it is clear that there is a legal difference between the suspension of a treaty and the refusal (whether or not justified) to comply with a treaty. The suspension of a treaty (or of a severable part of a treaty), if it is legally justified, places the treaty in a sort of limbo; it ceases to constitute an applicable legal standard for the parties while it is suspended and until action is taken to bring it back into operation.⁶⁶⁴ By contrast conduct inconsistent with the terms of a treaty in force, if it is justified as a countermeasure, does not have the effect of suspending the treaty; the treaty continues to apply and the party taking countermeasures must continue to justify its non-compliance by reference to the criteria for taking countermeasures (necessity, proportionality, etc.) for as long as its non-compliance lasts. Countermeasures are no more a ground for the suspension of a treaty than is necessity.⁶⁶⁵

325. There is thus clear distinction between action taken within the framework of the law of treaties (as codified in the 1969 Vienna Convention), and conduct raising questions of State responsibility (which are excluded from the Convention). The law of treaties is concerned essentially with the content of primary rules and with the validity of attempts to alter them; the law of responsibility takes as given the existence of the primary rules (whether based on a treaty or otherwise) and is concerned with the question whether conduct inconsistent with those rules can be excused and, if not, what the consequences of such conduct are. Thus it is coherent to apply the Convention rules as to the materiality of breach and the severability of provisions of a treaty in dealing with issues of suspension, and the rules proposed in the draft articles as to proportionality etc., in dealing with countermeasures.

(ii) *Scope of countermeasures*

326. According to article 47, "the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act". It is true that the draft articles go on to limit countermeasures in a variety of ways: (a) by the requirement that the taking of countermeasures be "necessary" to ensure compliance

with the secondary obligations of cessation and reparation; (b) by imposing certain substantive and procedural conditions on the taking and continuation of countermeasures, in particular proportionality; and (c) by excluding certain measures entirely (especially those involving the use of force or the violation of basic human rights). Even so, article 47 embodies an extremely broad formulation of countermeasures. A State which confiscates the property of another State, or destroys its embassy, "does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act". Yet it seems difficult to justify such measures as instrumental in ensuring compliance with the secondary obligations of the target State.

327. One way of limiting the breadth of countermeasures, initially proposed by the Special Rapporteur, Mr. Riphagen, is the notion of reciprocal countermeasures.⁶⁶⁶ Such countermeasures involved suspension of performance of obligations towards the responsible State "if such obligations correspond to, or are directly connected with, the obligation breached".⁶⁶⁷

328. The notion of reciprocal countermeasures has a certain visceral appeal, associated with the instinct of "tit for tat" retaliation, and the idea that a State can hardly complain, if it has done something to another State, that the very same thing should be done to it, or the very same obligation breached. But there are serious objections to the notion of reciprocal countermeasures as a limiting condition for taking countermeasures.⁶⁶⁸ These may be briefly summarized. First, reciprocal countermeasures evidently require that the injured State be in a position to impose the same or related measures as the responsible State, and whether this is so is essentially a matter of chance. For example, State A may not be able to sequester the assets of State B on its territory (in response to the seizure of its assets by State B) if State B has no assets there. Secondly, the notion of reciprocal countermeasures assumes that international obligations are reciprocal, but this is not necessarily true: for example, the obligation may be a unilateral one, or State A may already have irrevocably performed its side of the bargain. Thirdly, considerations of good order and humanity preclude many measures, whether or not one is the victim of similar action: if State A arbitrarily expels all the nationals of State B from its territory, this cannot justify State B doing the same. The notion of reciprocal countermeasures (adopted as a limitation on the right to take countermeasures) would place a premium on outrages by the responsible State, to which the injured State was not prepared to descend.

329. This conclusion (reached by the Commission on first reading) does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as for example

⁶⁶⁶ *Yearbook ... 1985* (see footnote 117 above), p. 3. See also *Yearbook ... 1999* (footnote 8 above), pp. 81, 89–90 and 94, paras. 325, 361 and 385.

⁶⁶⁷ *Yearbook ... 1985* (see footnote 117 above), p. 10 (art. 8). Mr. Riphagen also allowed for "reprisal[s]", involving suspension of performance of other unrelated obligations, but subject to a (loosely formulated) condition of reciprocity (*ibid.*, p. 11 (art. 9)).

⁶⁶⁸ *Yearbook ... 1996*, vol. II (Part Two), commentary to article 47, p. 67, para. (1).

⁶⁶³ *I.C.J. Reports 1997* (see footnote 18 above), p. 39, para. 48.

⁶⁶⁴ See the 1969 Vienna Convention, art. 72. The Convention does not say how a suspended treaty is to be revived, i.e. whether by consent of the parties or by unilateral act of the suspending State, and if the latter, in what circumstances. Cf. however article 72, paragraph 2.

⁶⁶⁵ As the Court affirmed in *I.C.J. Reports 1997* (see footnote 18 above), p. 63, para. 101.

in the *Air Service Agreement* case.⁶⁶⁹ Where a State steps outside the immediate context of a dispute, whether it involves air services or port access for another State, and imposes unrelated measures in some other field, the dispute may well be exacerbated rather than resolved. There is something to be said for a presumption in favour of reciprocal countermeasures—which could be expressed, for example, by a provision that, where reciprocal countermeasures are reasonably available, any measures taken with respect to unrelated obligations would be presumed not to be proportionate. But there would be difficulties in assessing what amounted to reasonable availability for this purpose, and on balance, the Special Rapporteur believes that the link between reciprocity and proportionality can sufficiently be drawn out in the commentary.

330. This leaves open the question whether some further limitation should not be imposed on the scope of countermeasures, even if they are not to be strictly reciprocal. In the *Gabčíkovo-Nagymaros Project* case, ICJ asserted that a countermeasure must be “reversible”. After concluding that “the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate”, the Court said:

It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.⁶⁷⁰

The problem here is that, whereas a measure may be reversible (assets can be unfrozen, civil aviation can be resumed), its effects while it was in force will rarely be entirely reversible, since consequential losses will have been suffered, by the target State and by third parties. For example the airline affected by the suspension of an air service agreement will have lost revenue (indeed it may have been driven from the brink of insolvency into actual liquidation). Yet it has never been suggested that a State successfully taking countermeasures should be required to compensate all those who may have suffered consequential loss, and to require this would effectively preclude countermeasures in many cases.⁶⁷¹

331. But the notion of reversibility can nonetheless stand. The point about countermeasures is that they are instrumental; they are taken with a view to achieving a particular result (compliance by the target State with its international obligations of cessation and reparation), and they are justified only insofar as they continue to be necessary to that end. Irrevocable damage done to the target State in breach of an international obligation of the State taking countermeasures would amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the draft articles. The difficulty is how to convey that idea. Rather than using the language of reversibility, it seems sufficient for this purpose that article 47, paragraph 2, define countermeasures as conduct involving the suspension of performance of an obliga-

tion to the target State.⁶⁷² This will clearly entail that the countermeasure not be such as to preclude the resumption of performance, and the commentaries can spell out this requirement in more detail.

(iii) *Other aspects of article 47*

332. Other aspects of the formulation of article 47 are less controversial. It is evident that countermeasures may only be taken subject to the conditions and restrictions set out in the following articles. No doubt this needs to be said, but it does not need a separate paragraph to say it. It is also clear that under the draft articles, countermeasures are intended to have an instrumental, not a punitive purpose. They can only be taken in order to induce the responsible State to comply with its obligations of cessation and reparation. Correspondingly, it is necessary before countermeasures are taken that the injured State should have called on the responsible State to comply, and that it should have failed or refused to do so.⁶⁷³ The circumstance of necessity justifying countermeasures arises, not because of the breach as such but because of the subsequent failure to comply with these obligations. Obviously for this failure to be established, the responsible State must first have been called on to comply.

333. The Special Rapporteur proposes below a version of article 47 in line with these conclusions.⁶⁷⁴

(b) *Obligations not subject to the regime of countermeasures*

334. As it stands, article 50 (Prohibited countermeasures) combines a number of quite different prohibitions.⁶⁷⁵ Some subparagraphs are directed at excluding certain forms of countermeasure altogether (subparas. (a), (c) and (e)). One at least (subpara. (b)) is directed at the effect of countermeasures, providing that they may not involve certain forms of “[e]xtreme ... coercion”. One (subpara. (d), excluding derogations “from basic human rights”) is inspired by certain well-established prohibitions of reprisals in the field of international humanitarian law, but also raises the separate question whether the effect of countermeasures in indirectly impairing basic human rights should not be addressed. It seems better and clearer, however, to distinguish between obligations which may not be suspended by way of countermeasures, and obligations which must be respected in the course of taking countermeasures—in other words, between the subject of countermeasures and their effect. Article 50 might usefully be divided into two: an article (in relation with article 47) which addresses the former question, and another which addresses the latter.

⁶⁷² In this respect the Special Rapporteur proposes to revert to the language of Mr. Riphagen in his sixth report (*Yearbook ... 1985* (see footnote 117 above), pp. 10–11).

⁶⁷³ As ICJ affirmed in the *Gabčíkovo-Nagymaros Project* case, *I.C.J. Reports 1997* (see footnote 18 above), p. 56, para. 84, affirming that “the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it”.

⁶⁷⁴ See paragraph 367 below.

⁶⁷⁵ For the text of and comments on article 50, see paragraphs 311–319 above.

⁶⁶⁹ UNRIIAA (see footnote 604 above), p. 417.

⁶⁷⁰ *I.C.J. Reports 1997* (see footnote 18 above), pp. 56–57, para. 87.

⁶⁷¹ There is of course a distinction between those whose rights vis-à-vis the injured State are impaired by a countermeasure, and those who are indirectly affected by such a measure. A trade embargo against State B may well affect third parties trading in or with State B; this is quite different from a trade embargo directed against those third parties as such.

(i) *Forcible countermeasures*

335. Turning to the subject of countermeasures, the first and uncontroversial exclusion is forcible countermeasures (existing art. 50 (a)). The rules relating to the use of force by States in international relations are those primary rules contained in or referred to by the Charter of the United Nations, together, perhaps, with certain other rules sustained by generally accepted international practice. To the extent that these rules are contained in the Charter, they are given effective paramountcy by Article 103; in any event there is a broadly held view that if any rules of international law have the status of peremptory norms it is these. In terms of the distinction between primary and secondary obligations these rules are primary; it is not the function of the draft articles to qualify or extend them by the development of secondary rules, even if that were possible.⁶⁷⁶ But there is, in any event, no basis in modern international law for countermeasures involving the use of force as prohibited by the Charter.

336. The only question then is the formulation of article 50 (a). France proposes a new formulation based on article 52 of the 1969 Vienna Convention;⁶⁷⁷ this is an improvement, but some further adjustment is required to take into account the proposed conception of article 50, viz. that it excludes certain obligations, a priori, as possible subjects of countermeasures. Accordingly, article 50 (a) should exclude from the regime of countermeasures the obligations as to the threat or use of force embodied in the Charter of the United Nations.

(ii) *Minimum obligations necessary to maintain diplomatic and consular inviolability*

337. A second exclusion, contained in article 50 (c), deals with “conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents”. By contrast with subparagraph (a) the concern here is a functional one. It is not that diplomatic and consular inviolability are peremptory or non-derogable norms. Rather subparagraph (c) seeks to maintain the basic level of diplomatic communication between the two States at a time when, by definition, relations between them are likely to be strained. It also seeks to avoid the situation where diplomatic personnel and premises become, in effect, permanent potential hostages as targets for countermeasures. In this context, the remarks of ICJ in the *United States Diplomatic and Consular Staff in Tehran* case are significant. The Court noted that even alleged criminal activities of the United States against the Islamic Republic of Iran would not have justified breaches of diplomatic and consular inviolability: “diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions”.⁶⁷⁸ It went on to refer to the rules of

diplomatic law as a “self-contained régime” and to “the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions [as] one of the very foundations of this long-established régime”.⁶⁷⁹ Evidently the Court did not contemplate that a breach of some other international obligation could constitute a justification or excuse for a breach of inviolability.

338. It may be noted that no Government has proposed the deletion of article 50 (c).⁶⁸⁰ It is true that, as one Government commented, such inviolability may not exist “in all circumstances”,⁶⁸¹ but it should be explained in the commentary that what is preserved is precisely the obligation to respect inviolability as it exists between the two States in accordance with the applicable rules of international law. That is, of course, entirely without prejudice to the rights of the receiving State under those rules (e.g. to terminate the mission, to declare personnel *persona non grata*, to impose reciprocal restraints on freedom of movement, etc.). Another State, by inference at least, raised the question whether the inviolability of diplomatic and consular premises and personnel might be subject to reciprocal countermeasures: in other words, whether State B’s seizure of the diplomatic personnel or premises of State A could justify State A in similarly detaining the personnel or premises of State B.⁶⁸² But there appears to be no modern case where infringements of diplomatic or consular inviolability (as distinct from other privileges) has been justified as a countermeasure, and—quite apart from the categorical language of ICJ, already quoted—it does not seem desirable to institute such a system exclusively for the purposes of subparagraph (c). That subparagraph should be maintained as it stands.

(iii) *Obligations in the field of dispute settlement*

339. Another functional necessity in times of conflict between States is to maintain in operation all existing provisions for dispute settlement. As ICJ noted in the *United States Diplomatic and Consular Staff in Tehran* case in relation to a bilateral treaty of amity, “any alleged violation of the Treaty by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes”.⁶⁸³ Although not included in article 50, this is implicit in article 48, paragraph 2, which requires the injured State to comply with “any ... dispute settlement procedure in force” between it and the target State. However it is desirable to say explicitly in article 50 that an obligation relating to dispute settlement may not be suspended as a countermeasure.

⁶⁷⁹ *Ibid.*, p. 40, para. 86.

⁶⁸⁰ See paragraph 316 above.

⁶⁸¹ *Yearbook ... 1998* (see footnote 35 above), p. 162.

⁶⁸² See paragraph 316 above, for the comment of the United States to that effect; and for discussion of reciprocal countermeasures, see paragraphs 327–329 above.

⁶⁸³ *I.C.J. Reports 1980* (see footnote 65 above), p. 28, para. 53. This is the counterpart in the field of countermeasures of the principle of the autonomy of arbitration clauses. See, for example, the 1969 Vienna Convention, art. 65, para. 4, and Schwebel, *International Arbitration: Three Salient Problems*, chap. I.

⁶⁷⁶ This includes, to the extent that they may still be recognized in international law, the rules relating to belligerent reprisals, which are primary rules relating to permissible conduct in armed conflict, not secondary rules of responsibility.

⁶⁷⁷ See paragraph 314 above.

⁶⁷⁸ *I.C.J. Reports 1980* (see footnote 65 above), p. 38, para. 83, referring, inter alia, to article 9 of the Vienna Convention on Diplomatic Relations.

(iv) *Obligations under human rights and humanitarian law*

340. Article 50 (*d*) exempts from the scope of countermeasures “[a]ny conduct which derogates from basic human rights”. As one Government noted,⁶⁸⁴ this raises a difficulty, since human rights obligations are not, in the first instance at least, owed to particular States, and it is accordingly difficult to see how a human rights obligation could itself be the subject of legitimate countermeasures. Of course it is possible that State A, in the course of taking countermeasures against State B (e.g. by freezing assets of State B in its territory) might violate the human rights of some individual, whether or not a national of State B. But it is obvious from the proposed formulation of article 47 that the lawfulness or legitimacy of the conduct vis-à-vis State B does not entail that it is lawful vis-à-vis third parties, including individuals. In any event, the measure itself would not be prohibited in such a case, merely its effects vis-à-vis the third party.⁶⁸⁵ A reservation for “basic” human rights may be necessary in the proposed article 48, dealing with the conditions for taking countermeasures, but it is out of place in article 50.

341. There may, however, be a need to reflect in article 50 the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, the Geneva Conventions of 12 August 1949 and Protocol I thereof, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.⁶⁸⁶ It is clear that where applicable rules of general international law or multilateral treaties prohibit certain conduct by way of reprisals, the relevant obligations cannot themselves be suspended in any circumstances, including by way of countermeasures, reciprocal or other.⁶⁸⁷ A provision, modelled on article 60, paragraph 5, of the 1969 Vienna Convention, does have a place in the draft articles. The broader issue of countermeasures whose effect is to impair fundamental human rights will be considered below.⁶⁸⁸

⁶⁸⁴ See paragraph 317 above.

⁶⁸⁵ As the Tribunal pointed out in the “*Cysne*” case, “reprisals are not admissible except against the wrongdoing State. It may be, admittedly, that legitimate reprisals, carried out against an offending State, affect those belonging to an innocent third State. But that is only an indirect and involuntary consequence, which the injured State will seek, in practice, always to avoid or to limit as far as possible” (*Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war* (see footnote 16 above), p. 1057).

⁶⁸⁶ See Partsch, “Reprisals”, pp. 203–204; and Oeter, “Methods and means of combat”, pp. 204–207, with references to relevant provisions.

⁶⁸⁷ See article 60, paragraph 5, of the 1969 Vienna Convention, which precludes a State from suspending or terminating for material breach any treaty provision “relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties”. Paragraph 5 was added at the United Nations Conference on the Law of Treaties by 87 votes to none, with 9 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), 21st plenary meeting, p. 115, para. 68). It is repeated unchanged in the counterpart 1986 Vienna Convention, art. 60, para. 5.

⁶⁸⁸ See paragraphs 349–351 below.

(v) *Obligations under other peremptory norms*

342. Finally, article 50 (*e*) prohibits as countermeasures “[a]ny other conduct in contravention of a peremptory norm of general international law”. It is obvious that a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Nonetheless a number of Governments have expressed concern at saying so, either because of their general position with respect to peremptory norms, or out of concern for the lack of specification of the category.⁶⁸⁹ The real difficulty, however, is in identifying existing peremptory norms whose application is not already excluded either by the conception of countermeasures itself, or by other specific exclusions. For example such matters as the prohibitions of genocide, slavery and torture are evidently excluded (both by the basic conception of countermeasures against a State and by the proposed equivalent of article 50 (*d*) dealing with basic human rights).⁶⁹⁰ Forcible countermeasures are excluded by subparagraph (*a*), on the basis that the rules relating to the use of force in international relations (widely regarded as non-derogable) govern the matter.⁶⁹¹ There is thus a case for the deletion of subparagraph (*e*) as unnecessary. On the other hand, new peremptory norms may come to be recognized, and if the international community as a whole comes to regard a particular rule as one from which no derogation may be permitted in any circumstances, it should follow that countermeasures derogating from that rule are prohibited. For these reasons, paragraph (*e*) should be retained.

343. Indeed there is a case for extending article 50 (*e*) to other rules of international law in force between the injured State and the target State which are agreed to be non-derogable, whether or not they are regarded as peremptory under general international law. On the other hand the standard example of a non-derogable norm occurs in the field of the regional human rights conventions, and issues of the effect of countermeasures on human rights are dealt with in other ways. Moreover the non-existence of a derogation clause in a multilateral treaty is not an indication that derogations may be freely made; indeed they can only be made in the presence of such a clause. No doubt a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the Treaties establishing the European Communities, which have their own system of enforcement.⁶⁹² Under WTO, special permission has to be obtained for retaliatory measures, and this again would exclude any residual right to take countermeasures under general international law for breaches of the WTO and re-

⁶⁸⁹ See paragraph 318 above.

⁶⁹⁰ See paragraphs 349–351 below.

⁶⁹¹ See paragraph 335 above.

⁶⁹² On the exclusion of unilateral countermeasures in European Union law, see, for example, joined cases 90 and 91–63 (*Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*) (1964), *Reports of cases before the Court*, p. 631; case 52/75 (*Commission of the European Communities v. Italian Republic*) (1976), *ibid.*, p. 284; and case 232/78 (*Commission of the European Economic Communities v. French Republic*) (1979), *ibid.*, p. 2792.

lated agreements.⁶⁹³ To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are “intransgressible”, they may well entail an exclusion of countermeasures.⁶⁹⁴ But this can be achieved by the *lex specialis* provision (currently art. 37), and it is sufficient to note the possibility in the commentary to article 50.

(c) *Conditions for taking and maintaining countermeasures*

344. Article 48 as adopted on first reading deals exclusively with procedural conditions for taking and maintaining countermeasures.⁶⁹⁵ For the reasons already given, it is necessary to consider both procedural and substantive issues under this rubric.

(i) *Substantive conditions*

345. Four issues need to be considered here: proportionality, effect on the rights of third States, effect on human rights, and situations of “extreme coercion”. These were covered respectively by articles 49, 47, paragraph 3, 50 (d) and (b) as adopted on first reading.

a. Proportionality

346. No one doubts that proportionality is a key constraint on the taking of countermeasures, and the retention of a separate article dealing with proportionality is widely supported.⁶⁹⁶ The question is rather one of its formulation. It is clearly appropriate to take into account both the degree of gravity of the breach and its effects on the victim (which, however, may or may not be a State). A number of Governments proposed, however, that the requirement of proportionality be more strictly formulated, and this suggests that the present double negative formulation “not be out of proportion” needs reconsideration. In other areas of the law where proportionality is relevant, it is normal to express the requirement in positive terms, even though—in those areas as well—what is proportionate is not a matter which can be determined precisely.⁶⁹⁷ ICJ in the case concerning the *Gabčíkovo-Nagymaros Project* said that

⁶⁹³ See article 3, paragraph 7, of the Understanding on Rules and Procedures governing the Settlement of Disputes (footnote 319 above), and for an example of such authorization, see WTO, European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities under article 22.6 of the DSU: Decision by the Arbitrators (WT/DS27/ARB) (9 April 1999).

⁶⁹⁴ To use the synonym adopted by ICJ in *Legality of the Threat or Use of Nuclear Weapons* (see footnote 607 above), p. 257, para. 79.

⁶⁹⁵ See paragraphs 298–305 above.

⁶⁹⁶ See the summary of Government comments in paragraphs 308–309 above.

⁶⁹⁷ This was the reason why the Arbitral Tribunal in the *Air Service Agreement* case adopted the negative formulation (see footnote 604 above). But they were of course dealing with a reciprocal countermeasure, in the same field of air services as the French restriction to which it was a response. Mr. Riphagen, Special Rapporteur, did not expressly apply the proportionality test to reciprocal countermeasures, though he did observe that “elements of ‘proportionality’ and of ‘interim protection’ are inherent in measures by way of reciprocity” (*Yearbook ... 1985* (see footnote 117 above), commentary to article 8, p. 11, para. (3)). He

countermeasures must be “commensurate with the injury suffered, taking account of the rights in question”.⁶⁹⁸ That positive formulation seems clearly preferable. The question is whether it is also useful to introduce into article 49 the notion of purpose, i.e. to require that the proportionality of countermeasures be tested by asking whether they are “tailored to induce the wrongdoer to meet its obligations under international law”.⁶⁹⁹ That is indeed a requirement, but it is an aspect of the test of necessity formulated in article 47. Proportionality is no doubt linked to necessity, in that a clearly disproportionate measure may well be judged not to have been necessary either. But it is also a limitation even on measures which are necessary in the sense that, without them, the target State is unlikely to comply. In every case a countermeasure must be proportionate to the injury suffered, and this has a function partly independent of the question whether the countermeasure was necessary to achieve a particular result. Accordingly, the Special Rapporteur proposes that countermeasures be “commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and its effects” on the injured party.

b. Effect on third States

347. Article 47, paragraph 3, makes it clear that countermeasures only justify a breach of international law vis-à-vis the responsible State. Indeed this follows from the relative and conditional effect of countermeasures, specified already in article 47, paragraph 1; it should also follow from the statement of countermeasures as circumstances precluding wrongfulness in part one, article 30. Governments have not cast any doubt upon the proposition, though some questioned the placement of paragraph 3 in article 47, and one at least suggested it should be more broadly formulated.⁷⁰⁰ The Special Rapporteur, for his part, rather doubts the value of a separate provision: since it is already clear that countermeasures only allow the suspension of performance of an obligation as between the injured State (or, perhaps, some other State or States acting on its behalf) and the responsible State, there is strictly speaking no need to refer to the position of third States. By definition their rights (i.e. the performance of obligations by the injured State which are owed to them) are unimpaired. This does not mean that third States may not be affected as a consequence of countermeasures. Countermeasures (e.g. in the form of an interruption of trading links, assuming that such an interruption constitutes a breach of international law vis-à-vis the target State)⁷⁰¹ may have indirect or consequential effects on third States, but that is another matter. Indeed it can be argued that a separate limitation so far as the rights of third States are concerned is not only unnecessary but that it is undesirable, since it raises, *a contrario*, an impression

adopted a “manifestly disproportional” test for non-reciprocal countermeasures or reprisals as he called them (*ibid.*, art. 9, para. 2).

⁶⁹⁸ *I.C.J. Reports 1997* (see footnote 18 above), p. 56, para. 85.

⁶⁹⁹ *Yearbook ... 1998* (see footnote 35 above), p. 160. See also paragraph 306 above.

⁷⁰⁰ See paragraphs 296–297 above.

⁷⁰¹ See paragraph 322 above. On the extent to which economic boycotts may breach international law, see, for example, Neff, “Boycott and the law of nations: economic warfare and modern international law in historical perspective”.

that countermeasures operate objectively, i.e. as against the world—which is not the case.⁷⁰²

348. The relative and limited effect of countermeasures, which preclude wrongfulness only vis-à-vis the responsible State, should be clearly expressed in articles 30 and 47, paragraph 1. If this is done, then strictly speaking the issue whether countermeasures justify breaches of obligations to third States cannot arise. However there is a point to Ireland's suggestion⁷⁰³ for a broader provision protecting the position of third parties; this will incidentally make it clear that countermeasures cannot justify breaches of obligations to third States.

c. Effect on human rights

349. The position with respect to human rights is at one level the same as the position with respect to the rights of third States. Evidently, human rights obligations are not owed to States as the primary beneficiaries, even though States are entitled to invoke those obligations and to ensure respect for them. Moreover human rights obligations have their own regime of qualifications and derogations which takes into account considerations such as national emergency. Thus it is obvious that human rights obligations (whether or not qualified as “basic” or “fundamental”) may not themselves be the subject of countermeasures, in other words, that human rights obligations may not be suspended by way of countermeasures, and that conduct inconsistent with human rights obligations may not be justified or excused except to the extent provided for by the applicable regime of human rights itself. The real problem is a different one. It involves the case where measures taken against a State have consequential effects on individuals, or indeed on the population of the State as such.

350. This issue has mostly been discussed in the context of the impact on civilian populations and especially on children, of Security Council sanctions, a subject which falls outside the scope of the draft articles. It may be noted, however, that General Comment 8 (1997) of the Committee on Economic, Social and Cultural Rights covers equally the case of sanctions imposed as countermeasures by individual States or groups of States as those imposed by the Security Council. The General Comment stresses that “whatever the circumstances, such sanctions should always take full account of the provisions of the

International Covenant on Economic, Social and Cultural Rights”,⁷⁰⁴ and goes on to state that:

In considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of the country to persuade them to conform to international law, and the collateral infliction of suffering on the most vulnerable groups within the targeted country.⁷⁰⁵

Analogies can be drawn from other elements of general international law. For example, article 54, paragraph 1, of Protocol I to the Geneva Conventions of 12 August 1949 stipulates unconditionally that: “Starvation of civilians as a method of warfare is prohibited.” The final sentence of article 1, paragraph 2, of the two International Covenants on Human Rights states that: “In no case may a people be deprived of its own means of subsistence”: this provision was the basis for article 42, paragraph 3, of the draft articles adopted on first reading.⁷⁰⁶

351. There is thus a range of concerns as to the impact of countermeasures on human rights, and some clarification of the position seems necessary, along the lines of present article 50 (*d*). In order to avoid suggesting that human rights obligations as such may be suspended by way of countermeasures, the proposed provision protecting the position of third parties generally should make express reference to the human rights of affected persons.⁷⁰⁷ Although some Governments wondered what is or is not included in referring to “basic” or “fundamental” human rights,⁷⁰⁸ this is not a matter the draft articles can resolve one way or the other. Rather the question will be determined by having regard to the human rights obligations under treaty and general international law of the acting State.

d. Situations of “extreme coercion”

352. Finally reference must be made to article 50 (*b*), which precludes countermeasures involving “[e]xtreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act”. Subparagraph (*b*) has proven controversial, giving rise to a wide range of Government comments, including proposals for its deletion or radical amendment.⁷⁰⁹ The difficulty is that, on the one hand, there is widespread concern as to the possibility for abuse of countermeasures, while on the other hand the essence of countermeasures is that they are coercive: they are by definition measures taken to induce a State to comply with its international obligations, measures otherwise unlawful which are necessary to that end. Thus a prohibition of “extreme coercion” has to meet the objections (*a*) that the reference to “extreme” coercion may only mean coercion which is effective for the permitted purpose; (*b*) that what is “extreme” cannot be defined; (*c*) that in accordance with the strengthened requirement of proportionality, “extreme” measures can only properly be

⁷⁰² It is useful to contrast countermeasures with measures taken in the exercise of belligerent rights. There is a complex body of rules relating to the position of third parties in armed conflict; they may be subject, for example, to the exercise of rights of search and seizure on the high seas, and their nationals, though they may not be targeted as such, may be the victims of weapons properly targeted at a belligerent. See, for example, International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*; Schindler, “Transformations in the law of neutrality since 1945”; and Bothe, “Neutrality in naval warfare: what is left of traditional international law?”. There appears to be no specific equivalent to this body of rules in the field of countermeasures, since the taking of countermeasures has never given rise to a “status” under international law equivalent to the status of belligerency.

⁷⁰³ See paragraph 296 above.

⁷⁰⁴ *Official Records of the Economic and Social Council, 1998, Supplement No. 2 (E/1998/22-E/C.12/1997/10)*, annex V, para. 1.

⁷⁰⁵ *Ibid.*, para. 4.

⁷⁰⁶ See paragraphs 38–42 above.

⁷⁰⁷ For the proposed provision, see paragraph 367 below.

⁷⁰⁸ See paragraph 317 above.

⁷⁰⁹ See paragraph 315 above.

responses to extreme and unlawful measures on the part of the responsible State. The reference in article 50 (b) to measures “designed to endanger the territorial integrity or political independence” of the target State raises analogous questions. Arguably, a measure cannot lawfully be “designed” to endanger the territorial integrity of a State because, first of all, the use of force is excluded as a countermeasure, and secondly, the territorial integrity of a State could not, as such, be the subject of countermeasures; like territorial sovereignty, territorial integrity is a permanent attribute of the State and is not subject to measures of suspension. As to political independence, if by endangering the political independence of a State is meant requiring that State to do something it refuses to do—i.e. comply with its international obligations—again it can be said that this is the very point of countermeasures, whereas if it means that a State’s political independence in other respects cannot be endangered, the question is how countermeasures otherwise lawful under the draft articles could have that effect.

353. Then there is the problem that article 50 (b) only prohibits measures which involve “extreme” coercion and which are designed to endanger territorial integrity or political independence. This suggests that less extreme measures designed to endanger territorial integrity (e.g. counter-intervention or counter-insurgency measures) may be lawful. Thus if State A allows a secessionist or rebel group to broadcast from its territory against neighbouring State B, State B could similarly allow a rebel group seeking the dissolution of State A to broadcast. Broadcasting, even if unlawful, is not normally a form of “extreme coercion”.

354. The formulation of article 50 (b) is thus deficient, and the question becomes whether some alternative formulation can be conceived to give assurances against the abuse of countermeasures, over and above the limitations included in the other articles. There is a case for the deletion of subparagraph (b), but on balance the Special Rapporteur believes that the concerns it tries to address are real ones. He suggests a provision to the effect that countermeasures may not endanger the territorial integrity or amount to intervention in the domestic jurisdiction of the target State.⁷¹⁰ Evidently, whether that State complies with its international obligations of cessation and reparation is not a matter of its domestic jurisdiction, but countermeasures must not be taken as an excuse to intervene in other issues internal to the responsible State, distinct from the question of its compliance with its international obligations; such issues continue to be protected by the principle of domestic jurisdiction.

⁷¹⁰ The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (see footnote 620 above), in dealing with the principle of non-intervention, stipulates that:

“No State ... has the right to intervene, directly or indirectly, for any reason whatever,* in the internal or external affairs of any other State ...

“Every State has an *inalienable** right to choose its political, economic, social and cultural systems, without interference in any form by another State.”

Similar affirmations are contained in a large number of resolutions, treaties and other texts.

(ii) *Procedural conditions*

355. In the light of the Commission’s conclusions reached at its fifty-first session in 1999 and summarized already,⁷¹¹ discussion of article 48 must proceed on the basis that the draft articles will not establish an organic link between countermeasures and any specific method of dispute settlement. It is, for the time being at least, the function of the Commission to formulate provisions on countermeasures on the basis that (a) it is seeking to express, as a matter of codification and progressive development, appropriate provisions on countermeasures under general international law; and (b) under general international law, States are entitled (as well as obliged) to settle their disputes by peaceful means of their own choice. This does not mean, however, that the draft articles need make no reference to such forms of dispute settlement as may be applicable to the parties in a given case.

356. The provisions of article 48, and the vigorous debate it has aroused, have already been noted.⁷¹² Three distinct issues are raised:

(a) The initial requirement of the notification of the dispute;

(b) The relation of the taking of countermeasures to the requirement to negotiate (and the compromise provision for “interim measures of protection”);

(c) The provision for suspension of countermeasures in the event that the dispute is submitted in good faith to third-party settlement.

357. As to the first, clearly a State aggrieved by a breach of international law and contemplating taking countermeasures in response to that breach should first call on the responsible State to comply with its obligations of cessation and reparation.⁷¹³ Whatever position may be taken on the formal requirements for the invocation of responsibility,⁷¹⁴ a State may not take countermeasures without giving the opportunity to the responsible State to respond to its complaint. This is spelled out very briefly indeed in article 47, paragraph 1, as adopted on first reading, under which the necessity for countermeasures is assessed in the light of any response to the demands of the injured State. But nothing is said as to the way in which these demands should be formulated. In its redrafted version of article 48, France proposes that the injured State should “[s]ubmit a reasoned request” to the responsible State calling on it to comply, notify it of the proposed countermeasures and agree to negotiate. But in the meantime (as from the date of the notification), it may “implement provisionally such countermeasures as may be necessary to preserve its rights”.⁷¹⁵ In effect this brings together in new, more specific (and in the Special Rapporteur’s view, improved) language the two elements contained in article 48, paragraph 1, adopted on first reading. But whatever position may be taken as to the second element of

⁷¹¹ See paragraph 265 above.

⁷¹² See paragraphs 298–305 above.

⁷¹³ According to ICJ, this requirement already exists under general international law (see paragraph 289 above).

⁷¹⁴ See paragraphs 234–238 above.

⁷¹⁵ See footnote 581 above, for the full text of France’s proposal.

provisional measures, it seems desirable to require specifically that, before countermeasures are taken, the responsible State must have been called on to comply with its obligations and have failed or refused to do so. In a situation where countermeasures are or may be warranted, a relatively short time limit could be set for a response; given the variety of possible cases. However, it does not seem appropriate to set any particular time limit in article 48 itself.

358. As to the second point, there is general agreement that the parties to a dispute potentially involving countermeasures should comply with any dispute settlement procedures in force between them. Existing article 48, paragraph 2, which says this, should be retained. The question, however, is whether the obligation to negotiate over the dispute should be a prerequisite to the taking of countermeasures in any form, or at least in any other than a provisional way. In that regard, the following comments may be offered:

(a) Whether or not the criterion of “reversibility” of countermeasures is expressly adopted, the essential point of countermeasures is that they are instrumental, not punitive, and that they must be terminated in the event that the responsible State complies with its international obligations. In this sense they *always* have a temporary character;

(b) The language of “interim measures of protection” adopted in article 48, paragraph 1, on first reading is unclear, and invites confusion with the provisional measures indicated or ordered by international courts and tribunals.⁷¹⁶ The very brief “definition” of such measures is also unsatisfactory;

(c) Even if it is poorly formulated in article 48, paragraph 1, there is a sensible distinction between measures taken immediately and provisionally in response to a breach (e.g. the temporary suspension of a licence, the temporary freezing of assets) and measures which, while still terminable, have a more definite impact (e.g. the withdrawal of a licence—which may nonetheless be reissued; the placing of assets under some form of management or administration—from which they may nonetheless be released). The draft articles should encourage more measured responses, as well as the opportunity for negotiations if these can be held without ultimate prejudice to the rights of the injured State;

(d) Although such a proposition received a degree of support during the debate on article 48 on first reading, to postpone all countermeasures until negotiations are concluded or have definitively broken down does not seem satisfactory.⁷¹⁷ Rather it would be a recipe for delay and prevarication.

Defective as it may be in its expression, for these reasons the Special Rapporteur believes that the essential balance struck in article 48 between notification and negotiation, on the one hand, and the capacity of the injured State to

take provisional measures to protect its rights, on the other, is an appropriate one. Furthermore that balance seems to be elegantly struck by France’s proposal, already referred to. The Special Rapporteur proposes a provision broadly along those lines.⁷¹⁸

359. The third point relates to the possible suspension of countermeasures once dispute settlement procedures have been engaged and a court or tribunal has the power to order or indicate interim measures of protection. In such a case—and for so long as the dispute settlement procedure is being implemented in good faith—unilateral action would not seem to be justified. Article 48, paragraphs 3–4, which incorporated this principle, was not simply an invention of the Commission. It was inspired by the remarks of the Tribunal in the *Air Service Agreement* case.⁷¹⁹ Moreover it has been on the whole accepted by the Governments which commented on article 48.⁷²⁰ In the Special Rapporteur’s view, it should be retained.

360. To summarize the conclusions on the three issues identified above, it is suggested that the draft articles provide that:

(a) Before countermeasures are taken, the responsible State must have been called on to comply with its obligations and have failed or refused to do so;

(b) Countermeasures should not be prohibited during negotiations; rather, the distinction adopted on first reading between “provisional” and other measures should be retained, but in a clearer formulation;

(c) Countermeasures should be suspended in the event that the dispute is submitted in good faith to third-party settlement, provided that the breach is not a continuing one.

(d) *Termination of countermeasures*

361. As noted already, France proposes a provision on the termination of countermeasures, to the effect that countermeasures must be terminated as soon as the conditions which justified taking them have ceased, i.e. “as soon as the obligations breached have been performed and full reparation has been obtained by the injured State”.⁷²¹ This is clearly implied by the existing articles but could well be made express.⁷²² The Special Rapporteur suggests a single article dealing with the suspension and termination of countermeasures, incorporating also the provisions of article 48 as to suspension of countermeasures, adopted on first reading.⁷²³

⁷¹⁶ See, for example, article 41 of the ICJ Statute; and article 290 of the United Nations Convention on the Law of the Sea.

⁷¹⁷ That view was rejected as a matter of general international law by the Tribunal in the *Air Service Agreement* case (see footnote 604 above), p. 445, para. 91.

⁷¹⁸ See paragraph 367 below, for the proposed provision; see also footnote 734 for an alternative provision, not embodying any distinction between “provisional” and other measures.

⁷¹⁹ UNRIIA (see footnote 604 above), pp. 445–446, paras. 94–96.

⁷²⁰ See paragraph 305 above. The proposal of France (see footnote 581 above) incorporates the same principle in nearly the same language.

⁷²¹ See paragraph 319 above.

⁷²² See paragraph 367 below for the proposed provision.

⁷²³ For the text of the proposed article, see paragraph 367 below.

(e) *Formulation of article 30*

362. The remaining question is the formulation of article 30 in part one. On the assumption that detailed provisions on countermeasures are incorporated in part two bis, article 30 can be very simple. It is recommended that it provide:

“The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if and to the extent that the act constitutes a lawful countermeasure as provided for in articles [47]–[50 bis].”⁷²⁴

4. COUNTERMEASURES AND THE EXCEPTION OF NON-PERFORMANCE

363. In his second report, the Special Rapporteur recommended that a narrow version of the exception of non-performance (*exceptio inadimplenti non est adimplendum*) be recognized as a circumstance precluding wrongfulness.⁷²⁵ The proposal received a mixed reception, and it was agreed to review it in the light of the reconsideration of the provisions on countermeasures.⁷²⁶ Likewise the views of Governments on the proposal, as expressed in the Sixth Committee during its fifty-fourth session in 1999, were mixed.⁷²⁷

364. The first question is whether the exception of non-performance is to be considered as a form of countermeasure. It is clear that the exception only applies to synallagmatic obligations (*prestations*), where one party's performance is related to and contingent upon the other's. Normally this will involve performance of the same or a closely related obligation. But in the Special Rapporteur's opinion it is clear that the exception of non-performance is not to be identified as a countermeasure in the sense of article 47. In cases where the exception applies, the reason why State A is entitled not to perform is simply that, in the absence of State B's performance of the related obligation, the time for State A's performance has not yet come. It is true that State A may withhold performance in order to induce State B to perform. But that is not the point of the exception, as it is of countermeasures. State A's motive is irrelevant; it may simply have no interest in performance in the absence of State B. Moreover there is no requirement of notice or of any attempt to settle the dispute by diplomatic or other means as a condition of continued application of the exception. It is simply that, following an agreement, for example, concerning the exchange of prisoners of war or for the joint funding of some project, State A is not obliged to release its prisoners

of war to State B or to make its contribution unless State B is in turn ready to perform its part of the bargain. Thus the exception of non-performance is to be seen either as a circumstance precluding wrongfulness in respect of a certain class of (synallagmatic) obligations, or as limited to an implied term in certain treaties. By contrast, while the nexus between the breach and non-performance is relevant to the question of proportionality, there is and should be no specific requirement of a nexus in the law of countermeasures.⁷²⁸

365. But even if it is juridically distinct from countermeasures, and even though it is recognized by a respectable body of international authority and opinion,⁷²⁹ the exception of non-execution may not warrant inclusion in the draft articles as a circumstance precluding wrongfulness. The essential question is whether the exception is to be conceived in international law as limited to conventional or treaty obligations, i.e. as an inference to be drawn, as a matter of interpretation, from an exchange of obligations in a treaty, or whether it has a broader legal basis.⁷³⁰ If the former, it can properly be classified as a primary rule and need not be included in the draft articles.

366. There seems little doubt that in its broader form the exception of non-performance should be regarded as based upon treaty or contract interpretation, performance of the same or related obligations being treated as conditional.⁷³¹ But the position with the narrower principle recognized by the Court in the *Chorzów Factory* case⁷³² is different. Here the relationship is not between synallagmatic obligations but between the conduct of the two parties: a breach by one party has “prevented” the other from fulfilling the obligation in question. This is but an application of the general principle that a party should not be allowed to rely on the consequences of its own unlawful conduct. In the Special Rapporteur's view that principle is capable of generating new consequences in the field of State responsibility, consequences which would be preserved by article 38 adopted on first reading.⁷³³ Whether any specific aspect of that general principle should be included in the draft articles is a matter of judgement. If article 38 is to be retained, however, it is open to the Commission to take the view that the *Chorzów Factory* principle is sufficiently covered.⁷³⁴ On that basis, and in the light of the equivocal

⁷²⁸ See paragraphs 327–329 above.

⁷²⁹ In addition to the authorities cited in the Special Rapporteur's second report, *Yearbook ... 1999* (footnote 8 above), pp. 78–83, paras. 316–331, see *Klöckner Industrie-Anlagen GmbH and others v. Republic of Cameroon*, *ICSID Reports* (Cambridge, Grotius, 1994), vol. 2, pp. 156–159; and O'Neill and Salam, “Is the *exceptio non adimpleti contractus* part of the new *lex mercatoria*?”, p. 152.

⁷³⁰ There is a clear analogy with the debate over whether the doctrine of fundamental change of circumstances in the law of treaties was based upon an implied clause in the treaty or was an independent rule of law. The 1969 Vienna Convention treated it as a rule of law (art. 62), and this is now the accepted view; see *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Jurisdiction of the Court, Judgment*, *I.C.J. Reports 1973*, p. 63, para. 36.

⁷³¹ See, for example, Ruzié, *Droit international public*, p. 48; and Greig, loc. cit., pp. 399–400.

⁷³² See footnote 47 above.

⁷³³ See paragraph 63 above.

⁷³⁴ Moreover there are difficulties with its formulation. Where State A's breach absolutely prevents State B's performance (e.g. where State A bars access to its territory or to resources indispensable for the per

(Continued on next page.)

⁷²⁴ See the Special Rapporteur's second report, *Yearbook ... 1999* (footnote 8 above), p. 96, para. 394.

⁷²⁵ *Ibid.*, pp. 78–83, paras. 316–331. The version recommended (as article 30 bis (*ibid.*, p. 87, para. 358)) was based on the dictum of PCIJ in the *Chorzów Factory* case (see footnote 47 above), p. 31, according to which “one Party cannot avail himself of the fact that the other has not fulfilled some obligation ... if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question”.

⁷²⁶ *Yearbook ... 1999* (see footnote 12 above), pp. 78–80, paras. 334–347, for a summary of the debate.

⁷²⁷ A/CN.4/504 (see footnote 3 above), p. 16, para. 52, summarizing a wide range of responses.

response it has received, the Special Rapporteur does not press his proposed article 30 bis.

5. CONCLUSIONS AS TO COUNTERMEASURES BY
AN INJURED STATE

367. For these reasons, the Special Rapporteur recommends that the following provisions on countermeasures taken by an injured State be incorporated in part two bis, chapter II:

“PART TWO BIS

“THE IMPLEMENTATION OF STATE
RESPONSIBILITY

“CHAPTER II

“COUNTERMEASURES

“*Article 47. Purpose and content of
countermeasures*

“1. Subject to the following articles, an injured State may take countermeasures against a State which is responsible for an internationally wrongful act in order to induce it to comply with its obligations under part two, as long as it has not complied with those obligations and as necessary in the light of its response to the call that it do so.

“2. Countermeasures are limited to the suspension of performance of one or more international obligations of the State taking those measures towards the responsible State.

“*Article 47 bis. Obligations not subject to
countermeasures*

“The following obligations may not be suspended by way of countermeasures:

“(a) The obligations as to the threat or use of force embodied in the Charter of the United Nations;

“(b) Obligations concerning the inviolability of diplomatic or consular agents, premises, archives or documents;

“(c) Any obligation concerning the third-party settlement of disputes;

“(d) Obligations of a humanitarian character precluding any form of reprisals against persons protected thereby; or

“(e) Any other obligations under peremptory norms of general international law.

“*Article 48. Conditions relating to resort to
countermeasures*

“1. Before taking countermeasures, an injured State shall:

“(a) Submit a reasoned request to the responsible State, calling on it to fulfil its obligations;

“(b) Notify that State of the countermeasures it intends to take;

“(c) Agree to negotiate in good faith with that State.

“2. The injured State may, as from the date of the notification, implement provisionally such countermeasures as may be necessary to preserve its rights under this chapter.

“3. If the negotiations do not lead to a resolution of the dispute within a reasonable time, the injured State acting in accordance with this chapter may take the countermeasures in question.⁷³⁵

“4. A State taking countermeasures shall fulfil its obligations in relation to dispute settlement under any dispute settlement procedure in force between it and the responsible State.

“*Article 49. Proportionality*

“Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and its harmful effects on the injured party.

“*Article 50. Prohibited countermeasures*

“Countermeasures must not:

“(a) Endanger the territorial integrity or amount to intervention in the domestic jurisdiction of the responsible State;

“(b) Impair the rights of third parties, in particular basic human rights.

(Footnote 734 continued.)

formance by State B of its obligation), State B will be able to plead force majeure. If, however, it is still technically possible for State B to perform (e.g. by using its own resources rather than those which State A should have provided), it cannot be said that State A has actually prevented performance: State B's excuse rests on equity, not impossibility. This in turn suggests a need for flexibility in the application of the *Chorzów Factory* dictum (see footnote 47 above), and reinforces the case for leaving it to be covered by article 38, if that article is to be retained.

⁷³⁵ If the Commission decides not to draw a distinction between “provisional” and other countermeasures, the following provision could be substituted for paragraphs 1–3:

“1. Before countermeasures are taken, the responsible State must have been called on to comply with its obligations, in accordance with article 46 ter, and have failed or refused to do so.”

“Article 50 bis. Suspension and termination of countermeasures

“1. Countermeasures must be suspended if:

“(a) The internationally wrongful act has ceased; and

“(b) The dispute is submitted to a tribunal or other body which has the authority to issue orders or make decisions binding on the parties.

“2. Notwithstanding paragraph 1, countermeasures in accordance with this chapter may be resumed if the responsible State fails to honour a request or order emanating from the tribunal or body, or otherwise fails to implement the dispute settlement procedure in good faith.

“3. Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.”

CHAPTER IV

Invocation of responsibility to a group of States or to the international community

368. Earlier sections of this report considered the range of consequences of State responsibility for the responsible State, as well as the invocation of responsibility by the injured State or States, whether by the bringing of an international claim or, eventually, by the taking of countermeasures. Two groups of issues remain with a view to the completion of the draft articles: (a) the invocation of the responsibility of a State towards a group of States extending beyond the State directly injured, including the invocation of responsibility towards the international community as a whole; and (b) the question of the residual and savings clauses envisaged for part four of the draft articles. This section of the report deals with these questions in turn. Since they have already been discussed or envisaged in the course of work on the topic since 1998, it is possible to deal with them at the level of principle. For the most part, the background in law and practice for the proposals made here—to the extent it exists at all—has already been described.⁷³⁶

A. General considerations

369. In his first report the Special Rapporteur analysed in detail the range of issues raised by articles 19 and 51–53 in respect of “international crimes”.⁷³⁷ Following an extensive debate,⁷³⁸ the Commission provisionally decided that it would address these issues in the following way:

[I]t was noted that no consensus existed on the issue of the treatment of “crimes” and “delicts” in the draft articles, and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that: (a) without prejudice to the views of any member of the Commission, draft article 19 would be put to one side for the time being while the Commission proceeded to consider other aspects of part one; (b) consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (*erga omnes*), peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19.⁷³⁹

⁷³⁶ See, however, paragraphs 391–394 below for a review of State practice in relation to collective countermeasures.

⁷³⁷ *Yearbook ... 1998* (see footnote 23 above), pp. 9–23 paras. 43–95.

⁷³⁸ Described in *Yearbook ... 1998*, vol. II (Part Two), pp. 64–77, paras. 241–331.

⁷³⁹ *Ibid.*, p. 77, para. 331.

The issue has generated a substantial further body of literature,⁷⁴⁰ and some additional comments of Governments.⁷⁴¹ In some cases existing positions have been restated, but there has also been some movement towards the idea that the systematic development of existing concepts—obligations to the international community as a whole, peremptory norms of international law—combined with a category of “gross” or “egregious” breaches, may respond sufficiently to the concerns raised by article 19.

370. It should be stressed that the adoption of the draft articles with the general support of the Commission is highly desirable, if not essential. In the Special Rapporteur’s view, it remains the case that no consensus can be formed around article 19 as adopted on first reading. But the same would be true of any proposal for the deletion of article 19, unless it is accompanied by the specific recognition of the importance for State responsibility of breaches of obligations to the international community as a whole, especially the most serious breaches.

371. In subsequent reports the Special Rapporteur has sought to give effect to the mandate recited in paragraph 369. To summarize:

(a) Compliance with the requirements of a peremptory norm of general international law is recognized as a circumstance precluding wrongfulness (art. 29 bis), and obligations arising from peremptory norms are recognized in other respects as having priority (art. 33, para. 2 (a); proposed art. 47 bis (e));

⁷⁴⁰ See, for example, Abi-Saab, “The uses of article 19”; Bowett, “Crimes of State and the 1996 report of the International Law Commission on State responsibility”; Dominicé, “The international responsibility of States for breach of multilateral obligations”; Gaja, “Should all references to international crimes disappear from the ILC draft articles on State Responsibility?”; Graefrath, “International crimes and collective security”; Pellet, “Can a State commit a crime? Definitely, yes!”; and “Vive le crime! Remarques sur les degrés de l’illicite en droit international”; Rao, “Comments on article 19 of the draft articles on State responsibility adopted by the International Law Commission”; Rosenne, “State responsibility and international crimes: further reflections on article 19 of the draft articles on State responsibility”; Rosentock, “An international criminal responsibility of States?”; Triffterer, “Prosecution of States for crimes of State”; and Zemanek, “New trends in the enforcement of *erga omnes* obligations”.

⁷⁴¹ For a summary of these views, see A/CN.4/496, paras. 110–115, and A/CN.4/504, paras. 23 and 78–81 (footnote 3 above).

(b) Necessity may not be invoked as a circumstance precluding wrongfulness where this would seriously impair an essential interest of the international community as a whole (art. 33, para. 1, (b)); such an interest may also weigh in favour of the invoking State;

(c) The definition of “injured State” specifically recognizes the general interests of States in securing compliance with obligations to the international community as a whole (proposed art. 40 bis).

In addition, the articles carefully distinguish between State responsibility for breaches of multilateral as distinct from bilateral obligations.

372. The question is, what remains? What is still necessary in order to fulfil the Commission’s mandate? In this respect, certain preliminary remarks are called for.

(a) First, it is necessary to recognize that the primary means in present international relations for dealing with emergencies affecting the very existence of States or the security of populations do not lie within the scope of the secondary rules of State responsibility. They are, *inter alia*, a matter for the competent international organizations, in particular the Security Council and the General Assembly;

(b) No doubt there are questions of the accountability and proper functioning of the Security Council and of other organizations faced with emergencies. It is significant, however, that such questions concern as much things not done as things badly done—the failure of timely intervention that could, perhaps, have averted a disaster, the formal promise as to the safety of “safe havens” that was dishonoured by inaction and lack of will.⁷⁴² To repeat, whatever institutional and other reforms may help to address these questions, they are not matters which can be resolved by way of the general secondary rules of State responsibility;

(c) For these and other reasons, it has already been provisionally agreed that the notion of “lawful sanctions” implicit in article 30 should be eliminated. Sanctions adopted pursuant to Chapter VII of the Charter of the United Nations, or otherwise validly imposed under international treaties, fall outside the scope of the project, and are covered respectively by articles 39 and 37–38;⁷⁴³

(d) One key feature of such sanctions is that their imposition and monitoring require organized collective action. The substantial systems of sanctions committees, procedures for authorizations and exceptions, the consideration of compensation to affected third States pursuant to article 50 of the Charter, deciding on the relations between non-forcible sanctions, peacekeeping and other measures—none of these are achievable within the scope of the draft articles, nor is there any value in seeking

to duplicate them by any parallel systems that could be envisaged;⁷⁴⁴

(e) A significant development in recent years has been the establishment of an international criminal court. Events during the 1990s have shown again the limited results that can flow from the sanctioning of whole populations, and the dilemma of appearing to punish many in order to sanction a few controlling figures. Where humanitarian or other tragedies are produced, or exacerbated, by the criminal conduct of individual leaders (whether or not they are formally in government), responses against the “State” or its people seem to miss the point. In the majority of cases of large-scale criminal conduct, the people of the State concerned are, either directly or collaterally, victims. Mechanisms are now being developed—of which the Rome Statute of the International Criminal Court is but one element—for holding the individuals involved accountable. In this enterprise, State responsibility has a role, but it is ancillary.⁷⁴⁵

(f) In particular, it has not been suggested that individual criminality under international law depends on any prior finding of the criminality of the State concerned. Were it to do so, difficult questions would be raised, since either there would be a need for a preliminary finding against the State itself,⁷⁴⁶ or the State would be dragged into the criminal court as an “absent” accused. This is not the way to achieve due process, for States or for individuals.⁷⁴⁷

In short, the general law of State responsibility can only play an ancillary role in this field. But there is such a role. In accordance with the provisions of part one of the draft articles, States as such may be responsible for gross breaches of fundamental obligations, and the consequences of that situation are correspondingly substantial: accountability to the international community as a whole, the obligation to cease the breach and to make full reparation for it, especially by way of restitution, and the possibility of significant countermeasures if these obligations are not fulfilled. In seeking to elaborate this role, certain key ideas need to be developed.

⁷⁴⁴ Any such systems would have to be in treaty form, whereas the form of the draft articles has not been decided (see paragraph 6 above).

⁷⁴⁵ For the role of criminal or disciplinary sanctions against individuals as a form of satisfaction in special cases, see paragraph 192 above.

⁷⁴⁶ Cf. the two-stage procedure applied to “criminal organizations” under the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279), arts. 9–11. It is very doubtful whether these provisions (which, of course, were not applied to the Government of Germany as such) were among “the principles of international law” affirmed by General Assembly resolution 95 (I) of 11 December 1946. They have not since been reflected in any international resolution or treaty.

⁷⁴⁷ It is sometimes said that State participation in a crime under international law renders the State “transparent”, thereby denying protection to its officials charged with international crimes. But the principle (affirmed in article 7 of the Charter of the International Military Tribunal (see footnote 746 above) and repeatedly since) that the official position of a person accused of an international crime “shall not be considered as freeing them from responsibility or mitigating punishment” applies irrespective of whether the official’s conduct formed part of a “crime of State”.

⁷⁴² See, for example, “Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica” (A/54/549) (15 November 1999); “Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda” (S/1999/1257, annex) (15 December 1999); and the statement of the Secretary-General of 16 December 1999 (SG/SM/7263–AFR/196).

⁷⁴³ For article 38, see paragraphs 60–65 above; for article 37, paragraphs 415–421 below; for article 39, paragraphs 422–426 below.

1. RIGHT OF EVERY STATE TO INVOKE RESPONSIBILITY
FOR BREACHES OF OBLIGATIONS TO THE
INTERNATIONAL COMMUNITY

373. In the context of State responsibility, it is appropriate to begin with the notion of obligations to the international community as a whole. It may be inferred that the content of those obligations is largely coextensive with the content of the peremptory norms. By definition a peremptory norm must have the same status vis-à-vis all States.⁷⁴⁸ It arises under general international law and local or conventional derogations from it are prohibited. It is conceivable that an obligation might exist *erga omnes* which was subject to variation as between two particular States by agreement between them. It would follow that the obligation was not peremptory. But it would equally follow that, in the event of a derogation, the *same* obligation was not owed to the international community as a whole.

374. However this may be, it is proposed to consider as the essential core of obligations to the international community as a whole those few norms which are generally accepted as universal in scope and non-derogable as to their content, and in the performance of which all States have a legal interest. This was the category which the Court seemed to have in mind in its dictum in the *Barcelona Traction* case.⁷⁴⁹ It is not necessary (indeed it is undesirable) for the draft articles to cite examples of such norms. They include the prohibition of the use of force in international relations, the prohibitions of genocide and slavery, the right of self-determination, and those other human rights and humanitarian law obligations which are recognized as non-derogable by general international law. The commentary should make it clear that the category includes only a small number of universally accepted norms.

375. With respect to this category of obligations, all States should be recognized as having a legal interest in compliance, whether or not the State is specially affected by their breach.⁷⁵⁰ This entails, as a minimum, that all States have a legal interest to secure cessation of any breach of these norms and to obtain appropriate assurances or guarantees of non-repetition. The draft articles should give effect to that entailment. It may be noted that there is no risk of conflict or contradiction where several or many States seek the cessation of a breach, or a declaration of a breach (or for that matter restitution, where what is to be restored is an objective situation, the status quo ante, in the interests of the victims of the breach⁷⁵¹). That being so, to limit such invocation to cases where all or virtually all States could agree to act would be too limiting. Any State party to an obligation established in the collective interest should be recognized as having at least

⁷⁴⁸ See article 53 of the 1969 Vienna Convention.

⁷⁴⁹ *I.C.J. Reports 1970* (see footnote 164 above), p. 32, para. 33; see also paragraph 97 above.

⁷⁵⁰ See paragraphs 106–107 and table 1 above. An appropriate analogy here is the idea of *locus standi* in the public interest; it may be noted that human rights and many other treaties give State parties generally the right to invoke responsibility, at least for the purposes of obtaining a declaration of a breach, without imposing any threshold requirement of their being specially affected.

⁷⁵¹ See paragraph 113 above.

the right to protest, to seek cessation and a declaration of the breach, and in appropriate cases to seek restitution.

2. LIMITATIONS ON THE RIGHT TO INVOKE
RESPONSIBILITY ON BEHALF OF ANOTHER

376. On the other hand, even if the right of each State to invoke responsibility in respect of obligations to the international community as a whole is to be recognized as an individual one, it is not a right established for the personal interest of that State, but in the community interest. It is distinct from the interest of a State, person or entity which is the specific victim of the breach (a State subject of an armed attack, a people denied the right of self-determination ...). Not-directly-affected States⁷⁵² asserting a legal interest in compliance are not seeking cessation or reparation on their own behalf but on behalf of the victims of the breach and in the public interest. It seems then that provisions for the invocation of responsibility on behalf of the international community need to acknowledge the primacy of the interests of the actual victims. In considering how this is to be achieved, it is necessary to consider separately the case where the victim is a third State, as distinct from a human group or other entity.

(a) *The victim State*

377. Where there is an identifiable victim State, then collective measures taken on its behalf, including in relation to reparation, should be taken with its consent.⁷⁵³ Difficulties can arise where the government of the victim State has been suppressed or overthrown, e.g. as a result of unlawful intervention from outside or of a coup, and where the victim State lacks valid representatives. This extreme case has certainly occurred, but it must be left to be resolved by existing law and practice relating to the representation of the State in times of emergency, and by the competent international organizations.⁷⁵⁴ It should not be allowed to obscure the normal situation where the victim State continues to be validly represented at the international level.

(b) *Victims other than States: peoples and populations*

378. In principle, the same solution might be envisaged where the primary victim is not a State but a human group or an individual. For obvious reasons, however, there may be great difficulties in securing legitimate representation by human groups or individuals, and in limiting the rights of other States to address issues of compliance at an international level, in the absence of a valid expression of the wishes of the victim or victims.⁷⁵⁵ In any event, such States may be properly concerned as to the issues of inter-

⁷⁵² Such as Ethiopia and Liberia in the *South West Africa* case, *I.C.J. Reports 1966* (see footnote 168 above).

⁷⁵³ See paragraph 109 above.

⁷⁵⁴ For a review see Talmon, *Recognition of Governments in International Law: with Particular Reference to Governments in Exile*, who seeks to reinstate the doctrine of recognition of governments-in-exile as the means of resolving such problems.

⁷⁵⁵ See the problem of representation referred to by Judge Vereshchetin in his separate opinion in the case concerning *East Timor*, *I.C.J. Reports 1995* (footnote 205 above), p. 135.

national legality, without necessarily identifying with the victims or seeking to represent them. It has already been proposed that parts two and two bis should not deal with the question of the invocation of responsibility by entities other than States, and an appropriate savings clause has been recommended in part two, chapter I.⁷⁵⁶ As to the invocation of responsibility by a State in cases where the primary victim is a non-State, the draft articles should provide that any State party to the relevant collective obligation should have the right to invoke responsibility by seeking cessation, assurances and guarantees of non-repetition and, where appropriate, restitution.

(c) “Victimless” breaches of community obligations

379. If there are no specific, identifiable victims (as may be the case with certain obligations *erga omnes* in the environmental field, e.g. those involving injury to the “global commons”), and if restitution is materially impossible, then other States may be limited to seeking cessation, satisfaction and assurances against repetition. Again, however, these are significant in themselves, and any State party to the relevant collective obligation should be entitled to invoke responsibility in these respects.

3. ISSUES OF PENALTY AND PROCESS

380. Evidently questions of cessation, non-repetition and restitution do not exhaust the potential consequences that may flow from a breach of obligations to the international community as a whole. Other consequences might include substantial damages reflecting the gravity of the breach, and even outright penalties. Indeed monetary payments are at the low end of the spectrum of possible consequences.⁷⁵⁷ But the question of penalties or punitive damages is a useful test case. It will be recalled that the draft articles as adopted on first reading did not provide for punitive damages even in the case of “international crimes” as defined in article 19.⁷⁵⁸ The exclusion of punitive damages in international law received support even from Governments which otherwise favoured article 19.⁷⁵⁹ Indeed, there is substantial authority for the proposition that punitive damages do not exist in international law.⁷⁶⁰ In the Special Rapporteur’s view, while responsibility may be invoked by States individually in order to ensure cessation and restitution in *all* cases involving breaches of obligations towards the international community as a whole,⁷⁶¹ the question must also be asked whether penalties or punitive damages can be provided for at least in the case of gross or egregious breaches. If the answer is no, then in this field the draft articles can have only a limited scope,

⁷⁵⁶ See paragraph 99 above, and for the text of the proposed provision, see paragraph 119.

⁷⁵⁷ Cf. the various consequences visited upon Iraq in the aftermath of its invasion of Kuwait, or on 1945 Germany in the aftermath of the Holocaust and the Second World War.

⁷⁵⁸ There is no reference to punitive damages in article 53. As already demonstrated, the Commission in adopting article 45, paragraph 2 (c), did not intend to provide for punitive damages (see paragraph 190 above).

⁷⁵⁹ See *Yearbook ... 1998* (footnote 23 above), p. 13, para. 54.

⁷⁶⁰ See the decisions referred to (*ibid.*, pp. 14–15, para. 57); and paragraph 190 above.

⁷⁶¹ See paragraph 375 above.

and the development of the secondary consequences by way of penalties for gross breaches will have to be left to the future. And this would be so, whether the reason given was the absence of any provision for punitive damages in international law, or the absence of any mechanism for imposing them, or its unacceptability to States for pragmatic reasons, or the impossibility of imposing such a regime in a text which does not have the force of a widely accepted treaty.⁷⁶²

381. It must be stressed that, despite the substantial debate that has surrounded article 19 and the notion of international crimes of States, practice has been almost entirely lacking. Active steps have been taken to implement the notion of international criminal responsibility for certain crimes under international law, and existing principles of international responsibility have been applied, under the auspices of the Security Council, to certain grave breaches, most notably the situation resulting from Iraq’s invasion of Kuwait in 1990. But legally and institutionally, arrangements for holding States accountable for the worst breaches of international law remain essentially as they were when article 19 was first proposed and adopted.

382. The situation may be compared with that under European Union law, so far the most developed supranational regulatory system. In particular, reference may be made to article 228 (formerly art. 171) of the Treaty establishing the European Community, which provides:

1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice. If the Member State concerned fails to take the necessary measures to comply with the Court’s judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.⁷⁶³

In 1996 the European Commission adopted guidelines for applying this provision, and in 1997 it adopted further guidelines on methods of calculating penalty payments. The first case in which these provisions were actually applied against a State occurred in 2000, when the Court of Justice of the European Communities imposed a penalty for a continuing breach of European Union law of

⁷⁶² This does not exhaust the catalogue of possible reasons. The international community is beginning to take seriously the imposition of penalties on individuals, including present and former governmental figures, who have committed egregious international crimes. That task might be thought more immediate and urgent than the penalizing of States and (indirectly) their populations.

⁷⁶³ This procedure is stated to be without prejudice to article 227, which allows any member State which considers that another member State has failed to fulfil any obligation under the Treaty to bring the matter before the Court, in effect for declaratory relief. However article 228 is the only procedure by which penalties can be imposed on member States.

€ 20,000 per day. This was imposed for the continuing dumping of harmful wastes into a river. In the course of its opinion, the Court summarized the effect of the Commission's guidelines for penalties as follows:

Memorandum 96/C 242/07 states that decisions as to the amount of a fine or penalty payment must be taken with an eye to their purpose, namely the effective enforcement of Community law. The Commission therefore considers that the amount must be calculated on the basis of three fundamental criteria: the seriousness of the infringement, its duration and the need to ensure that the penalty itself is a deterrent to continuation of the infringement and to further infringements.

Communication 97/C 63/02 identifies the mathematical variables used to calculate the amount of penalty payments, that is to say a uniform flat-rate amount, a coefficient of seriousness, a coefficient of duration, and a factor intended to reflect the Member State's ability to pay while ensuring that the penalty payment is proportionate and has a deterrent effect, calculated on the basis of the gross domestic product of the Member States and the weighting of their votes in the Council.⁷⁶⁴

The Court noted that these guidelines "help to ensure that [the Commission] acts in a manner which is transparent, foreseeable and consistent with legal certainty and are designed to achieve proportionality in the amounts of the penalty payments to be proposed".⁷⁶⁵ It approved the suggestion that the penalty amounts take into account national GDP and the State's voting power in the Council, on the ground that this "enables that Member State's ability to pay to be reflected while keeping the variation between Member States within a reasonable range".⁷⁶⁶ It concluded that:

[T]he basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations.

In the present case, having regard to the nature of the breaches of obligations, which continue to this day, a penalty payment is the means best suited to the circumstances.⁷⁶⁷

In reducing the penalty proposed by the Commission, the Court took into account that not all the continuing violations of the earlier judgement alleged by the Commission had been proved. At the same time, the continuing infringements, in view of their capacity to "endanger human health directly and harm the environment", as well as their inconsistency with European Union environmental policy, were to "be regarded as particularly serious".⁷⁶⁸

383. How the penalty procedure under article 228 will evolve is a matter for the future, and of course the procedure exists only in relation to European Union law as

such, not international law. A number of points may, however, be made:

(a) The procedure shows that, despite occasional claims to the contrary, there is nothing in the notion of the State or of treaty-based legal relations that excludes, a priori, the imposition of penalties;

(b) Penalties under article 228 are not denominated as "criminal", and their intention, primarily at least, is to enforce compliance;⁷⁶⁹

(c) They are imposed only in special cases, at the request of a collective organ, after a two-stage proceeding before a court with general and compulsory jurisdiction, and with all the accompaniments of due process;

(d) They are imposed in a system in which countermeasures are excluded.⁷⁷⁰

384. It seems clear to the Special Rapporteur that in the present stage of development of international law, the conditions for the regular imposition of penalties upon States do not exist, and can only be created with great difficulty. The Court of Justice referred to the need for transparency, certainty and proportionality. These are general legal requirements of due process in penal matters. They are not confined to legal subsystems such as that of the European Union.

385. But if there are difficulties in imposing penalties or similar sanctions on States in the absence of adequate institutions and procedures, there is on the other hand the practice of applying countermeasures in order to induce a State to comply with its international obligations. Special regimes apart, such countermeasures do not require the prior exhaustion of judicial remedies, let alone prior judicial authorization.⁷⁷¹ If the injured State is entitled to apply countermeasures as a decentralized form of seeking redress, the question is why it cannot be supported in doing so by other States which themselves have a recognized interest in compliance with the obligation breached. There is a further question, whether collective countermeasures should be allowed to one or some States faced with the breach of an obligation to the international community as a whole which does not directly injure any State (e.g. in the field of human rights or internal armed conflict).

B. Collective countermeasures⁷⁷²

386. A previous section of this report reviewed the provisions on countermeasures as adopted on first reading,

⁷⁶⁴ Court of Justice of the European Communities, *Commission of the European Communities v. Hellenic Republic*, case C-387/97, *Judgment of 4 July 2000, Reports of Cases before the Court of Justice and the Court of First Instance*, 2000-7 (A), p. I-5116, paras. 85-86, citing European Community memorandum 96/C 242/07 of 21 August 1996 (*Official Journal of the European Communities*, No. C 242 (1996), p. 6) and communication 97/C 63/02 of 28 February 1997 (*ibid.*, No. C 63 (1997), p. 2).

⁷⁶⁵ *Judgment of 4 July 2000* (see footnote 764 above), para. 87.

⁷⁶⁶ *Ibid.*, para. 88; cf. paragraph 89, where the European Community's guidelines are described as "a useful point of reference".

⁷⁶⁷ *Ibid.*, paras. 92-93.

⁷⁶⁸ *Ibid.*, para. 94.

⁷⁶⁹ The Court of Justice rejected the respondent's argument that the proceedings were inadmissible because there was a retrospective element to the penalty. It noted that "the argument put forward ... concerning the relevance, when setting the penalty payment, of factors and criteria relating to the past is indissociable from consideration of the substance of the case, in particular as regards the object of penalty payments under Article 171(2) of the Treaty" (*ibid.*, para. 42).

⁷⁷⁰ See paragraph 343 above.

⁷⁷¹ See paragraph 355 above.

⁷⁷² There is a valuable discussion of these issues by Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense*, pp. 110-175. See also Akehurst, "Reprisals by third States"; Charney, *loc. cit.*; Frowein, *loc. cit.*; Hutchinson, *loc. cit.*; and Simma, "From bilateralism to community interest in international law".

so far as they concern actions taken by injured States in the narrow sense (i.e. as proposed to be defined in article 40 bis, paragraph 1). The question is to what extent other States may legitimately assert a right to react against breaches of collective obligations to which they are parties, even if they are not injured in this sense. For the sake of simplicity, these cases will be discussed under the rubric of “collective countermeasures”. They are not limited to situations where some or many States act in concert. The collective element may also be supplied by the fact that the reacting State is asserting a right to respond in the public interest to a breach of a multilateral obligation to which it is a party, though it is not individually injured by that breach, or that the measures are coordinated by a number of States involved.

387. It is important to distinguish between individual countermeasures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs, on the one hand, and institutional reactions in the framework of international organizations, on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the Charter of the United Nations, is not covered by the draft articles.⁷⁷³ More generally the draft articles do not cover the case where action is taken by an international organization, even though the member States direct or control its conduct.⁷⁷⁴

388. A second necessary distinction is that between “unfriendly” but not unlawful reactions to the conduct of another State (retorsion) and those reactions which are inconsistent with the international obligations of the State and are justified, if at all, as legitimate countermeasures. While the distinction may sometimes be difficult to draw in practice, especially in the context of collective action, it is crucial for the purposes of State responsibility. Only countermeasures properly so-called fall within the scope of the draft articles.⁷⁷⁵ Thus countermeasures do not include policies of collective non-recognition, whether such non-recognition is obligatory⁷⁷⁶ or optional.

389. Thirdly, non-forcible countermeasures must be clearly distinguished from reactions involving the use of force. Measures involving the use of force in international relations, or otherwise covered by Article 2, paragraph 4,

⁷⁷³ See existing article 39, discussed below (paras. 422–426).

⁷⁷⁴ See paragraph 428 below for the proposed exclusion from the draft articles of questions concerning responsibility for the acts of international organizations.

⁷⁷⁵ Thus collective diplomatic boycotts, avoidance of State visits or sporting links, etc. do not breach international law and while their intent may be hostile or unfriendly, they do not involve countermeasures. The collective action taken by OAU against the apartheid system in South Africa also seems not to have involved countermeasures in the strict sense, in the absence of relevant treaty obligations with South Africa as to trade or aviation etc. See Ferguson-Brown, “The legality of economic sanctions against South Africa in contemporary international law”; cf. Dugard, “The Organization of African Unity and colonialism: an enquiry into the plea of self-defence as a justification for the use of force in the eradication of colonialism” (referring to self-defence rather than countermeasures). The collective measures against Rhodesia were taken pursuant to Chapters VI and later VII of the Charter of the United Nations: see Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia*, pp. 365–422.

⁷⁷⁶ As, for example, in the situation considered by ICJ in the *Namibia* case, *I.C.J. Reports 1971* (see footnote 169 above), p. 16.

of the Charter of the United Nations, are regulated by the relevant primary rules, and do not fall within the scope of the secondary obligations covered by the draft articles. This has already been affirmed in the context of existing article 50.⁷⁷⁷

390. On these understandings it is proposed, first, briefly to review some examples of recent experience concerned with collective countermeasures as defined, secondly, to attempt an assessment of that practice, and thirdly to consider, in the light of this practice, what provisions ought to be made in the draft articles. It should be stressed that this is not a matter of *introducing* into the draft articles provisions for collective countermeasures. As adopted on first reading, the draft articles allowed any injured State (broadly defined in the original article 40) to take countermeasures on its own account, without regard to what any other State might be doing, and in particular without regard to the views or responses of the victim State. The deficiencies of such a broad approach to collective countermeasures have already been considered.⁷⁷⁸ Thus the question is rather how the presently unlimited and uncoordinated provision for collective countermeasures, created by article 40 read in conjunction with article 47, is to be limited and controlled.

1. A REVIEW OF STATE PRACTICE

391. In a number of instances, States have reacted against violations of collective obligations, although they could not claim to be injured in the sense of article 40 bis, paragraph 1. Reactions have taken such forms as economic sanctions (contrary to treaty obligations) or other measures (e.g. the breaking off of air links in disregard of bilateral aviation treaties; the freezing of assets). Examples include the following:

(a) *United States-Uganda (1978)*. In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.⁷⁷⁹ As members of GATT, Uganda and the United States were obliged not to introduce general export restrictions and quotas in their economic relations.⁷⁸⁰ The United States however did not rely on GATT exceptions: the legislation recited that “the Government of Uganda ... has committed genocide against Ugandans” and that “the United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide”.⁷⁸¹

(b) *Certain Western countries-Poland and the Soviet Union (1981)*. On 13 December 1981, following the movement of Soviet troops along Poland’s eastern border, the Government of Poland imposed martial law and subsequently suppressed demonstrations and interned

⁷⁷⁷ See paragraph 335 above.

⁷⁷⁸ See paragraphs 109 and 114 above.

⁷⁷⁹ Uganda Embargo Act, Public Law 95–435 of 10 October 1978, *United States Statutes at Large 1978*, vol. 92, part 1 (Washington, D.C., United States Government Printing Office, 1980), pp. 1051–1053.

⁷⁸⁰ See article XI, paragraph 1, of GATT.

⁷⁸¹ Uganda Embargo Act (see footnote 779 above), p. 1052, sect. 5 (a)–(b).

12,500 dissidents.⁷⁸² After verbal condemnations from individual United Nations members, the United States and other Western countries took action against both Poland and the Soviet Union. Besides unfriendly acts, the measures included the suspension, with immediate effect, of treaties providing for landing rights of Aero-flot in the United States and LOT in Austria, France, the Netherlands, Switzerland, the United Kingdom and the United States.⁷⁸³ In all those instances, the suspension procedures provided for in the respective treaties were disregarded, and (unless their wrongfulness was precluded) the measures thus constituted violations of international law.⁷⁸⁴

(c) *Collective measures against Argentina (1982)*. In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.⁷⁸⁵ Following a request by the United Kingdom, European Community members, Australia, Canada and New Zealand went beyond the sphere of verbal condemnations and adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI, paragraph 1, and possibly article III, of GATT. It is doubtful whether the measures could be justified under the national security exception provided for in article XXI (b) (iii) of GATT.⁷⁸⁶ Moreover, the embargo adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,⁷⁸⁷ for which security exceptions of GATT did not apply;

(d) *United States-South Africa (1986)*. When in 1985, the Government of South Africa declared a state of emergency in large parts of the country, the Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.⁷⁸⁸ Subsequently, some countries introduced measures which went beyond those recommended by the Council and which involved prima facie breaches of international law. For example, the United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended, with immediate effect, landing rights of South African Airlines on United States territory.⁷⁸⁹ This immediate suspension

was contrary to the terms of the 1947 United States of America and Union of South Africa Agreement relating to air services between their respective territories⁷⁹⁰ and was justified as a measure which should encourage the Government of South Africa "to adopt reforms leading to the establishment of a non-racial democracy";⁷⁹¹

(e) *Collective measures against Iraq (1990)*. On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion as a breach of international peace and security and, from 6 August onwards, adopted a series of resolutions legitimizing reactions of Member States to restore the Government of Kuwait. Even before Member State action was authorized by the Council, European Community member States and the United States adopted trade embargoes and decided to freeze Iraqi assets.⁷⁹² This action was taken in direct response to the Iraqi invasion and, at least initially, was not legitimized by Council resolutions;

(f) *Collective measures against the Federal Republic of Yugoslavia (1998)*. In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.⁷⁹³ For a number of countries, such as France, Germany and the United Kingdom, the latter measure implied the breach of bilateral aviation agreements.⁷⁹⁴ Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that "President Milosevic's ... worsening record on human rights means that, on moral and political grounds, he has forfeited the right of his Government to insist on the 12 months notice which would normally apply."⁷⁹⁵ The Federal Republic of Yugoslavia protested these measures as "unlawful, unilateral and an example of the policy of discrimination".⁷⁹⁶

392. In some other cases, "interested" States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures, but asserted instead a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

⁷⁸² Rousseau, "Chronique des faits internationaux", pp. 603–604.

⁷⁸³ Sicilianos, op. cit., pp. 161–162; and Rousseau, loc. cit., p. 607.

⁷⁸⁴ See, for example, article 15 of the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People's Republic (Warsaw, 19 July 1972), United Nations, *Treaty Series*, vol. 1279, No. 21084, p. 205; and article 17 of the Civil Air Transport Agreement between the United States of America and the Union of Soviet Socialist Republics (Washington, 4 November 1966), *ibid.*, vol. 675, No. 9606, p. 3.

⁷⁸⁵ Security Council resolution 502 (1982).

⁷⁸⁶ Western States' reliance on this provision was disputed by other GATT members; cf. communiqué of Western countries, GATT document L. 5319/Rev.1 and the statements by Brazil and Spain, GATT document C/M/157, pp. 5–6. For an analysis, see Hahn, *Unilateral Suspension of GATT Obligations as Reprisal*, pp. 328–334; and Sicilianos, op. cit., p. 163.

⁷⁸⁷ The treaties are reproduced in *Official Journal of the European Communities*, No. L 298 (26 November 1979), p. 2; and *ibid.*, No. L 275 (18 October 1980), p. 14.

⁷⁸⁸ Security Council resolution 569 (1985). For further references, see Sicilianos, op. cit., p. 165.

⁷⁸⁹ ILM, vol. 26, No. 1 (January 1987), p. 79 (sect. 306), and p. 104 (implementation order).

⁷⁹⁰ United Nations, *Treaty Series*, vol. 66, p. 239 (art. VI).

⁷⁹¹ ILM (see footnote 789 above), p. 105.

⁷⁹² See, for example, President Bush's Executive Orders of 2 August 1990, reproduced in *American Journal of International Law* (Washington, D.C.), vol. 84, No. 4 (October 1990) pp. 903–905.

⁷⁹³ Common positions of 7 May and 29 June 1998, *Official Journal of the European Communities*, Nos. L 143, p. 1, and L 190, p. 3 (1998); implemented through Council Regulations 1295/98, *ibid.*, No. L 178 p. 33 (1998), and 1901/98, No. L 248, p. 1 (1998).

⁷⁹⁴ See, for example, United Kingdom, *Treaty Series* No. 10 (London, HM Stationery Office, 1960); and *Recueil des Traités et Accords de la France*, No. 69 (1967).

⁷⁹⁵ See *British Year Book of International Law*, 1998, vol. 69, p. 581. The British position is again summarized in *ibid.*, 1999, vol. 70, p. 555–556.

⁷⁹⁶ Statement of the Government of the Federal Republic of Yugoslavia on the suspension of flights of Yugoslav Airlines of 10 October 1998, reproduced in Weller, *The Crisis in Kosovo 1989–1999*, p. 227.

(a) *Netherlands-Suriname (1982)*. In 1980, a military government seized power in the former Dutch colony of Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Government of the Netherlands suspended the bilateral treaty on development assistance under which Suriname was entitled to financial subsidies until 1985.⁷⁹⁷ While the treaty itself did not contain any suspension or termination clauses, the Government of the Netherlands stated that the human rights violations in Suriname constituted a fundamental change of circumstances which gave rise to a right of suspension;⁷⁹⁸

(b) *European Community member States-Federal Republic of Yugoslavia (1991)*. A similar line of reasoning was advanced by European Community member States in their relation to Yugoslavia. In late 1991, in response to resumption of fighting within Yugoslavia, European Community members suspended, and later denounced, the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia.⁷⁹⁹ This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in its resolution 713 (1991). The reaction was incompatible with the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice.⁸⁰⁰ Justifying the suspension, European Community member States explicitly mentioned the threat to peace and security in the region. But as in the case of Suriname, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.⁸⁰¹

393. These examples are illustrative rather than exhaustive. They show a certain willingness on the part of some States to resort to countermeasures in response to violations of collective obligations. In other cases, it is not always easy to decide whether the actions already involved conduct inconsistent with international obligations or were cases of unfriendly but lawful acts by way of retorsion. For example, the measures taken by Western countries against the Soviet Union following the invasion of Afghanistan may be mentioned. While most of the measures probably constituted acts of retorsion, the most controversial reaction, the United States embargo on cereal exports, may have violated its commitment to the Soviet Union under bilateral agreements.⁸⁰²

⁷⁹⁷ See Lindemann, "The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam", pp. 68–69. The relevant treaty is reprinted in *Tractatenblad van het Koninkrijk der Nederlanden*, No. 140 (1975).

⁷⁹⁸ See Siekmann, "Netherlands State practice for the parliamentary year 1982–1983", p. 321.

⁷⁹⁹ *Official Journal of the European Communities*, No. L 315 (1991), p. 1, for the suspension; and No. L 325 (1991), p. 23, for the denunciation.

⁸⁰⁰ Article 60, second paragraph, of the Cooperation Agreement.

⁸⁰¹ Equally the European Court of Justice relied on the law of treaties and not the law of State responsibility in upholding the validity of the European Community regulation in question: see *A. Racke GmbH and Co. v. Hauptzollamt Mainz*, case C–162/96, *Judgment of 16 June 1998, Reports of Cases before the Court of Justice and the Court of First Instance*, 1998–6, pp. 3706–3708, paras. 53–59.

⁸⁰² While the terms of the agreement were observed, the United States Government had unilaterally given permission for the purchase

394. In a number of other cases, it seems that "interested" States at least asserted a right to resort to countermeasures in response to violations of collective obligations, although their actual responses fell short of being countermeasures. In this regard, mention can be made of various declarations adopted at Group of Seven summits calling for collective action against countries harbouring airline terrorists.⁸⁰³ The reaction of certain States in supporting the United States at its request during the crisis concerning diplomatic and consular personnel suggests that the reacting States were prepared to take countermeasures, although the measures actually taken arguably remained mere retorsions.⁸⁰⁴

2. AN ASSESSMENT

395. The survey shows that in a considerable number of instances States, which were not "injured" in the sense of article 40 bis, paragraph 1, have taken measures against a target State in response to prior violations of collective obligations by that State. Moreover in some cases at least, those measures were themselves in breach of (or would otherwise have been in breach of) the obligations of the State taking the measures vis-à-vis the target State. This seems to suggest that a right to resort to countermeasures cannot be restricted to the victims of the breach in question, but can also derive from violations of collective obligation, as these have been defined earlier in the present report.⁸⁰⁵

396. However, this statement must be qualified in a number of respects:

(a) First, it has to be frankly admitted that practice is dominated by a particular group of States (i.e. Western States). There are few instances in which, for example, States from Africa or Asia have taken collective countermeasures;⁸⁰⁶

(b) Secondly, practice is selective; in the majority of cases involving violations of collective obligations, no reaction at all has been taken, apart from verbal condemnations;

(c) Thirdly, even if coercive measures were taken, they were not always designated as countermeasures. The decision of the Government of the Netherlands to rely on fundamental change of circumstances in order to suspend its treaty with Suriname seems to imply a preference for other concepts.⁸⁰⁷

of larger quantities of cereals. These were annulled by the United States embargo. See Sicilianos, *op. cit.*, p. 158.

⁸⁰³ See the joint statement on international terrorism adopted at the Bonn Economic Summit (17 July 1978), ILM, vol. XVII, No. 5 (September 1978), p. 1285. Subsequent statements can be found, *ibid.*, vol. XX, No. 4 (July 1981), p. 956; and *ibid.*, vol. XXV, No. 4 (July 1986), p. 1005.

⁸⁰⁴ See the analysis by Frowein, *loc. cit.*, p. 417; and Sicilianos, *op. cit.*, pp. 159–160.

⁸⁰⁵ Paras. 83 and 92.

⁸⁰⁶ But for collective action in the context of southern Africa, see footnote 169 above.

⁸⁰⁷ See paragraph 392 (a) above. It may be noted that stringent conditions are applicable to fundamental change of circumstances under article 62 of the 1969 Vienna Convention, as interpreted and applied for example in the case concerning the *Gabčíkovo-Nagymaros Project*,

397. It must be admitted that practice does not allow clear conclusions to be drawn as to the existence of a right of States to resort to countermeasures, in the absence of injury in the sense of article 40 bis, paragraph 1. On the other hand, a number of observations can be made.

398. First, there does not appear to exist a distinction based on the legal source of the collective obligation which has been violated. In the examples given, States have reacted against breaches of conventional as well as customary international law. Of course, resort to countermeasures will be excluded in response to violations of treaties which generally exclude the application of general rules of international law, or which contain their own provisions for authorizing collective measures. But on the other hand, the mere existence of conventional frameworks including monitoring mechanisms (e.g. in the field of human rights) has not been treated as excluding recourse to countermeasures.

399. Furthermore, despite the selectiveness of practice, none of the instances concerns isolated or minor violations of collective obligations. If States have resorted to countermeasures in response to violations of collective obligations, the violation has been seen to have reached a certain threshold.⁸⁰⁸ Indeed the examples referred to involve some of the major political crises of recent times. With all due caution, it seems possible to say that reactions were only taken in response to severe violations of collective obligations.

400. Finally, in cases involving one directly injured State (i.e. a victim State as well as other “interested” third States), the victim State’s reaction seems to have been treated as legally relevant, if not decisive, for all other States. For example, during the Falklands conflict and the Tehran hostage crisis, States other than the United Kingdom and the United States respectively only acted upon the appeal of those States as the direct victims, and only within the scope of the appeal made. Where a State is the victim of a breach (and other States’ interest in the breach, if any, is of a more general character), it seems appropriate that the victim State should be in a position to decide whether and what countermeasures should be taken, within the overall limits laid down by the draft articles. Third States should not be able, in effect, to intervene in a dispute by taking countermeasures if the principal parties wish to resolve it by other means. There is here an analogy with collective self-defence. In the *Military and Paramilitary Activities in and against Nicaragua* case, ICJ noted that action by way of collective self-defence could not be taken by a third State except at the request of the

primary obligee (the State subjected to the armed attack).⁸⁰⁹ Yet, of course, the rules relating to the use of force give rise to obligations *erga omnes*: they are collective obligations. The *Military and Paramilitary Activities in and against Nicaragua* case was referred to by the Court in the *Gabčíkovo-Nagymaros Project* case as relevant to the law of countermeasures,⁸¹⁰ and the analogy seems a reasonable, if not a compelling, one. If State A cannot act in collective self-defence of State B without State B’s consent, it does not seem appropriate to hold that it could take (collective) countermeasures in cases where State B is the victim, irrespective of State B’s wishes. On the other hand, if State A, a member of the international community to which the obligation is owed, cannot take proportionate countermeasures on behalf of State B, the victim of the breach, then State B is in effect left to face the responsible State alone, and a legal relationship based on multilateral obligation is effectively converted to a bilateral one at the level of its implementation. That too does not seem right as a matter of principle.

3. TENTATIVE CONCLUSION

401. The conclusions to be drawn from the practice reviewed above are necessarily tentative; the practice is rather sparse and involves a limited number of States. Nonetheless there is support for the view that a State injured by a breach of a multilateral obligation should not be left alone to seek redress for the breach. If other States are entitled to invoke responsibility on account of such breaches, at least in terms of seeking cessation and assurances of non-repetition, as well as restitution on behalf of the injured State,⁸¹¹ it does not seem inconsistent with principle that they be recognized as entitled to take countermeasures with the consent of that State. Of course such countermeasures should comply with the conditions laid down for the injured State itself,⁸¹² and in addition their “collective” character should be recognized. Thus all the countermeasures taken in relation to a particular breach should be considered in determining whether the response is, overall, proportionate. In addition, if the responsible State is cooperating with the injured State in the resolution of the dispute, other States should respect that process. This can be achieved by limiting the action of “third” States to countermeasures that would have been legitimate if taken by the injured State itself.

402. It is therefore proposed to alter the position of the draft articles on the question of collective countermeasures by limiting the extent to which States, not themselves directly injured by a breach of multilateral obligation, can take action by way of countermeasures. In contrast to the position taken on first reading, the draft articles should make clear that the distinction, proposed to be incorporated in article 40 bis, between injured States and other States entitled to invoke responsibility, has repercussions on the right of the broader group of States to resort to countermeasures.

I.C.J. Reports 1997 (see footnote 18 above). It is accordingly doubtful that such a doctrine will be applicable in many of these cases. The point is, however, that in some cases Governments have preferred to rely on (possibly inapplicable) grounds for the termination of treaties rather than on countermeasures.

⁸⁰⁸ It is not the function of the Special Rapporteur, or the Commission, to judge in particular cases whether more or less widely shared perceptions of egregious breaches actually corresponded to the facts. States taking countermeasures do so at their peril, and the question whether they are justified in any given case is one for objective appreciation (see paragraph 289 above). The point is rather that the States taking these measures asserted that they were justified on the basis—and by clear implication, only on the basis—that the grounds invoked were genuine, serious and, if established, warranted such a response.

⁸⁰⁹ See footnote 207 above.

⁸¹⁰ *I.C.J. Reports 1997* (see footnote 18 above), p. 55, para. 83.

⁸¹¹ See paragraph 377 above.

⁸¹² See paragraph 367 above, for the terms on which it is proposed that an injured State be entitled to take countermeasures.

In cases where the violation of a collective obligation directly injures one State, other States bound by the obligation and falling within the definition proposed in article 40 bis, paragraph 2, should be entitled to take countermeasures on behalf of the injured State, with that State's request and consent and within the scope of the consent given. In addition, it will be necessary to adapt the regime of countermeasures by an injured State on its own account to deal with the situation where several States take, or are entitled to take, countermeasures in the collective interest. In particular the conduct of each of the States that takes such measures should be taken into account in the assessment of proportionality. These conditions and limitations are reflected in the proposed provision set out in paragraph 413 below.

403. A second situation concerns the question of collective countermeasures in cases where no State is "injured" in the sense of article 40 bis, paragraph 1—notably, breaches of human rights obligations, owed to the international community as a whole but affecting only the nationals of the responsible State. The difficulty here is that, almost by definition, the injured parties will lack representative organs which can validly express their wishes on the international plane, and there is a substantial risk of exacerbating such cases if third States are freely allowed to take countermeasures based on their own appreciation of the situation. On the other hand it is difficult to envisage that, faced with obvious, gross and persistent violations of community obligations, third States should have no entitlement to act.

404. In various contexts, especially those involving human rights and humanitarian law, a distinction is drawn between individual violations of collective obligations, and breaches which have a gross and systematic character. Moreover this is done even where the underlying rule is the same for individual and for gross or systematic breaches (as it often is). For example:

(a) The European Court of Human Rights has distinguished between individual complaints and cases involving systematic violations amounting to a practice of inhuman or degrading treatment or punishment, holding the exhaustion of local remedies rule inapplicable in the latter case;⁸¹³

(b) The procedure established by Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 targets cases involving "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms".⁸¹⁴

(c) The definition of crimes against humanity as a matter of general international law implies a threshold of systematic or widespread violations, either in terms or (as

with genocide and apartheid) by necessary implication from the very definition of the prohibited acts.⁸¹⁵

Attention should also be drawn to the justification for the ban on airline flights to the Federal Republic of Yugoslavia, as articulated by the Council of the European Union in Council Regulation (EC) No. 1901/98 of 7 September 1998. The recital alleged, inter alia:

indiscriminate violence and brutal repression against its own citizens, which constitute serious violations of human rights and international humanitarian law.⁸¹⁶

405. As a matter of policy, the constraints and inhibitions against collective countermeasures—in particular, concern about due process for the allegedly responsible State, the problem of intervention in and possible exacerbation of an individual dispute—are substantially reduced where the breach concerned is gross, well attested, systematic and continuing. To disallow collective countermeasures in such cases does not seem appropriate. Indeed to do so may place further pressure on States to intervene in other, perhaps less desirable ways. It is not the function of the Commission to examine in the present context the lawfulness of humanitarian intervention in response to gross breaches of community obligations.⁸¹⁷ But at least it can be said that international law should offer to States with a legitimate interest in compliance with such obligations, some means of securing compliance which does not involve the use of force.

406. For these reasons, the Special Rapporteur proposes that the draft articles should allow States parties to a community obligation to take collective countermeasures in response to a gross and well-attested breach of that obligation, in particular in order to secure cessation and to obtain assurances and guarantees of non-repetition on behalf of the non-State victims.⁸¹⁸ Such countermeasures should comply with the other conditions for countermeasures laid down in the draft articles, and in particular they should not, taken together, infringe the requirement of proportionality. The text should reflect this restriction rather than implying—as did articles 40 and 47 as adopted on first reading—that individual countermeasures are a corollary to all kinds of injury broadly defined.

C. Additional consequences of "gross breaches" of obligations to the international community as a whole

407. The next question is whether further consequences can be attached to the category of gross, egregious or systematic breaches of obligations to the international com-

⁸¹⁵ See, for example, the definition of "crimes against humanity" in article 7 of the Rome Statute of the International Criminal Court, reflecting the Commission's own definition in article 18 of the draft Code of Crimes against the Peace and Security of Mankind (*Yearbook ... 1996*, vol. II (Part Two), p. 47,

⁸¹⁶ *Official Journal of the European Communities*, No. L 248 (8 September 1998), p.1.

⁸¹⁷ As ICJ noted in the cases concerning *Legality of Use of Force, Provisional Measures, Order of 2 June 1999*, *I.C.J. Reports 1999*, para. 16, "the use of force in Yugoslavia ... under the present circumstances ... raises very serious issues of international law".

⁸¹⁸ See also paragraphs 115–116 and table 2 above.

⁸¹³ *Ireland v. United Kingdom* (see footnote 175 above), discussed in the Special Rapporteur's second report, *Yearbook ... 1999* (see footnote 8 above), p. 37, para. 125.

⁸¹⁴ For an assessment of the resolution 1503 procedure, see, for example, Alston, "The Commission on Human Rights", pp. 145–155.

munity as a whole.⁸¹⁹ Of course, the general legal consequences of responsibility will apply to such breaches, and their incidence will be more substantial in proportion to the gravity of the breach. But are there any further legal consequences applicable to “gross breaches” as such? It is necessary to distinguish the question of additional obligations on the responsible State and possible consequences for other States.

408. So far as the responsible State itself is concerned, it is remarkable that the draft articles on first reading only proposed the following consequences of crimes as defined in article 19:

(a) Restitution was required, even if the burden of providing restitution was out of all proportion to the benefit gained by the injured State instead of compensation (art. 52 (a), disapplying article 43 (c) in case of crimes);

(b) Restitution could seriously jeopardize the political independence or economic stability of the responsible State (art. 52 (a), disapplying article 43 (d));

(c) Measures by way of satisfaction could “impair the dignity” of the responsible State (art. 52 (b), disapplying article 45, paragraph 3).

If, as recommended, article 43 (d) is deleted,⁸²⁰ only the first and third of these “consequences” will remain, and it is very difficult to envisage actual cases in which either will make any difference. As to the first, in the absence of a valid election of compensation in lieu of restitution by the injured party,⁸²¹ restitution (if it is possible) will be effectively mandatory, having regard to the importance of the values associated with obligations to the international community as a whole, and the need not to condone their violation. As to the third, the main element of the proposed article 45, paragraph 4, is now proportionality,⁸²² and there is no need to “humiliate” even a State which has committed a gross breach of a community obligation. In the Special Rapporteur’s view, these “consequences” are trivial, incidental and unreal, and should be deleted.

409. On the other hand, having regard to the values underlying article 19—which are valid whether or not one accepts the language of “crimes” to express them—then

⁸¹⁹ In the draft articles adopted on first reading, it was noted that “alternative phrases such as ‘an international wrongful act of a serious nature’ or ‘an exceptionally serious wrongful act’ could be substituted for the term ‘crime’” (*Yearbook ... 1996*, vol. II (Part Two), art. 40, p. 63, para. 3). It should be stressed that some of these gross breaches are distinct legal wrongs in themselves, since the definition of the wrong of itself ensures that only severe or extreme cases are covered (e.g. genocide, crimes against humanity). Others (e.g. torture) are general legal wrongs which in circumstances of extreme or systematic application would fall within the category. It has been suggested that a draft article be added to make this clear. This might be located in part two, chapter I, and might provide that:

“The obligations of the responsible State set out in this part may be owed to another State, to several States, to all other States parties or to the international community as a whole, depending on the character and content of the international obligation and on the circumstances of the breach, and irrespective of whether a State is the ultimate beneficiary of the obligation.”

⁸²⁰ See paragraph 144 (d) above.

⁸²¹ To the extent that restitution relates to the continuing performance of the primary obligation, it may be that not even the injured State can validly waive it (see paragraphs 134 and 253 above).

⁸²² See paragraph 194 above.

there is a case for damages to be awarded for gross breach in a way that will reflect the gravity of the breach and deter its commission in future. It has been argued that the imposition of penalties by some centralized judicial process, equivalent to that under article 228 of the Treaty establishing the European Community, is beyond the scope of the present text, and would require a special regulatory regime which is presently lacking, and which the draft articles cannot realistically create.⁸²³ The position with respect to punitive damages is not necessarily the same, however, and it can be envisaged that an injured State could be held entitled to demand punitive damages. In reality, following gross and systematic breaches of community obligations, there will always be a much wider group of persons indirectly affected, and major restoration work to be done. For the purposes of discussion, the Special Rapporteur proposes that in the case of gross breach of community obligations, the responsible State may be obliged to pay punitive damages. Alternatively, if the present formulation of article 45, paragraph 2 (c), is not retained in relation to breaches more generally,⁸²⁴ it could be applied to the category of gross breaches.

1. ADDITIONAL OBLIGATIONS FOR OTHER STATES FACED WITH GROSS BREACHES OF COMMUNITY OBLIGATIONS?

410. If article 52 as adopted on first reading envisaged few or no additional obligations for the responsible State, article 53 did—paradoxically—envisage such obligations for third States. In respect of the gross breaches referred to in article 19, third States were obliged:

(a) Not to recognize as lawful the situation created by the crime;

(b) Not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;

(c) To cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and

(d) To cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

These consequences were analysed in an earlier report.⁸²⁵ There the point was made that, leaving to one side the controversial terminology of “crimes”, they are broadly acceptable, but only so long as they do not carry a *contrario* implications for other breaches which may not be egregious, systematic or gross. States may not recognize as lawful, for example, a unilateral acquisition of territory procured by the use of force, even if the use of force was arguably lawful. States may not lawfully assist in the detention of hostages, even in isolated cases. Again, for the purposes of discussion, the Special Rapporteur proposes a consolidated version of articles 51–53. The commentary should make it clear that the consequences spelled out may also apply in other cases, depending on the context and the content of the applicable primary rule.

⁸²³ See paragraphs 382–383 above.

⁸²⁴ As proposed in paragraph 191 above.

⁸²⁵ *Yearbook ... 1998* (see footnote 23 above), p. 11, para. 51.

2. LEAVING SCOPE FOR FURTHER DEVELOPMENTS

411. It is obvious that issues of the salience and enforcement of community obligations are undergoing rapid development.⁸²⁶ Older structures of bilateral State responsibility are plainly inadequate to deal with gross violations of human rights and humanitarian law, let alone situations threatening the survival of States and peoples. The draft articles cannot hope to anticipate future developments, and it is accordingly necessary to reserve to the future such additional consequences, penal and other, which may attach to internationally wrongful conduct by reason of its classification as a crime, or as a breach of an obligation to the international community as a whole. Such a clause might perhaps be seen as an admission of defeat in the search for adequate and principled alternatives to existing article 19. But in the Special Rapporteur's view, it is rather a realistic acknowledgement of the limits of codification and progressive development, at a time of rapid institutional and political change.

D. Summary of conclusions as to part two, chapter III, and part two bis

412. For these reasons, the Special Rapporteur proposes that the text of part two, chapter III, should read as follows:

“[CHAPTER III

“SERIOUS BREACHES OF OBLIGATIONS TO
THE INTERNATIONAL COMMUNITY
AS A WHOLE

“Article 51. Consequences of serious breaches of obligations to the international community as a whole

“1. This chapter applies to the international responsibility that arises from the serious and manifest breach by a State of an obligation owed to the international community as a whole.

“2. Such a breach entails, for the State responsible for that breach, all the legal consequences of any other internationally wrongful act and, in addition, [punitive damages] [damages reflecting the gravity of the breach].

“3. It also entails, for all other States, the following further obligations:

“(a) Not to recognize as lawful the situation created by the breach;

“(b) Not to render aid or assistance to the State which has committed the breach in maintaining the situation so created;

“(c) To cooperate in the application of measures designed to bring the breach to an end and as far as possible to eliminate its consequences.

⁸²⁶ See paragraphs 372 and 391, and cf. paragraph 382 above.

“4. Paragraphs 2 and 3 are without prejudice to such further penal or other consequences that the breach may entail under international law.]”

Since the proposed chapter III is self-contained, and since article 19 adopted on first reading played no role whatever in part one, if chapter III is adopted article 19 itself can be deleted. The commentary will need to explain in further detail the limited content of the category to which chapter III applies and the non-exclusiveness of the consequences set out in paragraph 3.

413. A number of provisions must also be added to part two bis as already proposed. First of all, article 40 bis as already proposed should make it clear in what respects the broader category of States (referred to in paragraph 2) is entitled to invoke responsibility, in accordance with the recommendations already made.⁸²⁷ The conditions for the invocation of responsibility laid down in part two bis should also apply as far as necessary to such States.⁸²⁸ In addition the following provisions should be added to that part:

“Article 50A.⁸²⁹ Countermeasures on behalf of an injured State

“Any other State entitled to invoke the responsibility of a State under [article 40 bis, paragraph 2] may take countermeasures at the request and on behalf of an injured State, subject to any conditions laid down by that State and to the extent that that State is itself entitled to take those countermeasures.

“Article 50B. Countermeasures in cases of serious breaches of obligations to the international community as a whole

“1. In cases referred to in article 51 where no individual State is injured by the breach, any State

⁸²⁷ See paragraphs 378–379 above.

⁸²⁸ This can be achieved by adding to proposed article 40 bis provisions to the effect that an injured State may invoke all the consequences of an internationally wrongful act in accordance with part two. In addition the following paragraph should be added in relation to the broader category of States presently referred to in article 40 bis, paragraph 2:

“A State referred to in paragraph 2 may seek:

“(a) Cessation of the internationally wrongful act, in accordance with article 36 bis;

“(b) On behalf of and with the consent of the injured State, reparation for that State in accordance with article 37 bis and chapter II;

“(c) Where there is no injured State:

“(i) Restitution in the interests of the injured person or entity, in accordance with article 43; and

“(ii) [Punitive damages] [Damages reflecting the gravity of the breach], in accordance with article 51, paragraph 2, on condition that such damages shall be used for the benefit of the victims of the breach.”

In addition article 46 ter as already proposed (para. 284 above) can apply to any State invoking responsibility, whether or not it is an injured State.

⁸²⁹ These articles would come before article 50 bis (Suspension and termination of countermeasures) as proposed in paragraph 367 above.

may take countermeasures, subject to and in accordance with this chapter, in order to ensure the cessation of the breach and reparation in the interests of the victims.

“2. Where more than one State takes countermeasures under paragraph 1, those States shall cooperate in order to ensure that the conditions laid down by this chapter for the taking of countermeasures are fulfilled.”

CHAPTER V

Part Four

GENERAL PROVISIONS

414. Finally, it is necessary to bring together certain savings clauses already adopted on first reading, or subsequently proposed, and to consider what other provisions of a general character might be included in part four. Part four is to be understood as a general and concluding part, clarifying certain matters with which the draft articles do not deal, and spelling out certain relationships between the draft articles and other rules, and fields, of international law.

A. Existing articles

1. ARTICLE 37. *LEX SPECIALIS*

415. Article 37 as adopted on first reading is headed “*lex specialis*”. It provides:

The provisions of this part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.

416. The very brief commentary to article 37 stresses “the *residual* character of the provisions of part 2”, and notes that, either in the instrument creating the primary obligation in question or otherwise, States may “determine the legal consequences, as between them, of the internationally wrongful act involved”.⁸³⁰ The only limitation upon this freedom, according to the commentary, is that States may not, even

inter se, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law, nor escape from the supervision of the competent United Nations organs by virtue of their responsibilities relating to the maintenance of international peace and security.⁸³¹

417. Government comments on draft article 37 have supported the principle;⁸³² indeed a number of Governments have suggested that it should apply generally to the

draft articles.⁸³³ The Czech Republic raises the relationship between the provisions of article 37 and “crimes” as dealt with in article 19, suggesting that it would be useful to review the wording of draft article 37 “with a view to making it clearer that the provisions of part two, when they deal with the regime applicable to ‘crimes’, are no longer simply residual in character”.⁸³⁴ It points out that if “‘crimes’ consist of breaches of peremptory rules” of *jus cogens*, “the secondary rules applicable to them must also be peremptory in nature, with no possibility of derogating from them by means of an agreement *inter partes*”.⁸³⁵

418. Switzerland raises the relationship between draft article 37 and article 60 of the 1969 and 1986 Vienna Conventions, noting that on the current wording of article 37, the termination of a treaty in accordance with these provisions “could be considered as precluding all other consequences, namely, those deriving from the draft articles on State responsibility”.⁸³⁶ It suggests that this situation should be clarified and that a reservation concerning article 60 of the Vienna Conventions might be appropriate.⁸³⁷

419. As to the location of the draft article, Japan suggests that it should be placed in part one, chapter I, of the draft.⁸³⁸ France, on the other hand, considers that the draft article could be included in either the introductory or final provisions of the draft articles as, along with articles 38 and 39, it deals “with the relationship between the draft articles and external rules, and emphasize[s] the supplementary nature of [the] text”.⁸³⁹

⁸³⁰ *Yearbook ... 1983*, vol. II (Part Two), commentary to article 2 [present art. 37], p. 42–43, para. (1). No examples are given.

⁸³¹ *Ibid.*, p. 43, para. (2).

⁸³² See the discussion held in the Sixth Committee in which “the remark was made that the draft should continue to respect *lex specialis*” (A/CN.4/496 (footnote 3 above), p. 20, para. 127). The Sixth Committee has noted that specific treaty regimes providing their own framework for the responsibility of States would ordinarily prevail over the provisions of the draft articles (regardless of their eventual form) (*ibid.*). Likewise, at its fifty-fourth session it was noted that the draft articles “would not apply to self-contained legal regimes, such as those on the environment, human rights and international trade, which had been developed in recent years” (A/CN.4/504 (footnote 3 above), p. 9, para. 15).

⁸³³ See comments by Germany (*Yearbook ... 1998* (footnote 35 above), p. 102), the United States (*ibid.*, p. 133), the United Kingdom (*ibid.*, p. 100) and Japan (“the precedence given to the *lex specialis* rule certainly cannot be unique to part two, but may also be relevant to part three or even part one” (*Yearbook ... 1999* (footnote 43 above), p. 107). See also the observation made in the Sixth Committee that “the Commission should draft the articles on the assumption that the rule of *lex specialis* should be transformed into a general principle” (A/CN.4/496 (footnote 3 above), p. 20, para. 127).

⁸³⁴ *Yearbook ... 1998* (see footnote 35 above), p. 137.

⁸³⁵ *Ibid.*

⁸³⁶ *Ibid.*

⁸³⁷ The discussion in the Sixth Committee also stressed the importance of respecting the “parallelism between the law of treaties and the law of international responsibility, while making clear the complementarity of the draft articles with the Vienna Convention” (A/CN.4/496 (footnote 3 above), p. 20, para. 127).

⁸³⁸ *Yearbook ... 1999* (see footnote 43 above), p. 107.

⁸³⁹ *Yearbook ... 1998* (see footnote 35 above), p. 137.

420. States often make specific provision for the legal consequences of breaches of particular rules. The question then is whether those consequences are exclusive, in other words, whether the consequences which would otherwise apply under general international law are thereby excluded. This is always a question of interpretation in each case, which no provision such as article 37 can pre-judge. In some cases it will be clear from the language of a treaty or other text that only the consequences specified flow. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the WTO dispute settlement mechanism as it relates to remedies.⁸⁴⁰ An example of the latter is article 41 (formerly 50) of the European Convention on Human Rights.⁸⁴¹ Both concern matters dealt with in part two of the draft articles, but the same considerations apply, in principle, to part one. Thus a particular treaty might impose obligations on a State but define the “State” for that purpose in a way which produced different consequences than would otherwise flow from the rules of attribution in part one, chapter II.⁸⁴²

421. The Special Rapporteur agrees with the view that article 37 should apply generally to the draft articles, and that it should accordingly be placed in part four. A version of article 37, leaving open the question of interpretation, is accordingly proposed.⁸⁴³

2. ARTICLE 39. RELATIONSHIP TO THE CHARTER OF THE UNITED NATIONS

422. Article 39 provides as follows:

The legal consequences of an internationally wrongful act of a State set out in the provisions of this part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.

423. Government comments on draft article 39 have been somewhat mixed. A number of States seem to view as unproblematic the precedence given by the draft article to the mechanism of the Charter of the United Nations for the maintenance of international peace and security over the provisions of part two of the draft articles.⁸⁴⁴ The United States, for instance,

agrees with the objective of the draft article in emphasizing that the Charter’s allocation of responsibility for the maintenance of peace and

security rests with the Security Council, and that an act of a State, properly undertaken pursuant to a Chapter VII decision of the Council, cannot be characterized as an internationally wrongful act.⁸⁴⁵

In its view, Article 103

not only establishes the pre-eminence of the Charter, but [sic] it makes clear that subsequent agreements may not impose contradictory obligations on States. Thus, the draft articles would not derogate from the responsibility of the Security Council to maintain or restore international peace and security.⁸⁴⁶

424. France, on the other hand, is concerned that draft article 39 “appears to run counter to Article 103 of the Charter of the United Nations, which makes no distinction between the provisions of the Charter”⁸⁴⁷ and suggests that such a provision would “have the effect of restricting the prerogatives of the Security Council”. France considers that it would “be preferable to state that the provisions of the draft articles do not impair the provisions and procedures of the Charter, in accordance with Article 103 thereof”,⁸⁴⁸ and proposes reformulation of the article as follows: “The provisions of the present articles are without prejudice to the provisions and procedures of the Charter of the United Nations, pursuant to Article 103 thereof.”⁸⁴⁹ The United Kingdom, though it supports the principle of pre-eminence of the Charter reflected in Article 103 and draft article 39, opposes addressing the question of the relationship between the rights and obligations of States under the law of State responsibility and under the Charter in the draft articles. In its view, this “question raises complex issues, which concern not only the United Nations but also other international and regional organizations which may be acting in conjunction with the United Nations or in roles assigned to them under the Charter”.⁸⁵⁰

425. As to the location of the draft article, France believes that it could be included in the final or introductory provisions of the draft articles.⁸⁵¹ Japan is in favour of placing the article in part one, chapter I, “[a]s article 39 is related to the draft articles as a whole”.⁸⁵²

426. The Special Rapporteur agrees in principle with this view, although having regard to the content of part one, chapter I, article 39 is better placed in part four. He also agrees that there is no need to single out those provisions of the Charter of the United Nations relating to the maintenance of international peace and security, or to use the qualifying phrase “where appropriate”, which is suggestive but lacks meaning.⁸⁵³ Article 103 of the

⁸⁴⁰ See paragraph 157 and footnote 319 above.

⁸⁴¹ See paragraph 156 and footnote 312 above.

⁸⁴² Cf. “federal” clauses in treaties, allowing certain component units of the State to be excluded from the scope of the treaty (e.g. the Convention on the settlement of investment disputes between States and nationals of other States, arts. 70 and 72), or limiting obligations with respect to such units (e.g. the Convention for the protection of the world cultural and natural heritage, art. 34).

⁸⁴³ See paragraph 429 below.

⁸⁴⁴ See the comments of the Czech Republic (discussing responses to “international crimes” and noting that “in the field of the maintenance of international peace and security ... there is in fact already a specific mechanism, which is appropriately covered by draft article 39” (*Yearbook ... 1998* (footnote 35 above), p. 137); Mongolia (emphasizing that the text “should take into full account the current situation concerning the measures which the United Nations is taking under Chapter VII of the Charter” (*ibid.*)); and Japan (“It is evident that under such provisions as Article 103 of the Charter of the United Nations and article 39 of the draft articles, the Charter has precedence over the draft articles” (*Yearbook ... 1999* (footnote 43 above), p. 108).

⁸⁴⁵ *Yearbook ... 1998* (see footnote 35 above), p. 138.

⁸⁴⁶ *Ibid.* The United States further notes that “State responsibility principles may inform the [Security] Council’s decision-making, but the draft articles would not govern its decisions”.

⁸⁴⁷ *Ibid.*, p. 137.

⁸⁴⁸ *Ibid.*

⁸⁴⁹ *Ibid.*

⁸⁵⁰ *Ibid.*, p. 138.

⁸⁵¹ *Ibid.*, p. 137.

⁸⁵² *Yearbook ... 1999* (footnote 43 above), p. 108.

⁸⁵³ The language of article 39 adopted on first reading is strongly criticized by Arangio-Ruiz, “Article 39 of the ILC first-reading draft articles on State responsibility”. He proposes either the deletion of article 39 altogether, or a provision which does not go “further than Article 103 of the Charter in a way which may lead to distortions of the régime of State responsibility” (p. 751). For the reasons given in the text the present Special Rapporteur proposes a simple savings clause relating to article 39, and is therefore consistent with the latter alternative.

Charter is comprehensive and categorical: its effect, whatever it may be, can be reserved in a simple provision.⁸⁵⁴

B. Proposed additions to part four

427. It has become usual for texts proposed by the Commission (whether for adoption in treaty form or otherwise) to contain a range of savings and other general clauses. These are intended to delimit the scope of the text and to preserve cognate legal questions. A conspicuous example is the 1969 Vienna Convention, which reserves cases of State succession, State responsibility and the outbreak of hostilities (art. 73) as well as the case of an aggressor State (art. 75). Any function the latter article may play is performed here by article 39, and it does not seem necessary to refer to questions of State succession in the draft articles.⁸⁵⁵ On the other hand, there has been uncertainty and confusion over the relations between suspension or termination of treaties and the non-performance of treaty obligations by way, for example, of countermeasures. It seems appropriate that the draft articles return the complement of article 73 of the Vienna Convention and expressly reserve any question as to the validity, suspension, termination or content of a treaty.⁸⁵⁶ Indeed it might be asked whether the same should not be said about the content and applicability to a State of any rule of substantive customary international law, i.e. any rule specifying the content of an international obligation. To assist discussion, such a proposal is made below.

428. Other possible savings clauses include the following:

(a) *Reservation for responsibility of or for acts of international organizations.* This has already been proposed and was provisionally agreed by the Commission at its fiftieth session in 1998;⁸⁵⁷

(b) *Cases of diplomatic protection.* By contrast the relation between the draft articles and the Commission's project on diplomatic protection cannot be expressed in terms of exclusion. The draft articles cover cases of State responsibility in the field of diplomatic protection, as well as in the field of direct State-to-State injury, and this is so even though the secondary rules in the field of diplomatic protection will be specified in more detail in the course of the Commission's work on that topic. There seems no need to spell this out in the text; it can be made clear in the commentary;

(c) *Issues of invalidity and non-recognition.* Questions of fundamental validity of State acts fall outside the scope of the draft articles, even though they may be, in some cases at least, consequential upon internationally unlawful conduct. Correlatively so do general questions of non-recognition, which concern issues either of fundamental validity or of State policy, as the case may be. Again, however, there seems no need to spell this out in the text as distinct from the commentary;

⁸⁵⁴ See paragraph 429 below.

⁸⁵⁵ It is controversial in what circumstances there can be succession to State responsibility. The draft articles do not address that issue, which is an aspect of the law of succession rather than of responsibility.

⁸⁵⁶ Cf. the proposal of Switzerland (para. 418 above).

⁸⁵⁷ *Yearbook ... 1998*, vol. II (Part Two), p. 85, para. 424.

(d) *Non-retroactivity of the draft articles.* Treaty texts based on the Commission's work often provide that they do not apply, as such, to events occurring prior to their entry into force, but without prejudice to the possible effect of any rule embodied in the treaty which reflects general international law.⁸⁵⁸ Since no decision has yet been taken as to the possible form of the draft articles, it seems unnecessary to consider such a clause at this stage;

(e) *Definition clauses.* The draft articles have adopted a strategy of defining terms as required for particular purposes in particular articles. No separate definition clause seems to be required.

C. Summary of conclusions as to part four

429. For these reasons, the Special Rapporteur proposes that the text of part four should read as follows:

“PART FOUR

“GENERAL PROVISIONS

“Article 37. *Special provisions made by other applicable rules*

“The provisions of these articles do not apply where and to the extent that the conditions for or the legal consequences of an internationally wrongful act of a State have been exclusively determined by other rules of international law relating to that act.

“Article A. *Responsibility of or for the conduct of an international organization*

“These articles shall not prejudice any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

“Article B. *Rules determining the content of any international obligation*

“These articles are without prejudice to any question as to the existence or content of any international obligation of a State, the breach of which may give rise to State responsibility.

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

“The legal consequences of an internationally wrongful act of a State under these articles are without prejudice to Article 103 of the Charter of the United Nations.”

⁸⁵⁸ See, for example, the 1969 Vienna Convention, art. 4. But there is no equivalent in the Vienna Convention on Diplomatic Relations nor in the Vienna Convention on Consular Relations.

**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.4/510

**Third 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]
[9 June 2000]

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Introduction

1. It may be recalled that the International Law Commission finalized a set of 17 draft articles on the subtopic of prevention on its first reading in 1998. These were transmitted to the General Assembly in a report covering the work of the Commission on its fiftieth session.¹ In transmitting the draft set of 17 articles on the subtopic of prevention, the Commission also requested comments from Member States of the United Nations on the following three questions:

(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 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?

2. Several States participated in the discussion of the item on international liability and commented on the draft articles. Observations made by States on the three questions raised by the Commission were the subject of the second report of the Special Rapporteur.² Thereafter, States were invited to submit written comments on the set of draft articles by the end of 1999 to enable the Commission to take up the second reading of the draft articles on prevention. Five States have submitted their written comments.³ Given the availability of views of States as expressed both in the debates of the Sixth Committee of the General Assembly in 1998 and in 1999, as well as in written comments, it is opportune to review various articles on prevention prepared in the first reading of the Commission. It may be helpful to summarize the comments from States before considering possible changes suggested by them.

¹ See *Yearbook ... 1998*, vol. II (Part Two), pp. 21–23. As explained by the Chairman of the Commission, Mr. Baena Soares (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 13th meeting (A/C.6/53/SR.13), para. 11), these draft articles drew their inspiration from the articles adopted by the Working Group of the Commission in 1996, which had been reconsidered in the light of the Commission’s decision to focus first on the prevention aspects of the topic, as well as recent developments, especially the adoption of the Convention on the Law of the Non-navigational Uses of International Watercourses (adopted in New York on 21 May 1997 (*Official Records of the General Assembly, Fifty-first Session, Supplement No. 49*, resolution 51/229, annex).

² *Yearbook ... 1999*, vol. II (Part One), p. 111, document A/CN.4/501.

³ As of 12 April 2000, France, Lebanon, the Netherlands, Turkey and the United Kingdom of Great Britain and Northern Ireland had submitted their comments; see A/CN.4/509 (reproduced in the present volume).

CHAPTER I

Comments of Member States

3. Once a decision was taken by the Commission to deal with the topic of prevention first, separating it from the topic of liability, the finalization of the draft articles within the year was appreciated by States.⁴ Several States, while appreciating the general thrust of the draft articles on prevention, felt strongly that the Commission should not overlook the main objective of its mandate, i.e. international liability for injurious consequences arising out of acts not prohibited by international law.⁵ In their view, the Commission had a duty to deal with liability as it was an important main component of the equation, together with prevention. At least one State cautioned the Commission against taking up the subject of liability too soon before the existing trends were settled.⁶

4. On the scope of the topic, some States regretted the decision of the Commission to exclude activities which actually caused harm. It may be recalled that draft article 1 (b) was considered in 1996 by the Working Group of the Commission, which placed it in brackets. It was suggested that the regime should deal with “present” as well as “future” harm.⁷ One State doubted whether the

draft articles would apply to activities which, if taken individually, would only cause less than significant harm, but taken together could produce significant harm.⁸ It was suggested that the draft articles should deal with harm caused to the global commons.⁹

5. Some States felt that the draft articles should have covered harm in the ecosystem by including a suitable reference to it in article 1 following the example of articles 20 and 22 of the Convention on the Law of the Non-navigational Uses of International Watercourses.¹⁰ However, most States endorsed the scope of the draft

⁴ See *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 13th–22nd meetings (A/C.6/53/SR.13–22).

⁵ *Ibid.* For example, Bangladesh (draft articles were “constructive and practical”, 16th meeting (A/C.6/53/SR.16), para. 2), and Mexico (they constituted a “full and balanced document”, *ibid.*, para. 6) wanted the Commission to deal with liability. Similarly, see statements/comments of Ireland (*ibid.*, 20th meeting (A/C.6/53/SR.20), para. 49), Viet Nam (*ibid.*, para. 38), Hungary (*ibid.*, 19th meeting (A/C.6/53/SR.19), para. 15), New Zealand (*ibid.*, 16th meeting (A/C.6/53/SR.16), para. 44), Austria (*ibid.*, 15th meeting (A/C.6/53/SR.15), para. 7), Sri Lanka (*ibid.*, 22nd meeting (A/C.6/53/SR.22), para. 24), Sweden on behalf of the Nordic countries (*ibid.*, 17th meeting (A/C.6/53/SR.17), para. 3), Egypt (*ibid.*, 22nd meeting (A/C.6/53/SR.22), para. 18), Portugal (*ibid.*, 20th meeting (A/C.6/53/SR.20), para. 28), Guatemala (*ibid.*, 17th meeting (A/C.6/53/SR.13), para. 58), the United Republic of Tanzania (*ibid.*, para. 59), Bahrain (*ibid.*, 21st meeting (A/C.6/53/SR.21), para. 12), Romania (*ibid.*, 18th meeting (A/C.6/53/SR.18), para. 1), the Libyan Arab Jamahiriya (*ibid.*, para. 42), Cuba (*ibid.*, para. 50), Tunisia (*ibid.*, para. 60), Nigeria (*ibid.*, 17th meeting (A/C.6/53/SR.17), para. 33), Uruguay (*ibid.*, 16th meeting (A/C.6/53/SR.16), para. 89), Mongolia (*ibid.*, 15th meeting (A/C.6/53/SR.15), para. 40), Argentina (*ibid.*, para. 94), Slovakia (*ibid.*, 22nd meeting (A/C.6/53/SR.22), para. 28) and Lebanon (A/CN.4/509, reproduced in the present volume).

⁶ For instance, the United States of America noted that, “[f]ollowing the completion of the second reading ... a pause in the Commission’s work might be appropriate in order for international practice to develop that area”. It “believed that international regulation in the area of liability should proceed through careful negotiations on particular topics, such as oil pollution or hazardous wastes, or in particular regions, and not by attempting to develop a single global regime. Once State practice had developed further, the Commission might be asked to resume its work in the light of precedents established” (*Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 19th meeting (A/C.6/54/SR.19), para. 38).

⁷ Guatemala (*ibid.*, *Fifty-third Session, Sixth Committee*, 13th meeting (A/C.6/53/SR.13), para. 56). On behalf of the Nordic countries (Sweden) it was “stressed that not only was the notion of prevention relevant to activities involving risk ... but that it also came into play in relation to the containing and minimizing of the adverse effects arising from the normal conduct of hazardous activities and from accidents” (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting (A/C.6/54/

SR.25), para. 124; also *ibid.*, *Fifty-third Session, Sixth Committee*, 17th meeting (A/C.6/53/SR.17), para. 2). Secondly, the related assumption in paragraph (13) of the commentary to draft article 1 was that the “proper distinction was rather between events that were certain and those that were less than certain, and possibly quite improbable” (Austria, *ibid.*, 15th meeting (A/C.6/53/SR.15), para. 5).

⁸ See the comment by the United Kingdom which assumed that the articles were not intended to apply to groups of activities each of which would have minimal transboundary impact which, when taken together, would cause transboundary harm. It suggested that it would be useful to clarify that the draft articles applied to “‘any activity’ (in the singular) not prohibited by international law which involves a risk of causing significant transboundary harm” (A/CN.4/509, reproduced in the present volume).

⁹ While endorsing the draft articles as “logical, complete and moderate”, Italy recommended that they should cover harm to the “global commons”; in supporting the decision “to distinguish between harmful activities and those which were merely hazardous in the sense that they entailed a risk of significant transboundary harm” it noted that it “understood, but did not agree with, the reasons for the decision to limit the obligation of prevention to harm caused in the territory of and in other places under the jurisdiction or control of another State”. It pointed out that in that connection ICJ, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons (I.C.J. Reports 1996)*, had referred to “prevention specifically in relation to regions over which no State had sovereignty” (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 15th meeting (A/C.6/53/SR.15), paras. 64–65). For the Netherlands’ view to the same effect, see A/CN.4/509, reproduced in the present volume. For a contrary view, see the remarks of China, *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting (A/C.6/53/SR.14), p. 6, para. 40.

¹⁰ See footnote 1 above. See also the comment of Switzerland (*ibid.*, *Fifty-third Session, Sixth Committee*, 13th meeting (A/C.6/53/SR.13), para. 64); see further Chile, which noted that the Commission should explore the feasibility of an entity or institution being empowered to act on behalf of the international community in the event of damage to common spaces, perhaps through the establishment of a high commissioner on the environment, as had been suggested. Chile felt that Switzerland had raised an interesting notion in that connection by referring at a previous meeting to the concept of “damage to ecosystems” (*ibid.*, 14th meeting (A/C.6/53/SR.14), para. 22). Austria appeared to raise the same concern, but referred more directly to the so-called creeping pollution affecting the environment. It stated that “the suggestion was that a State’s obligation to prevent ‘significant transboundary harm’ that was *bound** to occur might be discharged by the State’s taking measures to prevent or minimize the risk of such harm. The assumption that State conduct involving the risk of *inevitable** significant transboundary harm did not, as such, also entail that State’s obligation to cease and desist from the risk-bearing conduct was highly questionable; it reflected an anachronistic view of the fundamental balance of States’ rights and obligations in situations in which a significant degradation of the environment was involved” (*ibid.*, 15th meeting (A/C.6/53/SR.15), para. 5).

articles in their current form.¹¹ Even though no State questioned the use of the phrase “acts not prohibited by international law” employed in draft article 1, this has been the subject of considerable discussion among international law experts. This essentially raises the question of the relationship between the topic of State responsibility and international liability. This discussion is also one of right focus on the implications of an activity as opposed to the legality or validity of the activity itself. It is suggested that very few activities are prohibited by international law and that it is fundamentally misconceived generally to categorize activities as permitted or not prohibited by international law.¹²

6. It was suggested that draft article 2 (a) indicating a range or spectrum encompassing the “risk” covered by the draft articles was confusing and could be re-drafted.¹³ With respect to draft article 2 (c), it was observed that the “causal” or “spatial” connection between harm originating from the State of origin and occurring in the affected State should be explicitly brought out.¹⁴

7. Some States felt that the type of activities which came within the scope of the draft articles should be specified to avoid unnecessary confusion.¹⁵ Others found such a task was avoidable as it could not be complete and final in view of evolving scientific and technological developments.¹⁶ It was also suggested that in the absence of a binding provision on settlement of disputes the Commission should clarify further the concept of “significant harm” or drop the adjective “significant” altogether.¹⁷ A contrary view

was expressed that the threshold of “significant harm” was low and that the same should be given greater emphasis as “serious” or “substantial” harm. In that connection it was also noted that the principle of “no harm” should not be given undue importance.¹⁸ On the other hand, several States supported the threshold of “significant harm”.¹⁹ One State indicated further that the obligation of conduct was based not on the absolute concept of minimizing risk, the limits of which would be difficult to grasp, but on the crucial requirement of an equitable balance of interests among the States concerned. It was also added that to this end it was necessary to incorporate the idea of equitable balance of interests in article 3 following the example of article 5 of the Convention on the Non-navigational Uses of International Watercourses.²⁰

8. Some States indicated that the duty of prevention was subject to the basic right of a State to develop its natural resources in accordance with the principle of sovereignty in the interest of the economic well-being of its people.²¹ It was noted that State sovereignty should be stressed, together with the right to development and capacity-building, to enable States to better discharge applicable duties of due diligence or standards of due care.²² One State questioned the lack of emphasis on sustainable development within the draft articles and regretted the lack of any provision for financial and other assistance and recognition of common but differentiated responsibilities to achieve the goal of environmental protection.²³ Other States also

¹¹ For example, France noted that the draft could “be regarded as restrictive, for two reasons”: that was “a welcome restriction, in comparison with the 1996 draft” (A/CN.4/509, reproduced in the present volume). See also the United States, which welcomed the “Commission’s initiative in redirecting its work to focus on avoiding transboundary harm” (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting (A/C.6/53/SR.14), para. 44). It also expressed its happiness at the completion of the first reading of the draft articles “[n]otwithstanding the difficulty of the task and the time that had been required”. In this view, the “Commission had done a comprehensive and thorough review of the issue of prevention and the obligation of due diligence” (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 19th meeting (A/C.6/54/SR.19), para. 37).

¹² See Brownlie, *System of the Law of Nations: State Responsibility*.

¹³ Guatemala (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 13th meeting (A/C.6/53/SR.13), para. 56).

¹⁴ The United Kingdom suggested that “transboundary harm means harm which is caused by an activity in the territory of the State of origin or in other places under its jurisdiction or control and which occurs in the territory of or in other places under the jurisdiction or control of another State, whether or not the States concerned share a common border” (A/CN.4/509, reproduced in the present volume). See also Venezuela (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 15th meeting (A/C.6/53/SR.15), para. 27).

¹⁵ India (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 15th meeting (A/C.6/53/SR.15), para. 91); Israel (*ibid.*, para. 19); Malawi (*ibid.*, 16th meeting (A/C.6/53/SR.16), para. 71); United Kingdom (A/CN.4/509, reproduced in the present volume); and the Netherlands (*ibid.*).

¹⁶ Japan (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting (A/C.6/53/SR.14), para. 19); Chile (*ibid.*, para. 21); Indonesia (*ibid.*, para. 36); Venezuela (*ibid.*, 15th meeting (A/C.6/53/SR.15), para. 26); Uruguay (*ibid.*, 16th meeting (A/C.6/53/SR.16), para. 90); and Tunisia (*ibid.*, 18th meeting (A/C.6/53/SR.18), para. 60).

¹⁷ Pakistan (*ibid.*, 17th meeting (A/C.6/53/SR.17), para. 21); also Viet Nam (*ibid.*, 20th meeting (A/C.6/53/SR.20), para. 40).

¹⁸ Ethiopia (*ibid.*, 15th meeting (A/C.6/53/SR.15), paras. 42 and 45).

¹⁹ For example, the Czech Republic noted that the term “significant” had given rise to much debate in the past, including during the negotiations concerning the Convention on the Law of the Non-navigational Uses of International Watercourses (see footnote 1 above), to the point where the controversy now appeared to have exhausted its potential. Under those circumstances, the choice of the term “significant” appeared to be justified (*ibid.*, para. 56). Mexico observed that, with regard to the threshold of harm, although any wording involved a value judgement, the inclusion of activities involving the risk of causing “significant harm” provided some elements of certainty; “significant” was the most appropriate term (*ibid.*, 16th meeting (A/C.6/53/SR.16), para. 11). See also Greece (*ibid.*, 22nd meeting (A/C.6/53/SR.22), para. 43) and China (*ibid.*, 14th meeting (A/C.6/53/SR.14), para. 40). Several others generally supported the draft articles: Germany (*ibid.*, 15th meeting (A/C.6/53/SR.15), para. 76); Italy (*ibid.*, para. 64); Mongolia (*ibid.*, para. 39); Indonesia (*ibid.*, para. 36); and Malaysia (*ibid.*, para. 32).

²⁰ Czech Republic (*ibid.*, 15th meeting (A/C.6/53/SR.15), para. 57). See also footnote 1 above.

²¹ Malaysia (*ibid.*, para. 32) and Indonesia (*ibid.*, para. 36).

²² China, while endorsing the general thrust of the draft articles on prevention which were essential to protect the environment and applied only to activities which involved the risk of causing significant transboundary harm, noted “the absence of provisions embodying the need to pay due attention to special conditions of the developing world” as a “drawback”. It stressed that for the benefit of the developing countries and for the common good, “it was necessary to promote technology transfers on equitable terms, develop a common fund for financial support and provide training and technical cooperation” (*ibid.*, 14th meeting (A/C.6/53/SR.14), para. 42).

²³ India, observing that reference to “equitable balance of interests in draft article 12” and the linkage of capacity-building to achieving the goals of prevention, as noted in paragraph 16 of the commentary to article 3, was not sufficient and regretted that the “draft articles failed to embody important principles such as the sovereign right of States to exploit their own natural resources according to their own policies, the concept of common but differentiated responsibility and the international consensus on the right to development; in that regard, it was un-

noted the need to make provisions in the draft articles to reflect the interests of developing countries.²⁴

9. While noting that the duty of prevention in article 3 was a duty of due diligence, some States suggested that the same might be directly incorporated in that article instead of referring to the duty of the State of origin to take “all appropriate measures”.²⁵

10. However, a view was expressed that the duty of prevention under article 3 was essentially reduced to being a negotiable duty between the State of origin and the States likely to be affected, given the duty of cooperation in general, consultation (art. 11) and the equitable balance of interests to be achieved (art. 12).²⁶ However, that view is not generally shared. On the other hand, it was noted that the duty of due diligence as articulated by the Commission was in accordance with current realities of State practice and international law.²⁷ Further, several States specifically endorsed

fortunate that none of the draft articles had been devoted specifically to the need for an overall balance between the environment and development, as established at the United Nations Conference on Environment and Development” (ibid., 15th meeting (A/C.6/53/SR.15), para. 87).

²⁴ Hungary (ibid., 19th meeting (A/C.6/53/SR.19, para. 17); Cuba (ibid., 18th meeting (A/C.6/53/SR.18, para. 51); Tunisia (ibid., para. 60); Malawi (ibid., 16th meeting (A/C.6/53/SR.16, para. 72); Egypt (ibid., 22nd meeting (A/C.6/53/SR.22), para. 18) (Egypt felt that the subtopic had to be treated with great caution, for it involved technical, as well as legal issues and standards which varied from State to State); Republic of Korea (ibid., 16th meeting (A/C.6/53/SR.16, para. 22) (the Republic of Korea felt it was essential to strike a balance between the interests of the State of origin and those of the State or States likely to be affected, developmental and environmental considerations, and between advanced and developing countries).

²⁵ Switzerland (ibid., 13th meeting (A/C.6/53/SR.13, para. 65); and the Netherlands (A/CN.4/509, reproduced in the present volume).

²⁶ In a written attachment to a statement in the Sixth Committee (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 15th meeting (A/C.6/53/SR.15), para. 18), Austria stated that the problematic nature of the Commission’s view of the present-day allocation of international rights and obligations between risk-creating and risk-exposed States was once again driven home in draft articles 11 and 12. In essence, article 11, paragraph 1, subjected measures aimed at the minimization of a risk of (significant) transboundary harm to a consultation procedure and, ultimately, negotiations between the States concerned. In the final analysis, it also rendered negotiable the fundamental legal obligation to prevent significant transboundary harm. The United Kingdom appeared to share the concern of Austria, but only up to a point and not fully. For it noted that it supported the formulation of the general duty of prevention in article 3 and considered it to reflect existing international law. However, while it saw the value in the development of a duty of consultation and the concept of equitable balancing of interests, it was concerned that, as currently drafted, articles 11 and 12 might have the effect of undermining the general duty of prevention. At any rate, “the relationship between these articles should be clarified” (A/CN.4/509, reproduced in the present volume). In fact, the United Kingdom suggested, in connection with article 12, that a proper clarification would be what was indicated as the correct purpose of article 11 on consultations. It noted that, as regards the substance of the consultations, it assumed that “the purpose [was] not to detract from the State of origin’s duty of prevention in article 3, but rather to discuss a mutually acceptable choice of measures to give effect to that duty” (ibid.).

²⁷ For example, the Russian Federation noted that the “obligation of prevention naturally entailed due diligence, but ... that such due diligence could not be identical for all countries: standards that were normal for developed countries might be unattainable for countries in economic difficulties”. It “therefore endorsed the use in compliance procedures of the sunshine approach and incentives to comply, with the use of sanctions as a last resort”. It “considered that the draft articles followed the correct approach and were in keeping with contemporary international law” (*Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 28th meeting (A/C.6/54/SR.28), para. 72).

the duties of cooperation, consultation and the need to achieve equitable balance of interests with a view to achieving a proper balance of interests of all States concerned.²⁸

11. While one State rejected articles 7–16 as not in conformity with current requirements of law, in particular the idea of “prior consent” incorporated therein,²⁹ another State expressed reservations regarding the requirements that the public must be informed of potential risks (draft art. 9) and the principle of non-discrimination (draft art. 16).³⁰ It was noted that unless the States concerned had compatible legal systems, the implementation of those provisions could raise numerous questions of jurisdiction and effective implementation. According to this view, article 16 could serve as a guideline for progressive legislative development. The same State also opposed compulsory third-party dispute settlement and preferred negotiation between States as more appropriate. It was also suggested that it was not appropriate for such a procedure to be incorporated, as a provision, in a framework convention.

12. Several other suggestions were also made to improve the effectiveness of the regime of prevention. One suggestion was to include in the set of draft articles a provision concerning emergency preparedness and the duty of notification in the case of such emergencies arising out of activities falling within the scope of the draft articles.³¹ Another suggestion was to make cooperation between States and competent international organizations more central for the implementation of the duty of prevention.³² Some States suggested the imposition of more specific time limits on States under articles 10, 11 and 13.³³ It was

²⁸ Greece (ibid., *Fifty-third Session, Sixth Committee*, 22nd meeting (A/C.6/53/SR.22), para. 43); United Republic of Tanzania (ibid., 13th meeting (A/C.6/53/SR.13), para. 61 (commending article 12, especially 12 (a)). Switzerland noted that the system proposed in draft articles 7–8 and 10–13, “embodying a relatively broad duty of notification counterbalanced by the fact that the obligation to prevent was not absolute but conditioned by the equitable balance [of interests] referred to in draft article 12, seemed admirable” (ibid., para. 66). See also the Czech Republic (ibid., 15th meeting (A/C.6/53/SR.15), para. 57), Italy (ibid., para. 66) (article 12 was supported for the balance set between the interests of the State of origin and those States likely to be affected), Germany (ibid., para. 78) (articles 11–12 were supported to maintain a balance between the interests of the States concerned), Slovakia (ibid., 22nd meeting (A/C.6/53/SR.22), para. 28) (at first glance, the draft articles on prevention seemed “to be well conceived, since they were aimed at emphasizing the duty of prevention and striking a fair balance between the interests of the States concerned”).

²⁹ For Turkey’s view, see A/CN.4/509 (reproduced in the present volume).

³⁰ For India’s view, see *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 15th meeting (A/C.6/53/SR.15), paras. 88–89.

³¹ Comments of the Netherlands (A/CN.4/509, reproduced in the present volume). See also Bulgaria (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting (A/C.6/53/SR.16), para. 24).

³² The Netherlands (A/CN.4/509, reproduced in the present volume).

³³ Switzerland (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 13th meeting (A/C.6/53/SR.13), para. 66); Mexico (ibid., 16th meeting (A/C.6/53/SR.16), para. 14); Greece (ibid., 22nd meeting (A/C.6/53/SR.22), para. 43). For a different view, see Germany (ibid., 15th meeting (A/C.6/53/SR.15), para. 77) (“timely notification”).

also suggested that former draft article 3 adopted by the Working Group of the Commission in 1996 on the freedom of a State to act within its own territory, which had been omitted from the present draft articles, should be reincorporated at least in a preambular paragraph.³⁴ A number of other suggestions were essentially of a drafting nature and could be examined by the Drafting Committee.³⁵

³⁴ France (A/CN.4/509, reproduced in the present volume). See also China (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee, 14th meeting (A/C.6/53/SR.14)*, para. 41) (former article 3 (1996) could provide a basis for the regime of prevention). For the opposite view that former article 3 was unnecessary and better dropped, see Guatemala (*ibid.*, 13th meeting (A/C.6/53/SR.13), para. 56).

³⁵ See general comments of States on articles 1–17 (A/CN.4/509, reproduced in the present volume).

13. The comments noted above raised issues concerning the scope of the topic, the need for specifying activities covered by the topic, the desirability of clarifying further the concept of “significant harm”, the relationship between the duty of prevention and liability, liability and responsibility, the impact of the test of equitable interests on the duty of due diligence and the usefulness of specifying fixed time limits for exchange of information between the States concerned under articles 10, 11 and 13, and various other amendments or additions to the draft articles which were of a drafting nature.

14. The scope of the topic has been carefully considered at various stages of the examination of the subject of international liability. Both within the Commission and in the debates in the Sixth Committee,

CHAPTER II

Scope of the topic and related issues

differing views were expressed as to the need to cover environmental problems in general, and the global commons in particular. Similarly the question of whether harm arising from multiple sources interacting together and harm produced over a period of time in a cumulative fashion should also be included came up for consideration. It was a deliberate decision of the Commission to limit the topic only to those activities bearing a risk of causing significant harm. In the opinion of the Commission, issues concerning other possible harms would require different treatment, and they could not be subsumed in the treatment of the present topic of prevention of significant transboundary harm. Limiting the scope of the topic was deemed essential in order to complete the first and second readings of the draft articles on prevention within the current quinquennium. The Commission therefore felt it necessary to delete from the scope of the present draft articles former draft article 1 (b) tentatively proposed by the Working Group of the Commission in 1996 in order to focus more sharply on the issues of prevention.³⁶

³⁶ For a discussion of the various issues concerning the scope of the topic, see the first report of the Special Rapporteur, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/487 and Add.1, pp. 193–197, paras. 71–98, and pp. 198–199, paras. 111–113. In the case of protection of the environment, see: (a) Kiss, “The international protection of the environment”. The author notes that the concept of “common concern of mankind” (p. 1083) has become more relevant in dealing with global environmental problems; and that this is different from States accepting obligations in respect of the development of shared resources, including management of transboundary harm; (b) Wolfrum, “Liability for environmental damage: a means to enforce environmental standards?”, wherein it is submitted that liability regimes in the environmental context are slow to develop effective enforcement mechanisms and that their impact is more a way of deterrence than of a compensatory effect; (c) Taylor, *An Ecological Approach to International Law: Responding to Challenges of Climate Change* (international liability as a legal response to the greenhouse effect is an improvement on State responsibility). However, it has the disadvantage of: applying the transboundary approach, being uncertain as to protection of the environment per se; and encouraging a piecemeal approach to regulation of environ-

15. On the desirability of specifying the activities falling within the scope of the present draft articles, it may be recalled that the Commission studied the matter carefully. In 1995, the Working Group recommended that there was no need to spell out the activities to which the draft articles could be applied. As science and technology were constantly evolving, activities falling within the scope of the draft articles could vary from time to time. In any case, what was excluded was reasonably clear. For example, the following fell outside the scope of the present draft articles: activities causing harm in their normal operation, that is, those beyond the state of a risk; harm caused by creeping pollution, that is, harm caused over a period of time, harm caused by a combination of effects from multiple sources, activities which do not have a physical quality and whose consequences flow from an intervening policy decision relating to monitoring, socio-economic or similar fields; harm caused to the environment in general, or global commons in particular.

16. Closely related to the question of scope of the topic is the requirement of the threshold of significant harm. Significant harm is explained as something more than measurable, but need not be at the level of serious or substantial harm. The harm must lead to a detrimental effect on matters in other States, such as: human health, industry, property, environment or agriculture in other States. Such detrimental effects must be capable of being measured by factual and objective standards. Further, significant harm is also explained

mental degradation. On global commons, see Arsanjani and Reisman, “The quest for an international liability regime for the protection of the global commons”. Review by the authors of successive efforts to deal with harm to the global commons indicated “a quest for an effective legal regime that has, as yet, had very limited success”; further, it is a desirable policy to develop legal instruments which aim to abate activities harmful to the global commons within the legal framework of State responsibility for wrongful acts (p. 488).

as a combination of risk and harm encompassing at one end activities with a high probability of causing significant harm and at the other end activities with a low probability of causing disastrous harm. Besides, it is the view of the Commission that the threshold of significant harm is something that should be fixed by common agreement in respect of different activities depending upon the type of risk involved and hazard posed by the activity. Agreement in this regard would be directly related not only to the socio-economic conditions of the parties concerned, but also to the scientific level and awareness of the implications of the activities and the availability of technological resources. Accordingly, the fixing of a threshold is

directly linked to the level of tolerance in the community, as well as the practical necessities or realities of the context in which the standard is sought to be agreed and implemented. Therefore it does not appear to be either possible or worthwhile to define a concept which, of necessity, would have to be arrived at by common agreement on the basis of available scientific and technological inputs and the practical realities of the context.³⁷

³⁷ For a discussion of the concept of significant harm, see *Yearbook ... 1998*, vol. II (Part Two), pp. 26–27, paras (4)–(7) of the commentary to article 2, finalized by the Commission on first reading. See also Zemanek, “State responsibility and liability”, in particular pp. 196–197.

CHAPTER III

Prevention and liability

17. A number of comments from Governments addressed the need for the Commission to study the question of liability, which was in their opinion closely related to the topic of prevention of significant transboundary harm. It was suggested that without a fuller development of the topic of liability, treatment of the principle of prevention would remain inadequate as the consequences of harm would be outside the scope of prevention. Even though non-performance of the due diligence obligation governing the principle of prevention could be addressed in the field of State responsibility, the principle of liability, which was the focus of the Commission under the current topic, remained an important element. A close link was also observed between the obligation of due diligence and liability in the event of damage.

18. Without expressing any value judgement on the close relationship between the topic of prevention and liability, it is important to note that the Commission took a pragmatic decision in 1999 to deal with the topic of prevention first and finalize it in the second reading before examining the future course of action on the subject of liability.

19. The subject of due diligence was considered to be important by some delegations, which suggested that the matter should be examined further. This was precisely the subject of study of the second report of the Special Rapporteur.³⁸

20. The Special Rapporteur concluded that the obligation of due diligence involved in the duty of prevention could be said to contain the following elements:³⁹

(a) 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 en-

sure the fulfilment of its international obligations. To that end, the State must also establish and maintain an adequate administrative 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. 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;

(b) The required degree of care is also proportional to the degree of hazardousness of the activity involved. 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;

(c) In this connection, it is worth recalling the various principles considered in the first report of the Special Rapporteur,⁴⁰ such as the need for prior authorization, environmental impact assessment and the taking of all necessary and reasonable precautionary measures. 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;

(d) 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.

³⁸ *Yearbook ... 1999* (see footnote 2 above), pp. 116–118, paras. 18–30.

³⁹ *Ibid.*, pp. 118–119, paras. 31–34.

⁴⁰ *Yearbook ... 1998* (see footnote 36 above), p. 175.

CHAPTER IV

Duty of due diligence and equitable interests

21. A separate question was raised about the relationship between article 12 on an equitable balance of interests among States concerned and the duty of prevention specified in article 3, and an apprehension was expressed that it might lead to a dilution of the obligation of prevention and due diligence. The comments are more in the nature of a caution against such a dilution. In any case, the apprehension expressed in this regard is misplaced. It may be emphasized that the requirement of achieving an equitable balance of interests is only addressed in the context of the obligation of cooperation imposed upon the States concerned. The balancing of interests is intended to result in a regime by the concerned States which would better implement the duty of prevention in a manner that is satisfactory to all States concerned.⁴¹

22. The question has been raised about the need to put the principle of prevention and the duty of due diligence in the broader context of sustainable development and the associated requirements of capacity-building and the establishment of suitable funding mechanisms, including an international fund, to help developing countries and countries in economic transition to establish necessary standards and acquire suitable technology to implement such standards or obligations. This is a matter that was fully considered by the Commission in 1998 on the basis of the first report submitted by the Special Rapporteur.⁴² It was felt that the principle of prevention and the duty of due diligence was broadly related to questions of sustainable development, capacity-building and international funding mechanisms. In fact, this was expressly noted in the commentary to article 3. For example, it was noted, with reference to principle 11 of the Rio Declaration on Environment and Development (Rio Declaration),⁴³ that standards applied by some countries might be inappropriate and of unwarranted economic and social costs to other countries, in particular, developing countries. It was also pointed out that the economic level of States was one of the factors to be taken into account in determining whether a State had complied with its obligations of due diligence. However, it is understood that a State's economic level could not be used to discharge a State from its obligation in this regard. Further, the Commission also noted that States were engaged in continuously evolving mutually beneficial schemes in the areas of capacity-building, transfer of technology and financial resources. Such efforts were

recognized to be in the common interests of all States in developing uniform international standards regulating and implementing the duty of prevention.

23. Accordingly, it is reiterated that the implementation of the principle of prevention and the duty of due diligence is not isolated or divorced from the broader context of sustainable development and the consideration of the needs and practices of developing countries or countries in economic transition. In this context, it is also understood that each State is free to determine the priorities of its economic development in accordance with its own national policies and for this purpose to utilize and develop the natural resources within its territory or in areas under its jurisdiction or control in accordance with the principle of sovereignty and the permanent sovereignty over its natural resources. The obligation of due diligence involved in the principle of prevention is consistent with the right to development just as environment and development are seen as compatible concepts.⁴⁴ These are all issues on which States are engaged in negotiation in different bilateral, regional and multilateral forums. The draft articles focus only on the duty of prevention and due diligence in a limited context. The regime recommended is expected to provide only a suitable basis for more comprehensive and specific agreements to be concluded by States in respect of one or more of the activities covered. In this sense the regime designed is only aimed at providing a framework.

24. In view of the strong sentiment expressed, it is deemed appropriate to refer to some of these principles in the preamble to put the matter into proper perspective.

⁴¹ See the comment and explanation of the United Kingdom (footnote 26 above).

⁴² See footnote 36 above.

⁴³ *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.

⁴⁴ Protection of the environment is directly linked to development, sustainable development, intergenerational equity and shared but differentiated responsibilities. For the Institute of International Law resolution of 4 September 1997, see Handl, "The environment: international rights and responsibilities". With respect to public participation, environmental impact assessment and the polluter pays principle, "there are strong doubts whether their status as principles of general international law is secured". The same is related to some extent to the difficulty of inferring customary law from treaty provisions which are either ambiguous or which did not yet generate uniform and consistent practice (see Malanczuk, "Sustainable development: some critical thoughts in the light of the Rio Conference", p. 43). On the principle of common but differentiated State responsibility and its application in the broader context of sustainable development, see Chowdhury, "Common but differentiated State responsibility in international environmental law: from Stockholm (1972) to Rio (1992)" (the author argued that the concept was "not a paradigm shift in the legal philosophy of State responsibility but rather a better articulation of State responsibility in the current conceptual and strategic linkage between environmental protection and sustainable development in a more equitable global order" (p. 322). See also Hossain, "Evolving principles of sustainable development and good governance".

CHAPTER V

Liability and responsibility: duality of regimes

25. In broadly defining the scope of activities covered by the draft articles, another important consideration is whether they should be characterized as activities not prohibited by international law. It may be recalled that the Commission first addressed this matter in the context of the study of State responsibility. At that time, the question concerning the obligation of a State to make good any transboundary harmful consequences arising out of activities conducted within its jurisdiction or in other places under its control (e.g. those involving space objects and nuclear reactors), especially those which because of their nature present certain risks but are not in themselves wrongful, was considered best left for a separate study.

26. The Commission concluded that it “fully recognizes the importance, not only of questions of responsibility for internationally wrongful acts, but also of questions concerning the obligation to make good any harmful consequences arising out of certain lawful activities, especially those which, because of their nature, present certain risks ... [T]he latter category of questions cannot be treated jointly with the former”.⁴⁵

27. Thus, State responsibility is concerned with the violation of a subjective international right even when it does not involve material damage.⁴⁶ On the other hand, international liability is premised upon the occurrence of significant harm or damage and not on any violation of an international obligation or subjective international right of a State.⁴⁷ To some extent the regime of liability could overlap with circumstances giving rise to wrongfulness, and for this reason the Commission avoided categorizing the topic as one dealing exclusively with “lawful” activities.⁴⁸ Thus, wrongful acts are the focus of State responsibility, whereas compensation for damage became the focus of international liability. The topic of prevention, on the other hand, is concerned with the management of risk.

⁴⁵ *Yearbook ... 1977*, vol. II (Part Two), p. 6, para. 17. The Special Rapporteur on State responsibility, Mr. Roberto Ago, described the issues falling under the topic of liability as “questions relating to responsibility arising out of the performance of certain lawful activities ... [o]wing to the entirely different basis of the so-called responsibility for risk” (*Yearbook ... 1970*, vol. II, document A/CN.4/233, p. 178, para. 6 (B)).

⁴⁶ Wolfrum, “Internationally wrongful acts”. See also Zemanek, “Causes and forms of international liability”, p. 323.

⁴⁷ See the first report on prevention of transboundary damage from hazardous activities, *Yearbook ... 1998* (footnote 36 above), pp. 188–189, paras. 41–44.

⁴⁸ See Boyle, “State responsibility and international liability for injurious consequences of acts not prohibited by international law: a necessary distinction?”. On the differences between State responsibility and liability topics, see: (a) Bedjaoui, “Responsibility of States: fault and strict liability”; (b) Zemanek, “State responsibility and liability”; (c) Berwick “Responsibility and liability for environmental damage: a roadmap for international environmental regimes”; and (d) Sucharitkul, “State responsibility and liability in transnational relations”.

28. The question then arises whether the reference to “activities not prohibited by international law” is appropriate in a regime which distinguished the duty of prevention from the broader concept of international liability. In this connection, it is suggested that few activities were per se generally prohibited under international law. The concern has always been for the consequences of the activities to determine whether they are permissible, lawful or unlawful, prohibited or not prohibited or wrongful. It has been pointed out that States are entitled to develop primary rules through treaty or customary practice and that it is the content of those rules that is critical, making global distinctions between lawful or unlawful activities useless and fundamentally misconceived. This is even more important now, as the draft articles were only dealing with prevention and not liability, which is outside the scope of the present articles.⁴⁹ The proponents of this view therefore recommend that the reference to “activities not prohibited by international law” in draft article 1 should be deleted.

29. However, according to another view, the reference to “activities not prohibited by international law” has come to signify a major dividing line between the topic of State responsibility and the broader topic of international liability, of which the principle of prevention is only a subtopic. Hence the reference was considered not only useful but essential. Further, it was noted that a distinction should be made between “acts” and “activities”.⁵⁰ While it was agreed that only a few activities (for example, prohibition of atmospheric nuclear testing or genocide, aggression) were the subject of prohibition under international law, the concern of the topic of liability has always been for the consequences or implications of an activity.⁵¹

⁴⁹ A principal exponent of this view is Brownlie, *op. cit.*, p. 50: “The present writer adheres to the following proposition: ‘The relations of adjacent territorial sovereigns are of course governed by the normal principles of international responsibility, and these may sustain liability for the consequences of extra-hazardous operations.’” “The only elements of the topic which merit the Commission’s efforts to construct a separate regime are the concept of strict liability for environmental harm and the balance of interests sought by the rapporteurs” (Boyle, *loc. cit.*, p. 22). See also Horbach, “The confusion about State responsibility and international liability”. She supports separate study, “not as a counterpart of state responsibility, but as an attempt to codify and develop aspects of international environmental law, and, thus, substantive primary rules” (p. 72).

⁵⁰ Mr. Julio Barboza explained: “Around a given activity there are countless individual acts which are intimately related to the activity. Some of these acts may be wrongful, but that does not make the activity itself wrongful.” (*Yearbook ... 1986*, vol. II (Part One), document A/CN.4/402, p. 161, para. 68.)

⁵¹ See Magraw, “Transboundary harm: the International Law Commission’s study of ‘international liability’”. According to Magraw, “[i]t is not self-evident that any doctrinal mischief would be caused” if liability for injurious consequences of lawful activities is pursued as a topic separate from State responsibility, particularly when Brownlie himself admitted State accountability for ultra-hazardous but lawful activities (p. 317). Further, Magraw believed that “the approach in the schematic outline represents an overdue attempt to face up to an increasingly common fact of international coexistence” (p. 321) and that the “key will

30. It should be emphasized that the phrase under consideration is important to indicate that claims concerning the non-fulfilment of the principle of prevention and the obligation of due diligence would not give rise to any implication that the activity itself is unlawful or prohibited. It only enables the States likely to be affected to insist upon the performance of the obligations involved and the suspension of the activity concerned when proper safety measures have not been secured at a stage prior to the occurrence of any actual harm or damage.⁵² To that extent, State responsibility could be engaged to implement obligations, including any civil

be to define the scope of the topic in a sufficiently modest manner so as not to invite noncompliance" (p. 322). See also the views of Zemanek, Berwick and Sucharitkul (footnote 48 above), who did not appear to question the distinction between liability and responsibility made on the basis of "activities not prohibited by international law".

⁵² Zemanek, "State responsibility and liability", p. 197. See also the second report of the Special Rapporteur, *Yearbook ... 1999* (footnote 2 above), p. 119, paras. 35–37.

responsibility or duty of the operator.⁵³ It is wrong to assume prohibition as the inevitable result of responsibility for wrongful acts, and that a balancing of the benefits and drawbacks of socially useful activities is not possible if the distinction is not sharply made in the topic of State responsibility. For as noted, it is the content of the relevant rule and the absolute or relative character of the obligation involved which matters. At the most, it is suggested, it is the harm the activity is causing, as in the *Trail Smelter* case,⁵⁴ that is prohibited and not the activity itself.⁵⁵

⁵³ For an examination of links which exist between State responsibility and liability and international civil liability regimes, see Rosas, "State responsibility and liability under civil liability regimes". However, different standards of liability, burden of proof and remedies apply to State responsibility and liability. See also Berwick, *loc. cit.*

⁵⁴ UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.

⁵⁵ See Akehurst "International liability for injurious consequences arising out of acts not prohibited by international law"; and Boyle, *loc. cit.*, p. 13.

CHAPTER VI

Recommendations

31. The phrase "activities not prohibited by international law" has been deliberately chosen only to indicate that the subject of international liability is pursued as a primary obligation as opposed to secondary obligations or consequences arising from a wrongful act, which is the subject of State responsibility. Further, it is aimed at emphasizing, in the case of significant transboundary harm, that the obligation is to make good the loss involved without any necessity for the victim to prove that the loss arose out of wrongful or unlawful conduct or to make the conduct itself wrongful or illegal. Eliminating or at least reducing such a burden of proof was considered necessary to establish a legal regime which could both deter the operator of hazardous activities and provide quick relief or compensation to victims in the case of a growing variety of environmental hazards where the causal connection cannot easily be established as a matter of scientific certainty or under a "reasonable and prudent" person test.

32. The above considerations are valid but would appear to relate to questions of liability for harm and fall outside the scope of the draft articles, which are aimed at the management of risk as part of prevention of significant transboundary harm. An emphasis on "physical connection", thus strictly limiting the scope of the draft articles, would help establish the causal or spatial connection much more directly in the case of activities covered by the draft articles than in the case of harm arising in other cases.

33. The test of balance of interests incorporated in articles 3 and 10–12 will be applicable to all activities, except to those which are expressly prohibited by virtue of a convention or agreement or customary international law. Developmental activities are not part of any such absolute or general prohibition. In the case of such developmental activities, given the growing interdepend-

encies, particularly among regional communities, States have been adopting techniques of integrated management of risks involved, sharing the benefits and costs.

34. Another approach which the present draft articles emphasize is that the duty of cooperation and consultation among all States concerned does not provide a right of veto to the States likely to be affected, except for the right to seek an opportunity to be engaged in designing and, where appropriate, in the implementation of the system of management of risk commonly shared with the State of origin.

35. Given the above, it is felt that the phrase "activities not prohibited by international law" could be considered for deletion from article 1 of the draft articles on prevention. Any decision taken in this regard by the Commission would of course be without prejudice to the decision taken by the Commission at the last session.⁵⁶

36. Finally, a number of drafting suggestions were made within the debates on the topic in the Sixth Committee in 1998 and 1999 and in the comments subsequently submitted by some States. These were carefully considered in a Working Group of the Commission during the first part of its fifty-second session in 2000. A revised set of draft articles drawn up on the basis of consultations held is contained in the annex to the present report for consideration and adoption by the Commission in its second reading. Given the nature of the exercise involved, it is also recommended that these draft articles be adopted as a framework convention.

⁵⁶ "... to defer consideration of the question of international liability, pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities" (*Yearbook ... 1999*, vol. II (Part Two), p. 16, para. 18).

ANNEX

**Revised draft articles recommended on second reading following discussions
held in the Working Group**

Prevention of significant transboundary harm

The General Assembly,

Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations,

Recalling its resolution 1803 (XVII) of 14 December 1962, containing the Declaration on permanent sovereignty over natural resources,

Recalling also its resolution 41/128 of 4 December 1986, containing the Declaration on the Right to Development,

Recalling further the Rio Declaration on Environment and Development of 13 June 1992,

Bearing in mind that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,

Recognizing the importance of promoting international cooperation,

Expressing its deep appreciation to the International Law Commission for its valuable work on the topic of the prevention of significant transboundary harm,

Adopts the Convention on the Prevention of Significant Transboundary Harm, annexed to the present resolution;

Invites States and regional economic integration organizations to become parties to the Convention.

**Convention on the Prevention of Significant
Transboundary Harm**

**Article 1. Activities to which the present
draft articles apply**

The present draft articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2. Use of terms

For the purposes of the present articles:

(a) “Risk of causing significant transboundary harm” means such a risk ranging from a high probability of causing significant harm to a low probability of causing disastrous harm ~~encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;~~

(b) “Harm” includes harm caused to persons, property or the environment;

(c) “Transboundary harm” means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(d) “State of origin” means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are carried out;

(e) “State likely to be affected” means the State in the territory of which the significant transboundary harm is likely to occur or which has jurisdiction or control over any other place where such harm is likely to occur;

(f) “States concerned” means the State of origin and the States likely to be affected.

Article 3. Prevention

States of origin shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm.

Article 4. Cooperation

States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing, or in minimizing the risk of, significant transboundary harm.

Article 5. Implementation

States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present draft articles.

Article 6 [7].¹ Authorization

1. The prior authorization of a State of origin shall be required for:

(a) All activities within the scope of the present draft articles carried out in the territory or otherwise under the jurisdiction or control of a State;

(b) Any major change in an activity referred to in subparagraph (a);

(c) A plan to change an activity which may transform it into one falling within the scope of the present draft articles.

¹ Article 6 has been moved towards the end of the draft articles and the remaining draft articles have been renumbered accordingly. The previous number of the draft articles appears between square brackets.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present draft articles. **Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present draft articles.**

3. In case of a failure to conform to the requirements of the authorization, the ~~authorizing~~ State of origin shall take such actions as appropriate, including where necessary terminating the authorization.

Article 7 [8]. Environmental impact assessment

Any decision in respect of the authorization of an activity within the scope of the present draft articles shall, **in particular**, be based on an **assessment** of the possible transboundary harm caused by that activity.

Article 8 [9]. Information to the public

States **concerned** shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present draft articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 9 [10]. Notification and information

1. If the assessment referred to in article 7 [8] indicates a risk of causing significant transboundary harm, the State of origin shall, ~~pending any decision on the authorization of the activity~~, provide the States likely to be affected with timely notification **of the risk and the assessment** and shall transmit to them the available technical and **all** other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on prior authorization of the activity pending the receipt, within a reasonable time and in any case within a period of six months, of the response from the States likely to be affected.

~~[2. The response from the States likely to be affected shall be provided within a reasonable time.]~~

Article 10 [11]. Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent, or to minimize the risk of, significant transboundary harm. **The States concerned shall agree, at the commencement of such consultations, on a reasonable time frame for the duration of the consultations.**

2. **The States concerned** shall seek solutions based on an equitable balance of interests in the light of article 11 [12].

2 bis. **During the course of the consultations, the State of origin shall, if so requested by the other States,**

arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period of six months unless otherwise agreed.²

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of States likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

Article 11 [12]. Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 10 [11], the States concerned shall take into account all relevant factors and circumstances, including:

(a) The degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;

(b) The importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) The risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

(d) The degree to which the State of origin and, as appropriate, States likely to be affected are prepared to contribute to the costs of prevention;

(e) The economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(f) The standards of prevention which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Article 12 [13]. Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the **State of origin territory or otherwise under the jurisdiction or control of another State** may have a risk of causing significant transboundary harm, the former State may request the latter to apply the provision of article 9 [10]. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 9 [10], it shall so inform the other

² Former article 13, paragraph 3, with the addition of the term "reasonable".

State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations in the manner indicated in article 10 [11].

~~3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a period of six months unless otherwise agreed.³~~

Article 13 [14]. Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information relevant to preventing, or minimizing the risk of, significant transboundary harm.

Article 14 [15]. National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets **or concerning intellectual property** may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 15 [16]. Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of activities within the scope of the present draft articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Article 16. Emergency preparedness

States of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other States likely to be affected and competent international organizations.

³ This paragraph has been moved to article 11, paragraph 2 bis.

Article 17. Notification of an emergency

States of origin shall, without delay and by the most expeditious means available, notify other States likely to be affected by an emergency concerning an activity within the scope of the present draft articles.

Article 18 [6]. Relationship to other rules of international law

Obligations arising from the present draft articles are without prejudice to any other obligations incurred by States under relevant treaties or rules of customary international law.

Article 19 [17]. Settlement of disputes

1. Any dispute concerning the interpretation or application of the present draft articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties, including submission of the dispute to mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of one of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be considered by the parties in good faith.

Note

Articles 3, 11 and 12 have a mutually interacting relationship. While article 3 deals with the obligation of prevention which a State of origin has, article 11 indicates the need for that State and States likely to be affected to engage in consultations with each other on the basis of the criteria indicated illustratively and not exhaustively under article 12. The purpose of such consultations is to arrive at a mutually agreeable system of management of the risk involved or to help prevention of the risk of transboundary harm. This is not meant thus in any way to absolve the State of origin from the obligation it has under article 3 but only to aid better implementation of that obligation to the mutual satisfaction of all the States concerned. An agreement achieved in this regard shall, in case of an actual transboundary harm, be without prejudice to any claims based on liability or State responsibility.

**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.4/509

**Comments and observations received from Governments:
report of the Secretary-General**

*[Original: Arabic/English/French]
[17 April 2000]*

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Multilateral instruments cited in the present report

	<i>Source</i>
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	United Nations, <i>Treaty Series</i> , vol. 1833, No. 31363, p. 3.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	Ibid., vol. 1989, No. 34028, p. 309.
Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992)	Ibid., vol. 1936, No. 33207, p. 269.
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	Ibid., vol. 2105, No. 36605, p. 457.
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</i> , Vol. III, resolution 51/229, annex.
Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998)	ECE/CEP/43.

Introduction

1. On 8 December 1998, the General Assembly adopted resolution 53/102, entitled “Report of the International Law Commission on the work of its fiftieth 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 international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) adopted on first reading by the Commission¹ and urged them to submit their comments and observations in writing by 1 January 2000.

¹ The text of the draft articles with commentaries thereto may be found in the report of the Commission on the work of its fiftieth session, Yearbook ... 1998, vol. II (Part Two), p. 21, para. 55.

2. By a note dated 11 February 1999, the Secretary-General invited Governments to submit their comments pursuant to paragraph 2 of General Assembly resolution 53/102.

3. As at 12 April 2000, replies had been received from the following five States (on the dates indicated): France (13 August 1999); Lebanon (19 May 1999); the Netherlands (24 January 2000); Turkey (7 March 2000); and the United Kingdom of Great Britain and Northern Ireland (24 March 2000). The comments and observations relating to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) are reproduced below, in an article-by-article manner.

Comments and observations received from Governments

General remarks

France

1. France welcomes the new focus of work on an important subject—prevention of transboundary damage from hazardous activities—which appeared to have reached an impasse.

2. The draft is satisfactory on the whole. It endeavours to implement a long-standing principle of international law: the non-harmful use of the territory of a State. The draft, which emphasizes the obligation of due diligence, satisfactorily lays down primary rules based chiefly on the rules set out in the Convention on the Law of the Non-navigational Uses of International Watercourses.

3. The draft can be regarded as restrictive, for two reasons:

(a) It deals only with harm to States and not harm to areas not subject to any form of sovereignty (the high seas and outer space). As to whether the scope of the draft should be broadened, it is not self-evident that it should;

(b) The draft stresses the “risk of causing significant transboundary harm”. This is a welcome restriction, in comparison with the 1996 draft.

4. The fact that former article 3 of the 1996 draft has disappeared could be considered unfortunate. That provision, concerning a State’s “freedom of action and the limits thereto”, is no longer to be found in the 1998 version. It might be advisable to mention that the freedom of a State to carry on activities in its territory is not unlimited and that such freedom is subject to the obligation to prevent or minimize the risk of causing significant transboundary harm. This principle should be set out in the draft, perhaps

in the preamble, not necessarily in the operative part of the text. Former article 3 also referred to the consequences of the harm, specifying that the State that caused the harm has specific obligations vis-à-vis the affected State. Here once again, it would be advisable to make some sort of reference to the principle concerned.

Lebanon

1. It appears from the heading of the draft articles, “International liability for injurious consequences arising out of *acts not prohibited* by international law (prevention of transboundary damage from hazardous activities)”, that it is a matter of positive liability arising out of activities that are not prohibited but are hazardous.

2. It appears from the draft articles that they address a series of duties that are incumbent on States that are the origin of damage while engaging in non-prohibited but hazardous activities giving rise to transboundary damage that has repercussions for the environment, persons or property in other States.

3. The imposition of these duties entails that in the event they are neglected and transboundary damage occurs, liability will be based on fault and will not be positive liability.

4. This contradiction must be resolved.

5. *The draft articles are incomplete since they do not address the consequences of failure to perform the duties they impose on States and do not establish provisions concerning liability arising therefrom or identify the relevant conditions and circumstances. This deprives the draft articles of practical usefulness and only raises differences between States that have no legal solution.*

6. *It is necessary to await the completion of the draft articles at future sessions of the Commission before detailed views on all the rules they address can be formulated.*

Netherlands

1. The Netherlands is disappointed with the minimalist approach that the draft articles adopt with regard to various matters. This material is regulated extensively in several existing conventions, albeit at sectoral level. The Commission's draft has thus far left the question of liability for damage entirely out of consideration. Even regarding prevention—the primary focus of the text—the draft does not go as far as existing sectoral conventions, as it deals exclusively with hazardous activities (in contrast to activities that definitely cause damage), which are more-over lawful. For the rest, the Netherlands notes the absence of any article on emergencies, as is found in other texts, for example, article 28 of the Convention on the Law of the Non-navigational Uses of International Watercourses; principle 18 of the Rio Declaration on Environment and Development;¹ and ILA resolution No. 2 1982 on legal aspects of the conservation of the environment.² The Netherlands deplores the absence of a provision on the obligation to prevent damage to common areas, i.e. areas beyond the limits of national jurisdiction.

2. The Netherlands would note that, in its commentary to article 2, the Commission refers to a spectrum of activities ranging from activities with “a low probability of causing disastrous harm” to those with “a high probability of causing other significant harm”.³ The Netherlands wonders whether this means that activities with a high probability of causing disastrous harm fall outside the scope of these articles because they would presumably be unlawful. Both the text of article 2 and the commentary to this article require clarification on this point.

3. Nor do paragraphs 94 and 96 of the Special Rapporteur's first report on the prevention of transboundary damage from hazardous activities⁴ yield a clear answer to the question of whether the activities mentioned fall outside the scope of the articles, although this does seem to be implied. Activities falling into this category are evidently assumed to be prohibited under international law, in contrast to the activities covered by the draft articles.

4. The Netherlands would favour adding a definition of the term “operator” to article 2, and clarifying the operator's role in other parts of the text. This does not alter the fact that the obligations defined in the draft articles refer to States and not to private individuals or companies such as “operators”.

5. Finally, the Netherlands assumes that military activities fall outside the scope of the draft articles.

¹ *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.

² ILA, *Report of the Sixtieth Conference held at Montreal, 29 August 1982–4 September 1982* (London, ILA, 1983).

³ *Yearbook ... 1998*, vol. II (Part Two), p. 26, para. (1).

⁴ *Ibid.* (Part One), document A/CN.4/487 and Add.1, p. 196.

Turkey

1. Turkey, as a country which observes the maintenance of friendly relations in the international arena and in particular within its region, and which considers cooperation among States for the protection of the environment as a further step in these good relations, attaches great importance to the rules of international law regulating the prevention of transboundary damage from hazardous activities. The formation and application of these rules at the international level would establish the basis for the protection of the environment which is shared by a number of States in a given region. Thus, the rules pertaining to the prevention of transboundary damage should be based on mutual understanding and respect for each State's rights, first and foremost respect for the sovereign rights of States. Viable and generally acceptable solutions could be codified by following the said principles, which have so far also determined the structure of the customary rules in this field.

2. Certain conventions, inter alia, the Convention on the Law of the Non-navigational Uses of International Watercourses, the United Nations Convention on the Law of the Sea, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, the Convention on the Transboundary Effects of Industrial Accidents and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), are referred to in the commentary sections throughout the draft articles. These conventions, some of which are not yet in force, could not be deemed to be customary rules, and consequently they could not readily be used as reference points for the establishment of the rules for the prevention of transboundary damage from hazardous activities.

3. In this context, it is worth recalling that Turkey was among those States that voted against the Convention on the Law of the Non-navigational Uses of International Watercourses. That Convention, which to date has been ratified by seven States, a number far below that required for its entry into force, goes beyond the scope of a framework convention and, in contradiction with its intent and nature, establishes a mechanism for planned measures. This has no basis in general and customary international law. Furthermore, this mechanism creates an obvious inequality between States by stipulating that, in order to implement its planned measures, a State belonging to a certain category is obliged to obtain the prior consent, tantamount to a veto right, of another State belonging to a certain other category. It is not appropriate for a framework convention to foresee any compulsory rules regarding the settlement of disputes and not to leave this issue to the discretion of the States concerned. Moreover, the Convention does not make any reference to the indisputable principle of the sovereignty of the watercourse States over parts of international watercourses situated in their territory. The Convention should clearly have established the primacy of the fundamental principles of equitable and reasonable utilization over the obligation not to cause significant harm.

4. For the reasons outlined above, Turkey has declared that the Convention on the Law of the Non-navigational

Uses of International Watercourses did not and, in the future, would not have any legal effect for Turkey in terms of general and customary international law.

5. The present draft articles, in some of their provisions, tend to follow the Convention on the Law of the Non-navigational Uses of International Watercourses, an approach about which Turkey has serious concerns. The individual points of concern are indicated in the paragraphs below.

6. It is observed that certain mechanisms are attempted to be established for the projects in their planning phase, in particular in articles 7–16. Although some previous conventions have envisioned similar mechanisms, it should be emphasized that those provisions are not customary rules and that they are regulations at the regional level with a limited number of participants. Therefore, a mechanism requiring the prior consent of all States concerned does not have any precedents in customary international law. It could be concluded that the Commission, in drafting the present articles, has entered into a position of codifying some rules before their establishment by customary law.

7. A mechanism of this nature is liable to cause certain inequalities among States. Those States which will have reached a relatively advanced stage of industrial development by the time the draft articles are adopted will only have to observe due diligence while managing their already existing enterprises, whereas less developed or developing States will have to comply with further requirements according to the draft articles, i.e. authorization (art. 7), impact assessment (art. 8), information to the public (art. 9), consultation on preventive measures (art. 11), exchange of information (art. 14), even the suspension of the activities in question (art. 13, para. 3). These requirements have the potential to create a kind of discrimination between developed and developing States.

8. Contrary to previous relevant international documents (e.g. Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),¹ Rio Declaration on Environment and Development² and Agenda 21³), the draft articles do not make any reference to the indisputable principle of the sovereignty of States over their natural resources within their territories, which is a fundamental deficiency.

9. Turkey has so far maintained its position that States should comply with their respective responsibilities in environmental matters, and has taken up various initiatives in its region. The principles of international law and customary rules in the field of environmental law have already set out certain means for the protection of the environment. In dealing with the articles for the prevention of transboundary damage from hazardous activities, the existing rules of customary law should not be eroded. It should further be emphasized that a mechanism seeking

the prior consent of all States concerned and a compulsory dispute settlement procedure are not within the constituent parts of customary rules of international law in this field. A widely acceptable body of provisions could only be achieved by avoiding any deviation from the existing customary rules.

United Kingdom

1. The United Kingdom commends the Commission on the draft articles on prevention of transboundary damage from hazardous activities provisionally adopted on first reading at its fiftieth session in 1998. It welcomes the articles as a useful contribution to the codification and development of international law on the topic.

2. The United Kingdom supports the formulation of the general duty of prevention in article 3, and considers it to reflect existing international law. However, while it sees value in the development of a duty of consultation and the concept of equitable balancing of interests, it is concerned that, as currently drafted, articles 11 and 12 may have the effect of undermining the general duty of prevention. At any rate the relationship between these articles should be clarified.

3. There is also room for further refinement of the draft articles in order to clarify other ambiguities and to recognize the weight now given by international environmental law to precautionary action, sustainable development and the polluter-pays principle.

Form that the draft articles should take

Netherlands

As regards the question of what form the draft articles ought to take—a convention, a framework convention or a model law/model rules—the Netherlands finds this difficult to answer at the current stage. On the one hand, an instrument that is non-binding in a legal sense (i.e. a recommendation, model law, model rules) has a certain advantage, in that a convention might well be ratified by too few States. On the other hand, it may be argued that a convention is the appropriate instrument, as the aim is to impose an “obligation of prevention” with specific reference to hazardous though lawful activities. The point of the draft articles is therefore to create a specific regulation to cover this area.

Article 1. Activities to which the present draft articles apply

Netherlands

1. While acknowledging the desirability of keeping the scope of the articles manageable, which is why the formulation “physical consequences” has been adopted, the Netherlands nonetheless doubts whether the term “physical” is broad enough for this purpose.

2. Given the fact that elsewhere in the text (see, for example, paragraph (2) of the Commission’s commentary

¹ *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

² *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.

³ *Ibid.*, annex II.

to article 10¹) mention is made of activities performed by private entities, article 1 too should distinguish, either in the article itself or in the comments on it, between government and private-sector activities.

3. The Netherlands would note that the sole difference between paragraph (11) of the Commission's comments,² dealing with the concept of control as opposed to jurisdiction, and paragraph (10) lies in the duration of the exercise of this "control". It would be a good idea to add a clear example here.

4. With reference to paragraphs (12) and (13) of the comments,³ the Netherlands would note that on the basis of case law (especially the *Gabčíkovo-Nagymaros Project* case,⁴ which, although it deals with State responsibility, is also applicable to the material under discussion), the concept of "risk" should include the element of "foreseeability".

¹ *Yearbook ... 1998*, vol. II (Part Two), p. 34.

² *Ibid.*, p. 25.

³ *Ibid.*

⁴ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

Turkey

In article 1 of the draft text, where the scope of application of the draft articles is put forward, four criteria are mentioned for the definition of the scope of activities. The second criterion, which is also found in the definition of the State of origin in article 2 (*d*), is that the activities to which preventive measures are applicable are "carried out in the territory or otherwise under the jurisdiction or control of a State". It is apparent that the regime applied within the territory of a State is different from the regime applied in other areas, such as the high seas or outer space. However, the explanation provided in the second criterion, as well as the regulation of article 2 (*d*), might yield an implication that the distinct regimes applied in the aforementioned different areas are getting closer so as to diminish their differing regimes on a more general plane. The differences of regimes pertaining to different areas should not be reduced while they are being regulated by the draft articles.

United Kingdom

1. This article, whose function is to define activities to which the draft articles apply, is of central importance. However, it is unclear in several important respects and needs further consideration. Precise definition of the scope of the articles would be essential were they to be adopted in the form of a binding instrument.

2. There is uncertainty, first, regarding the nature of activities covered. This could be resolved in a number of ways. For example:

(a) Activities falling within the scope of article 1 could be identified by reference to a list (the technique used in

the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention);

- (i) The State of origin could also be obliged to designate other activities which involve a risk of causing significant transboundary harm through their physical consequences (as in, for example, the Aarhus Convention), art. 6, para. 1);
- (ii) Article 1 could provide a framework for the conclusion of specific agreements by neighbouring States, and/or States in a particular area, and/or States in a particular river basin on more detailed lists of activities falling within the scope of this article.

Doubtless there may be other ways of clarifying the scope of article 1. But in any event clarification is needed because there could be a number of different interpretations of article 1, and this would lead to avoidable disputes between States about the scope of the articles.

3. Furthermore, the United Kingdom assumes that the articles are not intended to apply to groups of activities each of which would have a minimal transboundary impact but which, when taken together, would cause transboundary harm. If this is correct, there may be some room for clarification of article 1, by providing that the draft articles apply to "any activity" (in the singular) not prohibited by international law which involves a risk of causing significant transboundary harm.

Article 2. Use of terms

France

1. With regard to article 2, it should be made clear what is meant in subparagraph (*a*) by the term "significant transboundary harm". Although the commentary to this provision does provide a few indications in that connection, the drafting of this subparagraph is not explicit enough. A definition of "significant transboundary harm" is essential, because the scope of the obligation to prevent harm depends on it. The Commission should therefore consider the definition further. It would also be preferable to take an alternative and not a cumulative approach. The expression "risk of causing significant transboundary harm" should cover a low probability of causing disastrous harm *or* (not *and*) a high probability of causing other significant harm. There would thus be a relationship between the two probabilities.

2. The wording of subparagraph (*c*), concerning the identification of the areas covered by the draft, is ambiguous. The expression "places under the jurisdiction or control of a State" would appear to refer to such places as the continental shelf, the exclusive economic zone and oil platforms. The question is whether it also covers objects (ships and aircraft). France believes that objects should not be included. Subparagraph (*e*) appears to exclude objects. It would be preferable to limit the draft to areas under the jurisdiction or control of States.

3. In subparagraph (e), the expression “any other place” is too vague and should be made more specific. Moreover, the expression “State likely to be affected” could in some cases reinforce wrongful claims by a State to a territory. The term “control” could also give rise to difficulties in some instances, even though it naturally does not permit prejudgement of the lawfulness under international law of the control exercised over a given territory.

Netherlands

1. See the remarks already made in the general comments on activities with a “high probability of disastrous harm”.

2. For the rest, the Netherlands considers the use of the term “attributable” in paragraph (9) of the commentary¹ inappropriate, as it evokes associations with the regime for State responsibility.

3. There is a need for a definition of the term “operator” here. See the general comments above.

¹ *Yearbook ... 1998*, vol. II (Part Two), p. 27.

Turkey

See comments under article 1, above.

United Kingdom

The definition of “transboundary harm” in subparagraph (c) may need modification, for at the moment it does not specify any causal relationship between the activities in the State of origin and the transboundary harm occurring in the other State. This could be remedied by providing that “transboundary harm” means harm which is caused by an activity in the territory of the State of origin or in other places under its jurisdiction or control and which occurs in the territory of or in other places under the jurisdiction or control of another State, whether or not the States concerned share a common border.

Article 3. Prevention

Netherlands

1. The Netherlands considers it desirable to include the term “due diligence” in the text of the article in order to emphasize the obligation to make every effort and to exercise due care. The obligation to take “all appropriate measures” to prevent risk as currently formulated in this article is only one modality of “due diligence”. The following wording of article 3 is suggested: “States shall exercise due diligence in order to prevent, or to minimize the risk of, significant transboundary harm.”

2. As regards the question of whether the obligation of prevention should be seen as an obligation of conduct or an obligation of result, the Netherlands doubts whether this is a useful distinction, given that this very distinction was eliminated in the second reading of the Commission’s draft articles on State responsibility.

3. Paragraph (17) of the Commission’s commentary¹ refers to the “operator”. The Netherlands would reiterate the remarks it made on this term in its general comments above.

¹ *Yearbook ... 1998*, vol. II (Part Two), p. 29.

Article 4. Cooperation

France

In the case of article 4, the corresponding commentary focuses more on good faith than on cooperation. This article should in fact be divided into two parts: one dealing with cooperation in good faith between States and the other with cooperation between States and international organizations.

Netherlands

1. The Netherlands considers that article 4 needs to be moved to a different place in the text. The obligation to cooperate should not be mentioned until the material obligations referred to in the previous articles have been fully elaborated.

2. The phrase “as necessary” is unduly limiting; “where appropriate” would be preferable. In addition, the Netherlands would suggest adding the qualifier “competent” to “international organizations”. Certain organizations such as IAEA and IMO should perhaps be mentioned by name in the comments. The comments should also point out that “international organizations”, in this context, includes non-governmental organizations.

Article 5. Implementation

France

With regard to article 5, which requires States to take internal action, including the establishment of monitoring mechanisms, in implementation of the draft articles, one might ask why it is placed in the part of the draft dealing with prevention.

Netherlands

1. The Netherlands favours adding the qualifier “permanent” to “monitoring mechanisms”.

2. The use of the words “becoming a party to” in paragraph (1) of the commentary¹ wrongly anticipates the eventual legal form to be taken by the articles.

¹ *Yearbook ... 1998*, vol. II (Part Two), p. 30.

Article 6. Relationship to other rules of international law

Netherlands

The Netherlands considers that this article is in the wrong place. It interrupts the series of obligations im-

posed on States, and should be moved either to a place immediately following article 1 or to the end of the text.

Article 7. Authorization

France

With respect to article 7, one might ask whether it is appropriate for public international law to specify the consequences under domestic law of non-compliance with an internal measure. This provision could possibly be added to article 5.

Netherlands

1. The Netherlands would point out that draft article 7 fails to address the following points:

(a) The obligation of States to designate activities for which authorization is compulsory;

(b) Paragraph 3 should provide for a transitional period before existing activities would have to comply with the requirements laid down in the authorization;

(c) Following on from paragraph 3, States should be placed under an obligation to halt any activities being conducted without authorization;

(d) Both current paragraph 3 and the suggested addition should include the possibility of suspending as well as terminating authorization;

(e) As the purpose is to arrive at continuous prevention, and hence at constant monitoring, authorization should be granted for a set period of time.

2. The Netherlands would suggest reformulating paragraph 2 as follows:

“The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present draft articles. Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present draft articles.”

3. Concerning authorization granted for specific activities by private companies, the Netherlands would note that there should be a system of notification from companies to the State. After all, private companies enjoy a measure of protection in the draft articles (see the draft article on industrial secrets); they therefore also have certain obligations.

4. Partly in the light of article 5, the Netherlands believes that States should be required to pass legislation to impose on private companies the obligation to inform the State about any activities of the kind discussed here at all times.

United Kingdom

1. Paragraph 1 should be revised so that it clearly imposes an obligation rather than seeming simply to state a fact. For example, it could be formulated so as to provide

that States shall require prior authorization to be obtained for activities within the scope of the draft articles carried out in their territory or otherwise under their jurisdiction or control, as well as for any major change in any activity so authorized.

2. Paragraph 3 should apply both to unauthorized activities and those which fail to conform to the conditions of an authorization. This would be clearer if it were recast to provide that, in cases of failure to obtain authorization or to conform to the conditions specified in such authorization, the State of origin must take appropriate action, including, where necessary, terminating any authorization.

3. It would also be helpful to include in paragraph 3 some words that would require the State of origin to take action to stop an activity which is unauthorized or whose authorization has been terminated.

Article 8. Impact assessment

France

In article 8, it should be clarified that not only transboundary harm but anything affecting the environment has an environmental impact. It would be appropriate to return to the principle set out in article 10 of the 1996 draft, which concerned risk assessment and obliged a State to assess the possible consequences of the activity undertaken for the environment of other States.

Netherlands

1. The Netherlands proposes that in this article too (as in article 7) the term “authorization” should be qualified by “prior”.

2. The Netherlands favours including an appendix that would describe the minimum content of an environmental impact assessment, and inserting a reference to the appendix in the article.

United Kingdom

1. The United Kingdom notes that the impact assessment required by article 8 appears to be limited to an evaluation of the possible *transboundary* harm caused by the activity in question. It doubts whether it is feasible to assess the possible transboundary harm caused by an activity without carrying out a full environmental impact assessment which relates to the *entire* environmental impact of a proposed activity. The Commission may wish to consider revising this article accordingly.

2. In any event, as article 10 and the title to article 8 refer to “assessment” rather than “evaluation”, for the sake of consistency the text of article 8 should be brought into alignment by replacing “evaluation” by “assessment”.

Article 9. Information to the public**Netherlands**

The Netherlands suggests including the element of public participation in decision-making, following the example of the Rio Declaration on Environment and Development¹ It also suggests that the efforts to disseminate public information and to ascertain the views of the general public referred to in this article should be linked to the granting of authorization, for instance by adding the words “prior to any authorization”.

¹ *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.

United Kingdom

1. The United Kingdom is in full agreement with the purpose of this article as set out in the commentary to it, but considers that this is not adequately reflected in the text of the article. It should be made clear that the public likely to be affected includes the public of the State of origin as well as that of other States. It may also be desirable to define “the public likely to be affected” accordingly in article 2.

2. The article should also be expanded to encompass the other elements of principle 10 of the Rio Declaration on Environment and Development, which is set out in paragraph (4) of the commentary,¹ so as to require that the State of origin must afford the public the opportunity to participate in the decision-making processes and provide effective access to judicial and administrative proceedings, including redress and remedy.

¹ *Yearbook ... 1998*, vol. II (Part Two), p. 33.

Article 10. Notification and information**Netherlands**

1. The Netherlands would point out that the phrase “notification thereof” in paragraph 1 is ambiguous. Does it refer solely to the risk described or equally to the results of the assessment? The Netherlands suggests making the intended meaning more explicit by adding the word “all” to “other relevant information” and by replacing “thereof” by the phrase “of the risk and the assessment”.

2. It is recommended that a reference to the *Lake Lanoux* case¹ be added to the commentary to draft article 10.

3. Article 10, paragraph 1, refers to the obligation to notify the States likely to be affected, whereas paragraph 9 of the accompanying comments acknowledges that the State of origin may not always be able to identify all these States. This point is related to the problem noted above by the Netherlands, that the text fails to address the question of the risk of damage to common areas (see comments under “General remarks”, above).

¹ UNRIAA, vol. XII (Sales No. 63.V.3), p. 281.

United Kingdom

It is implicit in paragraph 2 that the State of origin is required to postpone a final decision on authorization until the “reasonable time” in which affected States have to respond has elapsed. This should be made explicit, for example, by requiring the State of origin to wait a reasonable time before taking a decision on authorization of the activity in order to give the States likely to be affected an opportunity to respond to the notification.

Article 11. Consultations on preventive measures**Netherlands****Paragraph 1**

Whereas article 10 refers to notification *pending* any decision on the authorization of the activity, the commentary to article 11, paragraph 1, on consultations (which would logically come after notification) refers to a time either preceding the granting of authorization or a later stage (i.e. when the hazardous activity is already going on). The Netherlands favours adding a provision along the following lines: “Such consultations should preferably take place prior to authorization.” This would not only protect the interests of the State likely to be affected, but indirectly protect those of the State of origin as well.

Paragraph 3

The Netherlands has taken note of the dissenting opinion of one member of the Commission, given in paragraph (12) of the commentary,¹ that the appointment of an independent and impartial fact-finding commission, as provided for in article 17, should have priority over a unilateral decision to proceed with the activity in question in the absence of an agreed solution between the States concerned. The Netherlands would note that a fact-finding mechanism set up for the purposes of article 11 should be regarded as an autonomous mechanism, to be distinguished, chronologically as well as in terms of content, from that provided for in draft article 17. This comment does not detract from the Netherlands’ view on the fact-finding commission as envisaged (see the comments on article 17 below).

¹ *Yearbook ... 1998*, vol. II (Part Two), p. 36.

United Kingdom

1. It would frustrate the purpose of this article if the State of origin were to authorize an activity or allow it to proceed while the required consultations were continuing. To avoid this it might be appropriate to add a final paragraph providing that the State of origin must not authorize an activity until consultations pursuant to this article have been concluded. It would be necessary in this context to indicate how the time frame for consultations should be determined. The most suitable method might be for the States concerned to agree on a time frame for consultations. The last part of article 5 of the Espoo Convention provides a useful precedent: “The Parties shall agree, at the commencement of such consultations, on a reasonable time frame for the duration of the consultation period.”

2. As regards the substance of the consultations, the United Kingdom assumes that the purpose is not to detract from the State of origin's duty of prevention in article 3, but rather to discuss a mutually acceptable choice of measures to give effect to that duty. The relationship between these articles needs to be clarified in the text of the draft articles.

Article 12. Factors involved in an equitable balance of interests

France

1. Article 12, entitled "Factors involved in an equitable balance of interests", is intended to provide guidance to States that have entered into consultations in an endeavour to achieve an equitable balance of interests. The goal is to strike a reasonable balance between the interests of the State carrying on the activity and the interests of States likely to be affected. One might ask whether, with such an approach, this article might overcompensate by obliging States likely to be affected—because they are at a more advanced level of development than the State that carried on the activity—to bear part of the cost of prevention. This is in fact what subparagraph (d) indicates.

2. France believes that the combination of subparagraphs (c) and (f) should not lead to the prevention threshold being lowered.

Netherlands

1. The Netherlands is of the opinion that the fact that the State of origin has an economic interest in the proposed activities should be taken into account in the application of article 12.

2. The Netherlands is of the opinion that the distinction between subparagraphs (a) and (c) is in need of clarification.

United Kingdom

1. The United Kingdom is concerned that the balance of this article may detract too far from the duty of prevention in article 3; its acceptability will ultimately depend on how the relationship between the duty of prevention and the concept of equitable balancing is defined (see paragraph 2 of the United Kingdom's comments under article 11, above).

2. In particular, subparagraph (d) appears inconsistent with this duty in implying that the State of origin has a choice whether to comply with article 3 in full or at all. The preparedness of the State of origin to contribute to the costs of prevention should only be relevant where the affected State is proposing measures over and above the requirements of article 3, for example to the level of its own national standards, and is willing to contribute to the additional costs. Subparagraph (d) should be clarified to this effect or deleted.

3. Moreover, the United Kingdom is unclear how the process of equitable balancing proposed in article 12 fits with certain other internationally accepted principles of

international environmental law, notably sustainable development, precautionary action, the polluter-pays principle, and as reflected in, inter alia, the Rio Declaration on Environment and Development.¹ Consideration should be given to incorporating in article 12, or elsewhere in the draft articles, the importance of ensuring that decisions on measures taken to prevent or minimize the risk of harm take full account of the following:

(a) That the needs of the present generation should be met without compromising the ability of future generations to meet their own needs;

(b) That lack of scientific certainty owing to insufficient relevant scientific information and knowledge regarding the risk of significant transboundary harm should not prevent the State of origin from taking a decision with regard to an activity in order to prevent or minimize the potential risk;

(c) That the costs of pollution prevention, control and reduction measures should be borne by the polluter.

¹ *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*.

Article 13. Procedures in the absence of notification

France

1. Article 13 takes a pre-contentious perspective. Paragraph 3 of the article did not appear in the 1996 draft. It requires the State of origin to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a period of six months if the other State requests it to do so in the course of consultations. There is a difference between article 11, paragraph 3, and article 13, paragraph 3: in the first case, it is the State of origin that takes the initiative and is responsible for taking the necessary action to prevent or minimize the risk of causing harm; in the second case, it is the requesting State that takes the initiative. In the latter case, the question is whether the State has the freedom to take the action that it itself considers appropriate or whether it must take action in consultation with the State of origin or, where appropriate, with an international organization.

2. Paragraph 3 of article 13 should be deleted. It casts suspicions on a State that has not anticipated the consequences of its activities (a sort of presumption of bad faith). Moreover, the six-month period gives rise to problems. It would be better to specify a reasonable period of time in the light of circumstances.

Article 14. Exchange of information

Netherlands

As noted above in the general comments, there is no provision for emergencies here, regarding matters such as the exchange of information.

Article 15. National security and industrial secrets**France**

Article 15 is appropriate because a State should not be obliged to reveal certain information, but the article should be reworded. The term “industrial secrets” is too restrictive. The following wording would be preferable: “data and information vital to the national security of the State or protected by intellectual property rights.”

Netherlands

As noted above in the general comments, the position of the “operators” mentioned in various parts of the text requires clarification. This matter is also relevant in the context of article 15.

Article 16. Non-discrimination**France**

In the case of article 16, the question is whether it is desirable to dispense with the forms of inter-State redress for which provision was made in article 21 of the 1996 draft and which no longer appear in the 1998 version. The title of the article should be changed because the article’s purpose is to give aliens access to a State’s courts. Non-discrimination is just one procedural aspect among others concerning access to such courts. The title of article 16 should therefore be “Access to courts”.

Netherlands

1. The Netherlands considers this draft article, as it now stands, to be very meagre. Its essence, i.e. that the State of origin must grant access to its judicial and other procedures, should be accorded a far more prominent place in the article, and should precede the reference to the principle of non-discrimination.

2. The Netherlands would suggest introducing the element of *lis pendens* into the text, for instance by referring to proceedings before the World Bank Inspection Panel. Furthermore, a more wide-ranging non-discrimination provision (in relation both to access to the courts and to redress), as in the Convention on the Law of the Non-navigational Uses of International Watercourses, would be helpful. In this light, it is recommended that the phrase “Unless the States concerned have agreed otherwise” be replaced by the phrase “Without prejudice to other internationally agreed procedures and other mechanisms of relief”, and that the words “to seek protection” be replaced by the words “to obtain protection”.

3. In connection with this draft article, the Netherlands would recall that a previous version of the draft (the draft articles drawn up by a working group of the Commission

in 1996¹) included a draft article on the “Nature and extent of compensation or other relief”. The Netherlands would suggest including this article again, and placing it after article 16.

¹ *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 100.

Article 17. Settlement of disputes**France**

1. Even though article 17, concerning settlement of disputes, does not give rise to any particular difficulties, one might ask how the independent and impartial fact-finding commission referred to in paragraph 2 is to be set up, and whether the body in question could also be a conciliation commission.

2. In any event, the settlement-of-disputes provisions do not really belong in the draft, and it would be preferable for the matter to be dealt with by the diplomatic conference established to negotiate the convention.

Netherlands

1. As regards the procedure for settling disputes relating to the application and interpretation of the articles, the Netherlands favours a more effective procedure than that currently envisaged. For instance, the wording of the provision on the appointment of a fact-finding commission is weak. It would be useful to take as an example the provision for settling disputes in article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses, where the fact-finding commission is given far wider powers, including the power to make proposals for conciliation. It would also be advisable to alter the period of time to be observed before adopting this procedure to three months, following the example of the United Nations Convention on the Law of the Sea.

2. See also the comments of the Netherlands in relation to article 11, paragraph 3.

Turkey

The establishment of compulsory rules for the settlement of disputes should be avoided. The provisions regarding the dispute settlement mechanisms should be flexible enough to allow the States concerned to determine the most efficient way of resolving any outstanding issues among them in conformity with the nature of such issues. The principle of free choice of means, as laid down in Article 33 of the Charter of the United Nations and reiterated in some other international instruments, should be observed.

RESERVATIONS TO TREATIES

[Agenda item 5]

DOCUMENT A/CN.4/508 and Add.1-4

Fifth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

[Original: French]

[29 March, 1 May, 23 June and 7 July 2000]

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	<i>Source</i>
Convention on Bills of Exchange and Promissory Notes (The Hague, 23 July 1912)	League of Nations, <i>International Conference for the Unification of the Law on Bills of Exchange, Promissory Notes and Cheques, Preparatory Documents</i> (C.234.M.83.1929.II), p. 42.
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.
Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties (Havana, 20 February 1928)	League of Nations, <i>Treaty Series</i> , vol. CXXXII, No. 3045, p. 301.
General Act (Pacific Settlement of International Disputes) (Geneva, 26 September 1928)	Ibid., vol. XCIII, No. 2123, p. 343.
Convention for the Unification of certain Rules regarding International Transport (Warsaw, 12 October 1929)	Ibid., vol. CXXXVII, No. 3145, p. 13.
Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 (The Hague, 28 September 1955)	United Nations, <i>Treaty Series</i> , vol. 478, No. 478, No. 6943, p. 371.
Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930)	League of Nations, <i>Treaty Series</i> , vol. CXLIII, No. 3313, p. 257.
Convention providing a Uniform Law for Cheques (Geneva, 19 March 1931)	Ibid., No. 3316, p. 355.
Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques (Geneva, 19 March 1931)	Ibid., No. 3317, p. 407.
Convention on Extradition (Montevideo, 26 December 1933)	Ibid., vol. CLXV, No. 3803, p. 45.

	<i>Source</i>
Convention (No. 63) concerning statistics of wages and hours of work in the principal mining and manufacturing industries, including building and construction, and in agriculture (Geneva, 20 June 1938)	United Nations, <i>Treaty Series</i> , vol. 40, No. 638, p. 255.
Articles of Agreement of the International Monetary Fund (Washington, 27 December 1945)	Ibid., vol. 2, No. 20, p. 39.
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General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, <i>Treaty Series</i> , vol. 55, No. 814, p. 187.
Protocol of Provisional Application of the General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	Ibid., p. 308.
Revised General Act for the Pacific Settlement of International Disputes (Lake Success, New York, 28 April 1949)	Ibid., vol. 71, No. 912, p. 101.
Convention (No. 96) concerning Fee-Charging Employment Agencies (revised 1949) (Geneva, 1 July 1949)	Ibid., vol. 96, No. 1340, p. 237.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	Ibid., vol. 75, Nos. 970–973, pp. 31 et seq.
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 No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994)	Council of Europe, <i>European Treaty Series</i> , No. 155.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	United Nations, <i>Treaty Series</i> , vol. 189, No. 2545, p. 137.
Convention (No. 102) concerning Minimum Standards of Social Security (Geneva, 28 June 1952)	Ibid., vol. 210, No. 2838, p. 131.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	Ibid., vol. 360, No. 5158, p. 117.
Convention relating to the settlement of conflicts between the law of nationality and the law of domicile (The Hague, 15 June 1955)	Hague Conference on Private International Law, <i>Collection of Conventions (1951–1996)</i> , p. 24.
Convention concerning the recognition of the legal personality of foreign companies, associations and institutions (The Hague, 1 June 1956)	Ibid., p. 28.
European Convention for the Peaceful Settlement of Disputes (Strasbourg, 29 April 1957)	United Nations, <i>Treaty Series</i> , vol. 320, No. 4646, p. 243.
European Convention on Extradition (Paris, 13 December 1957)	Ibid., vol. 359, No. 5146, p. 273.
Convention concerning the recognition and enforcement of decisions relating to maintenance obligations towards children (The Hague, 15 April 1958)	Ibid., vol. 539, No. 7822, p. 27.
Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods (The Hague, 15 April 1958)	Hague Conference on Private International Law, <i>Collection of Conventions (1951–1996)</i> , p. 20.
Geneva Conventions on the Law of the Sea (Geneva, April 1958)	
Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	United Nations, <i>Treaty Series</i> , vol. 516, No. 7477, p. 205.
Convention on the High Seas (Geneva, 29 April 1958)	Ibid., vol. 450, No. 6465, p. 11.
Convention on the Continental Shelf (Geneva, 29 April 1958)	Ibid., vol. 499, No. 7302, p. 311.
European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959)	Ibid., vol. 472, No. 6841, p. 185.
European Agreement on the Protection of Television Broadcasts (Strasbourg, 22 June 1960)	Ibid., vol. 546, No. 7951, p. 247.
Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960)	Ibid., vol. 956, No. 13706, p. 251.

	<i>Source</i>
Customs Convention on the Temporary Importation of Packings (Brussels, 6 October 1960)	Ibid., vol. 473, No. 6861, p. 131.
Convention on the Reduction of Statelessness (New York, 30 August 1961)	Ibid., vol. 989, No. 14458, p. 175.
Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (The Hague, 5 October 1961)	Ibid., vol. 527, No. 7625, p. 189.
Convention concerning the powers of authorities and the law applicable in respect of the protection of infants (The Hague, 5 October 1961)	Ibid., vol. 658, No. 9431, p. 143.
European Social Charter (Turin, 18 October 1961)	Council of Europe, <i>European Treaty Series</i> , No. 35.
ILO Convention (No. 118) concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (Geneva, 28 June 1962)	United Nations, <i>Treaty Series</i> , vol. 494, No. 7238, p. 271.
Declaration on the Neutrality of Laos (Geneva, 23 July 1962)	Ibid., vol. 456, No. 6564, p. 301.
Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality (Strasbourg, 6 May 1963)	Ibid., vol. 634, No. 9065, p. 221.
Convention (No. 119) concerning the guarding of machinery (Geneva, 25 June 1963)	Ibid., vol. 532, No. 7717, p. 159.
European Code of Social Security (Strasbourg, 16 April 1964)	Council of Europe, <i>European Treaty Series</i> , No. 48.
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 15 November 1965)	United Nations, <i>Treaty Series</i> , vol. 1144, No. 17957, p. 249.
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 Economic, Social and Cultural Rights (New York, 16 December 1966)	Ibid., vol. 993, No. 14531, p. 3.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 99, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid.
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European Convention on the protection of the archaeological heritage (London, 6 May 1969)	Ibid., vol. 788, No. 11212, p. 227.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, No. 18232, p. 331.
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Convention on the taking of evidence abroad in civil or commercial matters (The Hague, 18 March 1970)	Ibid., vol. 847, No. 12140, p. 231.
Convention on the recognition of divorces and legal separations (The Hague, 1 June 1970)	Ibid., vol. 978, No. 14236, p. 393.
Convention on the recognition and enforcement of foreign judgements in civil and commercial matters (The Hague, 1 February 1971)	Ibid., vol. 1144, No. 17957, p. 249.
Convention on Psychotropic Substances (Vienna, 21 February 1971)	Ibid., vol. 1019, No. 14956, p. 175.
Convention on the law applicable to traffic accidents (The Hague, 4 May 1971)	Ibid., vol. 965, No. 13925, p. 411.
Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (Washington, D.C., 20 August 1971)	Ibid., vol. 1220, No. 19677, p. 21.
European Convention on State Immunity (Basel, 16 May 1972)	Ibid., vol. 1495, No. 25699, p. 181.
Customs Convention on containers, 1972 (Geneva, 2 December 1972)	Ibid., vol. 988, No. 14449, p. 43.
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European Convention on the Legal Status of Children Born out of Wedlock (Strasbourg, 15 October 1975)	Ibid., vol. 1138, No. 17868, p. 303.
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Convention on Celebration and Recognition of the Validity of Marriages (The Hague, 14 March 1978)	Hague Conference on Private International Law, <i>Collection of Conventions (1951-1996)</i> , p. 242.
Convention on the Law Applicable to Matrimonial Property Regimes (The Hague, 14 March 1978)	Ibid., p. 228.
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Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	Ibid., vol. 1249, No. 20378, p. 13.
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United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	Ibid., vol. 1833, No. 31363, p. 3.
Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984)	Ibid., vol. 1465, No. 24841, p. 112.
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	<i>Source</i>
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PART I

Introduction

1. Formally speaking, this is the fifth report that the Special Rapporteur has submitted on reservations to treaties. Nevertheless, only a very incomplete version of the fourth report was submitted to the Commission in 1999, and in that year both the Commission and the Sixth Committee continued their consideration of the third report, begun in 1998. Thus, at the risk of redundancy, this section reproduces most of the introduction to the fourth report,¹ while including therein the necessary updates concerning new developments with regard to the earlier work of the Commission on the topic, as well as the action taken by other bodies in relation to reservations to treaties.

A. The earlier work of the Commission on the topic

2. 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.² 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.³ Sections 1 and 2 deal with the outcome of the first and second reports and the discussion of the third and fourth reports in the Commission and the Sixth Committee; sections B and C deal 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)*

3. 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.⁴ In order to have a clearer picture of such practice, with

the Commission's authorization,⁵ 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 its resolution 50/45 of 11 December 1995, the General Assembly invited States and international organizations, particularly those which are depositaries of conventions, to answer the questionnaires promptly;⁶ it reiterated that request in its resolution 51/160 of 16 December 1996.⁷

4. By the time the third report was prepared,⁸ 32 States and 22 international organizations⁹ had replied either partially or fully to the questionnaires. Since then, another State, New Zealand,¹⁰ and two more international organizations¹¹ have transmitted replies to the Secretariat.

5. 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 33 of the 187 States Members of the United Nations to which the questionnaire was sent and 24 of the international organizations that received questionnaires, or 18 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) (20 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.

6. The Special Rapporteur is fully aware that Commission questionnaires are burdensome for the legal departments of ministries for 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

⁵ See *Yearbook ... 1995*, vol. II (Part Two), p. 109, para. 489.

⁶ Para. 5.

⁷ Para. 7.

⁸ In the case of that part of the report, 30 April 1998.

⁹ *Yearbook ... 1998* (see footnote 3 above), p. 230, footnotes 7 and 9.

¹⁰ A number of States that had transmitted only partial replies completed their replies, for which the Special Rapporteur wishes to thank them.

¹¹ The organizations in question are the United Nations (Treaty Section) (1998) and WMO (1999), both of which the Special Rapporteur also wishes to thank.

¹ *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/499, p. 128.

² *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 126–141, paras. 8–90.

³ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, pp. 229–233, paras. 1–30.

⁴ *Ibid.*, pp. 241–249, paras. 89–146.

of statements by their representatives in the Sixth Committee; he attaches the greatest importance to such responses.¹² 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.

7. It was for these reasons that in his fourth report,¹³ the Special Rapporteur felt strongly that the Commission should recommend to the General Assembly that it 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. Nevertheless, although the Commission made an appeal to that effect in its report on its fifty-first session, in 1999,¹⁴ that appeal was transmitted only implicitly by the General Assembly at its fifty-fourth session,¹⁵ and no new replies have been received by the Secretariat since the end of the session. Perhaps the Commission should reiterate that request.

(b) *Outcome of the second report (1996–1997)*

8. Owing to lack of time, the Commission was unable to consider the second report on reservations to treaties¹⁶ at its forty-eighth session, in 1996. It did so at its following session, in 1997. Once it had considered the report, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.¹⁷

9. 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 chair-

persons of human rights bodies with universal membership,¹⁸ 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.¹⁹

10. 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.²⁰ 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.

11. In a letter dated 9 April 1998,²¹ 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 conclusions²² and stressed that the proposition enunciated in paragraph 10,²³ 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

¹⁸ 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.

¹⁹ 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.

²⁰ The Special Rapporteur intends to reproduce these replies in full in an annex to a future report; see paragraph 18 below.

²¹ The most important paragraph of the letter is reproduced in the third report (*Yearbook ... 1998* (footnote 3 above), p. 231, para. 16).

²² *Yearbook ... 1997* (see footnote 17 above): “The Commission emphasizes that the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts.”

²³ *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.”

¹² See paragraphs 32–50 below.

¹³ *Yearbook ... 1999* (see footnote 1 above), para. 6.

¹⁴ “The Commission recalls that, at its forty-seventh session, in 1995, a questionnaire on the topic was sent to States and international organizations. The Commission, while thanking the States and organizations which have already answered, would like to reiterate its plea to those States and organizations which have not answered so far, to do so. Moreover, the Commission welcomes additional answers on the parts of the questionnaire which had not been covered by the States and organizations which answered, indicating that they would respond later on those parts” (*Yearbook ... 1999*, vol. II (Part II), p. 18, para. 30).

¹⁵ See paragraph 3 of General Assembly resolution 54/111 of 9 December 1999.

¹⁶ *Yearbook ... 1996*, vol. II (Part One), p. 37, document A/CN.4/477 and Add.1.

¹⁷ *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157.

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.²⁴

12. In an important decision dated 2 November 1999,²⁵ the Human Rights Committee took this position in a specific case. What was involved was assessing the admissibility of a communication from a person condemned to death, whereas Trinidad and Tobago had, by means of a reservation entered following its re-accession to the Optional Protocol to the International Covenant on Civil and Political Rights which it had previously denounced, rejected the competence of the Committee "to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith".²⁶ Despite the contrary view held by the Government of Trinidad and Tobago, the Committee declared the complaint receivable on the basis of General Comment No. 24:

As opined in the Committee's General Comment No. 24, it is for the Committee, as the treaty body to the International Covenant on Civil and Political Rights and its Optional Protocols, to interpret and determine the validity of reservations made to these treaties. The Committee rejects the submission of the State party that it has exceeded its jurisdiction in registering the communication and in proceeding to request interim measures under rule 86 of the rules of procedure. In this regard, the Committee observes that it is axiomatic that the Committee necessarily has jurisdiction to register a communication so as to determine whether it is or is not admissible because of a reservation. As to the effect of the reservation, if valid, it appears on the face of it, and the author has not argued to the contrary, that this reservation will leave the Committee without jurisdiction to consider the present communication on the merits. The Committee must, however, determine whether or not such a reservation can validly be made.

At the outset, it should be noted that the Optional Protocol itself does not govern the permissibility of reservations to its provisions. In accordance with article 19 of the Vienna Convention on the Law of Treaties and principles of customary international law, reservations can therefore be made, as long as they are compatible with the object and purpose of the treaty in question. The issue at hand is therefore whether or not the reservation by the State party can be considered to be compatible with the object and purpose of the Optional Protocol.

In its General Comment No. 24, the Committee expressed the view that a reservation aimed at excluding the competence of the Committee under the Optional Protocol with regard to certain provisions of the Covenant could not be considered to meet this test:

²⁴ Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 40 (A/54/40)*, vol. I, annex VI.

²⁵ *Ibid.*, *Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. II, annex XI, communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, p. 258.

²⁶ *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1999*, vol. I (United Nations publication, Sales No. E.00.V.2), p. 176.

"The function of the first Optional Protocol is to allow claims in respect of [the Covenant's] rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to [the] object and purpose of the first Optional Protocol, even if not of the Covenant"¹¹ (emphasis added).

The present reservation, which was entered after the publication of General Comment No. 24, does not purport to exclude the competence of the Committee under the Optional Protocol with regard to any specific provision of the Covenant, but rather to the entire Covenant for one particular group of complainants, namely prisoners under sentence of death. This does not, however, make it compatible with the object and purpose of the Optional Protocol. On the contrary, the Committee cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population. In the view of the Committee, this constitutes a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols, and for this reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol. The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol.²⁷

¹¹ HRI/GEN/I/Rev.3, 15 August 1997, p. 46.

13. 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 (9–20 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.

14. 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 need to limit the number and scope 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 recognize to individuals, could not be placed on precisely the same footing as other treaties with different characteristics.

²⁷ *Rawle Kennedy v. Trinidad and Tobago* (see footnote 25 above), pp. 265–266, paras. 6.4–6.7.

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.²⁸

15. 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 the Committee adopted at its nineteenth session.²⁹ 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,³⁰ 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",³¹ 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 16³² or the failure of States parties to withdraw or modify them.³³

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 part of the States concerned to remove and modify them and thereby comply with general principles of international law.³⁴

²⁸ *Official Records of the General Assembly, Fifty-third Session*, item 113 (a) of the preliminary list (A/53/125), annex.

²⁹ *Ibid.*, *Fifty-third Session, Supplement No. 38* (A/53/38/Rev.1), part two, paras. 5–21.

³⁰ *Yearbook ... 1996* (see footnote 16 above). The Committee seems to be referring to paragraphs 241–251 (pp. 80–81), although they are not specifically mentioned.

³¹ *Official Records of the General Assembly* (see footnote 28 above), para. 20.

³² 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.

³³ *Official Records of the General Assembly* (see footnote 28 above), para. 23.

³⁴ *Ibid.*, para. 24.

16. In addition, in accordance with the recommendation contained in paragraph 2 of General Assembly resolution 52/156 of 15 December 1997,³⁵ five States transmitted to the Secretariat comments regarding the preliminary conclusions adopted by the Commission in 1997.³⁶ Generally speaking, these States welcomed the adoption of the preliminary conclusions³⁷ 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"³⁸ 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.³⁹ China agreed with Liechtenstein that the implementation of the recommendation in paragraph 7 of the preliminary conclusions might prove difficult in practice.⁴⁰ Liechtenstein concluded its comments by drawing the Commission's attention to the following points, which it felt deserved particular attention:

³⁵ *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.

³⁶ The three States mentioned in the third report, Liechtenstein, Monaco and the Philippines (*Yearbook ... 1998* (footnote 3 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.

³⁷ Liechtenstein wondered, however, whether they were not premature.

³⁸ 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 17 above)

³⁹ See the text of paragraph 12 in footnote 22 above.

⁴⁰ Paragraph 7 of the preliminary conclusions 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 17 above)

(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.⁴¹

17. 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.

18. Although, as he tried to explain in his third report,⁴² 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 2001, or by 2002 at the latest. At that point, as he indicated in his third report,⁴³ 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.

19. Moreover, the Special Rapporteur had annexed to his second report a bibliography concerning reservations to treaties.⁴⁴ As announced in the third report

a complete text of that document was annexed to the fourth report.⁴⁵

2. THIRD AND FOURTH REPORTS AND THE OUTCOME

20. The third report on reservations to treaties⁴⁶ consisted of three chapters of very unequal length. The 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.⁴⁷ Chapter I dealt with the definition of reservations (and interpretative declarations).⁴⁸ There was also a recapitulation of the draft guidelines proposed by the Special Rapporteur in the context of the Guide to Practice.⁴⁹

21. Owing to lack of time, the Commission was only able to give partial consideration to the third report at its fiftieth session in 1998. It completed the consideration of that report at its fifty-first session in 1999. In the meantime, the Special Rapporteur had submitted his fourth report which, taking into account the aforementioned circumstance, recapitulated the new elements introduced since the consideration of the second report⁵⁰ and proposed a reconsideration of the draft guideline concerning “statements of non-recognition”.⁵¹

(a) Consideration of the third report by the Commission

(i) The fiftieth session

22. At its fiftieth session, in 1998, the Commission considered the third report on reservations to treaties in three stages:

(a) First, it discussed the part of the report dealing with the definition of reservations to multilateral treaties and the corresponding draft guidelines,⁵² which it referred to the Drafting Committee;

(b) The Commission then proceeded—the Drafting Committee having made a number of amendments to

⁴⁵ *Yearbook ... 1999* (see footnote 1 above), annex (A/CN.4/478/Rev.1), p. 139.

⁴⁶ *Yearbook ... 1998* (see footnote 3 above), p. 221.

⁴⁷ *Ibid.*, pp. 229–235, paras. 1–46.

⁴⁸ *Ibid.*, pp. 236–284, paras. 47–413. Notwithstanding what the Special Rapporteur had hoped to do and had initially said he would do (see paragraphs 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.

⁴⁹ *Ibid.*, para. 512.

⁵⁰ These elements are largely reproduced in the present report. See paragraph 1 above.

⁵¹ *Yearbook ... 1999* (see footnote 1 above), pp. 135–137, paras. 44–54.

⁵² *Yearbook ... 1998* (see footnote 3 above), pp. 236–284, paras. 47–413; and draft guidelines 1.1 and 1.1.1–1.1.8 (*ibid.*, p. 299, para. 512), which, in the numbering system adopted in 1999, became 1.1.1–1.1.7 and 1.4.1–1.4.3; a “table of concordances” between the numbers of the draft guidelines proposed by the Special Rapporteur and those adopted by the Commission in 1999 appears as annex I to the present report.

⁴¹ See *Official Records of the General Assembly, Fifty-second Session, Sixth Committee, 22nd meeting (A/C.6/52/SR.22)*, paras. 80–87.

⁴² *Yearbook ... 1998* (see footnote 3 above), p. 232, para. 22.

⁴³ *Ibid.*, para. 23.

⁴⁴ *Yearbook ... 1996* (see footnote 16 above), annex I (A/CN.4/478), p. 85.

the draft guidelines—to consider the amended texts, six of which it adopted after making relatively minor adjustments. In addition, the Commission adopted the text of one “safeguard” guideline, proposed by the Special Rapporteur at the request of several members.⁵³ 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;

(c) Lastly, the Commission approved the commentaries on the draft articles it had adopted, which are reproduced in its report to the General Assembly.⁵⁴

23. At the close of the fiftieth session, in 1998, the Special Rapporteur also submitted the part of his third report⁵⁵ which deals with the distinction between reservations and interpretative declarations.⁵⁶ 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.⁵⁷

(ii) *The fifty-first session*

24. In 1999, at its fifty-first session, the Commission had before it the parts of the third report which it had been unable to consider the year before, concerning, on the one hand, interpretative declarations and, on the other hand, “reservations” and interpretative declarations relating to bilateral treaties.⁵⁸ In addition, the Commission had to re-examine the draft guidelines on “extensive reservations”⁵⁹ and new draft guideline 1.1.7, replacing the one on “statements of non-recognition” proposed by the Special Rapporteur in his third report.⁶⁰

25. Indeed, following the plenary debate at the fiftieth session, in 1998, the Special Rapporteur stated that he was convinced that he had been on the wrong track in considering initially that what was at issue were reservations in the legal sense of the term.⁶¹ Accordingly, in his fourth report,⁶² he proposed a draft guideline which reflected the position of the vast majority of members of the Commission and which was, with a few amendments, adopted by the Commission as draft guideline 1.4.3.

26. Moreover, as it had planned to do at its fiftieth session,⁶³ the Commission re-examined draft guidelines 1.1.1 and 1.1.3 concerning “object of reservations” and “reservations having territorial scope”, respectively, in the light of the discussion on interpretative declarations, which led it to reformulate the former⁶⁴ but to make no amendments to the latter.

27. At its fifty-first session, in 1999, the Commission therefore adopted, with larger or smaller amendments, all the draft guidelines on definition of reservations and interpretative declarations submitted to it in the third report of the Special Rapporteur.⁶⁵ It also re-examined and completed the “safeguard” guideline on “scope of definitions” which it had adopted provisionally in 1998.⁶⁶ Moreover, on the initiative of the Drafting Committee, the Commission proceeded to re-order the presentation of the 25 draft guidelines adopted up to then. They are now grouped in six sections on the following topics, respectively:

(a) Definition of reservations (guidelines 1.1 and 1.1.1–1.1.7);

(b) Definition of interpretative declarations (guidelines 1.2, 1.2.1 and 1.2.2);

(c) Distinction between reservations and interpretative declarations (guidelines 1.3 and 1.3.1–1.3.3);

(d) Unilateral declarations other than reservations and interpretative declarations (guidelines 1.4 and 1.4.1–1.4.5);

(e) Unilateral declarations relating to bilateral treaties (guidelines 1.5.1–1.5.3); and

(f) Scope of definitions (guideline 1.6).⁶⁷

28. The Special Rapporteur wishes to take the opportunity of this report to explain his views on the numbering system which he has adopted for the provisions of the Guide to Practice and which has been criticized by some members of the Commission for its apparent complexity.⁶⁸ This system satisfies two concerns. On the one

⁵³ *Yearbook ... 1998*, vol. II (Part Two), p. 101, footnote 220.

⁵⁴ The initial text read as follows:

“A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which a State, or an international organization, intends to apply the treaty as a whole”.

(*Ibid.*, p. 99, para. 540)

The new text reads:

“A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.”

(*Yearbook ... 1999*, vol. II (Part Two), p. 91, para. 470)

⁵⁵ After discussion, and in agreement with the Special Rapporteur, the Commission did not adopt draft guidelines 1.3.0, 1.3.0 bis and 1.3.0 ter, which listed the criteria for distinguishing between reservations and interpretative declarations. It rightly considered that such criteria were already inherent in the definitions themselves (see *Yearbook ... 1999* (*ibid.*), para. 468).

⁵⁶ See paragraph 22 above.

⁵⁷ See the table showing concordances between the draft guidelines proposed by the Special Rapporteur and those adopted by the Commission on first reading, annexed hereto (annex I).

⁵⁸ See, in particular, the comments by Mr. Kabatsi (*Yearbook ... 1999*, vol. I, 2597th meeting, p. 220, para. 53) and Mr. Kateka (*ibid.*, para. 54); contrasting opinion: Mr. Melescanu (*ibid.*, p. 221, para. 64).

⁵³ Initially unnumbered, this draft guideline is numbered 1.6 in the text adopted in 1999; see *Yearbook ... 1998*, vol. II (Part Two), p. 99, para. 540.

⁵⁴ *Yearbook ... 1998* (*ibid.*).

⁵⁵ *Yearbook ... 1998* (see footnote 3 above), pp. 261–284, paras. 231–406.

⁵⁶ See *Yearbook ... 1998*, vol. I, 2551st meeting, pp. 217–223 and *ibid.*, vol. II (Part Two), pp. 94–96, paras. 505–519.

⁵⁷ *Ibid.*, vol. I, 2552nd meeting, p. 228, para. 56.

⁵⁸ *Yearbook ... 1998* (see footnote 3 above), pp. 284–298, paras. 414–510.

⁵⁹ See paragraph 22 (b) above.

⁶⁰ *Yearbook ... 1998* (see footnote 3 above), p. 253, para. 177.

⁶¹ *Ibid.*, pp. 251–253, paras. 164–177.

⁶² *Yearbook ... 1999* (see footnote 1 above), pp. 135–137, paras. 44–54.

hand, it purports to diverge clearly from the usual format of international treaties, which are divided into articles; the Guide to Practice is not a draft treaty and is not, in principle, designed to become one.⁶⁹ Moreover, after some initial trial and error, this format should make it possible to insert any new provisions within the existing sections without undermining the general structure of the text and without resorting to the awkward formula of “bis”, “ter” and “quater” provisions. Perhaps the members of the Commission who might have been disconcerted at the outset by the numbering method adopted will agree that, now that the adjustment period is over, it does not pose any particular problems.⁷⁰

29. Each of the draft guidelines adopted up to now is the subject of a commentary.⁷¹

30. In the light of certain misunderstandings,⁷² it seems useful to recall that the *sole* purpose of section 1 of the Guide to Practice is to *define* what is meant by the term “reservations”, by distinguishing them from other unilateral declarations satisfying different criteria, particularly interpretative declarations. The draft guidelines contained therein do not in any way prejudice the validity of either statement. As the commentary on draft guideline 1.6 adopted by the Commission in 1999 explains clearly:

Defining is not the same thing as regulating. As “a precise statement of the essential nature of a thing”,⁷³ the sole function of a definition is to determine the general category in which a given statement should be classified. However, this classification does not in any way prejudice the validity of the statements in question: a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established. *A contrario*, it is not a reservation if it does not meet the criteria set forth in these draft guidelines (and in those which the Commission intends to adopt at the next session), but this does not necessarily mean that such statements are permissible (or impermissible) from the standpoint of other rules of international law. The same is true of interpretative declarations, which might conceivably not be permissible, either because they would alter the nature of the treaty or because they were not formulated at the required time;⁷⁴ etc.⁷⁵

31. The set of draft guidelines adopted in 1998 and 1999 calls for a second observation. While the topic

chosen by the Commission in agreement with the Sixth Committee is entitled “Reservations to treaties”, the Commission sought to define not only reservations *per se*, but also other interpretative statements made concerning a treaty and commonly referred to as “interpretative declarations”; it is often difficult to draw a dividing line between the two statements. For this reason, and in the light of the scope which the practice of interpretative declarations has assumed, the Special Rapporteur believes, despite his initial hesitations,⁷⁶ that it would be appropriate, in subsequent chapters of the Guide to Practice, to define the legal regime of reservations themselves, as well as that of interpretative declarations, and among the latter, to make a distinction between “mere” interpretative declarations and conditional interpretative declarations.⁷⁷ It is possible, moreover, that the legal regime of the latter statements, to which the declaring State or international organization subordinates its consent to be bound by a treaty, will be similar to that of reservations themselves.

(b) *Consideration of the reports of the Commission by the Sixth Committee*

32. Just as the Commission considered the Special Rapporteur’s report (corrected on one point in the fourth report)⁷⁸ twice, the Sixth Committee considered the Commission’s reports on the definition of reservations at both its fifty-third and fifty-fourth sessions, in 1998 and 1999.

33. In both cases, during the debate on the chapter of the report concerning reservations to treaties,⁷⁹ some delegations returned to topics considered in previous years, and many took positions and made useful suggestions on various draft guidelines adopted by the Commission.

(i) *General comments on the topic*

34. In 1998⁸⁰ and 1999⁸¹ several delegations restated their desire not to see the Vienna regime called into

⁶⁹ See *Yearbook ... 1995* (footnote 5 above), pp. 106–108, paras. 467–470, 483–484 and 487 (b)–(c).

⁷⁰ It is interesting to note that the representatives of States who spoke in the Sixth Committee at the past two sessions of the General Assembly did not seem to have special difficulties in that regard.

⁷¹ The commentaries on guidelines 1.1, 1.1.2–1.1.4 and 1.1.7 are contained in *Yearbook ... 1998*, vol. II (Part Two), pp. 99–107, para. 540. Those pertaining to other guidelines are contained in *Yearbook ... 1999*, vol. II (Part Two), pp. 93–126, para. 470.

⁷² See, in particular, the article by Zemanek—literally insulting to the Special Rapporteur—entitled “Alain Pellet’s definition of a reservation”. The author, who did not take the trouble to attempt to understand part one of the Guide to Practice (or, in any event, did not understand it), harshly attacks draft guideline 1.1.1 which, in his view, would legitimize across-the-board reservations. This is tantamount to confusing the definition of reservations with their validity. As the Special Rapporteur has pointed out on several occasions (*Yearbook ... 1998*, vol. I, 2545th, 2548th and 2549th meetings), it is absurd to exclude impermissible reservations from the definition of reservations; to do so is to rob oneself of any opportunity to declare them impermissible!

⁷³ *The Oxford English Dictionary*, 2nd ed. (Oxford, The Clarendon Press, 1989).

⁷⁴ This problem may very likely arise in connection with conditional interpretative declarations.

⁷⁵ *Yearbook ... 1999*, vol. II (Part Two), p. 126, para. (2).

⁷⁶ See, in particular, *Yearbook ... 1998*, vol. I, 2552nd meeting, and *Yearbook ... 1999*, vol. I, 2581st and 2586th meetings.

⁷⁷ The definition of conditional interpretative declarations is provided in draft guideline 1.2.1; see *Yearbook ... 1999*, vol. II (Part Two), pp. 103–106, with the commentary adopted by the Commission.

⁷⁸ *Yearbook ... 1999* (see footnote 1 above), pp. 135–137, paras. 44–54.

⁷⁹ *Yearbook ... 1998*, vol. II (Part Two), pp. 90–99, paras. 469–540, and *Yearbook ... 1999*, vol. II (Part Two), pp. 89–91, paras. 454–470.

⁸⁰ United States of America (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting, para. 52); France (*ibid.*, 16th meeting, para. 64); Sweden, on behalf of the Nordic countries (*ibid.*, 17th meeting, para. 5); Pakistan (*ibid.*, para. 20); Romania (*ibid.*, 18th meeting, para. 4); Germany (*ibid.*, para. 23); Venezuela (*ibid.*, para. 29); Cuba (*ibid.*, para. 55); Tunisia (*ibid.*, para. 57); Hungary, *ibid.*, 19th meeting, para. 23); Singapore (*ibid.*, para. 27); Islamic Republic of Iran (*ibid.*, 20th meeting, para. 9); Portugal (*ibid.*, para. 36); India (*ibid.*, 21st meeting, para. 34); and Egypt (*ibid.*, 22nd meeting, para. 14).

⁸¹ Chile (*Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 16th meeting, para. 3); Pakistan (*ibid.*, 17th meeting, para. 59); Slovenia (*ibid.*, 22nd meeting, para. 35); Croatia (*ibid.*, 25th meeting, para. 51); Russian Federation (*ibid.*, 26th meeting, para. 50); Libyan Arab Jamahiriya (*ibid.*, para. 14);

question, although some believed that a specific reservations regime should apply to human rights treaties,⁸² while others adamantly opposed the idea.⁸³

35. Several delegations drew attention to the growing interest in the subject⁸⁴ and stressed the practical usefulness the Guide to Practice would have for States once it was completed.⁸⁵ 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 could take.⁸⁶ It is encouraging to note that the exercise appeared convincing to those States that spoke on this point, none of which made any major criticism of the form selected.

36. However, two States considered the draft to be too detailed,⁸⁷ while another felt that the ultimate goal should be the elaboration of a draft convention,⁸⁸ while the Commission has never rejected this option outright, it is not in line with the thinking of the majority of its members,⁸⁹ and the Special Rapporteur has serious reservations about it. Yet another State suggested that the

draft should be supplemented by model statements,⁹⁰ which would seem to include not only model clauses, as the Commission has envisaged,⁹¹ but also model acceptances, objections or other reactions to reservations and interpretative declarations similar to those contemplated by the Council of Europe;⁹² this suggestion would appear to merit consideration.

37. More specifically, with regard to the “definition” exercise which the Commission undertook in 1998 and 1999, most delegations expressing views on the matter felt that it was useful and even very important,⁹³ even if some believed that the exercise should not stop there.⁹⁴ This conclusion is obvious;⁹⁵ however, as some delegates noted and as the Special Rapporteur again pointed out when he addressed the Sixth Committee, in keeping with the welcome practice instituted in 1997,⁹⁶ 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.⁹⁷

38. That is also why almost all delegations supported the intention of the Special Rapporteur⁹⁸ to define interpretative declarations in relation to reservations and to conduct a parallel study of the legal regimes applying to each.⁹⁹

(Footnote 81 continued.)

Slovakia (ibid., para. 58); Cyprus (ibid., para. 86); Egypt (ibid., 27th meeting, para. 24); Kuwait (ibid., 28th meeting, para. 87); and Cuba (ibid., para. 95).

⁸² Sweden, on behalf of the Nordic countries (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 17th meeting, para. 6); Italy (ibid., para. 33, and ibid., *Fifth-fourth Session, Sixth Committee*, 24th meeting, para. 27); Hungary (ibid., para. 36) and Niger (ibid., 25th meeting, para. 108); see also Ireland (ibid., *Fifty-third Session, Sixth Committee*, 20th meeting, para. 50). Greece said that the role of the human rights treaty monitoring bodies with regard to reservations should be reviewed (ibid., *Fifth-fourth Session, Sixth Committee*, 28th meeting, para. 12).

⁸³ Singapore (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 19th meeting, paras. 27–28); Egypt (ibid., 22nd meeting, para. 15, and ibid., *Fifth-fourth Session, Sixth Committee*, 27th meeting, para. 26); Pakistan (ibid., 17th meeting, para. 59); Tunisia (ibid., 25th meeting, para. 29) and Cuba (ibid., 28th meeting, para. 95); see also Algeria (ibid., *Fifth-third Session, Sixth Committee*, 20th meeting, para. 61) and the statement by the Secretary-General of AALCC (ibid., 17th meeting, para. 45).

⁸⁴ Sweden, on behalf of the Nordic countries (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 17th meeting, paras. 4 and 6); Germany (ibid., 18th meeting, para. 23); India (ibid., 21st meeting, para. 33); and Greece (ibid., 22nd meeting, para. 44); Bahrain (ibid., *Fifth-fourth Session, Sixth Committee*, 28th meeting, para. 54); and Portugal (ibid., para. 90).

⁸⁵ United Kingdom (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting, para. 15); Japan (ibid., 17th meeting, para. 26); Italy (ibid., 18th meeting, para. 33); Tunisia (ibid., para. 57); Chile (ibid., *Fifth-fourth Session, Sixth Committee*, 16th meeting, para. 2); United States (ibid., 19th meeting, para. 32, and 25th meeting, paras. 83 and 85); Slovenia (ibid., 22nd meeting, para. 35); Poland (ibid., 25th meeting, para. 110); Islamic Republic of Iran (ibid., 26th meeting, para. 69); Cyprus (ibid., para. 86); and Kuwait (ibid., 28th meeting, para. 87).

⁸⁶ France (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 65, and ibid., *Fifth-fourth Session, Sixth Committee*, 24th meeting, para. 38) and Niger (ibid., 25th meeting, para. 104) disputed the use of the word “directives”, and would prefer the term “lignes directrices”; the Special Rapporteur is not convinced that this change is warranted.

⁸⁷ Japan (*Official Records of the General Assembly, Fifth-fourth Session, Sixth Committee*, 25th meeting, para. 15); and Austria (ibid., 27th meeting, para. 17).

⁸⁸ Venezuela (*Official Records of the General Assembly, Fifth-fourth Session, Sixth Committee*, 27th meeting, para. 13).

⁸⁹ See *Yearbook ... 1995*, vol. II (Part Two), pp. 106–107, paras. 467–470, and p. 108, paras. 483 and 487.

⁹⁰ Croatia (*Official Records of the General Assembly, Fifth-fourth Session, Sixth Committee*, 25th meeting, para. 50).

⁹¹ See *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487.

⁹² See paragraphs 54–56 below.

⁹³ Austria (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 15th meeting, para. 16); Italy (ibid., 18th meeting, para. 33); Tunisia (ibid., para. 57); and Slovakia (ibid., 22nd meeting, para. 41).

⁹⁴ See in particular the United Kingdom (ibid., 14th meeting, para. 15) and also the annex to that country’s statement of 2 November 1999, which indicated that the United Kingdom was more than ever convinced that the discussion of definitions was unnecessarily absorbing the Commission’s time and leading it away from the main issues on which States needed guidance; see also Germany (ibid., *Fifth-fourth Session, Sixth Committee*, 25th meeting, para. 16); Sweden, on behalf of the Nordic countries (24th meeting, para. 47); and the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session (A/CN.4/504), paras. 87–88.

⁹⁵ The Special Rapporteur wishes to take his share of responsibility for the delay in the preparation of the Guide to Practice. In his “defence”, he would note that he received no assistance other than what the Commission secretariat was able to provide (assistance which he wholeheartedly welcomed), that he could not place excessive demands on the secretariat, given its heavy workload, and that the topic itself proved to be sprawling and complex.

⁹⁶ On 4 November 1998 (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 20th meeting, paras. 73–84).

⁹⁷ See paragraph 30 and footnote 72 above.

⁹⁸ See paragraph 31 above.

⁹⁹ Sweden, on behalf of the Nordic countries (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 17th meeting, para. 5); Germany (ibid., 18th meeting, para. 24); Venezuela (ibid., para. 30); Italy (ibid., para. 33); Tunisia (ibid., para. 57); Slovenia (ibid., 21st meeting, para. 5); Slovakia (ibid., 22nd meeting, para. 41); Greece (ibid., para. 45); Bosnia and Herzegovina (ibid., para. 47); Republic of Korea (ibid., para. 49); Niger (ibid., *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 105) and Switzerland (ibid., 28th meeting, para. 104). Only the United Kingdom appeared to express doubts on this point (ibid., *Fifty-third Session, Sixth Committee*, 14th meeting, para. 15).

(ii) *Observations on the draft guidelines*

39. The draft guidelines adopted received overall approval from several delegations,¹⁰⁰ although others offered some criticisms, generally on points of detail, or made interesting drafting suggestions.¹⁰¹ It is not possible to reflect all of them here, and only those of immediate interest for the work of the Commission relating to the adoption on first reading of the Guide to Practice are briefly described below.¹⁰²

40. With regard to guideline 1.1, which is noteworthy for being an amalgam of the definitions of reservations contained in the 1969 and 1986 Vienna Conventions, it is reassuring to note that most speakers endorsed the composite method used in adopting the general definition.¹⁰³ Three delegations did propose amendments to guideline 1.1, replacing the word “modify” by “limit” or “restrict”¹⁰⁴ or adding a reference to guideline 1.1.1.¹⁰⁵ However, as one delegation and the Special Rapporteur noted, that would amount to amending the Vienna definition,¹⁰⁶ which the Commission had decided to avoid as far as possible.¹⁰⁷

41. Some 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.¹⁰⁸ They agreed that it would be sufficient to return to that topic when the Commission

addressed reservations from that angle, which it planned to do in a special chapter of the Guide to Practice.¹⁰⁹

42. A single delegation initially cast some doubt on the possibility of “across-the-board” reservations referred to in guideline 1.1.1;¹¹⁰ however, it stated that it was satisfied with the reworded draft adopted in 1999.¹¹¹ Generally speaking, this text, which in the view of the Special Rapporteur provides significant clarification, was approved both in the original version adopted in 1998¹¹² and in 1999,¹¹³ although some delegations cautioned against a practice that had to be governed by specific rules,¹¹⁴ which the Commission would obviously have to consider when taking up the crucial question of the permissibility of reservations.

43. Subject to the possibility of including a reference to notifications of succession in cases of State succession,¹¹⁵ draft guideline 1.1.2 met with unanimous acceptance,¹¹⁶ as did guidelines 1.1.4¹¹⁷ and 1.1.7, with several delegations expressly acknowledging, by way of approval, their contribution to the progressive development of international law.¹¹⁸

44. Draft guideline 1.1.3 was generally approved,¹¹⁹ subject, in some cases, to certain drafting changes.¹²⁰ One delegation did wonder whether it would be appropriate to extend the scope of the draft guideline beyond

¹⁰⁹ See the second report (*Yearbook ... 1996* (footnote 16 above), pp. 48–49, para. 37, and p. 50, para. 46).

¹¹⁰ Czech Republic (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 78).

¹¹¹ On 3 November 1999 (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 79).

¹¹² See France (*ibid.*, *Fifty-third Session, Sixth Committee*, 16th meeting, para. 67) and Mexico (*ibid.*, 18th meeting, para. 16).

¹¹³ See Italy (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 24th meeting, para. 26); France (*ibid.*, para. 39); Poland (*ibid.*, 25th meeting, para. 111) and Greece (*ibid.*, 28th meeting, paras. 7–8).

¹¹⁴ France (*ibid.*, 24th meeting, para. 39); see also Burkina Faso (*ibid.*, 26th meeting, para. 46).

¹¹⁵ Czech Republic (*ibid.*, *Fifty-third Session, Sixth Committee*, 16th meeting, para. 82), Switzerland (*ibid.*, 20th meeting, para. 67) and Poland (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 112); see also footnote 108 above.

¹¹⁶ See, inter alia, France (*ibid.*, *Fifty-third Session, Sixth Committee*, 16th meeting, para. 68), Mexico (*ibid.*, 18th meeting, para. 16), Venezuela (*ibid.*, para. 29) and Bahrain (*ibid.*, 21st meeting, para. 17).

¹¹⁷ See, inter alia, Bahrain (*ibid.*, para. 18) and Greece (*ibid.*, 22nd meeting, para. 46).

¹¹⁸ See, inter alia, the Czech Republic (*ibid.*, 16th meeting, para. 84), Mexico (*ibid.*, 18th meeting, para. 18), Italy (*ibid.*, para. 34), Switzerland (*ibid.*, 20th meeting, para. 69), Bahrain (*ibid.*, 21st meeting, para. 18) and Greece (*ibid.*, 22nd meeting, para. 46). China drew attention to the problems posed by the withdrawal or modification of reservations and interpretative declarations formulated jointly (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 101); this question is addressed in part II of this report.

¹¹⁹ See, inter alia, France (*ibid.*, *Fifty-third Session, Sixth Committee*, 16th meeting, para. 68), Mexico (*ibid.*, 18th meeting, para. 17), Italy (*ibid.*, para. 34), Bahrain (*ibid.*, 21st meeting, para. 17; Bahrain, however, expressed reservations about a point in the commentary—expressly endorsed by France (*ibid.*, 16th meeting, para. 68)—that will warrant further study when the section of this report dealing with the formulation of reservations is considered) and Greece (*ibid.*, 22nd meeting, para. 46).

¹²⁰ Switzerland (*ibid.*, 20th meeting, para. 68) and Poland (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 113).

¹⁰⁰ United States (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting, para. 52); Argentina (*ibid.*, 15th meeting, para. 98); Algeria (*ibid.*, 20th meeting, para. 62); Slovenia (*ibid.*, 21st meeting, para. 5); India (*ibid.*, para. 34); Indonesia (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 22nd meeting, para. 39); and Sweden, on behalf of the Nordic countries (with the exception of guideline 1.1.3) (*ibid.*, 24th meeting, para. 46).

¹⁰¹ 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.

¹⁰² The valuable topical summaries of the discussions in the Sixth Committee on the reports of the Commission provide a fuller picture of the positions taken by States on individual guidelines (see A/CN.4/496, paras. 155–174; and A/CN.4/504, paras. 92–114).

¹⁰³ See, inter alia, the Czech Republic (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 77); Venezuela (*ibid.*, 18th meeting, para. 29); Tunisia (*ibid.*, para. 57); Greece (*ibid.*, 22nd meeting, para. 45); and Bosnia and Herzegovina (*ibid.*, para. 47); see also footnotes 80–81 above.

¹⁰⁴ France (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 66) and Switzerland (*ibid.*, 20th meeting, para. 66).

¹⁰⁵ Guatemala (*Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 43).

¹⁰⁶ Mexico (*ibid.*, 18th meeting, para. 16) and Mr. Pellet (*ibid.*, 20th meeting, paras. 74–75).

¹⁰⁷ See footnote 69 above.

¹⁰⁸ Czech Republic (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, paras. 81–83); Slovenia (*ibid.*, 21st meeting, para. 5, and *Fifty-fourth Session, Sixth Committee*, 22nd meeting, para. 35); Switzerland (*ibid.*, *Fifty-third Session, Sixth Committee*, 20th meeting, para. 67); Bosnia and Herzegovina (*ibid.*, 22nd meeting, para. 47); and Croatia (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 52).

situations of colonialism,¹²¹ and two others expressed some doubts as to the merits of the chosen solution or, in any event, to the possibility of making it general.¹²²

45. Curiously, draft guidelines 1.1.5–1.1.6, concerning unilateral statements by which States intend to increase the rights conferred by a treaty or discharge an obligation by an equivalent means, and 1.4.1–1.4.2, concerning unilateral statements purporting to undertake unilateral commitments, or add further elements to a treaty, which had been the subject of extensive debate in the Commission,¹²³ did not elicit very many comments from States. At most one can say that while some States felt in 1998 that the specific problem of “extensive reservations” ought to be taken up in order to remove any ambiguity,¹²⁴ others found the question to be a theoretical one.¹²⁵

46. Since 1998, some States have supported the Special Rapporteur’s position regarding the definition of interpretative declarations.¹²⁶ On this important aspect of the Commission’s work delegations to the Sixth Committee in 1999 did not differ in their views from the positions taken in the Commission and approved both the decision to define interpretative declarations in the Guide to Practice and the definition selected¹²⁷ with

only a few slight changes,¹²⁸ or the distinction criterion in guideline 1.3.¹²⁹

47. The distinction between “mere” and conditional interpretative declarations was approved by States.¹³⁰ Several States felt that the latter were closer to reservations than to mere interpretative declarations,¹³¹ while others insisted that the two concepts were different.¹³²

48. Many delegations in the Sixth Committee made comments, both general and detailed, about the draft guidelines contained in section 1.4 or the commentary thereto.¹³³ Guideline 1.4.3, concerning statements of non-recognition, on which there were major differences of view in the Commission,¹³⁴ was approved as to substance by all States that spoke,¹³⁵ although one of them felt that since certain statements did not constitute reservations, such a provision had no place in the Guide to Practice.¹³⁶

49. As for “reservations” to bilateral treaties, the draft texts proposed by the Special Rapporteur¹³⁷ and adopted by the Commission in 1999 were unanimously approved¹³⁸ with only minor changes.

50. The few delegations that commented on draft guideline 1.6, on “safeguards” (scope of definitions), approved them as well.¹³⁹

¹²¹ Mexico (*ibid.*, *Fifty-third Session, Sixth Committee*, 18th meeting, para. 17); Mexico extended this observation to draft guideline 1.1.4 (*ibid.*).

¹²² Sweden, on behalf of the Nordic countries (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 24th meeting, para. 46) and Spain (*ibid.*, 26th meeting, para. 2); in addition, the United Kingdom, which did not bring this point up again during the public debate in 1999, transmitted to the Special Rapporteur in July 1999 a long, forcefully argued note entitled “Draft guidelines on reservations to treaties provisionally adopted by the International Law Commission on first reading”, in which it concluded that State practice was contrary to the position taken by the Commission in that the latter included unilateral statements having the effect of excluding the application of an entire treaty to a non metropolitan territory. This note reached the Special Rapporteur too late to be of use during the Commission’s discussions in 1999, but should be a valuable tool during the second reading of the Guide to Practice.

¹²³ See paragraph 22 above.

¹²⁴ See France (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 69) and Switzerland (*ibid.*, 20th meeting, para. 70). Switzerland maintains that guideline 1.1.5 is useful but has some reservations about guideline 1.1.6; see also Switzerland (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 28th meeting, para. 102).

¹²⁵ Austria (*ibid.*, *Fifty-third Session, Sixth Committee*, 15th meeting, para. 16), Sweden, on behalf of the Nordic countries (*ibid.*, 17th meeting, para. 4) and the Russian Federation (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 26th meeting, para. 57, concerning guideline 1.1.6 only); Guatemala felt that guideline 1.1.5 did little more than state the obvious (*ibid.*, 25th meeting, para. 45, and also *Fifty-third Session, Sixth Committee*, 20th meeting, para. 42). Several States felt that statements purporting to undertake unilateral commitments (guideline 1.4.1) were in fact unilateral acts (see Italy (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 24th meeting, para. 28), Tunisia (*ibid.*, 25th meeting, para. 29), Venezuela (*ibid.*, 27th meeting, para. 13), Austria (*ibid.*, para. 17) and Bahrain (*ibid.*, 28th meeting, para. 58)), which is also what the Special Rapporteur thinks (see the third report (*Yearbook ... 1998* (footnote 3 above), p. 258, para. 212, draft guideline 1.1.5)).

¹²⁶ Mexico (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 18th meeting, para. 15) and Greece (*ibid.*, 22nd meeting, para. 45).

¹²⁷ See, *inter alia*, Chile (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 16th meeting, para. 5), Italy (*ibid.*, 24th meeting, para. 29), France (*ibid.*, para. 41), Croatia (*ibid.*, 25th meeting, para. 53), Poland (*ibid.*, para. 114) and Venezuela (*ibid.*, 27th meeting, para. 13).

¹²⁸ See the comments by Guatemala (*ibid.*, 25th meeting, para. 48), which believed that the word “attributed” left too much to the discretion of the declarant; the Republic of Korea (*ibid.*, para. 95), which wanted the definition of reservations to be reworded *a contrario*; France (*ibid.*, 24th meeting, para. 41); and Switzerland (*ibid.*, 28th meeting, para. 103), which suggested the reintroduction of time limits.

¹²⁹ Similarly, guideline 1.3.2, concerning the phrasing and name of interpretative declarations elicited little opposition.

¹³⁰ Only Japan criticized what it seemed to consider to be an unnecessary complication (*Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 15).

¹³¹ See the Republic of Korea (*ibid.*, para. 96) and Spain (*ibid.*, 26th meeting, para. 3). Switzerland thought that this could only be determined later (*ibid.*, 28th meeting, para. 104).

¹³² See Israel (*ibid.*, 25th meeting, para. 75), the Czech Republic (*ibid.*, para. 81) and China (*ibid.*, para. 100).

¹³³ See A/CN.4/504 (footnote 94 above), paras. 109–113.

¹³⁴ See paragraph 25 above and the fourth report (*Yearbook ... 1999* (footnote 1 above), pp. 135–137, paras. 44–54).

¹³⁵ France (*Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 24th meeting, para. 42), the Czech Republic (*ibid.*, 25th meeting, para. 81), Poland, which suggested that the question of the effects of such declarations should be considered by the Commission in the context of unilateral acts (*ibid.*, para. 115) and Spain (*ibid.*, 26th meeting, para. 2).

¹³⁶ Israel (*ibid.*, 25th meeting, para. 77); *contra*: China (*ibid.*, para. 102).

¹³⁷ See Argentina (*ibid.*, *Fifty-third Session, Sixth Committee*, 15th meeting, para. 98) and Venezuela (*ibid.*, 18th meeting, para. 30).

¹³⁸ Including by the United States (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 87), a fact which should be noted, owing to the wealth of practice existing in this area in that country. See also Hungary (*ibid.*, 24th meeting, para. 37), France (*ibid.*, para. 44), the Czech Republic (*ibid.*, 25th meeting, para. 82), the Niger (*ibid.*, para. 106), Poland (*ibid.*, para. 116) and Spain (*ibid.*, 26th meeting, para. 4); Spain points out, not without reason, that the title of draft guideline 1.5.1 is rather unsatisfactory.

¹³⁹ France (*ibid.*, *Fifty-third Session, Sixth Committee*, 16th meeting, para. 70) and Singapore (*ibid.*, 19th meeting, para. 27); Bahrain, however, felt that the question could not be separated from that of the permissibility of reservations (*ibid.*, 21st meeting, para. 19). On this

B. Action by other bodies

51. In his third report, the Special Rapporteur had drawn 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 has a cooperative relationship: the Council of Europe and AALCC.¹⁴⁰ These bodies continued their exploration of the topic in 1998–1999.

52. The third report noted 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 1998.¹⁴¹ During that session a special meeting devoted to reservations to treaties was held on 14 April 1998.

53. According to the report prepared by Mr. W. Z. Kamil,¹⁴² who had been appointed rapporteur of the special meeting, the participants had focused particular attention on the Commission's preliminary conclusions adopted in 1997.¹⁴³ Their deliberations yielded the following consensus views:

(a) The regime of reservations provided for in 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 human rights treaties; accordingly,

(d) Most participants opposed paragraph 5 of the preliminary conclusions.¹⁴⁴

54. The Group of Specialists on Reservations to International Treaties (DI-S-RT) established by the Committee of Ministers of the Council of Europe¹⁴⁵ continued its work and held several meetings which led to significant progress. During one meeting, held in Paris from 14 to 16 September 1998, 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.¹⁴⁶ It

also considered the "Model-objection clauses to reservations to international treaties considered as inadmissible", prepared by 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".

55. On the proposal of this group, which became the Group of Experts on Reservations to International Treaties (DI-E-RIT), the Committee of Ministers of the Council of Europe on 18 May 1999 adopted recommendation No. R (99) 13 on responses to inadmissible reservations to international treaties; it called on the Governments of member States to be guided by the "model response clauses to non-specific reservations" annexed to the recommendation.¹⁴⁷

56. At its second meeting,¹⁴⁸ the Group discussed the report of the Commission on reservations¹⁴⁹ and held a debate on the basis of a document by the Netherlands on key issues concerning the formulation of reservations to international treaties, a new version of which had been adopted at the third meeting;¹⁵⁰ this highly practical document looks at several major problems and will be discussed in this report in the context of the topics it covers. In addition, at these meetings the Group, in its capacity as a European observatory of reservations to international treaties, considered a list of reservations and declarations to international treaties and expressed doubts as to the lawfulness of some of them.

C. General presentation of the fifth report

57. Following the consideration of the first report on reservations to treaties, the Special Rapporteur concluded that:

(b)¹⁵¹ 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.¹⁵²

58. These conclusions met with general approval both in the Sixth Committee and in the Commission itself,

point, see paragraph 27 above. Guatemala suggested that the scope of this measure should be broadened (*Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 47).

¹⁴⁰ *Yearbook ... 1998* (see footnote 3 above), p. 233, paras. 27–30.

¹⁴¹ *Ibid.*, para. 30.

¹⁴² *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.

¹⁴³ See paragraph 8 above.

¹⁴⁴ *AALCC Bulletin* (see footnote 142 above), pp. 15–17.

¹⁴⁵ See third report (*Yearbook ... 1998* (footnote 3 above), p. 233, para. 28).

¹⁴⁶ See Council of Europe, CAHDI, document DI-S-RIT (98) 9/CAHDI (98) 23; this document clearly spells out the "Strasbourg approach" and discusses whether it can be applied in a general fashion.

¹⁴⁷ These model response clauses will be discussed in a later report.

¹⁴⁸ Held at Strasbourg, France, on 6 September 1999; see Council of Europe, CAHDI, document DI-E-RIT (99) 9 rev.

¹⁴⁹ And noted its concern at the current rate of progress of the Commission's work on the topic; see footnote 95 above.

¹⁵⁰ Held in Berlin on 10 March 2000. The document adopted is now entitled "Practical issues regarding reservations to international treaties" (DI-E-RIT (2000) 2, appendix 3).

¹⁵¹ Subparagraph (a) concerned the amendment of the title of the topic; the original title was "The law and practice relating to reservations to treaties".

¹⁵² *Yearbook ... 1995* (see footnote 5 above), p. 108, para. 487.

and they were not called into question during consideration of the second and third reports.¹⁵³ The Special Rapporteur views the conclusions as general guidelines to be used as a basis for consideration of the topic.

59. This report has been prepared according to the general method described in the third report on reservations to treaties.¹⁵⁴ This method is

(a) Empirical (the Special Rapporteur is unable to analyse the extensive documentation on the subject¹⁵⁵ 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.

60. 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.¹⁵⁶ 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.

61. In the second case, the omission was deliberate. As the Special Rapporteur indicated in his third report,¹⁵⁷ 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”¹⁵⁸ 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 guidelines of the Guide to Practice relating to the legal regime of interpretative declarations at the same time as the corresponding provisions relating to reservations.¹⁵⁹ This proposal met with the approval of both the members of the Commission who spoke on the matter¹⁶⁰ and the Sixth Committee.¹⁶¹ Thus, that approach will be followed in this and any subsequent report.

62. 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 this report.

63. In accordance with the above-mentioned provisional general outline,¹⁶² 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.

64. 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.

65. This report will thus be organized as follows:

(a) Chapter I: Alternatives to reservations and interpretative declarations;

(b) Chapter II: Formulation, modification and withdrawal of reservations and interpretative declarations.

¹⁵³ *Yearbook ... 1997*, (see footnote 17 above), pp. 52–53, paras. 116–123.

¹⁵⁴ *Yearbook ... 1998* (see footnote 3 above), pp. 233–235, paras. 31–41.

¹⁵⁵ See footnote 95 above.

¹⁵⁶ *Yearbook ... 1996* (see footnote 16 above), p. 48, para. 37.

¹⁵⁷ *Yearbook ... 1998* (see footnote 3 above), p. 235, para. 45.

¹⁵⁸ See the discussion of this issue in the third report (*ibid.*, pp. 271–274, paras. 306–327, pp. 275–276, paras. 337–339, and pp. 280–281, paras. 381–391); see also the views expressed by

Messrs Kateka (*Yearbook ... 1998*, vol. I, 2552nd meeting, p. 225, paras. 24–27), Illueca (*ibid.*, pp. 226–227, paras. 39–43), Addo (*ibid.*, p. 227, para. 44), Gaja (*Yearbook ... 1999*, vol. I, 2582nd meeting, pp. 105–106, paras. 46–47), Elaraby (*ibid.*, 2583rd meeting, pp. 109–110, para. 23) and Kamto (*ibid.*, p. 110, para. 24).

¹⁵⁹ *Yearbook ... 1998* (see footnote 3 above), p. 235, para. 46.

¹⁶⁰ *Yearbook ... 1998*, vol. I, 2552nd meeting. See the statements made by Messrs Brownlie (p. 225, para. 32), Simma (p. 226, para. 37), Al-Baharna (p. 227, para. 45), Herdocia Sacasa (para. 46), Economides (para. 47), Bennouna (para. 48) and Galicki (para. 49); see also *Yearbook ... 1998*, vol. II (Part Two), p. 98, paras. 533–539.

¹⁶¹ See paragraph 38 above.

¹⁶² See footnote 156 above.

CHAPTER I

Alternatives to reservations and interpretative declarations

66. In his first report, the Special Rapporteur mentioned a number of problems resulting from several specific treaty approaches which appeared to be rival institutions of reservations. Like the latter, these approaches are “aimed at modifying participation in treaties, but, like them, [put] at risk the universality of the conventions in question (additional protocols, bilateralization, selective acceptance of certain provisions, etc.)”.¹⁶³

67. As indicated in the second report, it seems useful to link the consideration of the definition of reservations to that of other procedures, which, while not constituting reservations, are, like them, “designed to and do, enable States to modify obligations under treaties to which they are parties; this is a question of alternatives to reservations, and recourse to such procedures may likely make it possible, in specific cases, to overcome some problems linked to reservations”.¹⁶⁴

68. Such consideration, to which this chapter is devoted, has two aims.¹⁶⁵ In the first place, such procedures can be a source of inspiration for the progressive development of the law applicable to reservations. Secondly—and it is for this reason that their description should be linked to the definition of reservations—some of these procedures are so close to reservations that the question arises whether they should not simply be treated as equivalent. Draft guidelines intended to facilitate distinctions between such procedures and reservations in the strict sense round out the discussion; it is proposed to include them in section 1 of the Guide to Practice, on definitions, which should thus be complete.

69. The same problem arises, *mutatis mutandis*, with regard to interpretative declarations.

70. For the sake of convenience, it is probably simplest, first, to present a brief overview of the many approaches designed to modify obligations resulting from a treaty or enabling its interpretation to be clarified (sect. A) and, secondly, to compare reservations as they are defined in the draft guidelines already adopted in the Guide to Practice, more specifically with these alternative procedures (sect. B).

A. Different procedures for modifying or interpreting treaty obligations

71. Neither reservations nor interpretative declarations, as defined in sections 1.1 and 1.2, respectively, of the Guide to Practice, are the only approaches available

to the parties for modifying the effects of the provisions of a treaty (in the first case) and clarifying its meaning (in the second case).

1. DIFFERENT PROCEDURES FOR MODIFYING THE EFFECTS OF A TREATY

72. In the first judgment which it rendered, PCIJ declined, not without reason, to

see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.¹⁶⁶

73. The fact remains that, once concluded through the expression of the free consent of the parties, treaties prove to be “voluntary traps” from which States (or international organizations) can “escape” only under very stringent, rarely fulfilled conditions, as codified and listed exhaustively¹⁶⁷ in the 1969 Vienna Convention.

74. In order to avoid this trap or, at least, mitigate its severity, States and international organizations strive to preserve their freedom of action by limiting treaty obligations. At the risk of undermining legal safeguards, “the ideal, for the diplomat and the politician, is, without any doubt, the non-binding obligation”.¹⁶⁸

75. This “concern of each government with preserving its capacity to reject or adopt [and adapt] the law (a minimal, defensive concern)”¹⁶⁹ is particularly present in two situations: where the treaty in question deals with especially sensitive matters or contains exceptionally onerous obligations,¹⁷⁰ or where it binds States whose situations are very different and whose needs are not necessarily met by a uniform set of rules. It is this type of consideration which led the authors of the ILO Constitution to state:

In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.¹⁷¹

¹⁶⁶ S.S. “Wimbledon”, *Judgments*, 1923, P.C.I.J., Series A, No. 1, p. 25.

¹⁶⁷ See article 42, paragraph 2, of the 1969 Vienna Convention.

¹⁶⁸ Virally, “Des moyens utilisés dans la pratique pour limiter l’effet obligatoire des traités”, p. 7.

¹⁶⁹ Lacharrière, *La politique juridique extérieure*, p. 31.

¹⁷⁰ Such is the case, for example, of the charters of “integrating” international organizations (see the Treaties establishing the European Communities; see also the Rome Statute of the International Criminal Court).

¹⁷¹ Art. 19, para. 3. This article reproduces the provisions of article 405 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).

¹⁶³ *Yearbook ... 1995* (see footnote 2 above), p. 150, para. 149; see also paragraphs 145–147 (*ibid.*, pp. 149–150).

¹⁶⁴ *Yearbook ... 1996* (see footnote 16 above), p. 49, para. 39.

¹⁶⁵ See, in this connection, the approach taken with regard to treaties concluded within the Council of Europe by Spiliopoulou Åkermark, “Reservation clauses in treaties concluded within the Council of Europe”, p. 506.

76. According to ILO, which bases its refusal to permit reservations to the international labour conventions on this article:

This would suggest that the object of the framers of the Treaty of Peace, in imposing on the Conference this obligation to give preliminary consideration to the special circumstances of each country, was to prevent States from pleading, after the adoption of a convention, a special situation which had not been submitted to the Conference's judgment.¹⁷²

As in the case of reservations, but by a different procedure, the aim is:

to protect the integrity of the essential object and purpose of the treaty while simultaneously allowing the maximum number of States to become parties, though they are unable to assume full obligations.¹⁷³

The quest to reconcile these two goals is the aim both of reservations in the strict sense and of the alternative procedures dealt with in this chapter.

77. Reservations are one of the means intended to bring about this reconciliation.¹⁷⁴ But they are far from "the only procedure which makes it possible to vary the content of a treaty in its application to the parties"¹⁷⁵ without undermining its purpose and object. Many other procedures are used.

78. Some authors have endeavoured to reduce all these procedures to one. Thus, Georges Droz, former Deputy Secretary General of the Hague Conference on Private International Law, has proposed to classify these alternatives to reservations under the single heading "options":

Like reservations, they undermine the uniformity created by the treaty. But unlike reservations, in which the reserving State is seen to withdraw to some extent from the treaty on a specific point, options simply allow for a modification, an extension or a clarification of the terms of the treaty within a framework and limits expressly provided for therein. Reservations and options have as their purpose to facilitate accession to the treaty for the largest number of States, despite the deep differences which may exist in their legal systems and despite certain national interests, but they do so differently. Reservations are a "surgical" procedure which amputates certain provisions from the treaty,¹⁷⁶ while options are a more "therapeutic" procedure which adapts the treaty to certain specific needs.¹⁷⁷

¹⁷² "The admissibility of reservations to general conventions," memorandum by the Director of the International Labour Office, submitted to the Council on 15 June 1927 (League of Nations, *Official Journal* (July 1927), p. 883. See also "Written statement of the International Labour Organization", *I.C.J. Pleadings, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pp. 224 and 236.

¹⁷³ Gormley, "The modification of multilateral conventions by means of 'negotiated reservations' and other 'alternatives—a comparative study of the ILO and Council of Europe"—part one", p. 65. On the strength of these similarities, this author, at the cost of worrisome terminological confusion, encompasses in a single study "all devices the application of which permit a State to become a party to a multilateral convention without immediately assuming all of the maximum obligations set forth in the text", *ibid.*, p. 64.

¹⁷⁴ See the second report, *Yearbook ... 1996* (footnote 16 above), p. 56, para. 90.

¹⁷⁵ Combacau and Sur, *Droit international public*, p. 133.

¹⁷⁶ This is a somewhat reductionist conception of reservations, as shown by some of the draft guidelines adopted up to now (see guidelines 1.1.1, 1.1.3 and 1.1.6).

¹⁷⁷ "Les réserves et les facultés dans les conventions de La Haye de droit international privé", p. 383.

79. While it has been severely criticized,¹⁷⁸ the notion of "options" has the advantage of showing that reservations are not the only means by which the parties to a multilateral treaty can modify the application of its provisions, to which a number of other procedures can lend a flexibility made necessary by the different situations of the States or international organizations seeking to be found by the treaty.

80. The common feature of these procedures, which makes them alternatives to reservations, is that, like the latter, they purport "to exclude or to modify the legal effect of certain provisions of the treaty"¹⁷⁹ or "of the treaty as a whole with respect to certain specific aspects"¹⁸⁰ in their application to certain parties. But there the similarities end, and drawing up a list of them proves difficult, "for the imagination of legal scholars and diplomats in this area had proved to be unlimited".¹⁸¹ In addition, on the one hand, some treaties combine several of these procedures with each other and with reservations, and on the other hand, it is not always easy to differentiate them clearly from one another.¹⁸²

81. If, however, an effort is made to do so, there are numerous ways to classify them.

82. Some procedures for modifying the legal effects of the provisions of a treaty are provided for in the treaty itself; others are external to it. This was the distinction adopted by Virally, one of the few authors to undertake a general enquiry into "the means used in practice to limit the binding effect of treaties". In general, it can be stated that the States has two methods at its disposal. The first consists of introducing limits on [treaty] obligations into the very texts in which they are defined. The second, on the other hand, consists of introducing these limits into the application of the texts by which States have bound themselves.¹⁸³

83. In the first of these two categories, mention can be made of the following:

(a) Restrictive clauses, "which limit the purpose of the obligation by making exceptions to and placing limits on it"¹⁸⁴ in respect of the area covered by the obligation or its period of validity;

¹⁷⁸ Particularly by Majoros, who believes that "the set of 'options' is merely an amorphous group of provisions which afford various options" ("Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", p. 88.

¹⁷⁹ See draft guideline 1.1 of the Guide to Practice.

¹⁸⁰ See draft guideline 1.1.1.

¹⁸¹ Virally, *loc. cit.*, p. 6.

¹⁸² *Ibid.*, p. 17.

¹⁸³ *Ibid.*, p. 8.

¹⁸⁴ *Ibid.*, p. 10. This notion corresponds to "clawback clauses" as they have been defined by Higgins: "By a 'clawback' clause is meant one that permits, in normal circumstances, breach of an obligation for a specified number of public reasons" ("Derogations under human rights treaties", p. 281); see also Ouguergouz, "L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: les réponses du droit international général", p. 296. Other authors propose a more restrictive definition; according to Gittleman, clawback clauses are provisions "that entitle a State to restrict the granted rights to the extent permitted by domestic law" ("The African Charter on Human and Peoples' Rights", p. 691, cited by Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles: étude sur l'article 15 de la Convention européenne des droits de l'homme*, p. 24).

(b) Escape clauses, “which have as their purpose to suspend the application of general obligations in specific cases”,¹⁸⁵ and among which mention can be made of savings clauses and derogations;¹⁸⁶

(c) Opting-[or contracting-]in clauses, which have been defined as “those to which the parties accede only through a special acceptance procedure, separate from accession to the treaty as a whole”,¹⁸⁷

(d) Opting-[or contracting-]out clauses, “under which a State will be bound by rules adopted by majority vote if it does not express its intent not to be bound within a certain period of time”,¹⁸⁸ or

(e) Those which offer the parties a choice among several provisions; or again,

(f) Reservation clauses, which enable the contracting parties to formulate reservations, subject to certain conditions and restrictions, as appropriate.

84. In the second category, which includes all procedures enabling the parties to modify the effect of the provisions of the treaty, but which are not expressly envisaged therein, are the following:

(a) Reservations again, where their formulation is not provided for or regulated by the instrument to which they apply;

(b) Suspension of the treaty,¹⁸⁹ whose causes are enumerated and codified in part V of the 1969 and 1986 Vienna Conventions, particularly the application of the principles *rebus sic stantibus*¹⁹⁰ and *non adimpleti contractus*;¹⁹¹

(c) Amendments to the treaty, where they do not automatically bind all the parties thereto;¹⁹² and

(d) Protocols or agreements having as their purpose (or effect) to supplement or modify a multilateral treaty only between certain parties,¹⁹³ including in the framework of “bilateralization”.¹⁹⁴

85. Among the latter modification procedures, the first two are unilateral, but derive from the general international law of treaties, while the last two derive from the joint initiative of the parties to the treaty, or some of them, following its adoption.

86. There are, in fact, many other possible classifications of these various approaches to modifying treaty obligations.

87. They can, for example, be classified according to the procedures used. Some are treaty-based; they are provided for either in the treaty whose effects are to be modified (such is the case with regard to restrictive clauses or amendments) or in a different treaty (protocols). Others are unilateral (reservations in cases where a treaty is silent, suspension of treaty provisions). Most are “mixed” in the sense that, being envisaged in the treaty, these procedures are implemented through unilateral declarations of the “receiving” State (reservations provided for in the treaty, including “negotiated reservations”,¹⁹⁵ unilateral statements formulated pursuant to escape clauses,¹⁹⁶ opting-in or opting-out clauses or clauses offering a choice among the treaty provisions).

88. In most cases, these procedures purport to limit, on behalf of one or more contracting parties, the obligations imposed in principle by the treaty. Such is the purpose not only of reservations¹⁹⁷ but also of restrictive or escape clauses. It may happen, however, that they increase such obligations, as opting-in clauses clearly demonstrate. As to the other procedures listed above, they are “neutral” in this respect, since they may purport either to limit or to increase the obligations, as the case may be (choice among treaty provisions, amendments, protocols).

89. Lastly, among these various procedures, some are “reciprocal” and purport to modify the effects of the treaty provisions in their application not only by the “receiving” State, but also by the other contracting parties in respect of that State. Such is the case, under certain conditions, of the reservations formulated under article 21 of the 1969 and 1986 Vienna Conventions, and, in general, of restrictive clauses, amendments and protocols (unless they expressly provide for discriminatory regimes). On the other hand, statements formulated under escape clauses (derogations or savings clauses) are in essence non-reciprocal (although the treaty may expressly provide the opposite¹⁹⁸). As to the opting-in or opting-out mechanisms or the provisions offering the parties a choice, they raise interesting questions in this regard (some of which will be considered more extensively in section 2 below), but generally speaking, it can be considered that everything depends on the wording of the relevant provisions or on the nature of the treaty concerned.

90. Thus, the famous article 36, paragraph 2, of the ICJ Statute clearly limits the acceptance by States of the compulsory jurisdiction of the Court to disputes between them and States which have made the same declaration:

The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, *in relation to any other state accepting the same obligation*,* the jurisdiction of the Court in all legal disputes concerning:

¹⁸⁵ Virally, loc. cit., p. 12.

¹⁸⁶ See paragraphs 138–139 below.

¹⁸⁷ Virally, loc. cit., p. 13.

¹⁸⁸ Simma, “From bilateralism to community interest in international law”, p. 329; see also Tomuschat, “Obligations arising for States without or against their will”, pp. 264 et seq.

¹⁸⁹ Termination of the treaty is a different matter; it puts an end to the treaty relations (see paragraph 133 below).

¹⁹⁰ See the 1969 and 1986 Vienna Conventions, art. 62.

¹⁹¹ Ibid., art. 60.

¹⁹² Ibid., arts. 40, para. 4, and 30, para. 4.

¹⁹³ Ibid., art. 41.

¹⁹⁴ See paragraphs 120–130 below.

¹⁹⁵ See paragraphs 164–165 and 169–170 below.

¹⁹⁶ The “mixed” nature of this procedure is particularly apparent in the case of derogations (as opposed to savings clauses), as they are not only provided for in the treaty, but must further be authorized by the other contracting parties on the initiative of the receiving party.

¹⁹⁷ See draft guidelines 1.1.5 and 1.1.6.

¹⁹⁸ See article XIX, paragraph 3, of the General Agreement on Tariffs and Trade.

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.¹⁹⁹

The same is true of article 5, paragraph 2, of the European Convention on Mutual Assistance in Criminal Matters:

Where a Contracting Party makes a declaration in accordance with paragraph 1 of this Article, any other Party may apply reciprocity.

91. On the other hand, the implementation of the escape clauses contained in human rights treaties is in essence non-reciprocal, and it is inconceivable that, for example, if a State party to the European Convention on Human Rights makes use of the option afforded by article 15 of that Convention,²⁰⁰ the other States parties would be released from their own obligations under the Convention, even with regard to the nationals of that State.

92. The fairly frequent combination of these various procedures further complicates their necessary²⁰¹ classification. To take but three examples:

(a) The optional declarations under article 36, paragraph 2, of the ICJ Statute²⁰² can be, and frequently are, accompanied by reservations;

(b) States can formulate reservations to restrictive clauses contained in escape clauses appearing in multilateral conventions; the reservation by France to article 15 of the European Convention on Human Rights (which is an escape clause and, more specifically, a savings clause)²⁰³ constitutes an abundantly commented²⁰⁴ illustration of this; and

¹⁹⁹ The drafting of article 36, paragraph 3 (“The declarations referred to above may be made unconditionally or on condition of reciprocity ...”) introduces an element of uncertainty. In practice, however, optional declarations under article 36, paragraph 2, are generally made on condition of reciprocity and the Court ensures its strict observance (see, among numerous examples: *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 22, *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, pp. 23–24, and *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 298–299).

²⁰⁰ “(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

“... ”

“(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor ...”

²⁰¹ Necessary again for the same reason (see paragraph 30 above): in the absence of clear distinctions and definitions, it is not possible to determine the legal regime applicable to a specific unilateral provision or declaration.

²⁰² See paragraphs 90 above and 191–193 below.

²⁰³ United Nations, *Treaty Series*, vol. 1496, annex A, p. 233. See also paragraphs 138–139 below.

²⁰⁴ See, for example, Pellet, “La ratification par la France de la Convention européenne des droits de l’homme”, pp. 1358–1363; Coussirat-Coustère, “La réserve française à l’article 15 de la Convention Européenne

(c) The entry into force of the derogation regimes provided for in certain conventions can be subordinated to the conclusion of a supplementary agreement; such is the case, for example, of article 23, paragraph (5), of the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters, whereby:

In the Supplementary Agreements referred to in article 21²⁰⁵ the Contracting States may agree:

...

- (5) Not to apply this Convention to decisions rendered in the course of criminal proceedings;

93. The Special Rapporteur hesitated for a long time before proposing the inclusion in the Guide to Practice of draft guidelines on alternatives to reservations. Upon reflection, however, he found it useful to include them for reasons comparable to those which led the Commission to include in the Guide a section 1.4 on unilateral statements other than reservations and interpretative declarations;²⁰⁶ the Guide to Practice has a strictly “utilitarian” purpose, and it is probably not superfluous to remind negotiators of international conventions that within the law of treaties there are, alongside reservations, various approaches making it possible to modify the effects of treaties through recourse to different procedures.

94. It seems useful, therefore, to include in the Guide to Practice a draft guideline 1.7.1²⁰⁷ with the following wording:

“1.7.1 *Alternatives to reservations*

“In order to modify the effects of the provisions of a treaty in their application to the contracting parties, States and international organizations may have recourse to procedures other than reservations.”

95. The question arises whether these procedures should be enumerated in the Guide to Practice (on the understanding that, in any event, such an enumeration would not be exhaustive) or whether such a list should appear only in the commentary. Ever hoping to better meet the needs of users, the Special Rapporteur leans towards the first solution, on the understanding, however, that procedures not specifically defined in other draft guidelines should be defined in the commentary. Since the Guide to Practice is not intended to become an international treaty, such a non-exhaustive enumeration does not appear to have the same drawbacks as when this type

des Droits de l’Homme; Cohen-Jonathan, *La Convention européenne des droits de l’homme*, Economica, Paris, 1989, pp. 564–566; and Tavernier, “Article 15”, pp. 493–494.

²⁰⁵ Article 21 provides as follows:

“Decisions rendered in a Contracting State shall not be recognized or enforced in another Contracting State in accordance with the provisions of the preceding Articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect.”

²⁰⁶ See, in particular, *Yearbook ... 1999*, (footnote 75 above), p. 112, paras. (1)–(2) of the commentary on draft guideline 1.4.

²⁰⁷ This numbering is provisional. The Commission may perhaps prefer to place the section provisionally numbered 1.7 on alternatives to reservations and interpretative declarations before draft guideline 1.6 on scope of definitions.

of procedure is used in a codification convention. This could be the subject of the following draft guideline:

“1.7.2 Different procedures permitting modification of the effects of the provisions of a treaty

“1. Modification of the effects of the provisions of a treaty by procedures other than reservations may result in the inclusion in the treaty of:

“(a) Restrictive clauses that limit the object of the obligations imposed by the treaty by making exceptions and setting limits thereto;

“(b) Escape clauses that allow the contracting parties not to apply general obligations in specific instances and for a specific period of time;

“(c) Statements made under the treaty by which a contracting party expresses its willingness to be bound by obligations that are not imposed on it solely by expression of its consent to be bound by the treaty.

“2. Modification of the effects of the provisions of a treaty may also result in:

“(a) Their suspension in accordance with the provisions of articles 57 to 62 of the 1969 and 1986 Vienna Conventions;

“(b) Amendments to the treaty entering into force only between certain parties; or

“(c) Supplementary agreements and protocols purporting to modify the treaty only as it affects the relations between certain parties.”

2. PROCEDURES FOR INTERPRETING A TREATY OTHER THAN INTERPRETATIVE DECLARATIONS

96. Just as reservations are not the only means at the disposal of contracting parties for modifying the application of the provisions of a treaty, interpretative declarations are not the only procedure by which States and international organizations can specify or clarify their meaning or scope.

97. Leaving aside the third-party interpretation mechanisms provided for in the treaty,²⁰⁸ the variety of such alternative procedures in the area of interpretation is nonetheless not as great. To the best of the Special Rapporteur's knowledge, hardly more than two procedures of this type can be mentioned.

98. In the first place, it is very often the case that the treaty itself specifies the interpretation to be given to its own provisions. Such is the primary purpose of the clauses containing the definition of the terms used in the treaty.²⁰⁹ Moreover, it is very common for a treaty to provide instructions on how to interpret the obligations

imposed on the parties either in the body of the treaty itself²¹⁰ or in a separate instrument.²¹¹

99. Secondly, the parties, or some of them,²¹² may conclude an agreement for the purposes of interpreting a treaty previously concluded between them. This possibility is expressly envisaged in article 31, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, which requires the interpreter to

take into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

100. Moreover, it may happen that the interpretation is “bilateralized”.²¹³ Such is the case where a multilateral convention delegates to bilateral agreements the task of clarifying the meaning or scope of certain provisions. Thus, article 23 of the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters, referred to earlier,²¹⁴ provides that contracting States shall have the option of concluding supplementary agreements in order, *inter alia*:

1. To clarify the meaning of the expression “civil and commercial matters”, to determine the courts whose decisions shall be recognized and enforced under this Convention, to define the expression “social security” and to define the expression “habitual residence”;

2. To clarify the meaning of the term “law” in States with more than one legal system; ...

101. It therefore seems desirable to include in the Guide to Practice a provision on alternatives to interpretative declarations, if only for the sake of symmetry with the proposal made above concerning alternatives to reservations.²¹⁵ On the other hand, in view of the small number of these alternatives, it does not appear necessary to devote a separate draft guideline to their enumeration. A single draft guideline can cover the two draft guidelines 1.7.1 and 1.7.2.

102. This draft guideline could be drafted as follows:

“1.7.5 Alternatives to interpretative declarations

“In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, the contracting parties may have recourse to procedures other than interpretative declarations. They may include in the treaty

²¹⁰ See, here again among countless examples, article 13, paragraph 4, of the International Covenant on Economic, Social and Cultural Rights: “No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions.”

²¹¹ See notes and supplementary provisions in annex I to GATT. This corresponds to the possibility envisaged in article 30, paragraph 2, of the 1969 and 1986 Vienna Conventions.

²¹² Where all the parties to the interpretative agreement are also parties to the original treaty, the interpretation is authentic (see paragraph (14) of the commentary to article 27, paragraph 3 (a), of the draft articles on the law of treaties, which became article 30, paragraph 3 (a), of the 1969 Vienna Convention (*Yearbook ... 1966*, vol. II, p. 221, document A/6309/Rev.1)); see, with regard to bilateral treaties, draft guideline 1.5.3.

²¹³ On the “bilateralization” of reservations, see paragraphs 120–130 below, and draft guideline 1.7.4.

²¹⁴ See paragraph 92 above.

²¹⁵ See paragraphs 93–94 above.

²⁰⁸ See Simon, *L'interprétation judiciaire des traités d'organisations internationales*.

²⁰⁹ See, among countless examples, article 2 of the 1969 and 1986 Vienna Conventions or article XXX of the Articles of Agreement of the International Monetary Fund.

express provisions whose purpose is to interpret the treaty or may conclude supplementary agreements to that end.”

103. No special provision concerning alternatives to conditional interpretative declarations²¹⁶ appears to be necessary: the alternative procedures listed above are treaty-based and require only the agreement of the contracting parties. It matters little, therefore, whether or not the agreed interpretation constitutes the *sine qua non* of their consent to be bound.

B. Distinction between reservations and other procedures for modifying the effects of a treaty

104. It is sometimes easy to distinguish between the various options available to States for modifying effects of a treaty with reservations; sometimes, however, it is by no means obvious how to draw such a distinction.

105. The fact that provision may be made in the treaty itself for ways of modifying treaty commitments thus provides no indication as to whether or not the procedures chosen can be described as reservations.²¹⁷ The problem is all the trickier in that according to the Vienna definition, which is reflected in draft guideline 1.1 in the Guide to Practice, the manner in which a unilateral act is phrased or named does not constitute an element of its definition as a reservation; a treaty may well not use the term “reservation” in describing a method of modifying treaty commitments, whereas the method in question matches the definition of reservations in all respects and must therefore be regarded as a reservation.²¹⁸ As pointed out by Droz: “It is sometimes difficult to distinguish between a reservation and an option, in terms of substance. Some provisions are presented as options but are in fact reservations, while other provisions whereby States ‘reserve’ certain possibilities are in fact only options.”²¹⁹

106. For example, there is little doubt that the “declarations” made under article 25 of the European Convention on Nationality²²⁰ constitute reservations even though neither the title nor the relevant provision itself contains the word “reservations”. On the other hand, in article 17 of the Energy Charter Treaty “[e]ach Contracting Party reserves the right to deny the advantages of this Part”, even though what is involved here is much more a restrictive clause than a reservation.

107. The fact remains that in some cases the distinction between “options” or “alternatives to reservations” and reservations themselves does not pose any particular problem. This is basically so in the case of two hypotheses: on the one hand, when modification of the effects

of a treaty does not result from a unilateral statement but from a treaty procedure, despite the doctrinal confusion that has arisen with respect to the notions of “treaty reservations” or “bilateralization”, and, on the other hand, when a unilateral statement by a State has the effect of suspending the application of certain provisions of a treaty or of the treaty as a whole or of terminating it. Much trickier problems arise in the case of hypotheses whereby a treaty provides that the parties may choose between treaty provisions, by means of unilateral statements.

108. For the sake of simplicity, it is preferable to consider each of the procedures in question individually and then to compare them with the definition of reservations.

1. TREATY METHODS OF MODIFYING THE EFFECTS OF A TREATY

109. One might imagine that there is little likelihood of confusing reservations and some of the procedures for modifying the effects of a treaty listed in draft guideline 1.7.2 above, which do not take the form of unilateral statements, but of one or more agreements between the party to a treaty or between certain parties to the treaty. However, whether it is a question of restrictive clauses set out in the treaty, amendments that take effect only as between certain parties to the treaty, or “bilateralization” procedures, problems can arise.

(a) Restrictive clauses

110. The fact that a unilateral statement purporting to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author,²²¹ is specifically provided for by a treaty is not sufficient to characterize such a statement as either being or not being a reservation. This is precisely the object of “reservation clauses” that can be defined as “treaty provisions [... setting] limits within which States should²²² formulate reservations and even the content of such reservations”,²²³ however, other exclusion clauses with the same or similar effects are nevertheless not reservations within the precise meaning of the word, as defined by the 1969 and 1986 Vienna Conventions and the Guide to Practice.

111. Imbert gives two examples that highlight this fundamental difference, by comparing article 39 of the Revised General Act for the Pacific Settlement of International Disputes²²⁴ with article 27 of the European Convention for the Peaceful Settlement of Disputes.²²⁵ Under article 39, paragraph 2, of the Revised General

²¹⁶ See draft guideline 1.2.1.

²¹⁷ See paragraphs 110–111 below.

²¹⁸ In this connection, see, for example, Majoros, *loc. cit.*, p. 88.

²¹⁹ *Loc. cit.*, p. 383.

²²⁰ “Each State may declare, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, that it will exclude Chapter VII from the application of the Convention” (on the subject of this provision, see paragraph 153 below). See also, for example, article 10 of the Agreement on international humane trapping standards, and article 19 of the Framework Convention for the protection of national minorities.

²²¹ See draft guidelines 1.1 and 1.1.1.

²²² It would be more accurate to use the word “may”.

²²³ Imbert, *Les réserves aux traités multilatéraux*, p. 12. If the Commission decides to devote part of the Guide to Practice to definitions (other than the part on reservations and interpretative declarations), it would be desirable to include a definition of reservation clauses. “Negotiated reservations” (see paragraphs 164 et seq. below) fall within this category.

²²⁴ Article 38 of the General Act (Pacific Settlement of International Disputes) of 26 September 1928 was similarly worded.

²²⁵ Imbert, *op. cit.*, p. 10.

Act, reservations that are exhaustively enumerated must be indicated at the time of accession and

may be such as to exclude from the procedure described in the present Act:

(a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute;

(b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States.

Article 27 of the European Convention reads:

The provisions of this Convention shall not apply to:

(a) Disputes relating to facts or situations prior to the entry into force of this Convention as between the Parties to the dispute;

(b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States.

112. There are striking similarities here: in both cases the aim is to exclude identical types of disputes from methods of settlement provided for by the treaty in question. However, the two approaches “work” differently: in the European Convention for the Peaceful Settlement of Disputes the exclusion is comprehensive and based on the treaty itself; in the Revised General Act for the Pacific Settlement of International Disputes the exclusion is just one of a number of possibilities available to States parties, and this exclusion is permitted by the treaty but takes effect only if a unilateral statement is made at the time of accession.²²⁶ Article 39 of the Revised General Act is a reservation clause; article 27 of the European Convention is a restrictive clause that limits the “object of the obligations imposed by the treaty by making exceptions and setting limits thereto”, as stated in the definition proposed above, in draft guideline 1.7.2.

113. There are many such restrictive clauses, in treaties on a wide range of subjects, such as the settlement of disputes,²²⁷ the safeguarding of human rights,²²⁸

²²⁶ It is therefore not entirely accurate to assert, as Imbert does, that “in practice, article 27 of the European Convention produces the same result as a reservation in respect of the General Act” (ibid.). This is true only of the reserving State’s relations with other parties to the Revised General Act for the Pacific Settlement of International Disputes, and not of such other parties’ relations among themselves, to which the treaty applies in its entirety.

²²⁷ In addition to article 27 of the above-mentioned European Convention, see, for example, article I of the Agreement between Great Britain and France, providing for the Settlement by Arbitration of certain Classes of Questions which may arise between the two Governments (London, 14 October 1903) (*British and Foreign State Papers, 1902–1903*, vol. 96, p. 35), which has served as a model for a great number of subsequent treaties:

“Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29 July 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two Contracting States, and do not concern the interests of third Parties.”

²²⁸ See the references to “clawback clauses” (footnote 184 above). For example (again, there are innumerable examples), article 4 of the International Covenant on Economic, Social and Cultural Rights:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only insofar as this may be

protection of the environment,²²⁹ trade,²³⁰ and the law of armed conflicts.²³¹

114. At first glance, there would appear to be no likelihood of confusion between such restrictive clauses and reservations. However, not only is language usage deceptive and “terms such as ‘public order reservations’, ‘military imperatives reservations’, or ‘sole competence reservations’ are frequently encountered”,²³² but authors, including the most distinguished among them, have caused an unwarranted degree of confusion. For example, in an oft-quoted passage²³³ from the dissenting opinion that he appended to the ICJ judgment in the *Ambatielos* case, Judge Zoričić stated the following:

A reservation is a provision agreed upon between the parties to a treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning.²³⁴

115. More ambiguously, but nevertheless in an unfortunate manner, Scelle also causes confusion in defining a reservation as “a *treaty clause** emanating from one or several* Governments that have signed or acceded to a treaty setting up a legal regime that derogates from the general treaty regime”.²³⁵

116. Although the confusion appears to be only doctrinal, the Commission could help to clear up the misunderstandings in question if it were to include in the Guide to Practice, an appropriate draft guideline, which could be inserted in section 1.7 on alternatives to reservations²³⁶ and would read:

“1.7.3 Restrictive clauses

compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

²²⁹ See article VII (Exemptions and other special provisions relating to trade) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or article 4 (Exceptions) of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.

²³⁰ See articles XII (Restrictions to safeguard the balance of payments), XIV (Exceptions to the rule of non-discrimination), XX (General exceptions) and XXI (Security exceptions) of GATT.

²³¹ See article 3 common to the Geneva Conventions of 12 August 1949 (minimum level of protection).

²³² Imbert, op. cit., p. 10. For an example of a “public order reservation”, see the first paragraph of article 6 of the Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties: “For reasons of public order or safety, States may expel foreigners domiciled, resident, or merely in transit through their territory.” For an example of a “sole competence reservation”, see article 3, paragraph 11, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: “Nothing contained in this article [on ‘offences and sanctions’] shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a party and that such offences shall be prosecuted and punished in conformity with that law.”

²³³ See Fitzmaurice, “The law and procedure of the International Court of Justice 1951–4: treaty interpretation and other treaty points”, pp. 272–273; however, although he quotes this definition with apparent approval, this distinguished author departs from it considerably in his commentary.

²³⁴ *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 76.

²³⁵ *Précis de droit des gens: Principes et systématique*, p. 472.

²³⁶ Another option would be to include it in section 1.1 on the definition of reservations.

“A provision in a treaty that purports to limit or restrict the scope or application of more general rules contained in the treaty does not constitute a reservation within the meaning of the present Guide to Practice.”

(b) *Amendments that enter into effect only as between certain parties to a treaty*

117. It would not appear to be necessary to dwell on another treaty procedure that would facilitate flexible application of a treaty: amendments (and additional protocols) that enter into effect only as between certain parties to a treaty.

118. This procedure, which is provided for in article 40, paragraphs 4–5,²³⁷ (and article 30, paragraph 4)²³⁸ and article 41²³⁹ of the 1969 and 1986 Vienna Conventions,²⁴⁰ is applied as a matter of rou-

²³⁷ Article 40. Amendment of multilateral treaties:

“4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

“5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

“(a) be considered as a party to the treaty as amended; and

“(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.”

²³⁸ Article 30. Application of successive treaties relating to the same subject matter:

“3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59 [on termination or suspension of the operation of a treaty implied by conclusion of a later treaty], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

“4. When the parties to the later treaty do not include all the parties to the earlier one:

“(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

“(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”

²³⁹ Article 41. Agreements to modify multilateral treaties between certain of the parties only:

“1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

“(a) the possibility of such a modification is provided for by the treaty; or

“(b) the modification in question is not prohibited by the treaty and:

“(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

“(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

“2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.”

²⁴⁰ In its commentary to the corresponding draft articles (art. 40 (former draft art. 36), paras. 4–5, art. 30 (former draft art. 26), para. 4, and art. 41 (former draft art. 37)), the Commission takes great care to distinguish between “formal amendments” and agreements making “modifications” (see *Yearbook ... 1966* (footnote 212 above), p. 232, para. (3) of the commentary to part IV, and p. 235, para. (1) of

tine. Even if, in terms of its general approach and as regards some aspects of its legal regime (respect for the fundamental characteristics of the treaty, though it does not contain a reference to its “object and purpose”), it is similar to procedures that characterize reservations, it is nonetheless very different in many respects:

(a) The flexibility it achieves is not the product of a unilateral statement by a State, but of agreement between two or more parties to the initial treaty;

(b) Such agreement may be reached at any stage, generally following the treaty’s entry into effect for its parties,²⁴¹ which is not so in the case of reservations that must be formulated at the time of the expression of consent to be bound, at the latest;

(c) It is not a question here of excluding or modifying *the legal effect* of certain provisions of the treaty *in their application*, but in fact of modifying *the provisions in question themselves*;²⁴²

(d) Moreover, whereas reservations can only limit their author’s treaty obligations or make provision for equivalent ways of implementing a treaty,²⁴³ amendments and protocols can have the effect of both extending and limiting the obligations of States and international organizations parties to a treaty.

119. Since there is no fear of confusion in the case of reservations, no clarification is called for and it would appear unnecessary to devote a specific guideline in the Guide to Practice to drawing a distinction which is already quite clear. It will suffice to mention that in this case there is a possible alternative to reservations, in draft guideline 1.7.2, as suggested above. However, some specific agreements concluded between two or more States Parties to basic treaties purporting to produce the same effects as those produced by reservations pose special problems, and it would be possible (and desirable) to combine the two in a single draft guideline.²⁴⁴

(c) *“Bilateralization” of “reservations”*

120. These specific agreements, which are sometimes equated with reservations, fall within the category of the “bilateralization” method, the doctrine of which was examined at the Hague Conference on Private International Law on the occasion of the adoption of the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters.

121. The bilateralization regime has been described as permitting “contracting States, while being parties to a multilateral convention, to choose the part-

the commentary to article 41 (former draft art. 37)). Such a distinction does not seem relevant for the purposes of a comparison with reservations.

²⁴¹ This is not always the case, however; see the well-known Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

²⁴² In this connection, see Ruda, “Reservations to treaties”, pp. 107–108.

²⁴³ Cf. draft guidelines 1.1.5–1.1.6 and, on the other hand, 1.4.1, 1.4.2 and 1.5.1.

²⁴⁴ See draft guideline 1.7.4 and paragraph 130 below.

ners with which they will proceed to implement the regime provided for".²⁴⁵ This is not an innovation of the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters, since it can be traced back to article XXXV, paragraph 1, of GATT.²⁴⁶ Moreover, a number of conventions on private international law adopted earlier in the context of the Hague Conference on Private International Law had already at least partially achieved the goal of free choice of partners, by allowing the parties to refuse to be bound vis-à-vis States that had not participated in the conventions' adoption²⁴⁷ or making the effect of the accession of such States subject to the specific consent of contracting States.²⁴⁸ The same applies to article 37, paragraph 3, of the European Convention on State Immunity, adopted in the context of the Council of Europe.²⁴⁹

²⁴⁵ Hoogstraten, "L'état présent de la Conférence de La Haye de droit international privé", p. 387.

²⁴⁶ "This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if

"(a) the two contracting parties have not entered into tariff negotiations with each other, and

"(b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application."

See Imbert, *op. cit.*, p. 199. The practice of "lateral agreements" (see Carreau and Juillard, *Droit international économique*, pp. 54–56 and 126–127) has accentuated this bilateralization. See also article XIII of the Marrakesh Agreement Establishing the World Trade Organization.

²⁴⁷ See, for example, article 13, paragraph 4, of the Convention concerning recognition of the legal personality of foreign companies, associations and institutions: "The adhesion shall have effect only for relations between the adhering State and States which do not make objection within six months from such communication" (quoted by Imbert, *op. cit.*, p. 200, who also refers to article 12 of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, article 31 of the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, and article 42 of the Convention concerning the International Administration of the Estates of Deceased Persons). For more recent examples, see article 44, paragraph 3, of the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption; article 58, paragraph 3, of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; and article 54, paragraph 3, of the Convention on the International Protection of Adults.

²⁴⁸ See, for example, article 17, paragraphs 2–3, of the Convention concerning the recognition and enforcement of decisions relating to maintenance obligations towards children:

"The Convention shall enter into force, between the acceding State and the State declaring acceptance of such accession on the sixtieth day following the date of deposit of the instrument of accession.

"The accession shall have effect only in relations between the acceding State and those Contracting States which have declared that they accept such accession ..."

(Quoted by Imbert, *op. cit.*, p. 200, who also refers to article 13 of the Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods, article 21 of the Convention concerning the powers of authorities and the law applicable in respect of the protection of infants, article 39 of the Convention on the taking of evidence abroad in civil or commercial matters, article 28 of the Convention on the recognition of divorces and legal separations, and article 18 of the Convention on the law applicable to traffic accidents; see also Jenard, "Une technique originale: la bilatéralisation de conventions multilatérales", p. 389).

²⁴⁹ "... if a State having already acceded to the Convention notifies the Secretary General of the Council of Europe of its objection to the accession of another non-member State, before the entry into force of this accession, the Convention shall not apply to the relations between these two States."

122. The general approach involved in this procedure is not comparable with the approach on which the reservations method is based; it allows a State to exclude by means of its silence or by means of a specific declaration, the application of a treaty as a whole in its relations with one or more other States and not to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain aspects. It is more comparable with statements of non-recognition, where such statements purport to exclude the application of a treaty between a declaring State and the non-recognized entity.²⁵⁰

123. However, in response to a Belgian proposal, the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters goes further than these traditional bilateralization methods. It not only makes the Convention's entry into effect with respect to relations between two States subject to the conclusion of a supplementary agreement,²⁵¹ but it also permits the two States to modify their commitment *inter se* within the precise limits set in article 23,²⁵²

In the Supplementary Agreements referred to in article 21 the Contracting States may agree: ...

Below is a list of 22 possible ways of modifying the Convention, whose purposes, as summarized in the explanatory report of C. N. Fragistas, are as follows:

1. *To clarify a number of technical expressions used by the Convention whose meaning may vary from one country to another (article 23 of the Convention, Nos. 1, 2, 6 and 12);*
2. *To include within the scope of the Convention matters that do not fall within its scope (article 23 of the Convention, Nos. 3, 4 and 22);*
3. *To apply the Convention in cases where its normal requirements have not been met (article 23 of the Convention, Nos. 7, 8, 9, 10, 11, 12 and 13);*
4. *To exclude the application of the Convention in respect of matters normally covered by it (article 23 of the Convention, No. 5);*
5. *To declare a number of provisions inapplicable (article 23 of the Convention, No. 20);*
6. *To make a number of optional provisions of the Convention mandatory (article 23 of the Convention, Nos. 8 bis and 20);*
7. *To regulate issues not settled by the Convention or adapt a number of formalities required by it to domestic legislation (article 23 of the Convention, Nos. 14, 15, 16, 17, 18 and 19).²⁵³*

124. According to Imbert, many of these alternatives "simply permit States to define words or to make provision for procedures; however, a number of them restrict the effect of the Convention and are genuine reserva-

²⁵⁰ See draft guideline 1.4.3 and paragraphs (5)–(9) of the commentary (*Yearbook ... 1999* (footnote 75 above), pp. 114–116).

²⁵¹ See footnote 205 above for the text of article 21 of the Convention.

²⁵² Mentioned above in paragraphs 92 and 100. The initial Belgian proposal did not envisage this possibility of modification, which was established subsequently as the discussions progressed (see Jenard, *loc. cit.*, pp. 392–393).

²⁵³ The Hague Conference on Private International Law, *Actes et documents de la session extraordinaire, 13 to 26 April 1966, Exécution des jugements* (The Hague, Imprimerie nationale, 1969), p. 364. See also Droz, "Le récent projet de Convention de La Haye sur la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale", p. 240.

tions (particularly those set out in paragraphs 5, 8, 13, 19 and 20)".²⁵⁴ The Special Rapporteur does not agree.

125. These options, which permit States concluding a supplementary agreement to exclude from the application of the basic treaty certain categories of jurisdictional decisions or not to apply certain provisions thereof, either as a general rule or in particular circumstances, do indeed purport to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the two States. However, and this is a fundamental difference, such exclusions or modifications are not the product of a unilateral statement, which constitutes an essential element of the definition of reservations,²⁵⁵ but, rather, an agreement between two of the States parties to the basic treaty that does not affect the other contracting parties to the treaty.

126. As Droz states, "if such provisions had been set out in the body of the Treaty itself, they would have constituted genuine reservations,²⁵⁶ but as a result of bilateralization they are confined to relations between two partners. The wish to eliminate the classic reservation system is obvious".²⁵⁷

The system leads to the elaboration of two instruments: a multilateral convention, on the one hand, and a supplementary agreement, on the other, which, although based on the multilateral convention, nevertheless has an independent existence.²⁵⁸

The supplementary agreement is, so to speak, an instrument that is not a prerequisite for the entry into effect of the treaty, but for ensuring that the treaty has effects on relations between the two States concluding the agreement, since its effects will otherwise be diminished (and it is in this respect that its similarity to the reservations procedure is particularly obvious) or increased; however, its treaty nature precludes any equation with reservations.

127. The Convention on the recognition and enforcement of foreign judgements in civil and commercial matters is not the only treaty that makes use of this procedure of pairing a basic convention and a supplementary agreement, thus permitting the introduction to the convention of alternative contents, even though the convention is a typical example and probably a more refined product. Reference may also be made, *inter alia*, to:²⁵⁹ article 20 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which permits contracting States to "agree to dispense with" a number of provisions; "but its application is not based on the free choice of a partner";²⁶⁰ article 34 of the Convention on the Limitation Period in the International Sale of Goods, which prompts the same com-

ment; articles 26, 56 and 58 of the European Convention on Social Security, which with similar wording states:

The application [of certain provisions] as between two or more Contracting Parties shall be subject to the conclusion between those Parties of bilateral or multilateral agreements which may also contain appropriate special arrangements;

or, for more recent examples: article 39, paragraph 2, of the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption:

Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.²⁶¹

or article 5 (Voluntary extension) of the Convention on the Transboundary Effects of Industrial Accidents:

Parties concerned should, at the initiative of any of them, enter into discussions on whether to treat an activity not covered by Annex I as a hazardous activity ... Where the Parties concerned so agree, this Convention, or any part thereof, shall apply to the activity in question as if it were a hazardous activity.

128. It seems inappropriate to devote a draft guideline to bilateralization as such since this treaty procedure does not have a *ratione materiae* effect but, rather, a *ratione personae* effect. On the other hand, there are quite powerful reasons in favour of a draft guideline on "bilateralized reservations" purporting to produce, in the relations of parties to a supplementary agreement, the same effect as that produced by reservations proper with which they are sometimes wrongly equated.

129. Such a draft guideline might read:

"1.7.4 [*Bilateralized reservations*] [*Agreements between States having the same object as reservations*]

"An agreement [, concluded under a specific provision of a treaty,] by which two or more States purport to exclude or to modify the legal effect of certain provisions [of the] [of a] treaty or of the treaty as a whole in their application to their relations *inter se* does not constitute a reservation within the meaning of the present Guide to Practice."

130. The alternative titles proposed for this draft guideline are intended to indicate that two approaches are conceivable: the Commission may wish to limit the guideline strictly to supplementary "bilateralization" agreements and, in that event, the logical title is the first one (even though using inverted commas does not work well)²⁶² and it would be desirable to include in the text the wording inside square brackets: or the Commission may wish to opt for a more general formulation to cover comprehensively all agreements containing derogations, in other words, both "bilateralized reservations"

²⁶¹ Once again, one cannot truly speak of bilateralization in a strict sense since this provision does not call for the choice of a partner. See also article 52 of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, or article 49 of the Convention on the International Protection of Adults.

²⁶² Inverted commas were used in the title of draft guideline 1.5.1 on reservations to bilateral treaties, but that approach was criticized by Spain in the Sixth Committee (see footnote 135 above).

²⁵⁴ Imbert, *op. cit.*, p. 200.

²⁵⁵ See draft guideline 1.1.

²⁵⁶ See paragraphs 110–116 above, including draft guideline 1.7.3.

²⁵⁷ "Les réserves et les facultés ...", p. 391.

²⁵⁸ Jenard, Rapport du Comité restreint sur la bilatéralisation, The Hague Conference on Private International Law (see footnote 253 above), p. 145. See also the explanatory report by Fragistas, *ibid.*, pp. 363–364.

²⁵⁹ These examples are taken from Imbert, *op. cit.*, p. 201.

²⁶⁰ *Ibid.*; see also Droz, "Les réserves et les facultés ...", pp. 390–391. In fact, this procedure bears a resemblance to amendments between certain parties to the basic convention alone.

and amendments and protocols between certain parties to treaties only and the second solution (without the words inside square brackets) would seem to be preferable. The Special Rapporteur himself has a preference for the second alternative, in the interest of achieving the greatest completeness possible, even though, as indicated above,²⁶³ amendments and protocols do not give rise to serious problems of definition vis-à-vis reservations. In either case, the nuances of the various possible formulations should be discussed in the commentary to this draft guideline.

2. UNILATERAL DECLARATIONS PURPORTING TO SUSPEND A TREATY OR CERTAIN PROVISIONS THEREOF

131. Unlike in the case of the procedures considered above, which reflect agreement between the parties to the treaty or between certain parties to it, the notifications in question in this paragraph are unilateral statements just as reservations are. And as in the case of reservations, they can purport to exclude the legal effect of certain provisions of a treaty in their application to the author of the notification, but only on a temporary basis. They can also suspend application of the treaty as a whole; in such cases, they are subject to the same legal regime as in the case of notifications of withdrawal or termination. Even though they are generally considered from a different angle, notifications made under a waiver or escape clause differ from the preceding clauses only with respect to their legal basis (since provision is made for them by means of a treaty provision, and not in the form of the general international law of treaties).

(a) *Notifications of suspension, denunciation or termination of a treaty*

132. Under article 65, paragraph 1, of the 1969 and 1986 Vienna Conventions:

A party which, under the provisions of the present Convention,²⁶⁴ invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

133. Unquestionably, unilateral statements are what are being dealt with here. However, that is where all possible comparisons with reservations end. These notifications do not purport “to exclude or to modify the legal effect of *certain provisions** of the treaty”, “or of the treaty as a whole *with respect to certain specific aspects*”*,²⁶⁵ but to put an end to the instrument that the treaty constitutes (in the case of notification of termination,²⁶⁶ to treaty relations (in the case of notification of withdrawal or denunciation of a multilateral treaty)²⁶⁷ or to release “the parties between which the operation of the

treaty is suspended from the obligation to perform the treaty [as a whole] in their mutual relations during the period of the suspension”.²⁶⁸

134. The problem of a possibly increasing similarity to reservations could, however, arise if the suspension did not affect the treaty as a whole, but only certain provisions thereof: in such a case,²⁶⁹ it is indeed a question of temporarily excluding the legal effect of certain provisions of a treaty in their application to the State or international organization that made the notification of partial suspension. And the temporary nature of such exclusion is not a decisive element in the differentiation from reservations, since reservations may be formulated for just a fixed period.²⁷⁰ Moreover, reservation clauses can impose such a provisional nature.²⁷¹

135. However, even in the case of a notification of partial suspension, a fundamental element of the definition of reservations is still lacking, since it can be assumed that such a notification is not made by a State “when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty”²⁷² or, more generally, by its author when “expressing consent to be bound”,²⁷³ but, on the contrary, after the treaty has taken effect for the author, which suffices in order to distinguish clearly between such unilateral statements and reservations.

136. Furthermore, the 1969 and 1986 Vienna Conventions make such statements subject to a legal regime that differs clearly from the reservations regime.²⁷⁴

²⁶⁸ Ibid., art. 72, para. 1 (a).

²⁶⁹ This possibility is not excluded by the 1969 and 1986 Vienna Conventions (despite their obvious caution); see article 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties), subparagraph (a), and article 44 (Separability of treaty provisions) of those two Conventions. See Reuter, “Solidarité et divisibilité des engagements conventionnels”, also reproduced in Reuter, *Le développement de l'ordre juridique international: écrits de droit international*, pp. 361–374.

²⁷⁰ Horn offers the example of ratification by the United States of the Convention on Extradition, with the reservation that certain provisions thereof should not be applicable to the United States “... until subsequently ratified in accordance with the Constitution of the United States of America” (*Reservations and Interpretative Declarations to Multilateral Treaties*, p. 100).

²⁷¹ See article 25, paragraph 1, of the European Convention on the Adoption of Children, and article 14, paragraph 2, of the European Convention on the Legal Status of Children Born out of Wedlock, whose wording is identical:

“A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period”;

or article 20 of the Convention on the recognition of divorces and legal separations, which authorizes contracting States which do not provide for divorce to reserve the right not to recognize a divorce, but whose paragraph 2 states: “This reservation shall have effect only so long as the law of the State utilizing it does not provide for divorce.”

²⁷² Draft guideline 1.1.

²⁷³ Draft guideline 1.1.2.

²⁷⁴ See, in particular, articles 65, 67–68 and 72.

²⁶³ In paragraphs 117–119.

²⁶⁴ See paragraph 73 above.

²⁶⁵ See draft guidelines 1.1 and 1.1.1.

²⁶⁶ See the 1969 and 1986 Vienna Conventions, art. 70, para. 1.

²⁶⁷ Ibid., para. 2.

(b) *Notifications made under a waiver or an escape clause*

137. It can happen that the suspension of the effect of the provisions of a treaty is the result of a notification not made, as in the hypothesis considered above, under the rules of general international treaty law, but on the basis of specific provisions set out in the treaty itself.

138. As indicated above,²⁷⁵ such escape clauses fall into two categories:²⁷⁶ waivers and escape clauses. Although some authors do not draw a clear distinction between the two,²⁷⁷ it can be assumed that escape clauses permit a contracting party temporarily not to meet certain treaty requirements owing to the difficulties it is encountering in fulfilling them as a result of special circumstances, whereas waivers, which produce the same effect, must be authorized by the other contracting parties or by an organ responsible for monitoring treaty implementation. That is to say, notifications made on the basis of an escape clause produce effects ipso facto, owing solely to the fact that they are notified to the other parties or to the depositary by the beneficiary State, whereas only authorization by the other contracting States or, more often, by an organ of an international organization, gives effect to notifications under a waiver.

139. A comparison of article XIX, paragraph 1 (a), and article XXV, paragraph 5, of GATT shows the difference clearly.²⁷⁸ The former article reads:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.²⁷⁹

This is an escape clause. On the other hand, the general provision laid down in article XXV, paragraph 5 (entitled “Joint Action by the Contracting Parties”), is a waiver:

In exceptional circumstance not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority

²⁷⁵ Para. 83.

²⁷⁶ See Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, pp. 218 and 302.

²⁷⁷ Manin provides a broad definition of “escape clauses”, which covers both escape clauses *sensu stricto* and waivers:

“The term ‘escape clauses’ is used to refer to the provisions set out in certain international agreements which offer contracting parties which invoke them the option of temporarily derogating, either fully or partially, from the provisions contained in such agreements as and when certain circumstances justify their application upon completion of a procedure determined by each agreement considered”

(“À propos des clauses de sauvegarde”, p. 1). See also see Virally, *loc. cit.*, pp. 14–15, and Ouguergouz, *loc. cit.*, p. 290.

²⁷⁸ See Carreau and Juillard, *op. cit.*, p. 104. Article 15 of the European Convention on Human Rights (see footnote 200 above) provides another well-known example of an escape clause, in a very different field.

²⁷⁹ This option has been regulated but not abolished by the Agreement on Safeguards contained in annex IA to the Marrakesh Agreement Establishing the World Trade Organization.

of the votes cast and that such majority shall comprise more than half of the contracting parties.²⁸⁰

140. The shared characteristic of these two types of clause is that they authorize States parties to the treaty containing them to suspend their treaty obligations temporarily. In that respect they bear a similarity to reservations, without there being any reason to focus on the distinction between escape clauses and waivers, since a treaty may make the formulation of a reservation subject to the reactions of the other parties,²⁸¹ which means that it is closer to a waiver than to an escape clause.

141. As stated by Manin,

[T]he identical approach taken in the case of the two methods is noteworthy. Both approaches appear to show little concern for the integrity of an international agreement, since they prefer a more universal application thereof. The option of formulating reservations is an element that is likely to promote more widespread acceptance of international treaties. Similarly, the fact that it is possible to release oneself or be released for a given period of time from one’s international obligations is such as to encourage a hesitant State to enter finally into a commitment that offers it a number of advantages.²⁸²

142. “There, however, the similarity between the two procedures ends.”²⁸³ In fact, in the case of a reservation, the partners of the reserving State or international organization are informed at the outset of the limits on the commitment of that State or organization, whereas in the case of a declaration under an escape clause, the aim is to remedy unforeseeable difficulties arising from the application of the treaty. The time element of the definition of reservations is thus absent, as it is in the case of all unilateral statements purporting to suspend the provisions of a treaty.²⁸⁴

143. For the sake of completeness, a guideline with the following wording could be included in section 1.4 of the Guide to Practice, on unilateral statements other than reservations and interpretative declarations:

“A unilateral declaration by which a State or an international organization purports to notify its intention to suspend the application of [all or] certain provisions of a treaty [whether in application of an escape clause or a waiver or under general rules on the suspension of treaties] is outside the scope of the present Guide to Practice.”

144. However, since there is no likelihood of serious confusion between such notifications and reservations it is not essential to include such a guideline in the Guide to Practice.

²⁸⁰ The same applies, for example, to article VIII, section 2 (a), of the Articles of Agreement of the International Monetary Fund: “... no member shall, *without the approval of the Fund*,* impose restrictions on the making of payments and transfers for current international transactions.”

²⁸¹ See the examples given by Imbert, *op. cit.*, pp. 174–176.

²⁸² Manin, *loc. cit.*, p. 3.

²⁸³ *Ibid.*

²⁸⁴ See paragraph 135 above. See also, in that connection, Spiliopoulou Åkermark, *loc. cit.*, pp. 501–502.

3. PROCEDURES PROVIDING FOR A CHOICE BETWEEN PROVISIONS OF A TREATY BY MEANS OF A UNILATERAL STATEMENT

145. The distinction between reservations on the one hand, and unilateral statements made on the basis of a treaty clause which allows States to choose between the treaty's provisions, on the other hand, however, proves to be far more problematic.

146. In an effort to clarify this matter, it would be useful to look at in succession:

(a) Statements by which a State, exercising an option provided for in a treaty, excludes the application of certain provisions of the treaty;

(b) Statements by which, conversely, a State accepts obligations which the treaty specifically presents as being optional;

(c) Lastly, statements by which a State chooses between obligations deriving from a treaty, again in exercise of an option provided for in the treaty itself.

147. Three preliminary comments must be made here:

(a) First, the specific purpose of these unilateral statements is, once again, to modify the application of the treaty to which they relate in order to facilitate accession thereto; in this way such statements come close to being reservations as defined in the 1969 and 1986 Vienna Conventions and the Guide to Practice;

(b) Secondly, as has already been noted,²⁸⁵ the fact that such options are provided for in the treaty whose application they seek to modify clearly does not of itself afford sufficient grounds for distinguishing between such unilateral statements and reservations: the purpose of reservation clauses is also to allow States to suspend the application of certain provisions of the treaty even though this may entail certain conditions;

(c) Thirdly, and lastly, the distinction between the three formulas above is not always obvious,²⁸⁶ particularly as they can occasionally be combined. Nevertheless, from an intellectual standpoint, they can and must be considered separately when comparing them to reservations as defined in draft guideline 1.1 and those that follow.

(a) *Unilateral statements excluding the application of certain provisions of a treaty under an exclusionary clause*

148. This case is dealt with in article 17, paragraph 1, of the 1969 and 1986 Vienna Conventions:

Without prejudice to articles 19 to 23, the consent of a State [or of an international organization] to be bound by part of a treaty is effective only if the treaty so permits ...

149. This provision, which was adopted without modification at the United Nations Conference on the Law of

Treaties,²⁸⁷ is explained by the Commission as follows in its final report of 1966 on the draft articles on the law of treaties:

Some treaties expressly authorize States to consent to a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification, acceptance, approval or accession is admissible. But in the absence of such a provision, the established rule is that the ratification, accession etc. must relate to the treaty as a whole. Although it may be admissible to formulate reservations to selected provisions of the treaty under the rule stated in article 16 [19 in the text of the Convention], it is inadmissible to subscribe only to selected parts of the treaty. Accordingly, paragraph 1 of the article lays down that, without prejudice to the provisions of articles 16 to 20 [19 to 23] regarding reservations to multilateral treaties, an expression of consent by a State to be bound by part of a treaty is effective only if the treaty or the other contracting States authorize such a partial consent.²⁸⁸

150. One thing that is immediately obvious about this provision is the fact that while it appears in part II, section 1 (Conclusion of treaties), it creates a link with articles 19 to 23, in part II, section 2, which are specifically devoted to reservations. Thus it becomes even more important to determine whether statements by which a State or an international organization expresses its consent to be bound only to part of a treaty when a treaty so permits are reservations or not.

151. Such exclusionary clauses (opting or contracting out) are quite common. Samples can be found in the conventions adopted under the auspices of the Hague Conference on Private International Law, the Council of Europe, ILO and in various other conventions.²⁸⁹ Among the latter, one may cite by way of example, article 14, paragraph 1, of the International Convention for the Prevention of Pollution from Ships, 1973:

A State may at the time of signing, ratifying, accepting, approving or acceding to the present Convention declare that it does not accept any one or all of Annexes III, IV and V (hereinafter referred to as "Optional Annexes") of the present Convention. Subject to the above, Parties to the Convention shall be bound by any Annex in its entirety.

152. The Hague Conference on Private International Law, which is surely the most inventive body when it comes to modifying the provisions of treaties drafted under its auspices, has used exclusionary clauses on many occasions:

(a) First paragraph of Article 8 of the Convention relating to the settlement of conflicts between the law of nationality and the law of domicile:

Each Contracting State, when signing or ratifying the present Convention or acceding thereto, may declare that it excludes the application of this Convention to disputes between laws relating to certain matters.

²⁸⁷ See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968* (United Nations publication, Sales No. E.68.V.7), report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, pp. 129–130, paras. 156–157.

²⁸⁸ *Yearbook ... 1966* (see footnote 212 above), pp. 219–220, para. (2) of the commentary to article 14.

²⁸⁹ The provisions which follow are cited by way of example and in no way exhaust the list of exclusionary clauses of conventions adopted in these forums. For other examples, see in general, Imbert, op. cit., pp. 171–172.

²⁸⁵ See paragraph 110 above.

²⁸⁶ For examples, see paragraphs 180 and 203–204 below.

(b) Article 9 of the Convention concerning the recognition of the legal personality of foreign companies, associations and institutions:

Each contracting State, on signing or ratifying the present Convention or on adhering hereto, may reserve the faculty of limiting the scope of its application, as defined in article 1.

153. The appearance of exclusionary clauses in conventions concluded by the Council of Europe is also common:²⁹⁰

(a) Article 34, paragraph 1, of the European Convention for the Peaceful Settlement of Disputes:

On depositing its instrument of ratification, any one of the High Contracting Parties may declare that it will not be bound by:

- (a) Chapter III relating to arbitration; or
- (b) Chapters II and III relating to conciliation and arbitration;

(b) Article 7, paragraph 1, of the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality:

Each Contracting Party shall apply the provisions of Chapters I and II. It is however understood that each Contracting Party may declare, at the time of ratification, acceptance or accession, that it will apply the provisions of Chapter II only. In this case the provisions of Chapter I shall not be applicable in relation to that Party;

(c) Article 25, paragraph 1, of the European Convention on Nationality:

Each State may declare, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, that it will exclude Chapter VII from the application of the Convention.

154. International labour conventions also make use of this technique, in keeping with the spirit of article 19 of the ILO Constitution:²⁹¹

(a) Article 2 of ILO Convention (No. 63) concerning statistic of wages and hours of work in the principal mining and manufacturing industries, including building and construction, and in agriculture:

1. Any Member which ratifies this Convention may, by a declaration appended to its ratification, exclude from its acceptance of the Convention:

- (a) any one of Parts II, III or IV; or
- (b) Parts II and IV; or
- (c) Parts III and IV.

2. Any Member which has made such a declaration may at any time cancel that declaration by a subsequent declaration.

3. Every Member for which a declaration made under paragraph 1 of this Article is in force shall indicate each year in its annual report upon the application of this Convention the extent to which any progress has been made with a view to the application of the Part or Parts of the Convention excluded from its acceptance;

²⁹⁰ For other examples, see Spiliopoulou Åkermark, loc. cit., pp. 504–505.

²⁹¹ See paragraph 75 above.

(b) Article 17, paragraph 1,²⁹² of ILO Convention (No. 119) concerning the guarding of machinery:

The provisions of this Convention apply to all branches of economic activity unless the Member ratifying the Convention specifies a more limited application by a declaration appended to its ratification.

155. International labour conventions (and other treaties) also contain more complex provisions that cannot be compared to exclusionary clauses, since ultimately they allow States Parties to exclude the application of certain provisions of the convention in respect of themselves while compelling them to accept others which are nevertheless quite different.²⁹³

156. As far as the Special Rapporteur knows, the great majority of authors who have taken up the question of whether or not statements made in application of such exclusionary clauses are reservations maintain that they are.²⁹⁴

157. The strongest argument that they are not clearly derives from the consistent strong opposition of ILO to such an assimilation, even though that organization regularly resorts to the opting-out procedure. In its reply to the Commission's questionnaire, ILO wrote, in a long passage which is worth citing in its entirety here:

It has been the consistent and long-established practice of the ILO not to accept for registration instruments of ratification of international labour Conventions when accompanied with reservations. As has been written, "this basic proposition of refusing to recognize any reservations is as old as ILO itself" (see W. P. Gormley, "The Modification of Multilateral Conventions by Means of Negotiated Reservations and Other Alternatives: A Comparative Study of the ILO and Council of Europe", 39 *Fordham Law Review*, 1970, at p. 65). The practice is not based on any explicit legal provision of the Constitution, the Conference Standing Orders, or the international labour Conventions, but finds its logical foundation in the specificity of labour Conventions and the tripartite structure of the Organization. Reference is usually made to two Memoranda as being the primary sources for such firm principle: first, the 1927 Memorandum submitted by the ILO Director to the Council of the League of Nations on the Admissibility of Reservations to General Conventions, and second, the 1951 Written Statement of the International Labour Organization in the context of the ICJ proceedings concerning the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

In his Memorandum to the Committee of Experts for the Codification of International Law, the ILO Director General wrote with respect to labour Conventions:

"these agreements are not drawn up by the Contracting States in accordance with their own ideas: they are not the work of plenipotentiaries, but of a conference which has a peculiar legal character and includes non-Government representatives. Reservations would still be inadmissible, even if all the States interested accepted them; for the rights which the treaties have conferred on non-Governmental interests in regard to the adoption of international labour Conventions would be overruled if the consent of the Governments alone could suffice to modify the substance and detract from the effect of the conventions" (see League of Nations, *Official Journal*, 1927, at p. [882]).

In the same vein, the ILO Memorandum, submitted to the ICJ in 1951, read in part:

²⁹² Paragraph 2 governs statements made in accordance with paragraph 1 and limits the application of the provisions of the Convention.

²⁹³ See paragraphs 197–210 below.

²⁹⁴ Some authors, however, without specifically taking a position, see distinct differences between contracting out and reservations (see Simma, loc. cit., pp. 329–331).

“international labour conventions are adopted and enter into force by a procedure which differs in important respects from the procedure applicable to other international instruments. The special features of this procedure have always been regarded as making international labour conventions intrinsically incapable of being ratified subject to any reservation ... It has been the consistent view of the International Labour Organization, since its establishment, that reservations are not admissible. This view is based upon and supported by the consistent practice of the International Labour Organization and by the practice of the League of Nations during the period from 1920–1946 when the League was responsible for the registration of ratifications of international labour conventions” (see *ICJ Pleadings, 1951*, at pp. 217, 227–228).

Wilfred Jenks, Legal Adviser of the ILO, addressing in 1968 the UN Vienna Conference on the Law of Treaties, stated the following:

“reservations to international labour Conventions are incompatible with the object and purpose of these Conventions. The procedural arrangements concerning reservations are entirely inapplicable to the ILO by reason of its tripartite character as an organization in which, in the language of our Constitution, ‘representatives of employers and workers’ enjoy ‘equal status with those of governments’. Great flexibility is of course necessary in the application of certain international labour Conventions to widely varying circumstances, but the provisions regarded by the collective judgement of the International Labour Conference as wise and necessary for this purpose are embodied in the terms of the Conventions and, if they prove inadequate for the purpose, are subject to revision by the Conference at any time in accordance with its regular procedures. Any other approach would destroy the international labour code as a code of common standards.”

In brief, with relation to international labour Conventions, a member State of the ILO must choose between ratifying without reservations and not ratifying. Consistent with this practice, the Office has on several occasions declined proffered ratifications which would have been subject to reservations (for instance, in the 1920s, the Governments of Poland, India and Cuba were advised that contemplated ratifications subject to reservations were not permissible; see *Official Bulletin*, vol. II, p. 18, and vol. IV, pp. 290–297). Similarly, the Organization refused recognition of reservations proposed by Peru in 1936. In more recent years, the Office refused to register the ratification of Convention No. 151 by Belize as containing two true reservations (1989). In each instance, the reservation was either withdrawn or the State was unable to ratify the Convention.

It is interesting to note that, in the early years of the Organization, the view was taken that ratification of a labour Convention might well be made subject to the specific condition that it would only become operative if and when certain other States would have also ratified the same Convention (see International Labour Conference, 3rd session, 1921, at p. 220). In the words of the ILO Director General in his 1927 Memorandum to the Council of the League of Nations,

“these ratifications do not really contain any reservation, but merely a condition which suspends their effect; when they do come into force, their effect is quite normal and unrestricted. Such conditional ratifications are valid, and must not be confused with ratifications subject to reservation which modify the actual substance of conventions adopted by the International Labour Conference” (for examples of ratifications subject to suspensive conditions, see Written Statement of the ILO in *Genocide Case, ICJ Pleadings, 1951*, at pp. 264–265).

There is no record of recent examples of such a practice. In principle, all instruments of ratification take effect 12 months after they have been registered by the Director General.

Notwithstanding the prohibition of formulating reservations, ILO member States are entitled, and, at times, even required, to attach declarations—optional and compulsory accordingly. A compulsory declaration may define the scope of the obligations accepted or give other essential specifications. In some other cases a declaration is needed only where the ratifying State wishes to make use of permitted exclusions, exceptions or modifications. In sum, compulsory and optional declarations relate to limitations *authorized* by the Convention itself, and thus do not amount to reservations in the legal sense. As the Written Statement of the ILO in the *Genocide*

Case read, “they are therefore a part of the terms of the convention as approved by the Conference when adopting the convention and both from a legal and from a practical point of view are in no way comparable to reservations” (see *ICJ Pleadings, 1951*, at p. 234). Yet for some, these flexibility devices have “for all practical purposes the same operational effect as reservations” (see Gormley, op. cit., *supra*, at p. 75).²⁹⁵

158. This reasoning reflects a respectable tradition, but is somewhat less than convincing:

(a) In the first place, while international labour conventions are obviously adopted under very specific circumstances, they are nevertheless treaties between States, and the participation of non-governmental representatives in their adoption does not modify their legal nature;

(b) Secondly, the possibility that the International Labour Conference might revise a convention that proved to be inadequate proves nothing about the legal nature of unilateral statements made in application of an exclusionary clause: the revised convention could not be imposed against their will on States that had made such statements when becoming parties to the original convention, and it matters little in such cases whether or not those statements were reservations;

(c) Lastly, and most importantly, the position traditionally taken by ILO reflects a restrictive view of the concept of reservations which is not reflected in the 1969 and 1986 Vienna Conventions.

159. In fact, the 1969 and 1986 Vienna Conventions do not preclude the making of reservations, not because of an authorization implicit in the general international law of treaties as codified in articles 19–23 of the Conventions, but on the basis of specific treaty provisions: reservation clauses.²⁹⁶ This is quite clear from article 19 (b) of the Conventions, which concerns treaties that provide “that only *specified** reservations ... may be made”, or article 20, paragraph 1, which stipulates that “a reservation expressly authorized by a treaty does not require any subsequent acceptance”.

160. In fact, exclusionary clauses are clearly related to reservation clauses, and the resulting unilateral statements are related to the “specified” reservations “expressly authorized” by a treaty, including international labour conventions.²⁹⁷ They are indeed unilateral statements made at the time consent to be bound is expressed and purporting to exclude the legal effect of certain provisions of the treaty as they apply to the State or the international organization making the statement, all of which corresponds exactly to the definition of reservations, and, at first glance at least,²⁹⁸

²⁹⁵ Reply to questionnaire, pp. 3–5.

²⁹⁶ See paragraph 110 above.

²⁹⁷ At the same time, there is little doubt that a practice accepted as law has developed in ILO. Under this practice, any unilateral statement seeking to limit the application of the provisions of international labour conventions that is not explicitly stipulated is inadmissible. This is also clearly the case with regard to the conventions adopted by the Hague Conference on Private International Law (see Droz, “Les réserves et les facultés ...”, pp. 388–392). However, this is an altogether different question from that of defining reservations.

²⁹⁸ This needs to be verified, but at least it is no longer a question of definition.

it would seem that they are not and need not be subject to a separate legal regime.

161. Except for the absence of the word “reservations”, there appears to be little difference between the aforementioned exclusionary clauses²⁹⁹ and:

(a) Article 16 of the Convention on Celebration and Recognition of the Validity of Marriages: “A Contracting State may reserve the right to exclude the application of Chapter I”, article 28 of which provides for the possibility of “reservations”;

(b) Article 33 of the Convention on the taking of evidence abroad in civil or commercial matters, concluded in the context of the Hague Conference on Private International Law: “A State may, at the time of signature, ratification or accession, exclude, in whole or in part, the application of the provisions of paragraph 2 of article 4 and of Chapter II. No other reservation shall be permitted”; and

(c) Article 35, entitled “Reservations”, of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment:

“Any Signatory may declare, at the time of signature or when depositing its instrument of ratification, acceptance or approval, that it reserves the right:

...

‘(c) not to apply Article 18’.”

And there are countless other examples.

162. The only disturbing element is the simultaneous presence in some conventions (at least those of the Council of Europe) of exclusionary *and* reservation clauses.³⁰⁰ The Special Rapporteur sees no other explanation for this situation than terminological vagueness.³⁰¹ And it is striking that, in its reply to the Commission’s questionnaire, ILO should mention among the problems encountered in the areas of reservations those relating to article 34 of the European Convention for the Peaceful Settlement of Disputes, since the word “reservation” does not even appear in this standard exclusionary clause.³⁰²

163. The distinction is not crystal clear,³⁰³ to say the least, and both in their form and their effects³⁰⁴ the statements made when expressing consent to be bound under exclusionary clauses are in every way comparable to reservations when provision is made for the latter, with restrictions, by reservation clauses.

164. In reality, exclusionary clauses take the form of “negotiated reservations”, as the term is currently (and

erroneously) accepted in the context of the Hague Conference on Private International Law and further developed in the context of the Council of Europe.³⁰⁵ As Imbert notes: “Strictly speaking, this means that it is the *reservation*—and not only the right to make one—that is the subject of the negotiations. In other words, unlike traditional clauses, clauses that apply such a procedure should make it possible to know beforehand not only what the reservation is but also what State will actually make it.”³⁰⁶ At the same time, the term is used in the Council of Europe in a broader sense, seeking to cover the “*procedure*” intended to enumerate either in the body of the Convention itself or in an annex the limits of the options available to States in formulating a reservation.”³⁰⁷

165. These, then, are not “reservations” at all in the proper sense of the term, but *reservation clauses* that impose limits and are precisely defined when the treaty is negotiated. And they are truly nothing more,³⁰⁸ even in the very rare cases where a specific State is mentioned in the clause as being its only beneficiary.³⁰⁹

166. In the Special Rapporteur’s view, these terminological nuances belong in the chapter of the Guide to Practice devoted to definitions, on the understanding that the point cannot be pressed too far, since they say nothing about which legal regime, if any, should govern a particular category of reservation, and since ultimately there is nothing to prevent the parties to a treaty from agreeing on a specific regime or waiver.

167. With regard to unilateral statements made when expressing the author’s consent to be bound by a treaty in accordance with an exclusionary clause, a draft guideline should be added to section 1.1 of the Guide to Practice in order to make it clear that what is involved is indeed a reservation, however phrased or named. The draft text might read:

“1.1.8³¹⁰ *Reservations formulated under exclusionary clauses.*

“A unilateral statement made by a State or an international organization when expressing its consent to be bound by a treaty or by a State when making a notification of succession, in accordance with a clause in the treaty expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties constitutes a reservation.”

³⁰⁵ See Droz, “Les réserves et les facultés ...”, pp. 385–388; Golsong, “Le développement du droit international régional”, p. 228, and Spiliopoulou Åkermark, loc. cit., pp. 489–490.

³⁰⁶ Op. cit., p. 196.

³⁰⁷ Golsong, loc. cit., p. 228; see also Spiliopoulou Åkermark, loc. cit., p. 498 and also pp. 489–490.

³⁰⁸ On this point, see Spiliopoulou Åkermark, loc. cit., pp. 498–499, and Imbert, op. cit., pp. 197–199.

³⁰⁹ See the annex to the European Convention on Civil Liability for Damage Caused by Motor Vehicles, which allowed Belgium to make a specific reservation for a three-year period, and article 32, paragraph 1 (b), of the European Convention on Transfrontier Television, which allowed the United Kingdom alone to formulate a specific reservation; examples cited by Spiliopoulou Åkermark, loc. cit., p. 499.

³¹⁰ This numbering is provisional; the Commission may wish to insert the draft text after draft guideline 1.1.2.

²⁹⁹ Paras. 151–154.

³⁰⁰ See articles 7 (para. 153 above) and 8 of the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, and the examples given by Spiliopoulou Åkermark, loc. cit., p. 506, footnote 121.

³⁰¹ This uncertainty is also stressed by Spiliopoulou Åkermark, loc. cit., p. 513.

³⁰² See paragraph 154 above.

³⁰³ Similarly, see Imbert, op. cit., p. 169, and Spiliopoulou Åkermark, loc. cit., pp. 505–506.

³⁰⁴ Similarly, see Gormley, loc. cit., pp. 75–76.

168. On the other hand, and not without some hesitation, the Special Rapporteur does not propose to include in the Guide to Practice a draft guideline defining “negotiated reservations”. This term is surely misleading,³¹¹ yet there does not seem to be any particular reason for dealing with it any differently than by means of the draft guideline proposed above for reservation clauses.³¹²

169. If, however, the Commission should take the opposite view, the following definition could be considered (and probably included in section 1.7 of the Guide to Practice):

“‘*Negotiated reservations*’

“A ‘negotiated reservation’ is [the provision of a treaty] [a reservation clause] indicating precisely and within certain limits what reservations can be made to [this] [a] treaty.”

The choice of bracketed phrases will depend on whether or not the term “reservation clause” is defined elsewhere.

170. Draft guideline 1.1.8 proposed above is fully compatible with the provisions of article 17, paragraph 1, of the 1969 and 1986 Vienna Conventions.³¹³ The question has already been raised: “What is the legal meaning of the reference in Article 17 (‘without prejudice to ...’) to Articles 19 to 23 of the Vienna Convention on the Law of Treaties, if not to imply that in some cases options amount to reservations?”³¹⁴

171. Yet, conversely, it would appear that this provision is drafted so as to imply that all clauses that offer parties a choice between various provisions of a treaty are not reservations.

172. As indicated below,³¹⁵ this is certainly true of statements made under opting-in clauses. But one might also ask whether it is not true of certain statements made under opting-out clauses as well.

173. It so happens that some treaties allow the parties to exclude, by means of a unilateral statement, the legal effect of certain of the treaty provisions in their application to the author of the statement, not (or not only) at the time of expression of consent to be bound, but after the treaty enters into force for them. For example,

(a) Article 82 of the ILO Convention (No. 102) concerning Minimum Standards of Social Security authorizes a member State that has ratified the Convention to denounce, 10 years after the entry into force of the Convention, either the entire Convention or one or more of Parts II to X;

(b) Article 22 of the Convention on the recognition of divorces and legal separations authorizes contracting States, “from time to time, [to] declare that certain categories of persons having their nationality need not be

considered their nationals for the purposes of this Convention”,³¹⁶

(c) Article 30 of the Convention on the Law Applicable to Succession to the Estates of Deceased Persons stipulates that:

A State Party to this Convention may denounce it, or only Chapter III of the Convention,* by a notification in writing addressed to the depositary;

(d) Article X of the ASEAN Framework Agreement on Services authorizes a member State to modify or withdraw any commitment in its schedule of specific commitments, subject to certain conditions, at any time after three years from the date on which that commitment entered into force.

174. Unilateral statements made under provisions of this type are clearly not reservations.³¹⁷

175. In this respect, the fact that they are formulated (or may be formulated) at a time other than the time of consent to be bound is perhaps not in itself absolutely decisive insofar as nothing prevents negotiators from departing from the provisions of the 1969 and 1986 Vienna Conventions, which are merely auxiliary in character; this aspect will be studied in more detail in the next chapter of this report.

176. Nevertheless, statements made under these exclusionary clauses after the entry into force of the treaty are very different from reservations in that they do not place conditions on the accession of the State or the international organization which makes them. Reservations are an element of the conclusion and entry into force of a treaty, as is demonstrated by the inclusion of articles 19–23 of the 1969 and 1986 Vienna Conventions in part II (Conclusion and entry into force of treaties). They are partial acceptances of the provisions of the treaty to which they relate; and that is why it seems logical to consider statements made at the time of expressing consent to be bound as being reservations. On the other hand, statements made after the treaty has been in force for a certain period of time in respect of their author are partial denunciations which, in their spirit, are much more closely related to part V (Invalidity, termination and suspension of the operation of treaties) of the Vienna Conventions. They may also be linked to article 44, paragraph 1, which does not exclude the right of a party to withdraw partially from a treaty if the treaty so provides.

177. It would be possible to include in section 1.7 of the Guide to Practice a draft guideline specifying the following:

“*Unilateral statements formulated under an exclusionary clause after the entry into force of the treaty*

³¹⁶ Concerning the circumstances under which this provision was adopted, see Droz, “Les réserves et les facultés ...”, pp. 414–415. This, typically, is a “negotiated reservation” in the sense referred to earlier (para. 169) whose sole beneficiary is the United Kingdom and which in reality has the same effects as an optional clause (see paragraph 180 below).

³¹⁷ Significantly, article 22, already cited (para. 173), of the Convention on the recognition of divorces and legal separations, is omitted from the list of reservation clauses given in article 25 of the Convention.

³¹¹ See paragraph 165 above.

³¹² See footnote 223 above.

³¹³ Quoted in paragraph 148 above.

³¹⁴ Spiliopoulou Åkermark, loc. cit., p. 506.

³¹⁵ See paragraphs 179–196 below.

“A unilateral statement made by a State or an international organization in accordance with a clause in the treaty expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to these parties after the entry into force of the treaty in their respect does not constitute a reservation.”

178. The Special Rapporteur considers, however, that this clarification is not essential. It merely repeats, *a contrario*, indications included in draft guideline 1.1.8 proposed above, and it is probably sufficient to include these explanations in the commentary to that guideline.

(b) *Unilateral statements accepting the application of certain provisions of a treaty under an optional clause*

179. In contrast to the exclusionary clauses under which the unilateral statements analysed above are made, “optional clauses” (or “opting-in” or “contracting-in” clauses) should be the terms used to designate clauses which envisage that the parties to a treaty may accept provisions which, in the absence of express acceptance, would not be applicable to them.³¹⁸

180. Paradoxically, the distinction between optional clauses and exclusionary clauses is not always obvious. In addition to the particular problems posed by clauses which offer a choice among the provisions of a treaty, some of which resemble both types of clause,³¹⁹ there are clauses which appear to be exclusionary clauses, but are really optional clauses in that statements made under these provisions actually result in granting additional rights to the other parties to the treaty, and therefore increase the *obligations* of the State or international organization which made the statement.

181. This is the case, for example, of article 22, already cited (para. 173) of the Convention on the recognition of divorces and legal separations, the complex scope of which has been explained by Droz as follows:

This power seems very mysterious. It must be remembered that the Convention takes the competence of the national authorities of the spouses as the basis for the recognition of foreign divorces. The purpose of this power is to enable the United Kingdom to specify that certain persons who are *British subjects*, but are not nationals of the United Kingdom itself (England, Scotland, Wales, Northern Ireland), for example nationals of Hong Kong, will not be regarded as “nationals” for the purposes of the application of the Convention. This means that a State which is bound by the Treaty to the United Kingdom will, of course, recognize the judgements issued in the United Kingdom concerning English or Scottish people, but, *merely on the basis of the nationality of the spouses*, will not be obliged to recognize judgements issued in London for the benefit of two nationals of Hong Kong. This is actually a power to make a certain specification, not a reservation. Indeed, the United Kingdom is not in any way seeking to *lessen* the effect on it of the Convention, but instead wishes to spare its partners from a considerable extension of the obligations of the Convention which would result solely from the concept of British nationality.³²⁰

182. Beyond these, often delicate, problems of the “dividing line” between different categories of treaty

³¹⁸ Here again, this expression should, undoubtedly, be defined in the Guide to Practice if the Commission decides to include in it the definition of the terms used (other than reservations and interpretative declarations).

³¹⁹ Which will be considered below (paras. 197–210).

³²⁰ Droz, “Les réserves et les facultés...”, pp. 414–415.

provisions allowing States to choose among the provisions of a treaty, it remains true that the optional clauses referred to here have the objective not of lessening but of increasing the obligations deriving from the treaty for the author of the unilateral statement.

183. The most famous of these clauses is Article 36, paragraph 2, of the ICJ Statute,³²¹ but there are many others; such clauses are either drawn up on the same model and result in the acceptance of the competence of a certain mode of settlement of disputes or of monitoring by an organ created by the treaty, as envisaged in article 41, paragraph 1, of the International Covenant on Civil and Political Rights:

A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the [Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.³²²

or are exclusively prescriptive in nature, as in the case of, among many other examples, article 25 of the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations:

Any Contracting State may, at any time, declare that the provisions of this Convention will be extended, in relation to other States making a declaration under this Article, to an official deed (“*acte authentique*”) drawn up by or before an authority or public official and directly enforceable in the State of origin insofar as these provisions can be applied to such deeds.³²³

184. Although, curiously, one author has found it possible to affirm that unilateral statements made under such optional clauses “*function*[ed] as reservations”,³²⁴ in reality, at the technical level, they have very little in common with reservations, apart from the (important) fact that they both purport to modify the application of the effects of the treaty.

³²¹ See paragraph 90 above.

³²² Compare with article 1 of the Optional Protocol. See also the former articles 25 (Acceptance of the right to address individual petitions to the Commission), 46 (Acceptance of inter-State declarations) of the European Convention on Human Rights (these articles have been modified, to provide for automatic compulsory jurisdiction, by articles 33–34 of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms) and article 45, paragraph 1, of the American Convention on Human Rights: “Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.”

³²³ See also article 16 and the second paragraph of article 17 of the Convention on the taking of evidence abroad in civil or commercial matters, and article 15 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, or article 4, paragraphs 2 and 4, of ILO Convention (No. 118) concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (see also the examples given in the “Written statement of the International Labour Organization”, memorandum by ILO (*I.C.J. Pleadings, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, p. 232) (*Advisory Opinion, I.C.J. Reports 1951*, p. 15), or again article 4, paragraph 2 (g), of the United Nations Framework Convention on Climate Change.

³²⁴ “[I]t is valid to conclude that they *function* as reservations” Gormley, *loc. cit.*, part two, p. 430). The author makes this comment with regard to former article 25 of the European Convention on Human Rights; see also pages 68–75 (*loc. cit.*, part one) regarding comparable clauses appearing in the international labour conventions.

185. It is quite clear that “opt-out clauses seem to be much closer to reservations than opt-in clauses”.³²⁵ Indeed, not only can (a) statements made under optional clauses be formulated, generally speaking, at any time, but also; (b) optional clauses “start from a presumption that parties are not bound by anything other than they have explicitly chosen”,³²⁶ while exclusionary clauses, like the mechanism for reservations, start from the opposite assumption; and (c) statements made under optional clauses purport not to “exclude or to modify the legal effect of certain provisions of [a] treaty in their application” to their author³²⁷ or to limit the obligations imposed on [the author] by the treaty,³²⁸ but, instead, to increase them, while the mere entry into force of the treaty for the author does not have this effect.

186. Here again, to a certain degree, the complex problems of “extensive reservations”³²⁹ arise. However, draft guideline 1.4.1 adopted by the Commission at its fifty-first session in 1999 states that:

A unilateral statement formulated by a State or an international organization in relation to a treaty whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

187. The only difference between the statements envisaged in that draft guideline and those under consideration here is that the former are formulated on the sole initiative of the author, while the latter are made under a treaty.

188. Given the great differences between them, a confusion between reservations, on the one hand, and statements made under an optional clause, on the other, need hardly be feared, so that it might be asked whether it is necessary to include a guideline in the Guide to Practice in order to distinguish between them. The Special Rapporteur believes, however, that this question should be answered in the affirmative: even if statements based on optional clauses are clearly, at the technical level, very different from reservations, with which statements made under exclusionary clauses may be (and must be) equated, such statements are nevertheless the counterpart of statements made under exclusionary clauses and their general objective is too similar for them to be ignored, particularly since they are often presented jointly.³³⁰

189. It is therefore proposed that the following draft guideline should be included in section 1.4 of the Guide to Practice:

“1.4.6³³¹ *Unilateral statements adopted under an optional clause*

³²⁵ Spiliopoulou Åkermark, loc. cit., p. 505.

³²⁶ Ibid.

³²⁷ Draft guideline 1.1 of the Guide to Practice.

³²⁸ Draft guideline 1.1.5.

³²⁹ See *Yearbook ... 1998* (footnote 3 above), pp. 258–260, paras. 213–222.

³³⁰ See, for example, Virally, who includes them under the same heading, “optional clauses” (loc. cit., pp. 13–14).

³³¹ This numbering is provisional: the Commission may wish to place this guideline after draft guideline 1.4.1.

“A unilateral statement made by a State or an international organization in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not imposed on them solely by the entry into force of the treaty is outside the scope of the present Guide to Practice.”

190. It goes without saying that, if the treaty so provides or, given the silence of the treaty, if it is not contrary to the object and purpose of the provision in question,³³² there is nothing to prevent such a statement, in turn, from being accompanied by restrictions aimed at limiting the legal effect of the obligation thereby accepted.

191. This is the case with the reservations frequently made by States when they accept the optional clause recognizing the optional jurisdiction of ICJ under Article 36, paragraph 2, of its Statute.³³³

192. There can be no question, in the context of the present report, of entering into a detailed analysis of the legal nature of these reservations and conditions.³³⁴ It is sufficient to express support for the views expressed by Rosenne in his masterpiece on the law and practice of ICJ.³³⁵

There is a characteristic difference between these reservations, and the type of reservation to multilateral treaties encountered in the law of treaties ... Since the whole transaction of accepting the compulsory jurisdiction is *ex definitione* unilateral and individualized and devoid of any multilateral element or element of negotiation, the function of reservations in a declaration cannot be to exclude or vary the legal effect of some existing provision in relation to the State making the declaration. Their function, together with that of the declaration itself, is to define the terms on which that State unilaterally accepts the compulsory jurisdiction—to indicate the disputes which are included within that acceptance, in the language of the *Right of Passage* (Merits) case.³³⁶

³³² In the *Loizidou* case (*Loizidou v. Turkey*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 310 (*Preliminary Objections*), *Judgment of 23 March 1995* (Council of Europe, Strasbourg, 1995), p. 139, para. 75), the European Court of Human Rights held that “having regard to the object and purpose of the [European] Convention [on Human Rights]”, the consequences of restrictions on its competence “for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have been expressly provided for. However no such provision exists in either article 25 or article 46” (on these provisions, see footnote 322 above).

³³³ Although the Statute is silent on the possibility of optional declarations under Article 36, paragraph 2, being accompanied by reservations other than the condition of reciprocity, this power, which is well established in practice and was confirmed by Committee IV/1 of Commission IV of the United Nations Conference on International Organization (see IV/7, p. 39), is quite clear. See Rosenne, *The Law and Practice of the International Court, 1920–1996*, pp. 767–769; see also the dissenting opinion of Judge Bedjaoui in the *Fisheries Jurisdiction* case (*Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*), p. 533, para. 42; and, for a recent discussion of this question, see the pleadings in *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction, Judgment, I.C.J. Reports 2000*, pp. 29–30, paras. 37–38.

³³⁴ Rosenne makes a distinction between these two concepts (op. cit., pp. 768–769) which is not convincing to the Special Rapporteur, but this is irrelevant for the purposes of the present report.

³³⁵ However, the second reason mentioned by Rosenne does not seem conclusive: it is based on the control exercised by the Court on the validity of reservations included in optional declarations (op. cit., pp. 769–770); but if it is not inherent to the institution of reservations to treaties, this control may also be exercised, if necessary, on reservations to multilateral treaties (see *Yearbook ... 1996* (footnote 16 above), paras. 177–251).

³³⁶ Op. cit., p. 769. The passage in question of the judgment appears in *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports*

193. These observations are consistent with the jurisprudence of ICJ, and, in particular, its recent judgment in the *Fisheries Jurisdiction* case between Spain and Canada:

Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court ... All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles of interpretation throughout.³³⁷

194. The same goes for the reservations which States attach to statements made under other optional clauses such as, for example, those resulting from the acceptance of the jurisdiction of ICJ under article 17 of the General Act of Arbitration³³⁸ in respect of which the Court has stressed "the close and necessary link that always exists between a jurisdictional clause and reservations to it".³³⁹

195. It is therefore impossible simply to equate reservations appearing in the unilateral statements by which a State or an international organization accepts a provision of a treaty under an optional clause with reservations to a multilateral treaty. It is undoubtedly true that their ultimate objective is to limit the legal effect of the provision which the author of the statement thereby recognizes as being applicable to it. But the reservation in question cannot be separated from the statement and does not, in itself, constitute a unilateral statement.

196. In view of the great theoretical and practical importance³⁴⁰ of the distinction, it seems necessary that this should be reflected in a guideline of the Guide to Practice, which is the necessary complement to draft guideline 1.4.6 proposed above. It could be drafted as follows:

"1.4.7 Restrictions contained in unilateral statements adopted under an optional clause

"A restriction or condition contained in a unilateral statement adopted under an optional clause does not constitute a reservation within the meaning of the present Guide to Practice."

(c) *Unilateral statements providing for a choice between the provisions of a treaty*

197. While article 17, paragraph 1, mentioned above,³⁴¹ of the 1969 and 1986 Vienna Conventions concerns the partial exclusion of the provisions of a

1960, p. 34.

³³⁷ *I.C.J. Reports 1998* (see footnote 333 above), p. 453, para. 44. See also page 454, para. 47: "Therefore, declarations and reservations are to be read as a whole."

³³⁸ Without prejudice to the exact legal nature of article 38 of this Act; see paragraph 200 below.

³³⁹ *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 33, para. 79. For a recent discussion of this question, see again the pleadings in the *Aerial Incident of 10 August 1999* case (footnote 333 above).

³⁴⁰ Particularly as regards interpretation; see the aforementioned judgment of ICJ in the *Fisheries Jurisdiction* case (footnote 333), paras. 42–56.

³⁴¹ Para. 148.

treaty under an exclusionary clause, paragraph 2 of the same provision envisages the intellectually different hypothesis in which the treaty contains a clause allowing a choice between several of its provisions:

The consent of a State [or an international organization] to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

198. The commentary to this provision, reproduced without change by the United Nations Conference on the Law of Treaties,³⁴² is concise but is sufficiently clear about the hypothesis envisaged:

Paragraph 2 takes account of a practice which is not very common but which is sometimes found, for example, in the General Act for the Pacific Settlement of International Disputes and in some international labour conventions. The treaty offers each State a choice between differing provisions of the treaty.³⁴³

199. As has been noted,³⁴⁴ it is not accurate (or, at all events, not very accurate) to say that such a practice is, today, not very common. It is actually fairly widespread, at least in the apparently rather vague sense given to it by the Commission at its eighteenth session in 1966. This includes two different hypotheses, however, which do not fully overlap.

200. The first is illustrated, for example, by the statements made under the General Act of Arbitration,³⁴⁵ article 38, paragraph 1, of which provides:

Accessions to the present General Act may extend:

A. Either to all the provisions of the Act (Chapters I, II, III and IV);

B. Or to those provisions only which relate to conciliation and judicial settlement (Chapters I and II), together with the general provisions dealing with these procedures (Chapter IV).

201. The same is true of several ILO conventions, in which this technique, often used subsequently,³⁴⁶ was introduced by Convention (No. 102) concerning Minimum Standards of Social Security, article 2 of which provides:

Each Member for which this Convention is in force—

(a) shall comply with—

(i) Part I;

(ii) at least three of Parts II, III, IV, V, VI, VII, VIII, IX and X, ...;

(iii) the relevant provisions of Parts XI, XII and XIII; and

(iv) Part XIV.

202. Along the same lines, two conventions of great scope which were adopted in the context of the Council of Europe may be cited:

³⁴² See footnote 287 above.

³⁴³ *Yearbook ... 1966* (see footnote 212 above), p. 202, para. (3) of the commentary to article 14 (became article 17 in 1969).

³⁴⁴ Spiliopoulou Åkermark, loc. cit., p. 504.

³⁴⁵ The Revised General Act for the Pacific Settlement of International Disputes adds a third possibility:

"C. Or to those provisions only which relate to conciliation (chapter I), together with the general provisions concerning that procedure (chapter IV)."

³⁴⁶ See Imbert, op. cit., p. 172.

(a) The European Social Charter, article 20, paragraph 1, of which provides for a partially optional system of acceptance.³⁴⁷

Each of the Contracting Parties undertakes:

(a) to consider part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that Part;

(b) to consider itself bound by at least five of the following Articles of Part II of this Charter: Articles 1, 5, 6, 12, 13, 16 and 19;

(c) ... to consider itself bound by such a number of Articles or numbered paragraphs of Part II of the Charter as it may select, provided that the total number of Articles or numbered paragraphs by which it is bound is not less than 10 Articles or 45 numbered paragraphs;

this complex system was used again in article A, paragraph 1, of the revised European Social Charter;³⁴⁸

(b) Article 2 of the European Charter for Regional or Minority Languages is similar:

1. Each Party undertakes to apply the provisions of Part II to all the regional or minority languages spoken within its territory and which comply with the definition in Article 1.

2. In respect of each language specified at the time of ratification, acceptance or approval, in accordance with Article 3, each Party undertakes to apply a minimum of thirty-five paragraphs or subparagraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13.

203. A superficial reading of these provisions could perhaps give rise to the impression that they are optional clauses within the meaning proposed above.³⁴⁹ In reality, however, they are very different: the statements which they invite the parties to make are not optional, but binding, and condition the entry into force of the treaty for them,³⁵⁰ and they have to be made at the time of giving consent to be bound by the treaty.

204. Similarly, these statements cannot be completely equated with those made in application of an exclusionary clause.³⁵¹ Clearly, they end up by excluding the application of provisions which do not appear in them. But they do so indirectly, through partial acceptance,³⁵² and not by excluding the legal effect of those provisions, but because of the silence of the author of the statement in their regard.

205. The same is true of statements made under the second category of treaty clauses which, even more clearly, offer a choice between the provisions of a treaty because they oblige the parties to choose a given provision (or a given set of provisions) *or, alternatively*, another provision (or another set of provisions). This is no longer a question of choosing *among* the provisions of a treaty but of choosing *between them*, on the understand-

ing that, in contrast to the previous case, there can be no accumulation,³⁵³ and the acceptance of the treaty is not partial (even if the obligations deriving from it may be more or less binding depending on the option selected).

206. These “alternative clauses” are less common than those analysed above. They do exist, however, as demonstrated, for example, by:

(a) Article 2 of ILO Convention (No. 96) concerning Fee-Charging Employment Agencies (revised 1949):³⁵⁴

1. Each Member ratifying this Convention shall indicate in its instrument of ratification whether it accepts the provisions of Part II of the Convention, providing for the progressive abolition of fee-charging employment agencies conducted with a view to profit and the regulation of other agencies, or the provisions of Part III, providing for the regulation of fee-charging employment agencies including agencies conducted with a view to profit.

2. Any Member accepting the provisions of Part III of the Convention may subsequently notify the Director General that it accepts the provisions of Part II; as from the date of the registration of such notification by the Director General, the provisions of Part III of the Convention shall cease to be applicable to the Members in question and the provisions of Part II shall apply to it;

(b) Or article XIV, section 1, of the Articles of Agreement of the International Monetary Fund (as amended in 1978) whereby:

Each member shall notify the Fund whether it intends to avail itself of the transitional arrangements in section 2 of this Article [Exchange restrictions], or whether it is prepared to accept the obligations of article VIII, Sections 2, 3 and 4 [General obligations of member States]. A member availing itself of the transitional arrangements shall notify the Fund as soon thereafter as it is prepared to accept these obligations.

207. As has been observed, “[o]ptional commitments ought to be distinguished from authorized reservations, although they in many respects resemble such reservations”.³⁵⁵ Moreover, the silence of article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions, which differs greatly from the reference in paragraph 1 to articles 19 to 23 on reservations³⁵⁶ constitutes, in contrast with unilateral statements made under an exclusionary clause, an indication of the clear dividing line between reservations and these alternative commitments.

208. In the two forms which they may take, these statements are clearly alternatives to reservations in that they constitute procedures which modify the application of a treaty on the basis of the preferences of the parties (even if these preferences are strongly indicated in the treaty). In addition, like reservations, they take the form of unilateral statements made at the time of signature or of the expression of consent to be bound (even if they may subsequently be modified—but, under certain conditions, reservations may be modified too). And the fact that they have to be provided for in the treaty to which they apply does not constitute a factor differentiating

³⁴⁷ Wiebringhaus, “La Charte sociale européenne: vingt ans après la conclusion du Traité”, p. 936.

³⁴⁸ See also articles 2–3 of the European Code of Social Security.

³⁴⁹ Para. 179.

³⁵⁰ This may be seen from the rest of the wording of article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions cited above (para. 197).

³⁵¹ See paragraphs 148–178 above.

³⁵² Imbert, *op. cit.*, p. 170.

³⁵³ Article 287 of the United Nations Convention on the Law of the Sea is midway between the two approaches: States must choose one or more binding procedures for the settlement of disputes leading to binding decisions, failing which the arbitral procedure provided for in annex VII applies. But there may be an accumulation of different procedures.

³⁵⁴ Imbert stresses that this is the best example of the type of clause allowing States to make a choice in the restrictive sense (*op. cit.*, p. 172); see also Horn, *op. cit.*, p. 134.

³⁵⁵ Horn, *op. cit.*, p. 133.

³⁵⁶ See paragraphs 150 and 170 above.

them from reservations, since reservations may also be provided for in a restrictive way by a reservation clause.

209. There are striking differences between these statements and reservations, however, because unlike reservations, these statements are the condition *sine qua non*, by virtue of the treaty, of the participation of the author of the statement in the treaty. Moreover, although they exclude the application of certain provisions of the treaty in respect of the State or international organization making the statement, this exclusion relates to the treaty itself and is inseparable from the entry into force of other provisions of the treaty in respect of the author of the same statement.

210. It seems necessary to specify, in the Guide to Practice, that unilateral statements meeting this definition do not constitute reservations within the meaning of the Guide. This could be done in the form of the following draft guideline:

“1.4.8 Unilateral statements providing for a choice between the provisions of a treaty

“A unilateral statement made by a State or an international organization in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty is outside the scope of the present Guide to Practice.”

Conclusion of part I

211. In the opinion of the Special Rapporteur, this draft guideline should come at the end of section 1 of

the Guide to Practice concerning the definition of reservations and interpretative declarations.

212. It goes without saying that the 34 draft guidelines of which section 1 is composed cannot attempt to cover all the hypotheses which could occur or resolve in advance all the problems which could arise, so great is the “imagination of legal scholars and diplomats”.³⁵⁷ However, they probably do cover all the *categories* of doubtful cases in which it can legitimately be questioned whether a procedure purporting to modify the application of the treaty is or is not a reservation or an interpretative declaration.

213. The next parts of the Guide to Practice will be strictly confined to unilateral statements corresponding to the various definitions contained in sections 1.1 and 1.2. It is to these definitions alone that the legal regime of reservations and interpretative declarations, as specified in these other parts, applies, which does not mean either that it will necessarily be a uniform regime for each of these categories³⁵⁸ or that certain elements of these regimes are not applicable to other unilateral statements which do not fall within the scope of the present Guide to Practice.

³⁵⁷ Virally, loc. cit., p. 6. See paragraph 80 above.

³⁵⁸ Thus, for example, the Commission seems to be inclined towards the definition of a set of rules applicable to conditional interpretative declarations which is markedly closer to the legal regime of reservations than to that of “simple interpretative declarations” (*Yearbook ... 1999*, (see footnote 75 above), pp. 105–106, paras. 13–18 of the commentary to draft guideline 1.2.1).

PART II

PROCEDURE REGARDING RESERVATIONS AND INTERPRETATIVE DECLARATIONS

Introduction

214. In his second report, the Special Rapporteur proposed a “provisional general outline of the study” on reservations,³⁵⁹ which the Commission endorsed.³⁶⁰ According to this outline, the first two parts of the study on reservations to treaties would deal with, respectively, the unity or diversity of the legal regime for reservations to multilateral treaties (reservations to human rights treaties) and the definition of reservations. The first of these topics was addressed in chapter II of the second report³⁶¹ and the second was addressed in the third report,³⁶² a

small part of the fourth report³⁶³ and chapter I of the present report.³⁶⁴

215. Also according to the general outline, the third part of the study was to deal with the formulation and withdrawal of reservations, acceptances of reservations and objections to reservations. The overall format of this part was presented as follows in the second report:

III. FORMULATION AND WITHDRAWAL OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS

A. Formulation and withdrawal of reservations

1. Acceptable times for the formulation of a reservation (1969 and 1986, art. 19, *chapeau*);

³⁶³ *Yearbook ... 1999* (see footnote 1 above), pp. 135–137, paras. 44–54.

³⁶⁴ All the draft guidelines dealing with the definition of reservations are contained in annex II to the present report.

³⁵⁹ *Yearbook ... 1996* (see footnote 16 above), p. 48, para. 37.

³⁶⁰ See *Yearbook ... 1996*, vol. II (Part Two), p. 80, para. 113, and *Yearbook ... 1997* (footnote 17 above), pp. 52–53, paras. 116–123.

³⁶¹ *Yearbook ... 1996* (see footnote 16 above), p. 52.

³⁶² *Yearbook ... 1998* (see footnote 3 above), pp. 236–284, paras. 47–413.

2. Procedure regarding formulation of a reservation (1969 and 1986, art. 23, paras. 1 and 4);

3. Withdrawal (1969 and 1986, arts. 22, paras. 1 and 3 (a), and 23, para. 4).

B. Formulation of acceptances of reservations

1. Procedure regarding formulation of an acceptance (1969 and 1986, art. 23, paras. 1 and 3);

2. Implicit acceptance (1969 and 1986, art. 20, paras. 1 and 5);

3. Obligations and express acceptance (1969 and 1986, art. 20, paras. 1–3) (paras. 124 (b), 148 (l)).

C. Formulation and withdrawal of objections to reservations

1. Procedure regarding formulation of an objection (1969 and 1986, art. 23, paras. 1 and 3);

2. Withdrawal of an objection (1969 and 1986, arts. 22, paras. 2 and 3 (b), and 23, para. 4).³⁶⁵

216. Overall, this format still seems valid and the Special Rapporteur proposes to follow it in the present report.

217. Nevertheless, he has seen fit to make some adjustments in the light, essentially, of the inclusion in section 1 of the Guide to Practice of a number of definitions dealing with interpretative declarations.³⁶⁶

218. Although he had hoped to be able to begin dealing comprehensively with the “legal regime of interpretative declarations” in his third report,³⁶⁷ the Special Rapporteur found, when he came to write that report, that this was neither feasible nor desirable.³⁶⁸ The legal regime of interpretative declarations cannot be studied independently of the related element of reservations.³⁶⁹ This is particularly true of conditional interpretative declarations, the legal regime of which undoubtedly is (or should be) very close to that of reservations.³⁷⁰

³⁶⁵ *Yearbook ... 1996* (see footnote 16 above), p. 48, para. 37. The references in parentheses are to the relevant articles of the 1969 and 1986 Vienna Conventions. Moreover, a footnote (*ibid.*, footnote 59) stated that: “To the extent that the role of depositories seems, in the predominant system, to have been exclusively ‘mechanical’, this chapter will probably be the logical—although probably not exclusive—place to discuss that topic.”

³⁶⁶ See draft guidelines 1.2, 1.2.1 and 1.2.2.

³⁶⁷ *Yearbook ... 1996* (see footnote 16 above), provisional general outline of the study, p. 48, para. 37.

³⁶⁸ See, for instance, *Yearbook ... 1997*, vol. II (Part Two), p. 52, para. 115, and *Yearbook ... 1998*, vol. II (Part Two), p. 98, paras. 534 and 539. See also the following summary records of the Commission: *Yearbook ... 1997*, vol. I, 2487th meeting, paras. 15 (Mr. Pellet) and 28 (Mr. Pambou-Tchivounda); 2500th meeting, para. 35 (Mr. Addo); 2552nd meeting, paras. 5 (Mr. Lukashuk), 9 (Mr. Pambou-Tchivounda), 15–16 (Mr. Pellet), 29–31 (Mr. Hafner), 32 (Mr. Brownlie) and 37–38 (Mr. Simma).

³⁶⁹ In a recent study, Sapienza accepts that the legal regime of reservations must be a starting point for studying the legal regime of interpretative declarations, but argues that the latter regime is a separate issue (*Dichiarazioni interpretative unilaterali e trattati internazionali*, p. 222). See likewise Horn, *op. cit.*, pp. 243–244.

³⁷⁰ See *Yearbook ... 1998* (footnote 3 above), p. 274, para. 328.

219. Like the other parts of the study, this part will therefore deal both with the procedure regarding reservations (and acceptances and objections related thereto) and with the formulation and withdrawal of interpretative declarations (straightforward or conditional) and reactions to such declarations.

220. Once again, the Special Rapporteur wishes to explain that he intends to adhere strictly to the approach proposed in the 1996 provisional general outline and to deal in this part of the study only with the *procedural* issue of the *formulation* of the various kinds of interpretative declaration, and not with the issue of whether or not they are lawful, which he will take up in his next report. However, this does not mean that there is no link whatsoever between the two issues: the respect for form considered in this part is an element of the lawfulness of reservations and determines their legal effects, as the wording of the opening phrase of article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions clearly shows.³⁷¹ “A reservation established with regard to another party *in accordance with articles 19, 20 and 23* ...*” produces the effects indicated in the subparagraphs that follow that paragraph.

221. Moreover, as in the case of definitions and in accordance with the decision taken by the Commission at its forty-seventh session in 1995,³⁷² one should start systematically with the relevant provisions of the 1969 and 1986 Vienna Conventions whenever those Conventions, no matter how incomplete, contain rules on some of the procedural problems dealt with in this part. This is obviously true of article 23 of the Vienna Conventions, entitled “Procedure regarding reservations”, but other provisions of the Conventions contain rules on the formulation of reservations, their acceptance or objections thereto. These provisions are listed in the excerpt from the provisional general outline reproduced above;³⁷³ they are the *chapeau* to article 19, part of article 20, and article 22. As a result, as was done for the definition of reservations,³⁷⁴ the Special Rapporteur will propose reproducing these provisions in the Guide to Practice, adapting them where necessary to the Guide’s form and layout.

222. By virtue of the above, the present part will be organized as follows:

(a) Chapter III: Formulation, modification and withdrawal of reservations and interpretative declarations;

(b) Chapter IV: Formulation and withdrawal of acceptances of and objections to reservations and of reactions to interpretative declarations (“reservations dialogue”).

³⁷¹ See likewise Jennings and Watts, eds., *Oppenheim’s International Law*, p. 1247.

³⁷² *Yearbook ... 1995*, (See footnote 5 above), p. 108, para. 487 (d).

³⁷³ Para. 215.

³⁷⁴ See draft guideline 1.1.

CHAPTER II

Formulation, modification and withdrawal of reservations and interpretative declarations

223. According to Ruda: “The procedure regarding reservations should necessarily be analogous to the procedure for the conclusion of treaties, because a reservation modifies the application of the provisions of a treaty, i.e., it modifies the substance of a contractual stipulation.”³⁷⁵ This is true in part, but disregards the fact that reservations are, by definition, *unilateral* declarations, an essential characteristic that makes them very different from the treaty to which they relate and which explains the procedural particularities of their formulation.

224. As one writer has said: “The formulation of reservations to a treaty is regulated by *diplomatic-procedural* norms, which concern the *moment* at which the reservation can be made; the *form* which it must take; the *publicity* which must be given to it; and, lastly, the *revocability* which is its defining feature.”³⁷⁶ However, this ignores the fact that the withdrawal of reservations, a consequence of their “revocability”, is subject to special rules which are not entirely symmetrical with those applicable to their formulation, since the modification of reservations can be a means of partially withdrawing them, something which remains highly problematic and should therefore be studied at the same time as withdrawal *sensu stricto*.

225. While the procedure for the formulation and withdrawal of reservations is fairly precisely regulated in the Vienna Conventions, they make no mention of the rules applicable to interpretative declarations, which one can but try to “develop progressively” by comparison with those on the formulation and withdrawal of reservations, in the light of a somewhat vague practice, since it does not seem possible to develop them entirely separately.

226. This chapter will therefore be divided into two sections on, respectively: (a) the formulation of reservations and interpretative declarations and (b) their withdrawal and modification.

A. Formulation of reservations and interpretative declarations

227. While the three Vienna Conventions of 1969, 1978 and 1986 define reservations as being “made” at specific moments,³⁷⁷ it is the verb “formulate” that is used in the substantive provisions on reservations:

(a) “A State may, when signing, ratifying, accepting, approving or acceding to a treaty, *formulate** a reserva-

³⁷⁵ Loc. cit., p. 193.

³⁷⁶ Maresca, *Il diritto dei trattati: la Convenzione codificatrice di Vienna del 23 Maggio 1969*, p. 299.

³⁷⁷ See article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and article 2, paragraph 1 (j) of the 1978 Vienna Convention.

tion unless ...” (art. 19 (Formulation of reservations) of the 1969 Vienna Convention);³⁷⁸

(b) “A reservation ... must be *formulated** in writing ...” (art. 23 (Procedure regarding reservations), para. 1, of the 1969 and 1986 Vienna Conventions);

(c) “If *formulated** when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed ...” (art. 23, para. 2, of the 1969 Vienna Convention);³⁷⁹

(d) When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty ... it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States ... unless, when making the notification of succession, it expresses a contrary intention or *formulates** a reservation which relates to the same subject matter as that reservation (art. 20, para. 1, of the 1978 Vienna Convention);

(e) “When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty ... a newly independent State may *formulate** a reservation unless the reservation is one the *formulation** of which would be excluded ...” (art. 20, para. 2, of the 1978 Vienna Convention);

(f) “When a newly independent State *formulates** a reservation ...” (art. 20, para. 3, of the 1978 Vienna Convention).

228. The use of the verb “formulate” rather than “make” in the above provisions is the result of a deliberate choice:³⁸⁰ the authors of the Vienna Conventions wanted to make it clear that a reservation is not sufficient in itself and produces effects (hence is “made”) only if it is either accepted³⁸¹ or expressly authorized by the treaty.³⁸² This choice does not, of course, solve

³⁷⁸ Article 19 of the 1986 Vienna Convention is identical, except that it also gives international organizations the power to formulate reservations.

³⁷⁹ Article 23, paragraph 2, of the 1986 Vienna Convention is identical, except that it adds act of formal confirmation to the list of ways of expressing consent to be bound by a treaty.

³⁸⁰ See with regard to future article 19 of the 1969 Vienna Convention, the first and fourth reports of Sir Humphrey Waldock on the law of treaties (*Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 62, para. (1) of the commentary on articles 17, 18 and 19, and p. 65, para. (9) of the commentary on article 17, and *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 50, para. 6), and the rejection of the proposal by China at the United Nations Conference on the Law of Treaties that the words “formulate a reservation” should be replaced by “make reservations” (*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 the first session of the Conference (A/CONF.39/14), p. 133, para. 176, p. 134, para. 177 (ii) and p. 137, para. 183 (b)).

³⁸¹ See article 20 of the 1969 and 1986 Vienna Conventions.

³⁸² Which is why article 19, paragraph 2 (b), of the 1969 and 1986 Vienna Conventions refers to “specified reservations” which “may be made*”.

every problem,³⁸³ and the Commission will have to come back to it when it takes up the question of the legal effects of reservations; it nevertheless shows, quite rightly, that the formulation of a reservation is part of a *process* of which it is the starting point and which continues (in theory) with its acceptance (or rejection—by means of an objection), which are dealt with in the next chapter of this report.

229. For now, all that matters is this starting point, namely, the moment at which a reservation (or an interpretative declaration) is formulated, the form it takes and the publicity which must be given to it. The hidden part of the iceberg, i.e. the internal procedure leading to the formulation of the reservation or interpretative declaration, must also be examined, as must its international implications.

1. MOMENT OF FORMULATION OF RESERVATIONS AND INTERPRETATIVE DECLARATIONS

230. Although the moment at which a reservation or a conditional interpretative declaration may be formulated is mentioned in their definitions,³⁸⁴ it is necessary to come back to it: first of all, simply listing the “instances in which a reservation may be formulated”, to use the title chosen by the Commission for draft guideline 1.1.2, does not solve all the problems raised in this regard; secondly, the Vienna Conventions themselves address the issue in several places.

231. The limit on the time within which a unilateral declaration may be formulated in order to constitute a reservation under article 2, paragraph 1 (*d*), is in fact confirmed by articles 19 and 23, paragraph 2, of the 1969 Vienna Convention and the corresponding provisions of the 1986 Vienna Convention.³⁸⁵

Article 19. Formulation of reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless ...

Article 23. Procedure regarding reservations

...

2. If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

232. Moreover, article 20, paragraph 1, of the 1978 Vienna Convention accepts that a reservation may be maintained or formulated at the moment when “a newly

³⁸³ See the developments recorded by Imbert, *op. cit.*, pp. 83–86; see also pages 89–90 (*ibid.*) and Ruda, *loc. cit.*, p. 179. Moreover, it is hard to see why article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions uses the word “made” in the definition of reservations.

³⁸⁴ See draft guidelines 1.1, 1.1.2, 1.1.4 and 1.2.1.

³⁸⁵ It is the latter provisions which are reproduced here, since they include the act of formal confirmation among the means of expressing consent to be bound, which the 1969 Vienna Convention, dealing exclusively with treaties among States, omits.

independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession”.

233. There is no point in returning to the issues already addressed and resolved by the Commission in connection with the definition of reservations. It can be taken as settled that:

(a) The list in article 19 of the 1969 and 1986 Vienna Conventions includes “all the means of expressing consent to be bound by a treaty mentioned” in the two Conventions,³⁸⁶

(b) A reservation may be formulated in relation to a territory in respect of which it makes a notification of territorial application,³⁸⁷

(c) The omission from the list in article 19 of the possibility of formulating a reservation on the occasion of a succession of States was remedied, at least in part, by article 20 of the 1978 Vienna Convention,³⁸⁸ and

(d) It is not useful to state expressly that a treaty may provide for the possibility of formulating a reservation at any other moment, since all the guidelines in the Guide to Practice are intended to substitute for an absence of will and the contracting parties to a treaty can always derogate therefrom if they see fit.³⁸⁹

234. On this latter point, it could nevertheless be asked whether it would be advisable to indicate in the Guide to Practice that such a possibility must be expressly provided for in the treaty or unanimously accepted by the parties. This goes back to the more general problem of reservations which are formulated late (see paragraphs 279–306 below). Moreover, a number of points should be made regarding the formulation *ratione temporis* of reservations and interpretative declarations (see paragraphs 235–278 below).

(a) *Reservations and interpretative declaration formulated ratione temporis*

(i) *The travaux préparatoires of articles 19 and 23, paragraph 2, of the 1969 and 1986 Vienna Conventions*

³⁸⁶ See draft guideline 1.1.2 and its commentary (*Yearbook ... 1998* (footnote 63 above), pp. 103–104); see also the third report on reservations to treaties, *ibid.* (footnote 3 above), pp. 247–248, paras. 138–143.

³⁸⁷ See draft guideline 1.1.4 and its commentary (*Yearbook ... 1998* (footnote 63 above), pp. 105–106); see also the third report on reservations to treaties, *ibid.* (footnote 3 above), pp. 248–249, paras. 144–146.

³⁸⁸ See draft guideline 1.1 and paragraphs (5) (*a*) and (8) (*b*) of its commentary (*Yearbook ... 1998* (footnote 63 above), pp. 99–100); see also the third report on reservations to treaties, *ibid.* (footnote 3 above), p. 239, paras. 70–72, and p. 247, para. 138. The specific problems with regard to succession of States will be dealt with in a separate study and in a specific part of the Guide to Practice.

³⁸⁹ See, for instance, the second report on reservations to treaties, *Yearbook ... 1996* (footnote 16 above), pp. 63 and 67, paras. 133 and 163, and the third report, *Yearbook ... 1998* (footnote 3 above), p. 243, paras. 102–103 and pp. 247–248, paras. 138–140; see also *Yearbook ... 1997* (footnote 17 above), p. 53, para. 122, and *Yearbook ... 1998* (footnote 63 above) ..., p. 103, para. (5) of the commentary to draft guideline 1.1.2.

235. The text of article 23, paragraph 2, of the 1986 Vienna Convention,³⁹⁰ which requires the confirmation of reservations made when signing if they have been formulated “subject to ratification, act of formal confirmation, acceptance or approval”, is reproduced above (para. 231).

236. This provision originated in the proposal, made by Sir Humphrey Waldock in his first report on the law of treaties, to include a provision (draft art. 17, para. 3 (b)), based on the principle that “the reservation will be presumed to have lapsed unless some indication is given in the instrument of ratification that it is maintained”.³⁹¹ The Special Rapporteur did not conceal that “[c]learly, different opinions may be held as to what exactly is the existing rule on the point, if indeed any rule exists at all”,³⁹² mentioning, in particular, article 14 (d)³⁹³ of the Harvard Draft Convention on the Law of Treaties, which posited the contrary assumption.³⁹⁴

237. The members of the Commission, absorbed in the discussion of the provisions concerning the lawfulness of reservations, attached hardly any importance to the part of the draft of what was then article 17 during discussion in the plenary meeting.³⁹⁵ After considering it on two successive occasions, the Drafting Committee adopted the principle proposed by the Special Rapporteur, while making several changes (not all of them felicitous³⁹⁶) to the initial draft.³⁹⁷

238. The commentary on this provision (which became article 18, paragraph 2) is interesting in that it explains in a concise way the *raison d'être* of the rule adopted by the Commission:

A statement of reservation is sometimes made during the negotiation and duly recorded in the *procès-verbaux*. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. It seems essential, however, that the State concerned should formally reiterate the statement in some manner in order that its intention actually to formulate a reservation should be clear.³⁹⁸

239. Governments made hardly any comments on the substance of draft article 18. Nevertheless (leaving aside

³⁹⁰ The text of the same provision in the 1969 Vienna Convention is identical, the only difference being that it does not mention the procedure to be followed by an international organization.

³⁹¹ *Yearbook ... 1962* (see footnote 380 above), p. 66, para. (11) of the commentary on article 17.

³⁹² *Ibid.*

³⁹³ Sir Humphrey cited article 15 (d) by mistake.

³⁹⁴ “If a State has made a reservation when signing a treaty, its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty”; the Harvard draft is reproduced in *Yearbook ... 1950*, vol. II, pp. 243–244.

³⁹⁵ See the summary records of the 651st to 656th meetings (25 May–4 June 1962), *Yearbook ... 1962*, vol. I, pp. 139–179. See, however, the comments by Mr. Castrén (*ibid.*, 652nd meeting, p. 148) and Sir Humphrey Waldock (*ibid.*, 656th meeting, pp. 174–175, para. 33).

³⁹⁶ The Drafting Committee referred, in particular, to confirmation of the reservation by the State which formulates it “when carrying out the act establishing its own consent to be bound by the treaty” (*Yearbook ... 1962*, vol. I, 663rd meeting, p. 221, para. 3).

³⁹⁷ See the summary records of the 663rd and 668th meetings, *Yearbook ... 1962*, vol. I, pp. 221–223 and 257.

³⁹⁸ *Yearbook ... 1962*, vol. II, document A/5209, p. 180.

the observations of Denmark and Finland, which concerned minor drafting questions³⁹⁹), note can be taken of Sweden’s comment that articles 18–19, which dealt with acceptance of and objections to reservations, contained much that “simply exemplifies what the parties may prescribe or that merely amounts to procedural rules which would fit better into a code of recommended practices”.⁴⁰⁰ Further to these observations, the Special Rapporteur, Sir Humphrey Waldock, proposed in his fourth report a new article 20 dealing with the question of reservations from a procedural standpoint.⁴⁰¹ The first two paragraphs of this article, entitled “Procedure regarding reservations”, corresponded to article 18, paragraphs 2–3, and article 19 of the former draft, and read as follows:

1. A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States.⁴⁰²

2. A reservation put forward upon the occasion of the adoption of the text or upon signing a treaty subject to ratification, acceptance or approval, shall be effective only if the reserving State formally confirms the reservation when ratifying, accepting or approving the treaty.⁴⁰³

240. During the discussions in the Commission on second reading, few observations were made on the formulation of reservations.⁴⁰⁴ Nevertheless, interesting comments were made on the “status” of a reservation formulated at the time of signing, pending its confirmation at the time of ratification.⁴⁰⁵ In this connection, the Special Rapporteur believed that the rules on acceptance of reservations should be applicable only after the reservation was confirmed; “otherwise, it might be difficult to frame a rule governing the case of tacit consent”.⁴⁰⁶ After certain changes had been made to it by the Drafting Committee, new article 20 was adopted by the Commission.⁴⁰⁷

241. Draft article 20, paragraph 2, as finally adopted, differed from the current text of article 23, paragraph 2, only by the inclusion of a reference to reservations formulated “on the occasion of the adoption of the text”,⁴⁰⁸

³⁹⁹ *Yearbook ... 1965* (see footnote 380 above), pp. 46–47. Japan also submitted draft articles which roughly recapitulated the Commission’s wording concerning the moment of formulation of reservations (*Yearbook ... 1966* (see footnote 212 above), p. 305).

⁴⁰⁰ *Yearbook ... 1965* (see footnote 380 above), p. 47. This allusion to a “code of recommended practices” testifies to an interesting intuition of the needs which the elaboration of the Guide to Practice is designed to meet.

⁴⁰¹ *Ibid.*, pp. 53–54.

⁴⁰² This paragraph recapitulates the preliminary clause of former article 18, paragraph 2 (a) (*Yearbook ... 1962* (see footnote 398 above), p. 176) and in a simplified form, paragraph 3 of that article.

⁴⁰³ This paragraph was a slightly simplified version of former article 18, paragraph 2 (b) (*ibid.*). For their part, paragraphs 3–4 dealt with express and tacit acceptance of a reservation and paragraphs 5–6 with objections to reservations.

⁴⁰⁴ See, however, the observations by Mr. Ruda (*Yearbook ... 1965*, vol. I, 797th meeting, p. 154, para. 71) and Mr. Rosenne (*ibid.*, 813rd meeting, p. 264, paras. 5–8).

⁴⁰⁵ See, in particular, the comments by Mr. Bartoš and Mr. Lachs (*ibid.*, 813rd meeting, p. 269).

⁴⁰⁶ *Ibid.*, para. 74.

⁴⁰⁷ *Ibid.*, 816th meeting, p. 284, para. 55.

⁴⁰⁸ “If formulated on the occasion of the adoption of the text or upon signing the treaty ...” (*Yearbook ... 1966* (see footnote 212 above), p. 208).

a reference that was deleted at the Vienna Conference under circumstances that have been described as “mysterious”.⁴⁰⁹ The commentary on this provision reproduces the 1962 text⁴¹⁰ almost verbatim and adds:

Paragraph 2 concerns reservations made at a later stage [after negotiation]: on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval. Here again the Commission considered it essential that, when definitely committing itself to be bound, the State should leave no doubt as to its final standpoint in regard to the reservation. The paragraph accordingly requires the State formally to confirm the reservation if it desires to maintain it. At the same time, it provides that in these cases the reservation shall be considered as having been made on the date of its confirmation, a point which is of importance for the operation of paragraph 5 of article [20 in the text of the Convention].⁴¹¹

242. The rule in article 23, paragraph 2, of the 1969 Vienna Convention was reproduced in its essence by Special Rapporteur Paul Reuter in his fourth and fifth reports on the question of treaties concluded between States and international organizations or between two or more international organizations, with only the drafting changes made necessary by the inclusion of international organizations⁴¹² and the introduction of the concept of “formal confirmation” (with the risks of confusion which this implies between that concept and the notion of simple “confirmation” of the reservation in article 23⁴¹³). This provision was adopted on first reading with the new drafting changes made necessary by the introduction into the draft of the concept of “formal confirmation”—equivalent to ratification for international organizations—in the form of two separate articles, owing to the distinction that was adopted for a while between, on the one hand, treaties between several international organizations and, on the other hand, treaties between States and one or more international organizations or between international organizations and one or more States.⁴¹⁴ The two articles 23 and 23 bis, which received no comments from Governments,⁴¹⁵ were again combined in a single provision on second reading. This provision differs from article 23 of the 1969 Vienna Convention only by the mention of international organizations and the mechanism of formal confirma-

tion (of the treaty itself).⁴¹⁶ The Vienna Conference on the Law of Treaties of 1986 adopted the text prepared by the Commission without making any changes to the French text.⁴¹⁷

(ii) *The obligation to confirm reservations made when signing*

243. While there can be hardly any doubt that at the time of its adoption, article 23, paragraph 2, of the 1969 Vienna Convention pertained more to progressive development than to codification in the strict sense,⁴¹⁸ it may probably be considered that the obligation formally to confirm reservations formulated when treaties in formal form are signed has become part of positive law. Crystallized by the 1969 Convention and confirmed in 1986, the rule is followed in practice and seems to satisfy an *opinio necessitatis juris* which allows a customary value to be assigned to it.

244. Thus, in an aide-memoire dated 1 July 1976, the United Nations Legal Counsel, describing the “practice of the Secretary-General in his capacity as depositary of multilateral treaties regarding ... reservations and objections to reservations relating to treaties not containing provisions in that respect”, relied on article 23, paragraph 2, of the 1969 Vienna Convention in concluding that: “If formulated at the time of signature subject to ratification, the reservation has only a declaratory effect, having the same legal value as the signature itself. It must be confirmed at the time of ratification; otherwise, it is deemed to have been withdrawn”.⁴¹⁹ The Council of Europe changed its practice in this regard in 1980;⁴²⁰ and in their answers to the Commission’s questionnaire on reservations to treaties, the States which replied to question 1.10.2⁴²¹ indicated that, in general, they confirmed reservations formulated when the treaty was signed at the time of ratification or accession.⁴²²

⁴¹⁶Tenth report of Mr. Reuter, *Yearbook ... 1981* (see footnote 414 above), and report of the Commission, *Yearbook ... 1982*, vol. II (Part Two), p. 37.

⁴¹⁷The Chairman of the Drafting Committee, Mr. Al-Khasawneh, stated that a correction had been made to the English text (replacing “by a treaty” with “by the treaty”) (*United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986, Official Records*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5, Vol.I), fifth plenary meeting, 18 March 1986, p. 15, para. 63).

⁴¹⁸See the first report of Sir Humphrey Waldock (*Yearbook ... 1962* (footnote 380 above) and paragraph 236 above. See also Greig, “Reservations: equity as a balancing factor?”, p. 28, and Horn, *op. cit.*, p. 41.

⁴¹⁹*United Nations Juridical Yearbook, 1976* (United Nations publication, Sales No. E.78.V.5), pp. 209 and 211. See also Whiteman, *Digest of International Law*, pp. 158–159.

⁴²⁰See Horn, *op. cit.*, and Polakiewicz, *Treaty-Making in the Council of Europe*, pp. 95–96.

⁴²¹“If reservations were formulated at the time when the treaty was signed, were they formally confirmed when the State expressed its definitive consent to be bound?” (*Yearbook ... 1996* (footnote 16 above), annex II, p. 99).

⁴²²See the replies by Japan, Switzerland (with the exception, it would appear, however, of the International Telecommunication Convention and the additional protocols thereto, but no explanation is given concerning this exception), France and Mexico. Bolivia indicated that on one occasion it formulated reservations when signing but did not

⁴⁰⁹“In paragraph 2, the phrase ‘on occasion of the adoption of the text’ mysteriously disappeared from the ILC text, when it was finally approved by the Conference” (Ruda, *loc. cit.*, p. 195). The Special Rapporteur found no trace of any amendment to this effect in the official records of the Conference.

⁴¹⁰See paragraph 238 above.

⁴¹¹*Yearbook ... 1966* (see footnote 212 above), p. 208.

⁴¹²*Yearbook ... 1975*, vol. II, document A/CN.4/285, p. 38, and *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/290 and Add.1, p. 146.

⁴¹³See the discussions on this subject at the 1434th meeting on 6 June 1977 (*Yearbook ... 1977*, vol. I, pp. 101–103). At the same meeting, a discussion began on the notion of international organizations having the capacity to become parties to a treaty (*ibid.*).

⁴¹⁴See the text and its commentary in *Yearbook ... 1976* (footnote 412 above), p. 146 (fifth report of Mr. Reuter) and *Yearbook ... 1977*, vol. II (Part Two), pp. 115–116 (report of the Commission—two separate articles; this distinction was abandoned in 1981—see the tenth report of Mr. Reuter, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, pp. 63–64). See also the discussions at the 1434th and 1451st meetings, *Yearbook ... 1977* (footnote 413 above) pp. 101–103 and 195–196).

⁴¹⁵The Council of Europe stated, however, that the rule contained in paragraph 2 of the article was in conformity with its practice (*Yearbook ... 1982*, vol. II (Part Two), annex, p. 143, para. 36).

245. Curiously, however, the practice of the Secretary-General of the United Nations is inconsistent with the conviction expressed by the Legal Counsel in 1976,⁴²³ since the former includes in the valuable publication entitled *Multilateral Treaties Deposited with the Secretary-General* reservations formulated when the treaty was signed, whether or not they were confirmed subsequently,⁴²⁴ even on the assumption that the State formulated other reservations when expressing its definitive consent to be bound.

246. In legal writing, the rule laid down in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions is the object of what now appears to be general approval,⁴²⁵ even if that was not always true in the past.⁴²⁶ In any event, whatever arguments might be advanced against it, they would not be of such a nature as to challenge a clear rule appearing in the Vienna Conventions that the Commission has decided to follow in principle, except in case of an overwhelming objection.

247. Accordingly, it seems both necessary and desirable to recapitulate in the Guide to Practice, in the form of a draft guideline, the rule laid down in article 23, paragraph 2, of the 1986 Vienna Convention.⁴²⁷ Two problems arise, however, with regard to the specific formulation of this draft.

248. First, is it appropriate simply to reproduce the wording of article 23, paragraph 2, or should it be supplemented to take into account the possibility afforded to a successor State to formulate a reservation when it makes a notification of succession in accordance with draft guideline 1.1, which thus rounds out the definition of reservations contained in article 2, paragraph 1 (d), of the 1986 Vienna Convention? The answer is not very simple. At first glance, the successor State can either confirm or invalidate an existing reservation

made by the predecessor State,⁴²⁸ or formulate a new reservation when it makes a notification of succession;⁴²⁹ in neither of these two cases is the successor State thus led to confirm a reservation when signing. Nevertheless, under article 18, paragraphs 1–2, of the 1978 Vienna Convention, a newly independent State may, under certain conditions, establish through a notification of succession its capacity as a contracting State or party to a multilateral treaty which was not in force on the date of the State succession and to which the predecessor State was itself a contracting State. Under article 2, paragraph (f), of the 1969 and 1986 Vienna Conventions, however, “‘contracting State’ means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force”—a State, not a mere signature. It follows, conversely, that there can be no “‘succession to the signing” of a treaty (in formal form⁴³⁰)⁴³¹ and that the concept of notification of succession should not be introduced into draft guideline 2.2.1.⁴³²

249. Secondly, it might be asked whether the Commission should take account, in the preparation of this draft, of draft guideline 1.1.2 (Instances in which a reservation may be formulated), which provides that:

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

The problem does not arise with regard to the designation of the moment when the confirmation should take place, since the formula contained in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions is equivalent to the one adopted by the Commission in draft guideline 1.1.2 (“when expressing its consent to be bound”). It might be thought, however, that the number of cases to which article 23, paragraph 2, seems to limit the possibility of subordinating definitive consent to be bound (ratification, act of formal confirmation, accept-

(Footnote 422 continued.)

confirm them, since they were the subject of a protocol annexed to the treaty. In its reply to question 1.10.1 (“Was the timing of the formulation of the reservations based on any particular considerations? If so, what considerations?”) (*Yearbook ... 1996* (footnote 16 above), annex II, p. 99), Denmark, which stated that it formulated all its reservations when expressing definitive consent to be bound, expressly based its answer on article 23, paragraph 2, of the 1969 Vienna Convention.

⁴²³ See paragraph 244 above.

⁴²⁴ Examples of reservations formulated when signing and not confirmed subsequently: the reservations made by the Islamic Republic of Iran and Peru to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (United Nations, *Treaty Series*, vol. 1582, No. 27627, pp. 398 and 402) and those made by Turkey to the Customs Convention on containers, 1972 (*ibid.*, *Multilateral Treaties Deposited with the Secretary-General ...* (see footnote 26 above), p. 487). Examples of reservations made when signing and confirmed when expressing consent to be bound: the reservation made by the United Kingdom to the Protocol to the Agreement on the importation of educational, scientific and cultural materials of 22 November 1950 (*ibid.*, vol. II, p. 66), the reservations made by Argentina and Venezuela to the Agreement establishing the Common Fund for Commodities (*ibid.*, pp. 139–140), and the reservation made by Slovakia to the Convention on the Safety of United Nations and Associated Personnel (*ibid.*, p. 121).

⁴²⁵ See, in particular, Greig, *loc. cit.*, p. 28, and Imbert, *op. cit.*, p. 285.

⁴²⁶ See Imbert, *op. cit.*, pp. 283–284.

⁴²⁷ Rather than the 1969 formulation, which is less comprehensive because international organizations are omitted.

⁴²⁸ See the 1978 Vienna Convention, art. 20, para. 1.

⁴²⁹ *Ibid.*, para. 2.

⁴³⁰ See paragraphs 259–260 below.

⁴³¹ The publication *Multilateral Treaties Deposited with the Secretary-General ...* (see footnote 26 above) mentions, however—in the footnotes and without special comment—reservations formulated when signing by a predecessor State and apparently not formally confirmed by the successor State or States; see, for example, Czechoslovakia’s reservations to the United Nations Convention on the Law of the Sea, noted in connection with the Czech Republic and Slovakia (*ibid.*, p. 239, note 4). Moreover, irrespective of the question of reservations, some States expressly indicated that they intended to succeed to the signature of a predecessor State (see, for example, the notifications made by the Czech Republic and Slovakia concerning the Convention on the Territorial Sea and the Contiguous Zone (*ibid.*, p. 239, note 4), the Convention on the High Seas (*ibid.*, p. 200, note 2), the Convention on the Continental Shelf (*ibid.*, p. 206, note 2) and the 1978 Vienna Convention (*ibid.*, pp. 277–278).

⁴³² According to Pilloud, “in applying by analogy the rule provided in article 23, paragraph 2 of the Vienna Convention concerning reservations expressed at the time of signature, one might say that the States which had made declarations of continuity” to the Geneva Conventions of 1949 “should, if they had intended to assume on their own account the reservations expressed [by the predecessor State], have stated this specifically in their respective declarations of continuity” (“Reservations to the Geneva Conventions of 1949”, p. 111). It is doubtful whether such an analogy could be made; the matter will be considered in a future report on succession to reservations.

ance or approval) is too small and does not correspond to the one in article 11.

250. In the view of the Special Rapporteur, however, such a concern is excessive; the differences in wording between article 11 and article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions lie in the omission from the latter of these provisions of two possibilities contemplated in the former: “exchange of instruments constituting a treaty” and “any other means if so agreed”.⁴³³ The probability that a State or an international organization would subordinate the expression of its definitive consent to be bound by a multilateral treaty subject to reservations to one of these modalities is sufficiently low that it does not seem useful to overburden the wording of draft guideline 2.2.1 or to include, in chapter 2 of the Guide to Practice, a draft guideline equivalent to draft guideline 1.1.2. No doubt it will be sufficient to mention this point in the commentary.

251. Under these circumstances, the wording of draft guideline 2.2.1 can be modelled on that of article 23, paragraph 2, of the 1986 Vienna Convention:

“2.2.1 Reservations formulated when signing and formal confirmation

“If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.”

252. It may be asked, furthermore, whether a reservation can be formulated when initialling⁴³⁴ or signing a treaty *ad referendum*, which are mentioned along with signing in article 10 of the 1969 and 1986 Vienna Conventions as methods of authenticating the text of a treaty. The answer to this question is certainly affirmative: nothing prevents a State or an international organization from indicating formally to its partners the “reservations” which it has regarding the adopted text at the authentication stage,⁴³⁵ or, for that matter, at any previous stage of negotiation.

253. This had, moreover, been contemplated by the Commission in draft article 18 (which became article 23 of the 1969 Vienna Convention), of which paragraph 2, as it appeared in the final text of the draft articles adopted at the eighteenth session in 1966, provided that: “If formulated on the occasion of the adoption of the text ... a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered

⁴³³ For a similar comment concerning the comparison of article 2, paragraph 1 (d), and article 11, see paragraph (8) of the commentary to draft guideline 1.1.2, *Yearbook ... 1998* (see footnote 63 above), p. 104.

⁴³⁴ See Szafarz, “Reservations to multilateral treaties”, p. 295.

⁴³⁵ On authentication “as a distinct part of the treaty-making process”, see the commentary on article 9 of the Commission’s draft articles on the law of treaties (which became article 10 at the United Nations Conference on the Law of Treaties), *Yearbook ... 1966* (footnote 212 above), p. 195.

as having been made on the date of its confirmation”.⁴³⁶ Commenting on this provision, the Commission stated:

Statements of reservations are made in practice at various stages in the conclusion of a treaty. Thus, a reservation is not infrequently expressed during the negotiations and recorded in the minutes. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. The Commission, however, considered it essential that the State concerned should formally reiterate the statement when signing, ratifying, accepting, approving or acceding to a treaty in order that it should make its intention to formulate the reservation clear and definitive. Accordingly, a statement during the negotiations expressing a reservation is not, as such, recognized in article 16 as a method of formulating a reservation and equally receives no mention in the present article.⁴³⁷

254. As indicated above,⁴³⁸ the reference to the adoption of the text disappeared from the text of article 23, paragraph 2, of the 1969 Vienna Convention under “mysterious” circumstances during the Vienna Conference on the Law of Treaties, probably out of concern for consistency with the wording of the *chapeau* of article 19 (the summary records of the Conference give no indication about this, however). The question arises whether it might not be appropriate to reinstate the reference in the Guide to Practice.

255. In the view of the Special Rapporteur, the Commission would be making a useful clarification by reinstating it, given that:

(a) On the one hand, any reservation formulated prior to the expression of definitive consent to be bound⁴³⁹ by the treaty must be confirmed by its author; that is the very purpose of this clarification; and

(b) On the other hand, there does not seem to be any reason to limit the clarification to “embryonic” reservations formulated when adopting or authenticating the text; the obligation to confirm formally is, of course, required, especially when the “intention to formulate a reservation” is expressed at a prior stage of negotiation.

256. This clarification could be the subject of a draft guideline 2.2.2, worded as follows:

“2.2.2 Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation

“If formulated when negotiating, adopting or authenticating the text of the treaty, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.”

⁴³⁶ *Yearbook ... 1966* (see footnote 212 above), p. 208.

⁴³⁷ *Ibid.*, para. (3) of the commentary.

⁴³⁸ Para. 241 above.

⁴³⁹ “Negotiated reservations”, that is to say, reservation clauses inserted in a treaty during negotiation (see paragraphs 164–171 above), are often adopted following the expression by one or more States of their disagreement with some of the proposed provisions; such expressions of disagreement may be regarded as “embryonic reservations”.

257. This wording is taken from that of draft guideline 2.2.1,⁴⁴⁰ itself modelled on article 23, paragraph 2, of the 1986 Vienna Convention, and the question arises whether it might not be advantageous to combine the two drafts. This would “economize” on provisions, but would have the drawback of altering the text of the Vienna Convention. It may, of course, be asserted that the Commission did the same thing with regard to draft guideline 1.1; however, the question was not posed in exactly the same terms; the definition of reservations adopted in the draft “is none other than the composite text of the definitions contained in the 1969, 1978 and 1986 Vienna Conventions to which no changes have been made”.⁴⁴¹ The combining in a single draft of the texts proposed for draft guidelines 2.2.1 and 2.2.2 would not be of the same nature and would be tantamount to adding to the text of the Vienna Conventions a possibility that they did not contemplate. For this reason, the Special Rapporteur is inclined to favour two separate drafts.

258. If a majority of members of the Commission were of a different view, the text of the draft might read as follows:

“Reservations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation

“If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, an act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.”

259. Whatever solution is adopted in this respect,⁴⁴² the proposed wording (which is, in any event, faithful to the Vienna text) clearly implies that the rule thus codified applies only to treaties in formal form, those that do not enter into force solely by being signed.⁴⁴³ On the other hand, with regard to treaties not requiring any post-signing formalities in order to enter into force, which are referred to in French legal writing as “agreements

in simplified form”,⁴⁴⁴ it is self-evident that, if formulated when the treaty is signed, a reservation becomes effective immediately, without any formal confirmation being necessary or even conceivable.⁴⁴⁵

260. In truth, however, this rule derives from the text of article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions; it is reproduced in draft guideline 2.2.1 and supplemented by draft guideline 2.2.2. Nevertheless, given the practical nature of the Guide to Practice, it would probably not be superfluous to clarify this explicitly in a draft guideline 2.2.3:

“2.2.3 Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]”⁴⁴⁶

“A reservation formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.”

261. It is self-evident, however, that if an “embryonic reservation” to an agreement in simplified form is formulated when negotiating, adopting or authenticating the text of a treaty, it must be confirmed when signing. Nevertheless, just as, in this case, signing constitutes the expression of definitive consent to be bound, the possibility is covered expressly by draft guidelines 2.2. and 2.2.2 (“when expressing its consent to be bound”), and it seems completely unnecessary to repeat it in a separate draft guideline.

262. There is, moreover, another hypothetical case in which the confirmation of a reservation formulated when signing appears to be superfluous, namely, where the treaty itself provides expressly for such a possibility without requiring confirmation. Thus, for example, article 8, paragraph 1, of the Convention on reduction

⁴⁴⁴ While the procedure involving agreements in simplified form is more commonly used for concluding bilateral rather than multilateral treaties, it is not at all unknown in the second case, and major multilateral agreements may be cited which have entered into force solely by being signed. This is true, for example, of the General Agreement on Tariffs and Trade of 1947 (at least in terms of the entry into force of the bulk of its provisions following the signing of the Protocol of Provisional Application of the General Agreement on Tariffs and Trade), the Declaration on the Neutrality of Laos and the Agreement establishing a Food and Fertiliser Technology Centre for the Asian and Pacific Region. There are also “mixed” treaties that can, if the contracting parties so choose, enter into force solely upon signature or following ratification (see article XIX of the Agreement relating to the International Telecommunications Satellite Organization “INTELSAT”; see also the following footnote).

⁴⁴⁵ The Special Rapporteur is not aware, however, of any clear example of a reservation made at the time when a multilateral agreement in simplified form was signed. This eventuality certainly cannot be ruled out, however; as the preceding footnote indicates, there are also “mixed treaties” which can, if the parties so choose, enter into force solely upon signature or following ratification, and which are subject to reservations or contain reservation clauses (see the Convention on Psychotropic Substances (art. 32), the Convention on a Code of Conduct for Liner Conferences and the International Convention on Arrest of Ships, 1999 (art. 12, para. 2)).

⁴⁴⁶ The alternative draftings that have been proposed relate to the fact that, as indicated in footnote 443 above, the term “agreements in simplified form”, familiar to jurists schooled in the Roman law tradition, might bewilder those with training in common law.

⁴⁴⁰ See paragraph 251 above.

⁴⁴¹ *Yearbook ... 1998* (see footnote 63 above), p. 99, para. (1) of the commentary to draft guideline 1.1.

⁴⁴² What is involved is not a fundamental issue. The solution to be adopted by the Commission in this regard will constitute a precedent, however, for the question cannot fail to arise again with respect to other provisions of the Vienna Conventions. Taking into account the advantage of deviating as little as possible from the Conventions, it seems to the Special Rapporteur that the Commission should take another look at the matter before combining draft guidelines 2.2.1 and 2.2.2, as envisaged in paragraph 258 above.

⁴⁴³ On the distinction between treaties in formal form and agreements in simplified form, see, in particular: Chayet, “Les accords en forme simplifiée”; Nguyen Quoc Dinh, Daillier and Pellet, *op. cit.*, pp. 136–144; and Smets, *La conclusion des accords en forme simplifiée*. This distinction is more common among authors writing in the Roman-Germanic tradition than among those schooled in common law, which is more concerned with executive agreements, a concept that does not fully coincide with the notion of agreements in simplified form (see Horvath, “The validity of executive agreements”). Sinclair (*The Vienna Convention on the Law of Treaties*), p. 41) and Brownlie (*Principles of Public International Law*, p. 611), however, mentioned the concept of “agreements” or “treaties in simplified form” in connection with discussions on the law of treaties in the Commission.

of cases of multiple nationality and military obligations in cases of multiple nationality provides that:

Any Contracting Party may, *when signing this Convention or* depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in the Annex to the present Convention.⁴⁴⁷

263. In a case of this kind, it seems that practice consists of not requiring a party which formulates a reservation when signing to confirm it when expressing definitive consent to be bound; thus, to return to the previous example, France made a reservation when it signed the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality and did not confirm it subsequently.⁴⁴⁸ Likewise, Hungary and Poland did not confirm their reservation to article 20 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, which provides, in its article 28, paragraph 1, that such a reservation can be made when signing. Nor did Luxembourg confirm its reservation to the Convention relating to the Status of Refugees, or Ecuador its reservation to the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents.⁴⁴⁹ It is true that other States⁴⁵⁰ nonetheless confirmed their reservations, to the same provision of the Convention against torture at the time of ratification. In the view of the Special Rapporteur, reservations made when signing the Convention against torture were sufficient in and of themselves. While nothing prevented the reserving States from confirming them,⁴⁵¹ nothing compelled them to do so. The rule set out in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions should be applicable only where the treaty is silent; otherwise, the provisions providing for the possibility of reservations when signing would have no useful effect.

264. Despite the uncertainties in practice—which may be explained by the fact that if a formal confirmation in a case of this kind is not essential, it is also not ruled out—it does not seem futile to endorse the “minimum” practice (this seems logical, since the treaty expressly provides for the formulation of reservations when sign-

⁴⁴⁷ See also, among numerous examples: article 17 of the Convention on the Reduction of Statelessness; article 30 of the Convention on mutual administrative assistance on tax matters; article 29 of the European Convention on Nationality; and article 24 of the Convention on the Law Applicable to Succession to the Estates of Deceased Persons.

⁴⁴⁸ Council of Europe, European Committee on Legal Cooperation (CCJ), *CCJ Conventions and Reservations to those Conventions*, note by the secretariat, CCJ (99) 36, Strasbourg, 30 March 1999, p. 11. The same applied to Belgium’s reservations to the Convention on mutual administrative assistance on tax matters (*ibid.*, p. 50).

⁴⁴⁹ *Multilateral Treaties Deposited with the Secretary-General ...* (see footnote 26 above), pp. 213–214; p. 265; and *ibid.*, vol. II, p. 115. The Hungarian reservation was subsequently withdrawn.

⁴⁵⁰ Belarus, Bulgaria (reservation subsequently withdrawn), Czechoslovakia (reservation subsequently withdrawn by the Czech Republic and Slovakia), Morocco, Tunisia and Ukraine (reservation subsequently withdrawn); see *Multilateral Treaties Deposited with the Secretary-General ...* (footnote 26 above), pp. 212–214.

⁴⁵¹ And such “precautionary confirmations” are quite common (see, for example, the reservations by Belarus, Brazil (which, however, confirmed only two of its three initial reservations), Hungary, Poland, Turkey and Ukraine to the Convention on Psychotropic Substances (*ibid.*, vol. I, pp. 327–329)).

ing⁴⁵²) by embodying it in a draft guideline that might read as follows:

“2.2.4 Reservations formulated when signing for which the treaty makes express provision

“A reservation formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate a reservation at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.”

(iii) *Time of formulation of interpretative declarations (recapitulation)*

265. The third report on reservations to treaties discusses in some detail the time at which an interpretative declaration may be formulated.⁴⁵³ The report indicates in particular that a “mere” interpretative declaration may be formulated at any time, unless otherwise stipulated by the treaty that it concerns, whereas a conditional interpretative declaration may be formulated only when signing or when expressing consent to be bound, since by definition it makes participation in the treaty by the declarant State or international organization subject to certain conditions.

266. These views were accepted by the Commission and are reflected in draft guideline 1.2, which defines interpretative declarations independently of any time factor,⁴⁵⁴ and draft guideline 1.2.1, which on the contrary specifies that a conditional interpretative declaration, like a reservation, is a “unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty”.⁴⁵⁵

267. However, in the case of this second hypothesis, the Commission noted that if the conditional interpretative declaration was formulated when signing the treaty, it would “probably” be “confirmed at the time of expression of definitive consent to be bound”.⁴⁵⁶ There is no logical reason for advocating one solution for reservations and another for conditional interpretative declarations.

268. It will be noted that in practice States wishing to make their participation in a treaty subject to a specified interpretation of the treaty generally confirm their interpretation when stating it at the time of signature or at any earlier point in the negotiations. The following are examples:

⁴⁵² If this principle was not recognized, many unconfirmed reservations would have to be deemed illegal (or without effect), even where the States which formulated them did so on the basis of the text of the treaty itself.

⁴⁵³ *Yearbook ... 1998* (see footnote 3 above), pp. 274–276, paras. 328–339.

⁴⁵⁴ See *Yearbook ... 1999* (footnote 75 above), pp. 101–103, paras. (21)–(32) of the commentary to draft guideline 1.2.

⁴⁵⁵ *Ibid.*, pp. 105–106, paras. 15–18 of the commentary to draft guideline 1.2.1.

⁴⁵⁶ *Ibid.*, p. 106, footnote 371.

(a) Germany and the United Kingdom, upon ratifying the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, confirmed “declarations”⁴⁵⁷ that could be regarded as being conditional;⁴⁵⁸

(b) Monaco proceeded in the same manner when it signed and then ratified the International Covenant on Civil and Political Rights;⁴⁵⁹

(c) Austria set out in its instrument of ratification of the European Convention on the protection of the archaeological heritage a declaration made when signing;⁴⁶⁰

(d) The European Community, when approving the Convention on Environmental Impact Assessment in a Transboundary Context, also confirmed a declaration that it had made when signing.⁴⁶¹

269. It is thus appropriate to transpose to conditional interpretative declarations the rules governing the formal confirmation of reservations formulated when signing (draft guideline 2.2.1) or when negotiating, adopting or authenticating the text of the treaty (draft guideline 2.2.2). Two problems arise, however.

270. First, there is a methodological problem as to whether to include one or more draft guidelines reproducing the substance of the corresponding draft text on the confirmation of reservations formulated when signing, or whether it would suffice to follow the procedure adopted by the Commission in draft guideline 1.5.2 on interpretative declarations in respect of bilateral treaties,⁴⁶² and to refer to draft guidelines 2.2.1 and 2.2.2. The chief reason for adopting that procedure in draft guideline 1.5.2 was that the Commission had decided not to deal with “reservations” to bilateral treaties in the remainder of the Guide to Practice.⁴⁶³ This reason no longer applies: even if the Guide to Practice is to focus essentially on reservations, it has been agreed that wherever appropriate the Guide should also contain guidelines on the legal regime of interpretative declarations (mere or conditional).⁴⁶⁴ It would therefore be desirable to include in the Guide substantive provisions on the obligation to confirm formally conditional interpretative declarations formulated prior to expressing definitive consent to be bound, unless the corresponding rules on

reservations are simply transposed to conditional interpretative declarations.⁴⁶⁵

271. If the Commission agrees to this initial suggestion, it will still have to take a position on a second problem concerning form: whether one or two draft guidelines should be devoted to the question of formal confirmation of conditional interpretative declarations, as in the case of reservations. In the Special Rapporteur’s view, this problem should be approached from a different angle. It was in order to avoid “touching up” the provisions of the Vienna Conventions on the law of treaties that he expressed a clear preference for adopting two separate draft guidelines: one linked to the time of the confirmation of the reservations formulated when signing, and the other to negotiations.⁴⁶⁶ This consideration does not apply in the case of interpretative declarations, in respect of which the 1969 and 1986 Vienna Conventions have nothing at all to say.

272. It would therefore be reasonable to transpose draft guidelines 2.2.1 and 2.2.2 to interpretative declarations and to combine them, as in the case of the alternative proposed in paragraph 258 above for reservations:

“2.4.4 Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation

“If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, an act of formal confirmation, acceptance or approval, a conditional interpretative declaration must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the declaration shall be considered as having been made on the date of its confirmation.”

273. For the same reasons, it would seem legitimate to transpose to interpretative declarations⁴⁶⁷ draft guidelines 2.2.3 and 2.2.4 concerning non-confirmation of reservations formulated when signing an agreement in simplified form or of a treaty making express provision for them. The draft guidelines in question might read as follows:

“2.4.5 Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]

“An interpretative declaration formulated when signing [an agreement in simplified form] [a treaty that

⁴⁵⁷ See *Multilateral Treaties Deposited with the Secretary-General ...* (footnote 26 above), vol. II, pp. 356–357.

⁴⁵⁸ Moreover, the question may be asked whether confirmation of an interpretative declaration made when signing constitutes an indication (among others) of its conditional nature.

⁴⁵⁹ *Multilateral Treaties Deposited with the Secretary-General ...* (footnote 26 above), p. 139.

⁴⁶⁰ United Nations, *Treaty Series*, vol. 788, No. 11212, p. 240, and *ibid.*, vol. 1338, No. 11212, p. 335.

⁴⁶¹ *Multilateral Treaties Deposited with the Secretary-General ...* (footnote 26 above), vol. II, p. 363. See also the declarations by Italy and the United Kingdom on the Convention on biological diversity (*ibid.*, pp. 379–380).

⁴⁶² This draft guideline reads: “Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.”

⁴⁶³ See draft guideline 1.5.1 and paragraphs (19)–(20) of the commentary thereto (*Yearbook ... 1999* (footnote 75 above), pp. 120 and 123–124).

⁴⁶⁴ See paragraph 218 above.

⁴⁶⁵ Here again (see footnote 447 above), this is not a crucial problem, but the decision taken by the Commission on this matter will constitute a precedent, which should probably be followed in the subsequent parts and chapters of the Guide to Practice.

⁴⁶⁶ See paragraph 257 above.

⁴⁶⁷ It is unnecessary to distinguish between conditional interpretative declarations and mere interpretative declarations, because there is in any event no obligation to confirm mere interpretative declarations, which unless otherwise provided may be formulated at any time (see paragraphs 265–266 above).

enters into force solely by being signed] does not require any subsequent confirmation.

“2.4.6 Interpretative declarations formulated when signing for which the treaty makes express provision

“An interpretative declaration formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate such a declaration at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.”

274. However, precisely because they may in principle be formulated at any time,⁴⁶⁸ mere interpretative declarations pose a particular problem not encountered in the case of reservations and which does not arise in the case of conditional interpretative declarations either: what happens in cases where the treaty to which they apply expressly provides that they may be formulated only at specified times, as in the case of article 310 of the United Nations Convention on the Law of the Sea?⁴⁶⁹

275. Clearly, in such cases, the contracting parties may make interpretative declarations such as those envisaged in the relevant provision only at the time or times specified in the treaty. This is so obvious as to prompt the question as to whether this needs to be spelled out in a guideline in the Guide to Practice.

276. However, there are two reasons for including such a provision. First, this could be an opportunity to recall that a mere interpretative declaration may in principle be formulated at any time—which none of the draft guidelines adopted so far currently do, other than draft guideline 1.2, which does so by omission, since it does not introduce any time element into the definition of interpretative declarations.⁴⁷⁰ Secondly, such a clarification is in fact neither any more nor any less superfluous than those set out, for example, in article 19 (a)–(b) of the 1969 and 1986 Vienna Conventions, which deal with the option of entering reservations.⁴⁷¹

277. The existence of an express treaty provision limiting the option of formulating interpretative declarations is not the only instance in which a State or an international organization is prevented, *ratione tempo-*

ris, from formulating an interpretative declaration. The same applies in cases where the State or organization has already formulated an interpretation which its partners have taken as a basis or were entitled to take as a basis (*estoppel*). In such a case, the author of the initial declaration is prevented from modifying it. This hypothesis will be considered below in section (b), together with questions relating to the modification of reservations and interpretative declarations. However, it should be reflected in draft guideline 2.4.3.

278. Moreover, this draft guideline must exclude special rules relating to conditional interpretative declarations. It might read as follows:

“2.4.3 Times at which an interpretative declaration may be formulated

“Without prejudice to the provisions of guidelines 1.2.1, 2.4.4, 2.4.7 and 2.4.8, an interpretative declaration may be formulated at any time, [unless otherwise provided by an express provision of the treaty] [the treaty states that it may be made only at specified times].”

(b) Late reservations and interpretative declarations

(i) Late reservations

279. Unless otherwise provided by a treaty, which is always possible, the expression of definitive consent to be bound constitutes for the contracting parties the last time (and in view of the requirement concerning formal confirmation of reservations formulated during negotiations and when signing, the only time) when a reservation may be formulated.⁴⁷² This rule, which is unanimously recognized in the relevant doctrine,⁴⁷³ and which arose from the very definition of reservations and is also implied by the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions, is widely observed in practice.⁴⁷⁴ It was regarded as forming part of positive law by ICJ in its judgment in the case concerning *Border and Transborder Armed Actions*:

Article LV of the Pact of Bogotá enables the parties to make reservations to that instrument which “shall, with respect to the State that makes them, apply to all signatory States on the basis of reciprocity”. In the absence of special procedural provisions, those reservations may, in accordance

⁴⁶⁸ See paragraphs 265–266 above.

⁴⁶⁹ “Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention,* from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and its regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.” Also see, for example, article 26, paragraph 2, of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and article 43 of 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.

⁴⁷⁰ See paragraphs 265–266.

⁴⁷¹ Article 19 of the 1969 Vienna Convention reads: “A State may ... formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made ...”

⁴⁷² However, some reservation clauses specify that “reservations to one or more of the provisions of this Convention may be made at any time prior to ratification of or accession to this Convention” (Convention on Third Party Liability in the Field of Nuclear Energy, art. 18) or “at the latest at the moment of ratification or at accession, each State may make the reserves contemplated in articles ...” (Convention concerning the powers of authorities and the law applicable in respect of the protection of infants, art. 23)—these examples are quoted by Imbert, *op. cit.*, pp. 163–164.

⁴⁷³ It has been stated particularly forcefully by Gaja: “[T]he latest moment in which a State may make a reservation is when it expresses its consent to be bound by a treaty” (“Unruly treaty reservations”, p. 310).

⁴⁷⁴ Moreover, this explains why States sometimes try to get around the prohibition on formulating reservations after the entry into effect of a treaty by calling unilateral statements “interpretative declarations”, which actually match the definition of reservations (see paragraph (27) of the commentary to draft guideline 1.2 (Definition of interpretative declarations), *Yearbook ... 1999* (footnote 75 above), p. 102; see also the third report on reservations to treaties, *Yearbook ... 1998* (footnote 3 above), p. 276, para. 340.

with the rules of general international law on the point as codified by the 1969 Vienna Convention on the Law of Treaties, be made only at the time of signature or ratification of the Pact or at the time of accession to that instrument.⁴⁷⁵

280. Moreover, it has interesting specific consequences—which the Special Rapporteur will expand on and clarify in the report that he will in principle prepare next year on the permissibility of reservations (since the fundamental problem is clearly how to determine whether a belated reservation is impermissible solely owing to that fact). However, two of the consequences in question should be considered at the current stage since they help to clarify the scope of the rule implied by the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions.⁴⁷⁶

281. On the one hand, the principle that a reservation may not be formulated after the expression of definitive consent to be bound appeared to be sufficiently established at the Inter-American Court of Human Rights for the Court to consider, in its advisory opinion concerning *Restrictions to the Death Penalty*, that, once made,⁴⁷⁷ a reservation “escapes” from its author and may not be interpreted outside the context of the treaty itself. The Court adds the following:

A contrary approach might ultimately lead to the conclusion that the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation relates, including even all such matters which the State might subsequently declare that it intended the reservation to cover.

The latter result cannot be squared with the Vienna Convention, which provides that a reservation can be made only when signing, ratifying, accepting or acceding to a treaty (Vienna Convention, art. 19).⁴⁷⁸

282. On the other hand, following the *Belilos* case,⁴⁷⁹ the Government of Switzerland initially revised its 1974 “interpretative declaration”, which the European Court of Human Rights regarded as an impermissible reservation, by adding a number of clarifications to its new “declaration”.⁴⁸⁰ The permissibility of this new declaration, which was criticized by the relevant doctrine,⁴⁸¹ was challenged before the Federal Court, which in its

⁴⁷⁵ *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 85.

⁴⁷⁶ It would seem unnecessary to reproduce formally in the Guide to Practice the rule enunciated in the provision in question: that would overlap with the definition set out in draft guidelines 1.1 and 1.1.2. However, it is included in order to introduce the exceptions that may be made with respect to it by draft guideline 2.3.4 (see paragraph 286 below).

⁴⁷⁷ The word “made” is probably more appropriate here than “formulated”, since the Inter-American Court of Human Rights considers (perhaps questionably) that “a reservation becomes an integral part of the treaty”, which is conceivable only if it is “in effect”.

⁴⁷⁸ *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3, paras. 63–64. Gaja interprets this advisory opinion the same way (*loc. cit.*, p. 310).

⁴⁷⁹ *Belilos v. Switzerland, European Court of Human Rights, Series A, No. 132*, judgement of 29 April 1988.

⁴⁸⁰ See United Nations, *Treaty Series*, vol. 1496, No. 2889, p. 234–235; vol. 1525, p. 213; and vol. 1561, pp. 386–387.

⁴⁸¹ See in particular Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt *Belilos* du 29 avril 1988)”, p. 314. Also see the other references made by Flauss, “Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: requiem pour la déclaration interprétative relative à l’article 6, paragraphe 1”, p. 300, footnote 28.

decision *Elisabeth B. v. Council of State of Thurgau Canton* of 17 December 1992 declared the declaration invalid on the ground that it was a new reservation⁴⁸² that was incompatible with article 64, paragraph 1, of the European Convention on Human Rights.⁴⁸³ *Mutatis mutandis*, the limit on the formulation of reservations imposed by article 64 of the Convention is similar to the limit resulting from article 19 of the 1969 and 1986 Vienna Conventions, and the judgement of the Swiss Federal Court should certainly be regarded as a reaffirmation of the prohibition in principle on reservations formulated following the definitive expression of consent to be bound and also, perhaps, of the impossibility of formulating a new reservation in the guise of an interpretation of an existing reservation.⁴⁸⁴

283. The decision of the European Commission of Human Rights in the *Chrysostomos* case leads to the same conclusion, but provides an additional lesson. In the case in question, the European Commission believed that it followed from the “clear wording” of article 64, paragraph 1, of the European Convention on Human Rights “that a High Contracting Party may not, in subsequent recognition of the individual right of appeal, make a major change in its obligations arising from the Convention for the purposes of procedures under article 25”.⁴⁸⁵ Here again, the decision of the European Commission may be interpreted as a confirmation of the rule resulting from the introductory wording of the provision in question, with the important clarification that a State may not circumvent the prohibition on reservations following ratification by adding to a declaration made under an opting-in clause (which, does not in itself, constitute a reservation)⁴⁸⁶ conditions or limitations with effects identical to those of a reservation, at least in cases where the optional clause in question does not make any corresponding provision.

284. Although in the *Loizidou* judgement rendered in the same case the European Court of Human Rights was not as precise, the following passage can be regarded as a reaffirmation of the position in question:

⁴⁸² The European Court of Human Rights would have declared the 1974 “declaration” as a whole invalid: “The interpretative declaration concerning article 6, paragraph 1, of the European Convention on Human Rights, formulated by the Federal Council at the time of ratification could therefore not have a full effect in either the field of criminal law or in that of civil law. As a result, the 1988 interpretative declaration cannot be regarded as a restriction, a new formulation or a clarification of the reservation that existed previously. Rather, it represents a reservation formulated subsequently” (*Journal des Tribunaux*, 1995, p. 536; German text in *Europäische Grundrechte-Zeitschrift*, vol. 20 (1993), p. 72).

⁴⁸³ “Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.”

⁴⁸⁴ For a discussion of the other problems posed by this judgement, see below.

⁴⁸⁵ Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Applications Nos. 15299/89, 15300/89 and 15318/89, *Chrysostomos et al. v. Turkey*, vol. 68 (Strasbourg, 1993), p. 216. See also Decision of 4 March 1991, *Revue universelle des droits de l’homme*, vol. 3, No. 5 (July 1991), p. 200, para. 15.

⁴⁸⁶ See paragraphs 179–196 above and draft guidelines 1.4.6 and 1.4.7.

The Court further notes that article 64 of the Convention enables States to enter reservations when signing the Convention or when depositing their instruments of ratification. The power to make reservations under article 64 is, however, a limited one, being confined to particular provisions of the Convention.⁴⁸⁷

285. The decisions of the Inter-American Court of Human Rights, the European Court of Human Rights and the Swiss Federal Court reaffirm the stringency of the rule set out at the beginning of article 19 of the 1969 and 1986 Vienna Conventions and draws very direct and specific consequences therefrom, which certainly should be made explicit in the Guide to Practice.

286. This draft guideline could be worded as follows:

“2.3.4 Late exclusion or modification of the legal effects of a treaty by procedures other than reservations

“Unless otherwise provided in the treaty, a contracting party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

“(a) Interpretation of a reservation made earlier; or

“(b) A unilateral statement made under an optional clause.”

287. The Special Rapporteur is aware that, in the draft guideline proposed above, he has reverted to certain “alternatives” to reservations, which, he proposed in the previous chapter, should be excluded from the scope of the Guide to Practice. He believes, however, that such a guideline is essential once it is a matter not of regulating these procedures as such, but of emphasizing that they may not be used to circumvent the rules relating to reservations themselves. By contrast, since draft guideline 1.4.6⁴⁸⁸ defines unilateral statements made under an optional clause and is to be the subject of a commentary, it does not appear necessary to expand further here on the meaning of the rule reflected in subparagraph (a); it will be quite sufficient to refer back to draft guideline 1.4.6 and the related commentary.

288. Despite its far-reaching implications, the principle that a reservation may not be formulated after expression of consent to be bound “is not absolute. It applies only if the contracting States do not authorize by agreement the formulation, in one form or another, of new reservations”.⁴⁸⁹

289. Although this hypothesis “has never been contemplated, either in the context of the International Law Commission or during the Vienna Conference”,⁴⁹⁰ it is relatively frequent.⁴⁹¹ Thus, for example:

(a) Article 29 of the 1912 Convention on Bills of Exchange and Promissory Notes provided that:

The State which desires to avail itself of the reservations in Arti-

⁴⁸⁷ *Loizidou v. Turkey*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 310 (*Preliminary Objections*), *Judgment of 23 March 1995* (Council of Europe, Strasbourg, 1995), p. 28, para. 76.

⁴⁸⁸ See paragraph 189 above.

⁴⁸⁹ Flauss, *loc. cit.*, p. 302.

⁴⁹⁰ Imbert, *op. cit.*, p. 12, footnote 14.

⁴⁹¹ In addition to the examples cited below, see those given by Imbert, *op. cit.*, pp. 164–165.

cle 1, paragraph 2, or in Article 22, paragraph 1, must specify the reservation in its instrument of ratification or adhesion ...

The contracting State which *hereafter** desires to avail itself of the reservations⁴⁹² above mentioned, must notify its intention in writing to the Government of the Netherlands;⁴⁹³

(b) Likewise, under article XXVI of the Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air:

No reservation may be made to this Protocol except that a State may *at any time** declare by a notification addressed to the Government of the People’s Republic of Poland that the Convention as amended by this Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities;

(c) Article 38 of the Convention concerning the International Administration of the Estates of Deceased Persons provides that:

A Contracting State desiring to exercise one or more of the options envisaged in Article 4, the second paragraph of Article 6, the second and third paragraphs of Article 30 and Article 31, shall notify this to the Ministry of Foreign Affairs of the Netherlands, either at the time of the deposit of its instrument of ratification, acceptance, approval or accession *or subsequently*;⁴⁹⁴

(d) Under article 30, paragraph 3, of the Convention on mutual administrative assistance in tax matters:

After the entry into force of the Convention in respect of a Party, that Party may make one or more of the reservations listed in paragraph 1 which it did not make at the time of ratification, acceptance or approval. Such reservations shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of the reservation by one of the Depositories;⁴⁹⁵

(e) Similarly also, article 10, paragraph 1, of the International Convention on Arrest of Ships, 1999 provides that:

Any State may, at the time of signature, ratification, acceptance, approval or accession, *or at any time thereafter**, reserve the right to exclude the application of this Convention to any or all of the following.

⁴⁹² In fact, what is meant here is not *reservations*, but *reservation clauses*.

⁴⁹³ See also article 1, paragraphs 3–4, of the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes and article 1, paragraphs 3–4, of the Convention providing a Uniform Law for Cheques: “The reservations referred to in Articles ... may, however, be made after ratification or accession, provided that they are notified to the Secretary-General of the League of Nations ...”; “Each of the High Contracting Parties may, in urgent cases, make use of the reservations contained in Articles ... even after ratification or accession.”

⁴⁹⁴ See also article 26 of the Convention on the Law Applicable to Matrimonial Property Regimes: “A Contracting State having at the date of the entry into force of the Convention for that State a complex system of national allegiance may specify *from time to time** by declaration how a reference to its national law shall be construed for the purposes of the Convention.” This hypothesis may refer to an interpretative statement rather than a reservation.

⁴⁹⁵ This Convention entered into force on 1 April 1995; it seems that no State party has exercised the option envisaged in this provision. See also article 5 of the Additional Protocol to the European Convention on Information on Foreign Law, “[a]ny Contracting Party which is bound by the provisions of both chapters I and II may at any time declare by means of a notification addressed to the Secretary General of the Council of Europe that it will only be bound by one or the other of chapters I and II. Such notification shall take effect six months after the date of the receipt of such notification”.

290. This is not especially problematic in itself and is in conformity with the idea that the Vienna rules are only of a supplementary nature (as will be the guidelines of the Guide to Practice, and with all the more reason).⁴⁹⁶ However, since what is involved is a derogation from a rule now accepted as customary and enshrined in the Vienna Conventions, it seems necessary that such a derogation should be expressly provided for in the treaty.

291. It is true that the European Commission of Human Rights, curiously,⁴⁹⁷ is more flexible in this respect, having appeared to rule that a State party to the European Convention on Human Rights could invoke the amendment of national legislation covered by an earlier reservation to modify, at the same time, the scope of that reservation without violating the time limit placed on the option of formulating reservations by article 64 of the Convention.⁴⁹⁸ The import of this jurisprudence⁴⁹⁹ is not clear, however, and it may be that the European Commission took this position because, in reality, the amendment of its legislation did not in fact result in an additional limitation on the obligations of the State concerned.⁵⁰⁰

292. Whatever the case, the requirement that there should be a clause expressly authorizing the formulation of a reservation after expression of consent to be bound seems all the more crucial given that it was necessary, for particularly pressing practical reasons, which the Commission set out in paragraph (3) of its commentary to draft guideline 1.1.2, to include a time limit in the definition of reservations itself:

[T]he idea of including time limits on the possibility of making reservations in the definition of reservations itself had progressively gained ground, given the magnitude of the drawbacks in terms of stability of legal relations of a system which would allow parties to formulate a reservation at any moment. It is in fact the principle *pacta sunt servanda* itself which would be called into question, in that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question; in addition, this would excessively complicate the task of the depositary.⁵⁰¹

293. Thus, there is undoubtedly a need to specify this requirement in a draft guideline. However, since this is not the only exception to the rule that a reservation must, in principle, be made not later than the moment at which consent to be bound is expressed, it is doubtless preferable to include the two exceptions in a single draft

⁴⁹⁶ See paragraph 233 and footnote 424 above.

⁴⁹⁷ Curiously, because the organs of the European Convention on Human Rights are certainly inclined to have little sympathy for the institution of reservations itself.

⁴⁹⁸ See footnote 509 below.

⁴⁹⁹ See for instance *Association X v. Austria*, application No. 473/59, *Yearbook of the European Convention on Human Rights 1958–1959*, vols. 1–2 (1960), p. 400; *X v. Austria*, application No. 1731/62, *ibid.*, 1964, vol. 7 (1966), p. 192; and *X v. Austria*, application 8180/78, Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 20, p. 26.

⁵⁰⁰ In the *X v. Austria* case, application No. 1731/62, the European Commission took the view that “the reservation made by Austria on 3 September 1958 ... covers the law of 5 July 1962, the result of which was not to enlarge a posteriori the field removed from the control of the Commission*”, p. 202.

⁵⁰¹ *Yearbook ... 1998* (see footnote 63 above) p. 103, para. (3); see also the third report on reservations to treaties, *Yearbook ... 1998* (footnote 3 above), p. 247, para. 136.

guideline. It is not clear, moreover, that they are as different from one another as they appear.

294. It emerges from current practice that the other contracting parties may unanimously accept a late reservation, and this consent (which may be tacit) can be seen as a collateral agreement extending *ratione temporis* the option of formulating reservations—if not reservations to the treaty concerned in general, then at least the reservation or reservations in question.

295. This possibility has been seen as translating the principle that “the parties are the ultimate guardians of a treaty and may be prepared to countenance unusual procedures to deal with particular problems”.⁵⁰² In any event, according to another author:

The solution must be understood as dictated by pragmatic considerations. A party remains always⁵⁰³ at liberty to accede anew to the same treaty, this time by proposing certain reservations. As the result will remain the same whichever of these two alternative actions one might choose it seemed simply more expedient to settle for the more rapid procedure ...⁵⁰⁴

296. Initially, the Secretary-General of the United Nations, in keeping with his great caution in this area, had held to the position that: “[i]n accordance with established international practice to which the Secretary-General conforms in his capacity as depositary, a reservation may be formulated only at the time of signature, ratification or accession”, and, as a result, he had taken the view that a party to the International Convention on the Elimination of All Forms of Racial Discrimination which did not make any reservations at the time of ratification was not entitled to make any later.⁵⁰⁵ Two years later, however, he softened his position considerably in a letter to the permanent mission to the United Nations of a Member State⁵⁰⁶ that was contemplating denouncing the Convention providing a Uniform Law for Cheques with a view to reaccessing to it with new reservations. Taking as a basis “the general principle that the parties to an international agreement may, by unanimous decision, amend the provisions of an agreement or take such measures as they deem appropriate with respect to the application or interpretation of that agreement”, the Legal Counsel states:

Consequently, it would appear that your Government could address to the Secretary-General, over the signature of the Minister for Foreign Affairs, a letter communicating the proposed reservation together with an indication of the date, if any, on which it is decided that it should take effect. The proposed reservation would be communicated to the States concerned (States parties, Contracting States and signatory States) by the Secretary-General and, in the absence of any objection by States parties within 90 days from the date of that communication (the period traditionally set, according to the practice of the Secretary-General, for the purpose of tacit acceptance and corresponding, in the present case, to the

⁵⁰² Greig, *loc. cit.*, pp. 28–29.

⁵⁰³ The author is referring to a specific treaty: the Convention providing a Uniform Law for Cheques (see paragraph 296 below), in which article VIII expressly provides for the option of denunciation; but the practice also applies in the case of treaties that do not include a withdrawal clause (see paragraph 298 below).

⁵⁰⁴ Horn, *op. cit.*, p. 43.

⁵⁰⁵ Memorandum to the Director of the Division of Human Rights, 5 April 1976, *United Nations Juridical Yearbook, 1976* (see footnote 419 above), p. 221.

⁵⁰⁶ The Member State in question was France (see Horn, *op. cit.*, p. 42).

period specified in the third paragraph of article I of the Convention for acceptance of the reservations referred to in articles 9, 22, 27 and 30 of annex II), the reservation would be considered to take effect on the date indicated.⁵⁰⁷

297. That is indeed what happened: the Government of France addressed to the Secretary-General, on 7 February 1979, a letter drafted in accordance with this information; the Secretary-General circulated this letter on 10 February and “[s]ince no objections by the Contracting States were received within 90 days from the date of circulation of this communication ... the reservation was deemed accepted and took effect on 11 May 1979”; curiously, the Government of the Federal Republic of Germany expressly stated, on 20 February 1980, that it “raise[d] no objections thereto”.⁵⁰⁸

298. Since then, the Secretary-General of the United Nations appears to have adhered continuously to this practice in the performance of his functions as depositary.⁵⁰⁹ It was formalized in a legal opinion of the Secretariat of 19 June 1984 to the effect that “the parties to a treaty may always decide, *unanimously*, at any time, to accept a reservation in the absence of, or even contrary to, specific provisions in the treaty”, and irrespective of whether the treaty contains express provisions as to when reservations may be formulated.⁵¹⁰

299. This practice is not limited to the treaties of which the Secretary-General is the depositary. In the above-mentioned 1978 legal opinion, the Legal Counsel of the United Nations had referred to a precedent involving a late reservation to the Customs Convention on the Temporary Importation of Packings deposited with the Secretary-General of the Customs Co-operation Council, article 20 of which

provides that any Contracting Party may, at the time of signing and ratifying the Convention, declare that it does not consider itself bound by article 2 of the Convention. Switzerland, which had ratified the Convention on 30 April 1963, made a reservation on 21 December 1965, which was submitted by the depositary to the States concerned and, in the absence of any objection, was considered accepted with retroactive effect to 31 July 1963.⁵¹¹

300. Several States parties to the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, which entered into force

⁵⁰⁷ Letter to the Permanent Mission of a Member State to the United Nations (14 September 1978), *United Nations Juridical Yearbook, 1978* (United Nations publication, Sales No. E.80.V.1), p. 200.

⁵⁰⁸ *Multilateral Treaties Deposited with the Secretary-General ...* (see footnote 26 above), vol. II, part II, p. 422, note 4.

⁵⁰⁹ In addition to the examples given by Gaja, loc. cit., p. 311, see for instance Belgium’s reservation (which in fact amounts to a general objection to the reservations formulated by other parties) to the 1969 Vienna Convention: while this country had acceded to the Convention on 1 September 1992, “On 18 February 1993, the Government of Belgium notified the Secretary-General that its instrument of accession should have specified that the said accession was made subject to the said reservation. None of the Contracting Parties to the Agreement having notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its circulation (23 March 1993), the reservation is deemed to have been accepted” (*Multilateral Treaties Deposited with the Secretary-General ...* (see footnote 26 above), vol. II, p. 275, note 9).

⁵¹⁰ Letter to a governmental official in a Member State, *United Nations Juridical Yearbook, 1984* (United Nations publication, Sales No. E.91.V.1), p. 183.

⁵¹¹ See footnote 542 below.

on 2 October 1983, have widened the scope of their earlier reservations⁵¹² or added new ones after expressing their consent to be bound.⁵¹³

301. Likewise, late reservations to certain conventions of the Council of Europe have been formulated without any objection being raised. This was true, for example, of:

(a) Greece’s reservation to the European Convention on the Suppression of Terrorism;⁵¹⁴

(b) Portugal’s reservations to the European Convention on Mutual Assistance in Criminal Matters;⁵¹⁵ and

(c) The “declaration” by the Netherlands of 14 October 1987 restricting the scope of its ratification (on 14 February 1969) of the European Convention on Extradition.^{516, 517}

302. This brief (and incomplete) picture proves one point: it is not out of the question that late reservations should be deemed to have been legitimately made, in the absence of any objection by the other contracting parties consulted by the depositary.⁵¹⁸ But it also shows that the cases involved have almost always been fairly borderline ones; either the delay in communicating the reservation was minimal, or the notification occurred after ratification, but before the entry into force of the treaty for the reserving State,⁵¹⁹ or else the planned reservation was

⁵¹² France (ratification—25 September 1981; amendment—11 August 1982—IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 1999*, p. 77).

⁵¹³ Liberia (ratification—28 October 1980; new reservations—27 July 1983, subject of a procès-verbal of rectification of 31 August 1983), *ibid.*, p. 81; Romania (accession—8 March 1993, rectified subsequently, in the absence of any objection, to include reservations adopted by Parliament), *ibid.*, p. 83; United States (ratification—12 August 1980, reservations communicated—27 July 1983, subject of a procès-verbal of rectification of 31 August 1983), *ibid.*, p. 86; in the case of Liberia and the United States, the French Government stated that, in view of their nature, it had no objection to those rectifications, but such a decision could not constitute a precedent.

⁵¹⁴ Ratification—4 August 1988; rectification communicated to the Secretary-General—6 September 1988. Greece invoked an error: the reservation expressly formulated in the act authorizing ratification had not been transmitted at the time of the deposit of the instrument of ratification (United Nations, *Treaty Series*, vol. 1525, No. 17828, p. 377).

⁵¹⁵ Deposit of the instrument of ratification—27 September 1994; entry into force of the Convention for Portugal—26 December 1994; notification of reservations and declarations—19 December 1996; in this case too, Portugal invoked an error due to the non-transmission of the reservations contained in the Assembly resolution and the decree of the President of the Republic published in the official gazette of Portugal (United Nations, *Treaty Series*, vol. 1934, No. A-6841, p. 328, and vol. 2045, p. 214).

⁵¹⁶ United Nations, *Treaty Series*, vol. 719, No. 5146, pp. 341–343, and vol. 1496, p. 325.

⁵¹⁷ See also the example of the late reservations by Belgium and Denmark to the European Agreement on the Protection of Television Broadcasts, cited by Gaja, loc. cit., p. 311.

⁵¹⁸ Regarding the exact modalities for such consultation and the parties consulted, see below.

⁵¹⁹ In this connection Gaja cites two reservations added on 26 October 1976 by the Federal Republic of Germany to its instrument of ratification (dated 2 August 1976) of the 1954 Convention relating to the Status of Stateless Persons (see *Multilateral Treaties Deposited with the Secretary-General ...* (footnote 26 above), p. 275) and observes that the Secretary-General’s position that, in the absence of any objection,

duly published in the official publications, but was “forgotten” at the time of the deposit of the instrument of notification, which can, at a pinch, be considered “rectification of a material error”.

303. In a pamphlet published by the Council of Europe, Mr. Jörg Polakiewicz, Deputy Head of the organization’s Legal Advice Department and Head of the Treaty Office, emphasizes the exceptional nature of the derogations permitted within that organization from the agreed rules on formulating reservations and adds: “Accepting the belated formulation of reservations may create a dangerous precedent which could be invoked by other states in order to formulate new reservations or to widen the scope of existing ones. Such practice would jeopardise legal certainty and impair the uniform implementation of European treaties.”⁵²⁰ For the same reasons, some authors are reluctant to acknowledge the existence of such a derogation from the principle of the limitation *ratione temporis* of the possibility of formulating reservations.⁵²¹

304. Yet, it is a fact that “[a]ll the instances of practice here recalled point to the existence of a rule that allows States to make reservations even after they have expressed their consent to be bound by a treaty, provided that the other Contracting States acquiesce to the making of reservations at that stage”.⁵²² In fact, it is difficult to imagine what might prevent all the contracting States from agreeing to such a derogation, whether this agreement is seen as an amendment to the treaty or as the mark of the “collectivization” of control over the permissibility of reservations.⁵²³

305. It is this requirement for unanimity, be it passive or tacit, that makes the exception to the principle acceptable and limits the risk of abuse. It is an indissociable element of this derogation, observable in current practice and consistent with the role of “guardian” of the treaty that States parties may collectively assume.⁵²⁴ But this requirement is not meaningful, nor does it fulfil its objectives, unless a single objection renders the reservation impossible. Failing this, the very principle established in the first phrase of article 19 of the 1969 and 1986 Vienna Conventions would be reduced to nothing: any State could add a new reservation to its acceptance of a treaty at any time because there would always be one other contracting State that would not object to such a reservation, and the situation would revert to that in which States or international organizations find them-

the reservations could be deemed to have been made on the date of ratification was “questionable, as the instrument of ratification could not be withdrawn” (Gaja, loc. cit., p. 311). Obviously, this is correct, but the “departure” from the rule contained in the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions is limited for all that.

⁵²⁰ Op. cit., p. 94.

⁵²¹ See Edwards Jr., “Reservations to treaties”, p. 383, and Baratta, *Gli effetti delle riserve ai trattati*, p. 27, footnote 65.

⁵²² Gaja, loc. cit., p. 312.

⁵²³ This “control” must, of course, be exercised in conjunction with the “organs of control”, where they exist. In the *Chrysostomos* and *Loizidou* cases, control by States over the permissibility *ratione temporis* of reservations (introduced by Turkey by means of an optional statement accepting individual petitions) was superseded by the organs of the European Convention on Human Rights (see paragraphs 283–284 above).

⁵²⁴ See paragraph 295 above.

selves at the time of becoming parties, when they enjoy very broad scope for formulating reservations, subject only to the limits set in articles 19–20.

306. It does not then seem compatible with the spirit of either the “Vienna definition” or the principle set forth in article 19 to consider that “an objection on the part of a Contracting State would arguably concern only the effects of the late reservation in the relations between the reserving and the objecting States”.⁵²⁵ The caution demonstrated in practice and the clarifications provided on several occasions by the Secretary-General, together with doctrinal considerations and concerns relating to the maintenance of legal certainty, justify, in this particular instance, the strict application of the rule of unanimity—it being understood that, contrary to the traditional rules applicable to all reservations (except in Latin America), this unanimity concerns the acceptance of (or at least the absence of any objection to) late reservations. It is without effect, however, on the participation of the reserving State (or international organization) in the treaty itself: in the event of an objection, it remains bound, in accordance with the initial expression of its consent; and it can only opt out (with a view to re-accepting subsequently and formulating anew the rejected reservations) in conformity with either the provisions of the treaty itself or the general rules codified in articles 54–64 of the 1969 and 1986 Vienna Conventions.

307. The question arises, however, whether a distinction should not be made between, on the one hand, objections in principle to the formulation of late reservations and, on the other hand, “traditional” objections, such as those that can be made to reservations pursuant to article 20, paragraph 4 (b), of the 1969 and 1986 Vienna Conventions. This distinction appears to be necessary, for it is hard to see why co-contracting States or international organizations should not have a choice between all or nothing, that is to say, either accepting both the reservation itself and its lateness or preventing the State or organization which formulated it from doing so, whereas they may have reasons that are acceptable to their partners. Furthermore, in the absence of such a distinction, States and international organizations which are not parties when the late reservation is formulated, but which become parties subsequently through accession or other means would be confronted with a *fait accompli*. Paradoxically, they could not object to a late reservation, whereas they are permitted to do so under article 20, paragraph 5,⁵²⁶ relating to reservations formulated when the reserving State expresses its consent to be bound.⁵²⁷

308. The unanimous consent of the other contracting parties should therefore be regarded as necessary for the *late formulation* of reservations. On the other hand, the

⁵²⁵ Gaja, loc. cit., p. 312.

⁵²⁶ “... a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.”*

⁵²⁷ It would be equally paradoxical to allow States or international organizations which become parties to the treaty after the reservation is entered to object to it under article 20, paragraph 4 (b), whereas the original parties cannot do so.

normal rules regarding acceptance of and objections to reservations, as codified in articles 20–23 of the 1969 and 1986 Vienna Conventions, should be applicable as usual with regard to the actual content of late reservations, to which the other parties should be able to object “as usual”.

309. In view of these remarks, the Commission could adopt two draft guidelines. The first one could establish the principle that a late reservation must be accepted unanimously, while the second would explain the consequences of an objection to such a reservation.

310. With regard to the principle, it would no doubt be useful to present it clearly as an exception to the basic principle that late reservations are prohibited. Accordingly, draft guideline 2.3.1 could be drafted as follows:

“2.3.1 Reservations formulated late

“Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty unless the other contracting parties do not object to the late formulation of the reservation.”

311. In view of the interest attached to avoiding late reservations to the extent possible, the phrase “unless the treaty provides otherwise”, which introduces the draft guideline proposed above, should be interpreted strictly. Under these circumstances, the Commission might do well to adopt “model clauses” (as it expressed the intention to do in 1995⁵²⁸), indicating to States and international organizations the type of provisions which it might be useful to include in a treaty in order to avoid any ambiguity in this regard.

312. Such model clauses could be based on the provisions cited above,⁵²⁹ on the understanding that in order to avoid any uncertainty with regard to reservations formulated after the expression of consent to be bound, but before the entry into force of the treaty, it would no doubt be preferable for such clauses to avoid referring to the entry into force. They might read as follows (alternatively, of course):

“Model clause 2.3.1 Reservations formulated after the expression of consent to be bound

“(a) A contracting party may formulate a reservation after expressing its consent to be bound by the present treaty;

“(b) A contracting party may formulate a reservation to the present treaty [or to articles X, Y and Z of the present treaty] when signing, ratifying, formally ratifying, accepting or approving the treaty or acceding thereto at any time thereafter;

⁵²⁸ See the report of the Commission on the work of its forty-seventh session: “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” (*Yearbook ... 1995* (footnote 5 above), p. 108, para. 487 (b)).

⁵²⁹ Para. 289.

“(c) A contracting party may formulate a reservation to the present treaty [or to articles X, Y and Z of the present treaty] at any time by means of a notification addressed to the depositary.”

313. Draft guideline 2.3.3 might read as follows:

“2.3.3 Objection to reservations formulated late

“If a contracting party to a treaty objects to a reservation formulated late, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being made.”

314. The considerations which explain the hesitations seen in practice with regard to late reservations apply also with regard to the length of time in which the other contracting parties must give their consent and the form that such consent must take.⁵³⁰ On the one hand, there would be no way to prevent all the contracting parties from accepting a modification in the way that the treaty applies to one of them; on the other hand, that possibility must be confined within narrow and specific limits, or else the very principle laid down in article 19 of the 1969 and 1986 Vienna Conventions would be undermined.

315. With regard to the form, just as reservations formulated within the set periods may be accepted tacitly,⁵³¹ it should likewise be possible for late reservations to be accepted in that manner (whether their late formulation or their content is at issue), and for the same reasons. It seems fairly clear that to require an express unanimous consent would rob the (at least incipient) rule that late reservations are possible under certain conditions of any substance, for, in practice, the express acceptance of reservations at any time is rare indeed.

316. Such is, moreover, the practice followed by the Secretary-General of the United Nations⁵³² and by the Secretaries-General of the Customs Co-operation Council (now World Customs Organization (WCO))⁵³³ and IMO,⁵³⁴ all of whom considered that a new reservation entered into force in the absence of objections from the other contracting parties.

317. It remains to be determined, however, how much time the other contracting parties have to respond to a late reservation. A similar question arises with regard to amendments to existing reservations.

318. With regard to late reservations in the strict sense, practice is ambiguous. To the knowledge of the Special

⁵³⁰ One might consider that what is involved here are questions relating to the formulation of acceptances of or objections to reservations. From a purely abstract standpoint, that is correct. In the view of the Special Rapporteur, however, these questions are so closely related to the issue of late reservations that it would be useful, as a practical matter, to address them at the same time as the latter.

⁵³¹ See article 20, paragraph 5, of the 1986 Vienna Convention: “... unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty ...”

⁵³² See paragraphs 296–298 above.

⁵³³ See paragraph 299 above.

⁵³⁴ See paragraph 300 above.

Rapporteur, the Secretaries-General of IMO, the Council of Europe and WCO proceeded in an empirical manner and did not set any specific periods when they consulted the other contracting parties.⁵³⁵ That was not true for the Secretary-General of the United Nations.

319. In the first place, when the Secretary-General's current practice was inaugurated in the 1970s, the parties were given a period of 90 days in which to object to a late reservation, where appropriate. Nevertheless, the choice of this period seems to have been somewhat circumstantial; it happens to have coincided with the period provided for in the relevant provisions of the Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques, to which France sought to make a new reservation.⁵³⁶ That notwithstanding, the 90-day period was adopted whenever a State availed itself thereafter of the opportunity to formulate a new reservation, or modify an existing one, after the entry into force with respect to that State of a new treaty of which the Secretary-General was the depositary.⁵³⁷

320. In practice, however, the period proved to be too short; owing to the delays in transmission of the communication by the Office of the Legal Counsel to States, the latter had very little time in which to examine these notifications and respond to them, whereas such communications are likely to raise "complex questions of law" for the parties to a treaty, requiring "consultations among them, in deciding what, if any, action should be taken in respect of such a communication".⁵³⁸ It is significant, moreover, that in the few situations in which parties took action, such actions were formulated well after the 90-day period that had theoretically been set for them.⁵³⁹

321. For this reason, following a note verbale from Portugal reporting, on behalf of the European Union, on difficulties linked to the 90-day period, the Secretary-General announced, in a circular addressed to all Member States, a change in the practice in that area:

[T]he Secretary-General as depositary will in future, when circulating a reservation which a State may seek to formulate subsequently to having established its consent to be bound by a treaty, stipulate twelve months as the period within which other parties must inform him if they do not wish him to consider them to have accepted that reservation.⁵⁴⁰

322. In taking this decision, which will also apply to the amendment of an existing reservation, "the Secretary-General [was] guided by Article 20, paragraph 5,

⁵³⁵ It would appear, however, that the Secretary-General of IMO considers that, in the absence of a response within one month following notification, the reservation becomes effective (see footnote 548 below and IMO, *Status of Multilateral Conventions* ... (footnote 512 above), concerning the reservation of Liberia, p. 81, and that of the United States, p. 86).

⁵³⁶ See paragraphs 296–297 above.

⁵³⁷ See paragraph 298 above.

⁵³⁸ Note verbale from the Legal Counsel (modification of reservations), 2000, addressed to the Permanent Representatives to the United Nations (4 April 2000), *Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2.

⁵³⁹ See the response by Germany to the French reservation to the Convention providing a Uniform Law for Cheques, issued one year following the date of the French communication (para. 297 above).

⁵⁴⁰ See footnote 537 above.

of the [Vienna] Convention, which indicates a period of twelve months to be appropriate for Governments to analyse and assess a reservation that has been formulated by another State and to decide upon what action, if any, should be taken in respect of it".⁵⁴¹ The decision meets the concerns of States and falls within the current trend towards establishing a "reservation dialogue" between a State which intends to formulate a reservation and the other contracting parties, facilitating such a dialogue through the length of time it allows.

323. This long period has one drawback, however: during the 12 months following notification by the Secretary-General,⁵⁴² total uncertainty prevails as to the fate of the reservation that has been formulated, and if a single State objects to it at the last minute, that is sufficient to consider it as not having been made.⁵⁴³ The question arises, therefore, whether an intermediate solution (six months, for example), would not have been wiser. Nevertheless, taking into account the provisions of article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions and the recent announcement by the Secretary-General of his intentions, it probably makes more sense to bring the Commission's position—which, in any event, has to do with progressive development and not with codification in the strict sense—into line with theirs.

324. Likewise, in view of the different practices followed by other international organizations acting as depositaries,⁵⁴⁴ it would no doubt be wise to reserve the possibility for an organization acting as depositary to maintain its usual practice, provided that it has not elicited any particular objections.

325. Based on article 20, paragraph 5, of the 1986 Vienna Convention, as adapted to the specific case of late reservations, draft guideline 2.3.2 could therefore be drafted as follows:

"2.3.2 Acceptance of reservations formulated late

"Unless the treaty provides otherwise or the usual practice followed by the depositary differs, a reservation formulated late shall be deemed to have been accepted by a contracting party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received."

(ii) *Late interpretative declarations*

326. Like reservations, interpretative declarations can be late. This is obviously true for conditional interpretative declarations, which, like reservations themselves, can be formulated (or confirmed) only when expressing consent to be bound, as stipulated in draft guidelines 1.2.1 and 2.4.4. But it may also be true for mere interpretative declarations which may, in principle, be formulated at any time,⁵⁴⁵ either because the treaty itself

⁵⁴¹ Ibid.

⁵⁴² In other words, not the communication from the State announcing its intention to formulate a late reservation. This is highly debatable.

⁵⁴³ See paragraphs 304–305 above.

⁵⁴⁴ See paragraph 316 above.

⁵⁴⁵ See draft guideline 2.4.3.

sets the period in which they can be made or because of circumstances surrounding their formulation.⁵⁴⁶

327. The declarations formulated on 31 January 1995 by the Government of Egypt, which had ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, constitute a striking example of late formulation.⁵⁴⁷

328. Under article 26, paragraph 2, of the Basel Convention, a State may, within certain limits, formulate such declarations, but only “when signing, ratifying, accepting, approving, or formally confirming or acceding to this Convention”. Several parties contested the admissibility of the Egyptian declarations, either because, in their view, the declarations were really reservations (prohibited by article 26, paragraph 1) or because they were late.⁵⁴⁸

329. Accordingly, the Secretary-General of the United Nations, depositary of the Basel Convention, “[i]n keeping with the depositary practice followed in similar cases ... proposed to receive the declarations in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of their circulation”.⁵⁴⁹ Subsequently, in view of the objections received from certain contracting States,⁵⁵⁰ the Secretary-General “[took] the view that he [was] not in a position to accept these declarations [formulated by Egypt] for deposit”,⁵⁵¹ declined to include them in the section entitled “Declarations and Reservations”, and reproduced them only in the section entitled “Notes”, accompanied by the objections concerning them.

⁵⁴⁶ See paragraphs 274–277 above.

⁵⁴⁷ See *Multilateral Treaties Deposited with the Secretary-General* ... (footnote 26 above), vol. II, pp. 358–359.

⁵⁴⁸ *Ibid.*, p. 359, observations by the United Kingdom, Finland, Italy, the Netherlands and Sweden.

⁵⁴⁹ *Ibid.*

⁵⁵⁰ See paragraph 328 above.

⁵⁵¹ *Multilateral Treaties Deposited with the Secretary-General* ... (see footnote 26 above), p. 359.

330. In truth, whether what is at issue are conditional declarations formulated after the expression of consent to be bound or mere interpretative declarations whose formulation is limited to certain periods, there does not seem to be any reason to deviate from the rules applicable to late reservations.

331. These rules should therefore be transposed to late interpretative declarations (whether what is at issue are mere interpretative declarations, where the treaty limits the possibility of making such declarations to specified periods, or conditional declarations) in draft guidelines 2.4.7 and 2.4.8, based on draft guideline 2.3.1:

“2.4.7 Interpretative declarations formulated late

“Where a treaty provides that an interpretative declaration can be made only at specified times, a State or an international organization may not formulate an interpretative declaration on that treaty at another time, unless the late formulation of the interpretative declaration does not elicit any objections from the other contracting parties.

“2.4.8 Conditional interpretative declarations formulated late

“A State or an international organization may not formulate a conditional interpretative declaration on a treaty after expressing its consent to be bound by the treaty unless the late formulation of the declaration does not elicit any objections from the other contracting parties.”

332. It is self-evident that the approaches laid down in draft guidelines 2.3.2 and 2.3.3 can also be transposed to acceptances of interpretative declarations formulated late and objections to such formulation. Nevertheless, it is probably not useful to overburden the Guide to Practice by including express draft guidelines in this respect, and it probably suffices to state as much in the commentary on the draft guidelines proposed above.

Annex I

**TABLE SHOWING CONCORDANCES* BETWEEN THE DRAFT GUIDELINES
PROPOSED BY THE SPECIAL RAPPORTEUR AND THOSE ADOPTED BY THE
COMMISSION ON FIRST READING**

	<i>Commission's numbering</i>	<i>Special Rapporteur's numbering</i>
1.	Definitions	—
1.1	Definition of reservations	1.1
1.1.1	Object of reservations	1.1.4
1.1.2	Instances in which reservations may be formulated	1.1.2
1.1.3	Reservations having territorial scope	1.1.8
1.1.4	Reservations formulated when notifying territorial application	1.1.3
1.1.5	Statements purporting to limit the obligations of their author	1.1.6
1.1.6	Statements purporting to discharge an obligation by equivalent means	—
1.1.7	Reservations formulated jointly	1.1.1
1.2	Definition of interpretative declarations	1.2
1.2.1	Conditional interpretative declarations	1.2.4
1.2.2	Interpretative declarations formulated jointly	1.2.1
1.3	Distinction between reservations and interpretative declarations	1.3
1.3.1	Method of implementation of the distinction between reservations and interpretative declarations	1.3.1
1.3.2	Phrasing and name	1.2.2
1.3.3	Formulation of a unilateral statement when a reservation is prohibited	1.2.3
1.4	Unilateral statements other than reservations and interpretative declarations	—
1.4.1	Statements purporting to undertake unilateral commitments	1.1.5
1.4.2	Unilateral statements purporting to add further elements to a treaty	1.1.6
1.4.3	Statements of non-recognition	1.1.7
1.4.4	General statements of policy	1.2.5
1.4.5	Statements concerning modalities of implementation of a treaty at the internal level	1.2.6
1.5	Unilateral statements in respect of bilateral treaties	—
1.5.1	“Reservations” to bilateral treaties	1.1.9
1.5.2	Interpretative declarations in respect of bilateral treaties	1.2.7
1.5.3	Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party	1.2.8
1.6	Scope of definitions	[1.4]

*This table is presented in response to a request by the Chairman of the Commission at its fifty-first session (*Yearbook ... 1999*, vol. I, 2597th meeting, p. 221, para. 59).

**DEFINITIONS: CONSOLIDATED TEXT OF ALL DRAFT GUIDELINES
DEALING WITH DEFINITIONS ADOPTED ON FIRST READING OR PROPOSED
IN THE PRESENT REPORT¹**

1.1 Definition of reservations²

“Reservation” means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.2 Object of reservations³

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation.

1.1.1 Instances in which reservations may be formulated⁴

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

1.1.3 Reservations having territorial scope⁵

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement, constitutes a reservation.

1.1.4 Reservations formulated when notifying territorial application⁶

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of the treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

sions of the treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 Statements purporting to limit the obligations of their author⁷

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

1.1.6 Statements purporting to discharge an obligation by equivalent means⁸

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 Reservations formulated jointly⁹

The joint formulation of a reservation by a number of States or international organizations does not affect the unilateral nature of that reservation.

1.1.8 Reservations formulated under exclusionary clauses¹⁰

A unilateral statement made by a State or an international organization when expressing its consent to be bound by a treaty or by a State when making a notification of succession, in accordance with a clause in the treaty expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties constitutes a reservation.

¹ The text of the draft guidelines proposed in the present report appears in italics.

² For the commentary on this draft guideline, see *Yearbook ... 1998*, vol. II (Part Two), pp. 99–100.

³ For the commentary to this draft guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 93–95.

⁴ For the commentary to this draft guideline, see *Yearbook ... 1998* (footnote 2 above), pp. 103–104.

⁵ *Ibid.*, pp. 104–105.

⁶ *Ibid.*, pp. 105–106.

⁷ For the commentary to this draft guideline, see *Yearbook ... 1999* (footnote 3 above), pp. 95–97.

⁸ *Ibid.*, p. 97.

⁹ For the commentary to this draft guideline, see *Yearbook ... 1998* (footnote 2 above), pp. 106–107.

¹⁰ Concerning this draft guideline, see paragraphs 148–178 of the present report, above.

1.2 Definition of interpretative declarations¹¹

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 Conditional interpretative declarations¹²

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 Interpretative declarations formulated jointly¹³

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations¹⁴

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations¹⁵

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in the light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

1.3.2 Phrasing and name¹⁶

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 Formulation of a unilateral statement when a reservation is prohibited¹⁷

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations¹⁸

Unilateral statements formulated in relation to a treaty which are not reservations or interpretative declarations are outside the scope of the present Guide to Practice.

1.4.1 Statements purporting to undertake unilateral commitments¹⁹

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 Unilateral statements purporting to add further elements to a treaty²⁰

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 Statements of non-recognition²¹

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 constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 General statements of policy²²

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

¹¹ For the commentary to this draft guideline, see *Yearbook ... 1999* (footnote 3 above), pp. 97–103.

¹² *Ibid.*, pp. 103–106.

¹³ *Ibid.*, pp. 106–107.

¹⁴ *Ibid.*, p. 107.

¹⁵ *Ibid.*, pp. 107–109.

¹⁶ *Ibid.*, pp. 109–111.

¹⁷ *Ibid.*, pp. 111–112.

¹⁸ *Ibid.*, pp. 112–113.

¹⁹ *Ibid.*, pp. 113–114.

²⁰ *Ibid.*, p. 114.

²¹ *Ibid.*, pp. 114–116.

²² *Ibid.*, pp. 116–118.

1.4.5 Statements concerning modalities of implementation of a treaty at the internal level²³

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting to affect its rights and obligations towards the other contracting parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

1.4.6 Unilateral statements adopted under an optional clause²⁴

A unilateral statement made by a State or an international organization in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not imposed on them solely by the entry into force of the treaty is outside the scope of the present Guide to Practice.

1.4.7 Restrictions contained in unilateral statements adopted under an optional clause²⁵

A restriction or condition contained in a unilateral statement adopted under an optional clause does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.8 Unilateral statements providing for a choice between the provisions of a treaty²⁶

A unilateral statement made by a State or an international organization in accordance with a clause contained in a treaty that expressly requires the parties to choose between two or more provisions of the treaty is outside the scope of the present Guide to Practice.

1.5 Unilateral statements in respect of bilateral treaties

1.5.1 "Reservations" to bilateral treaties²⁷

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

1.5.2 Interpretative declarations in respect of bilateral treaties²⁸

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 Legaleffect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party²⁹

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 Scope of definitions³⁰

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

1.7 Alternatives to reservations and interpretative declarations

1.7.1 Alternatives to reservations³¹

In order to modify the effects of the provisions of a treaty in their application to the contracting parties, States and international organizations may have recourse to procedures other than reservations.

1.7.2 Different procedures permitting modification of the effects of the provisions of a treaty³²

1. *Modification of the effects of the provisions of a treaty by procedures other than reservations may result in the inclusion in the treaty of:*

(a) *Restrictive clauses that limit the object of the obligations imposed by the treaty by making exceptions and setting limits thereto;*

(b) *Escape clauses that allow the contracting parties not to apply general obligations in specific instances and for a specific period of time;*

(c) *Statements made under the treaty by which a contracting party expresses its willingness to be bound by obligations that are not imposed on it solely by its expression of its consent to be bound by the treaty.*

2. *Modification of the effects of the provisions of a treaty may also result in:*

(a) *Their suspension, in accordance with the provisions of articles 57 to 62 of the 1969 and 1986 Vienna Conventions;*

²³ Ibid., p. 118.

²⁴ Concerning this draft guideline, see paragraphs 179–189 of the present report, above.

²⁵ Ibid., paras. 190–196 above.

²⁶ Ibid., paras. 197–210.

²⁷ For the commentary to this draft guideline, see *Yearbook ... 1999* (footnote 3 above), pp. 120–124.

²⁸ Ibid., pp. 124–125.

²⁹ Ibid., pp. 125–126.

³⁰ Ibid., p. 126.

³¹ Concerning this draft guideline, see paragraphs 72–94 of the present report, above.

³² Ibid., paras. 72–95 above.

(b) *Amendments to the treaty entering into force only for certain parties; or*

(c) *Supplementary agreements and protocols purporting to modify the treaty only as it affects the relations between certain parties.*

1.7.3 Restrictive clauses³³

A provision in a treaty that purports to limit or restrict the scope or application of more general rules contained in the treaty does not constitute a reservation within the meaning of the present Guide to Practice.

1.7.4 [“Bilateralized reservations”] [Agreements between States having the same object as reservations]³⁴

An agreement[, concluded under a specific provision of a treaty,] by which two or more States purport to

exclude or to modify the legal effect of certain provisions [of the] [of a] treaty or of the treaty as a whole in their application to their relations inter se does not constitute a reservation within the meaning of the present Guide to Practice.

1.7.5 Alternatives to interpretative declarations³⁵

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, the contracting parties may have recourse to procedures other than interpretative declarations. They may include in the treaty express provisions whose purpose is to interpret the treaty or may conclude supplementary agreements to that end.

³³ Ibid., paras. 110–116 above.

³⁴ Ibid., paras. 117–130 above.

³⁵ Ibid., paras. 96–103 above.

DIPLOMATIC PROTECTION

[Agenda item 6]

DOCUMENT A/CN.4/506 and Add. 1

First report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur

[Original: English/French]
[7 March and 20 April 2000]

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Introduction¹

1. The International Law Commission at its forty-eighth session, in 1996, identified the topic of “Diplomatic protection” as one of three topics appropriate for codification and progressive development.² In the same year, the General Assembly, in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.³ At the same session the Working Group submitted a report which was endorsed by the Commission.⁴ The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.⁵ The Commission also decided that it should endeavour to complete the first reading of the topic by the end of the current quinquennium.

2. At its 2501st meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic. The General Assembly in paragraph 8 of its resolution 52/156 of 15 December 1997 endorsed the decision of the Commission to include in its agenda the topic “Diplomatic protection”.

3. The Commission considered the preliminary report (*Yearbook ... 1998*, vol. II (Part One), p. 309, document A/CN.4/484) of the Special Rapporteur at its 2520th to 2523rd meetings, from 28 April to 1 May 1998.

4. At its 2534th meeting, on 22 May 1998, the Commission established an open-ended Working Group, chaired by Mr. Bennouna, Special Rapporteur of the topic,⁶ to consider possible conclusions that might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered in the second report of the Special Rapporteur for the fifty-first session of the Commission in 1999. The Working Group held two meetings, on 25 and 26 May 1998. As regards the approach to the topic, the Working Group agreed on the following:

(a) The customary law approach to diplomatic protection should form the basis for the work of the Commission on the topic;

(b) The topic would deal with secondary rules of international law relating to diplomatic protection; primary rules would only be considered when their clarification was essential to providing guidance for a clear formulation of a specific secondary rule;

(c) The exercise of diplomatic protection was the right of the State. In the exercise of that right, the State should take into account the rights and interests of its nationals for whom it was exercising diplomatic protection;

(d) The work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and in providing them with more direct and indirect access to international forums to enforce their rights. The Working Group was of the view that the actual and specific effect of such developments, in the context of the topic, should be examined in the light of State practice and insofar as they related to specific issues involved such as the nationality link requirement;

(e) The discretionary right of the State to exercise diplomatic protection did not prevent it from committing itself to its nationals to exercise such a right. In that context, the Working Group noted that some domestic laws had recognized the right of their nationals to diplomatic protection by Governments;

(f) The Working Group believed that it would be useful to request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection;

(g) The Working Group recalled the decision by the Commission at its forty-ninth session, in 1997, to complete the first reading of the topic by the end of the current quinquennium.⁷

5. As regards the second report of the Special Rapporteur, the Working Group suggested that it should concentrate on the issues raised in chapter I, “Basis for diplomatic protection”, of the outline proposed by the previous year’s Working Group.⁸

6. At its 2544th meeting, on 9 June 1998, the Commission considered and endorsed the report of the Working Group.

7. In 1999, Mr. Bennouna was elected as a judge to the International Tribunal for the Former Yugoslavia and resigned from the Commission. In July 1999, the Commission elected the author of the present report as Special Rapporteur on the topic of diplomatic protection.⁹

8. In July 1999 the Commission considered the topic at an informal Working Group meeting.

¹ The Special Rapporteur wishes to acknowledge the invaluable contribution made to the preparation of the report by Ms. Zsuzsanna Deen-Racsmany, a research assistant funded by the Cornelis van Vollenhoven Stichting of the University of Leiden, the Netherlands.

² *Yearbook ... 1996*, vol. II (Part Two), p. 97, para. 248, and p. 137, annex II, addendum 1.

³ *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 169.

⁴ *Ibid.* para. 171.

⁵ *Ibid.*, pp. 62–63, paras. 189–190.

⁶ *Yearbook ... 1998*, vol. I, 2534th meeting, p. 115, para. 90.

⁷ *Ibid.*, vol. II (Part Two), p. 49, para. 108.

⁸ *Yearbook ... 1997* (see footnote 3 above), p. 62, para. 189.

⁹ *Yearbook ... 1999*, vol. II (Part Two), p. 17, para. 19.

CHAPTER I

Structure of the report

9. The present report consists of three parts:

(a) An introduction to diplomatic protection which examines the history and scope of the topic and suggests how the right of diplomatic protection may be employed as a means to advance the protection of human rights in accordance with the values of the contemporary legal order;

(b) Several draft articles and commentaries on those articles. The articles raise a number of controversial issues on which the Special Rapporteur requires the views of the Commission to guide him in his future work. These matters might have been raised in an introductory report of the previous Special Rapporteur without an attempt to formulate them in draft articles. The format of draft articles does, however, place them in clearer focus for debate;

(c) An outline of the further articles to be submitted in future reports.

Introduction

10. There is much practice and precedent on diplomatic protection. Despite this, it remains one of the most controversial subjects in international law.¹⁰

11. Before the Second World War and the advent of the human rights treaty there were few procedures available to the individual under international law to challenge his treatment by his own State. On the other hand, if the individual's human rights were violated abroad by a foreign State the individual's national State might intervene to protect him or to claim reparation for the injuries that he had suffered. In practice it was mainly the nationals of the powerful Western States that enjoyed this privileged position, as it was those States that most readily intervened to protect their nationals who were not treated "in accordance with the ordinary standards of civilization"¹¹ set by Western States. Inevitably diplomatic protection of this kind came to be seen by developing nations, particularly in Latin America, as a discriminatory exercise of power rather than as a method of protecting the human rights of aliens.

12. To aggravate matters for non-Western States, diplomatic protection or intervention was exalted by the fiction that an injury to a national constituted an injury to the State itself. In 1924, PCIJ gave this fiction judicial blessing when it declared in the *Mavrommatis* case that:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right—its right to ensure, in the person of its subjects, respect for the rules of international law.¹²

¹⁰ Lillich, *The Human Rights of Aliens in Contemporary International Law*.

¹¹ *Harry Roberts (U.S.A.) v. United Mexican States* (UNRIAA, vol. IV (Sales No. 1951.V.1)), p. 77; see also *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, *ibid.*, p. 60.

¹² *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12. This dictum was repeated by PCIJ in

13. This fiction had important consequences. At one level, it provided a justification for military intervention or gunboat diplomacy. At another level, it allowed the United States of America and European Powers to reject Latin American attempts to compel foreigners doing business in Latin America to waive or renounce diplomatic protection on the ground that the national could not waive a right that belonged to the State.¹³

14. The diplomatic protection of aliens has been greatly abused. The Anglo-Boer war (1899–1902) was justified by the United Kingdom as an intervention to protect its nationals who owned the gold mines of the Witwatersrand. United States military intervention, on the pretext of defending their nationals in Latin America, has continued until recent times, as shown by the interventions in Grenada in 1983¹⁴ and Panama in 1989.¹⁵ Non-military intervention, in the form of demands for compensation for injuries inflicted on the persons or property of aliens, has also been abused,¹⁶ although one writer has suggested that the settlement of claims by arbitration often saved Latin American States from military intervention to enforce such claims.¹⁷

15. Much has changed in recent years. Standards of justice for individuals at home and foreigners abroad have undergone major changes. Some 150 States are today parties to the International Covenant on Civil and Political Rights and/or its regional counterparts in Europe, the Americas and Africa, which prescribe standards of justice to be observed in criminal trials and in the treatment of prisoners. Moreover, in some instances the individual is empowered to bring complaints about the violation of his human rights to the attention of international bodies such as the United Nations Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights or the African Commission on Human and Peoples' Rights.

16. The foreigner who does business abroad also has new remedies available to him. The Convention on the settlement of investment disputes between States and nationals of other States permits companies to bring proceedings against a State before ICSID, provided the defendant State and the national State of the company have consented to this procedure. Bilateral investment treaties offer similar remedies to companies doing business

Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 16.

¹³ For a full account of the dispute over such a waiver or Calvo clause, see Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy*.

¹⁴ Nash Leich, "Contemporary practice of the United States relating to international law" (1984), p. 200.

¹⁵ *Ibid.* (1990), p. 545.

¹⁶ See the separate opinion of Judge Padilla Nervo, *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 246.

¹⁷ Dunn, *The Protection of Nationals: A Study in the Application of International Law*, p. 58.

abroad.¹⁸ Undoubtedly the end of the cold war and the acceptance of market economy principles throughout the world have made both the life and the investment of the foreign investor more secure.

17. These developments have led some to argue that diplomatic protection is obsolete. Roughly the argument runs as follows: the equality-of-treatment-with-nationals-standard and the international minimum standard of treatment of aliens have been replaced by an international human rights standard, which accords to national and alien the same standard of treatment—a standard incorporating the core provisions of the Universal Declaration of Human Rights.¹⁹ The individual is now a subject of international law with standing to enforce his or her human rights at the international level. The right of a State to claim on behalf of its national should be restricted to cases where there is no other method of settlement agreed on by the alien and the injuring State. In such a case the claimant State acts as agent for the individual and not in its own right. The right of a State to assert its own right when it acts on behalf of its national is an outdated fiction which should be discarded—except, perhaps, in cases in which the real *national* interest of the State is affected.²⁰

18. This argument is flawed on two grounds; first, its disdain for the use of fictions in law; secondly, its exaggeration of the present state of international protection of human rights.

19. In some situations the violation of an alien's human rights will engage the interests of the national State.²¹ This is particularly true where the violations are systematic and demonstrate a policy on the part of the injuring State to discriminate against all nationals of the State in question. However, in the case of an isolated injury to an alien, it is true that the intervening State in effect acts as the agent of the individual in asserting his or her claim. Here the notion of injury to the State itself is indeed a fiction. This is borne out by two rules in particular: first, the rule that requires the individual to exhaust local remedies before the alien's State may intervene; and, secondly, the rule of continuous nationality that requires the individual to be a national of the protecting State both at the time of injury and at the time of presentation of the claim.²² Moreover, judicial decisions make it clear that in assessing the quan-

tum of damages suffered by the State, regard will be had to the damages suffered by the individual national.²³

20. The fictitious nature of diplomatic protection was a prominent feature of Mr. Bennouna's preliminary report in which he asked the Commission for guidance on the question whether a State in bringing an international claim was "enforcing its own right or the right of its injured national."²⁴

21. The present Special Rapporteur does not share his predecessor's disdain for fictions in law. Most legal systems have their fictions. Indeed Roman law relied heavily on procedural fictions in order to achieve equity.²⁵ "The life of the law is not logic, but experience", in the words of Oliver Wendell Holmes, the late Supreme Court Justice of the United States.²⁶ An institution, like diplomatic protection, that serves a valuable purpose should not be dismissed simply on the ground that it is premised on a fiction and cannot stand up to logical scrutiny.

22. The suggestion that developments in the field of international human rights law have rendered diplomatic protection obsolete requires more attention. García Amador, the first Special Rapporteur of the Commission on the subject of State responsibility, states that the traditional view of diplomatic protection that allowed the State to claim on behalf of its injured national belongs to an age in which the rights of the individual and the rights of the State were inseparable. Today the position is "completely different". Aliens, like nationals, enjoy rights simply as human beings and not by virtue of their nationality. "This means", he continues, "that the alien has been internationally recognized as a legal person independently of his State: he is a true *subject** of international rights."²⁷ A necessary implication of this reasoning is that the individual, now a subject of international law, with rights and duties under international law, should, other than in exceptional cases, fend for himself when he ventures abroad.

23. The present report is not the appropriate place for a full examination of the position of the individual in contemporary international law. Clearly the individual has more rights under international law today than she enjoyed 50 years ago. But whether this makes her a subject of international law is open to question.

24. The debate over the question whether the individual is a mere "object" of international law (the traditional view) or a "subject" of international law is unhelpful. It is better to view the individual as a *participant* in the international legal order.²⁸ As such the individual may participate in the international legal order by exercising her rights under human rights treaties or bilateral investment agreements. At the same time it is necessary to recognize that while the individual may have rights under interna-

¹⁸ See Lavieć, *Protection et promotion des investissements: étude de droit international économique*.

¹⁹ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. See García Amador, "State responsibility: some new problems", pp. 421 and 437–439; and *Yearbook ... 1957*, vol. II, document A/CN.4/106, pp. 112–116. See also the preliminary report on diplomatic protection by Mr. Mohamed Bennouna, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/484, p. 319, paras. 34–37.

²⁰ García Amador, loc. cit., p. 472.

²¹ Briery, "The theory of implied State complicity in international claims", p. 48. See also McDougal, Lasswell and Chen, "The protection of aliens from discrimination and world public order: responsibility of States conjoined with human rights", p. 442: "Like other 'fictions feigned', however, this identification of state and individual interests has been found, by disinterested observers as well as by claimant parties, to represent in many contexts a close approximation to social reality. People always have been, and remain, important bases of power for territorial communities."

²² Wyler, *La règle dite de la continuité de la nationalité dans le contentieux international*.

²³ *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 28.

²⁴ *Yearbook ... 1998* (see footnote 19 above), p. 316, para. 54.

²⁵ See, on the *actio ficticia* in Roman law, Sohm, *The Institutes*, pp. 259–260.

²⁶ *Yearbook ... 1972*, vol. I, 1167th meeting, p. 97, para. 53.

²⁷ García Amador, loc. cit., p. 421.

²⁸ Higgins, *Problems and Process: International Law and How We Use It*, pp. 48–55.

tional law, her remedies are limited—a fact that García Amador overlooks.²⁹

25. While the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) may offer real remedies to millions of Europeans, it is difficult to argue that the American Convention on Human Rights or the African Charter on Human and Peoples' Rights have achieved the same degree of success. Moreover, the majority of the world's population, situated in Asia, is not covered by a regional human rights convention. To suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights, provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The sad truth is that only a handful of individuals, in the limited number of States that accept the right of individual petition to the monitoring bodies of these conventions, have obtained or will obtain satisfactory remedies from these conventions.

26. The position of the alien abroad is no better. Universal and regional human rights conventions do extend protection to all individuals—national and alien alike—within the territory of States parties. But there is no multilateral convention that seeks to provide the alien with remedies for the protection of her rights outside the field of foreign investment.³⁰

27. In 1990, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families³¹ was adopted. The Convention expounds a charter of rights for migrant workers, with a monitoring body similar to the United Nations Human Rights Committee and an optional right of individual petition. That these remedies are not intended to replace the right of diplomatic protection is emphasized by article 23, which provides:

Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired.

The Convention has not yet received the 20 ratifications required to bring it into force—which suggests an unwillingness on the part of States to extend rights to migrant workers.

²⁹ The following comment of McDougal, Lasswell and Chen, loc. cit., p. 456, on Special Rapporteur Mr. García Amador's "noble 'synthesis' of the newer emerging law of human rights and the older law designed for the protection of aliens" (ibid., p. 454) best captures the differing responses to this "synthesis":

"By some his proposal is thought to extend the substantive protection of aliens much beyond what states can reasonably be expected to accept and to exacerbate the problems of cooperation between states of differing degrees of socialization. By others he might be thought, perhaps justifiably, to weaken an important traditional remedy for the protection of aliens before any effective new remedy is established in replacement."

³⁰ Para. 14 above.

³¹ See further on this Convention, Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*.

28. In 1985, the General Assembly adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live,³² which seeks to extend the rights contained in the Universal Declaration of Human Rights to aliens. The Declaration provides no machinery for its enforcement, but it does reiterate the right of the alien to contact his consulate or diplomatic mission for the purpose of protection. This starkly illustrates the current position: that aliens may have rights under international law as human beings, but they have no remedies under international law—in the absence of a human rights treaty—except through the intervention of their national State.³³

29. Until the individual acquires comprehensive procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection. As an important instrument in the protection of human rights, it should be strengthened and encouraged. As Lillich wrote in 1975:

[P]ending the establishment of international machinery guaranteeing third-party determination of disputes between alien claimants and states, it is in the interest of all international lawyers not only to support the doctrine [of diplomatic protection], but to oppose vigorously any effort to cripple or destroy it.³⁴

30. A similar view was expressed in 1968 by Przetacznik of the Polish Foreign Ministry. After listing the criticisms generally made against diplomatic protection, he wrote:

One may admit that this criticism is partially justified, but it contains some exaggeration and deliberate generalization. It cannot be denied, however, that diplomatic protection has often been abused, and that the stronger states are in a better position in the performance of diplomatic protection. Thus, the fault lies primarily in too harsh practices and not in the institution itself.

...

As far as human rights are developed and strengthened, diplomatic protection may lose some of its significance. However, human rights will probably not be able to supersede diplomatic protection in its entirety.

As long as diplomatic protection cannot be replaced by any better remedies, it is necessary to keep it, because it is badly needed, and its advantages outweigh its disadvantages in any case.³⁵

31. International human rights law does not consist of human rights conventions only. There is a whole body of conventions and customs, including diplomatic protection, that together comprise international human rights law. The International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights and other universal and regional human rights instruments are important, particularly as they extend protection to both alien and national in the territory of States parties.³⁶ But their remedies are weak.

³² General Assembly resolution 40/144 of 13 December 1985, annex.

³³ Geck, "Diplomatic protection", pp. 1059–1060.

³⁴ "The diplomatic protection of nationals abroad: an elementary principle of international law under attack", p. 359. See also Amerasinghe, *State Responsibility for Injuries to Aliens*, pp. 4–7.

³⁵ "The protection of individual persons in traditional international law (diplomatic and consular protection)", p. 113.

³⁶ For example, article 2, paragraph 1, of the International Covenant on Civil and Political Rights requires parties "to respect and to ensure to all individuals within its territory" the rights recognized in the Covenant. See also article 1 of the European Convention on Human

Diplomatic protection, albeit only available to protect individuals against a foreign Government, on the other hand, is a customary rule of international law that applies universally and, potentially, offers a more effective remedy. Most States will treat a claim of diplomatic protection from another State more seriously than a complaint against its conduct to a human rights monitoring body.³⁷

32. Contemporary international human rights law accords to nationals and aliens the same protection, which far exceeds the international minimum standard of treat-

Rights; and article 2 of the African Charter on Human and Peoples' Rights.

³⁷ A complaint from an individual under the European Convention on Human Rights backed by a foreign Government is likewise likely to carry more weight. See *Soering v. The United Kingdom*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 161, *Judgment of 7 July 1989* (Council of Europe, Strasbourg, 1989) (Federal Republic of Germany intervening); *Selmouni v. France*, Application No. 25803/94, *Judgment of 28 July 1999* (the Netherlands intervening); and *Denmark v. Turkey*, Application No. 34382/97, *Decision of 8 June 1999*.

ment for aliens set by Western Powers in an earlier era. It does not follow that these developments have rendered obsolete the traditional procedures recognized by customary international law for the treatment of aliens.³⁸ Although individuals today enjoy more international remedies for the protection of their rights than ever before, diplomatic protection remains an important weapon in the arsenal of human rights protection. As long as the State remains the dominant actor in international relations, the espousal of claims by States for the violation of the rights of their nationals remains the most effective remedy for the promotion of human rights. Instead of seeking to weaken this remedy by dismissing it as an obsolete fiction that has outlived its usefulness, every effort should be made to strengthen the rules that comprise the right of diplomatic protection.

³⁸ In the *Barcelona Traction* case (see footnote 16 above), p. 165, Judge Jessup declared: "The institution of the right to give diplomatic protection is surely not obsolete although new procedures are emerging."

CHAPTER II

Draft articles

Article 1. Scope

1. In the present articles diplomatic protection means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.

2. In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national.

Comment

A. DIPLOMATIC PROTECTION

33. The doctrine of diplomatic protection is closely related to that of State responsibility for injury to aliens. The idea that internationally wrongful acts or omissions causing injury to aliens engage the responsibility of the State to which such acts and omissions are attributable had gained widespread acceptance in the international community by the late 1920s. It was generally accepted that although a State was not obliged to admit aliens, once it had done so it was under an obligation towards the alien's State of nationality to provide a degree of protection to his person or property in accordance with an international minimum standard of treatment for aliens.³⁹

34. Several attempts have been made to codify this principle. In 1927, the Institute of International Law adopted a resolution on international responsibility of States for

injuries on their territory to the person or property of foreigners, which declared that:

The State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations.⁴⁰

In 1930, the Third Committee of the Conference for the Codification of International Law (The Hague) adopted in first reading a provision which stated that:

International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State.⁴¹

Later the 1960 draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School, proposed that:

A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State, and causes an injury to an alien.⁴²

This principle has been accepted as a rule of customary international law and applied in a great number of judicial and arbitral decisions. During the period of decolonization, some rejected its universal applicability on the grounds that it was open to abuse by the imperialist Powers, that it was an essentially Western invention and that aliens should not enjoy more extensive protection than a

⁴⁰ Art. 1 of the draft, reproduced in the first report on international responsibility by Mr. García Amador, *Yearbook ... 1956*, vol. II, document A/CN.4/96, p. 227.

⁴¹ Art. 1, League of Nations publication, *V. Legal, 1930.V.17* (document C.351(c)M.145(c).1930.V), reproduced in *Yearbook ... 1956* (see footnote 40 above), p. 225.

⁴² Art. 1, para. 1, of the draft Convention reproduced in Sohn and Baxter, "Responsibility of States for injuries to the economic interests of aliens", p. 548.

³⁹ Joseph, *Diplomatic Protection and Nationality: The Commonwealth of Nations*, p. 3; and Jennings and Watts, eds., *Oppenheim's International Law*, pp. 897 and 910–911.

State's own nationals.⁴³ Despite such criticism, State responsibility for injuries to aliens is generally accepted today.⁴⁴ It is also accepted that responsibility of this kind is accompanied by a duty to make reparation.⁴⁵ Thus in his revised draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens (art. 2, para. 1), presented to the Commission in 1961, the Special Rapporteur, Mr. García Amador, proposed that:

For the purposes of this draft, the "international responsibility of the State for injuries caused in its territory to the person or property of aliens" involves the duty to make reparation for such injuries ...⁴⁶

35. The present set of draft articles are essentially secondary rules. For this reason no attempt is made to present a provision incorporating a primary rule describing the circumstances in which the responsibility of a State is engaged for a wrongful act or omission to an alien. No attempt is made to formulate a provision on reparation either, as this is a matter dealt with in the draft articles on State responsibility.⁴⁷

36. Historically the right of diplomatic protection is vested in the State of nationality of the injured individual. This right is premised on the fiction that an injury to the individual is an injury to the State of nationality. The origins of this doctrine or fiction date back to the eighteenth century, when Vattel stated that:

Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.⁴⁸

Although this traditional doctrine of diplomatic protection has given rise to considerable debate, especially with regard to the question of whose rights are asserted when the State exercises diplomatic protection on behalf of its national,⁴⁹ it is a widely accepted rule of customary international law that States have the right to protect their nationals abroad. Although the State of residence has territorial jurisdiction over the alien, the State of nationality retains its personal jurisdiction over its national even while he or she is residing in another State.⁵⁰ The classical formulation of this position concerning the consequences of the personal jurisdiction of the State of nationality was stated by PCIJ in the *Mavrommatis* case:

⁴³ See, for example, Guha Roy, "Is the law of responsibility of States for injuries to aliens a part of universal international law?"

⁴⁴ See García Amador, *The Changing Law of International Claims*, pp. 74–76. This is also indicated by the fact that many authors deal with the treatment of aliens under the general topic of State responsibility. See, for example, Jennings and Watts, op. cit.; Brownlie, *Principles of Public International Law*; Harris, *Cases and Materials on International Law*; and Shaw, *International Law*.

⁴⁵ For further expressions of this principle, see García Amador, loc. cit., pp. 393–394.

⁴⁶ *Yearbook ... 1961*, vol. II, document A/CN.4/134 & Add.1, addendum, p. 46.

⁴⁷ See article 42, provisionally adopted by the Commission on first reading, *Yearbook ... 1996* (footnote 2 above), p. 63.

⁴⁸ *The Law of Nations or the Principles of Natural Law*, chap. VI, p. 136.

⁴⁹ This is discussed in more detail in the commentary to article 3, below.

⁵⁰ Leigh, "Nationality and diplomatic protection", p. 453.

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.⁵¹

The right of the State of nationality to exercise protection in this way has been confirmed by judicial decisions⁵² and the writings of scholars.⁵³ Furthermore, it has been codified in article 3 of the Vienna Convention on Diplomatic Relations and in article 5 of the Vienna Convention on Consular Relations, which lists as a function of diplomatic and consular missions:

Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law.⁵⁴

37. The general consensus on the right of the State to exercise diplomatic protection has prompted definitions of diplomatic protection which reflect the traditional State-centred position. In 1915, Borchard wrote that:

Diplomatic protection is in its nature an international proceeding, constituting "an appeal by nation to nation for the performance of the obligations of the one to the other, growing out of their mutual rights and duties".⁵⁵

Joseph, more concerned about the injuries to the individual and the responsibility of the State, writes that:

[D]iplomatic protection can be defined as a procedure for giving effect to State responsibility involving breaches of international law arising out of legal injuries to the person or property of the citizen of a State.⁵⁶

Charles De Visscher, cited with approval by García Amador, defines diplomatic protection as

a procedure by which States assert the right of their citizens to a treatment in accordance with international law.⁵⁷

38. Geck, writing in the *Encyclopedia of Public International Law*, presents a definition that takes account of

⁵¹ See footnote 12 above.

⁵² *Panevezys-Saldutiskis Railway case* (see footnote 12 above), pp. 16–17, and *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 24.

⁵³ See, for example, Joseph, op. cit., p. 1; Leigh, loc. cit., p. 453; Geck, loc. cit., p. 1046; and Jennings and Watts, op. cit., p. 512.

⁵⁴ Art. 3, para. 1 (b), of the Vienna Convention on Diplomatic Relations. The Vienna Convention on Consular Relations, in turn, contains a very similar, but somewhat more specific provision in article 5:

"Consular functions consist in:

"(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

"...

"(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State."

The European Convention on Consular Functions endorses this principle in its article 2, paragraph 1.

⁵⁵ Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, p. 354, citing Blaine, Secretary of State. See also page 357 (ibid.).

⁵⁶ Joseph, op. cit., p. 1. See also Leigh, loc. cit., p. 453.

⁵⁷ "Cours général de principes de droit international public", p. 507. García Amador quotes this definition in support of the idea that existing definitions emphasize the right of States to act. He himself did not offer any original definition. Instead, he quoted other authors and judicial decisions with similar emphasis (loc. cit., pp. 426–427).

developments relating to functional protection providing for agents of an international organization:

Diplomatic protection is ... the protection given by a subject of international law to individuals, i.e. natural or legal persons, against a violation of international law by another subject of international law.⁵⁸

Functional protection, by an international organization, first expounded in the *Reparation* case⁵⁹ in 1949, provides an important institution for the protection of the rights of individuals employed by an international organization.⁶⁰ Inevitably there are important differences between traditional diplomatic protection by a State and functional protection exercised by an international organization. For this reason the present set of articles makes no attempt to deal with functional protection.⁶¹

39. Surprisingly, perhaps, Mr. García Amador made no attempt to provide a conclusive definition of diplomatic protection. Mr. Bennouna, the first Special Rapporteur on diplomatic protection, simply described it, in his preliminary report, as

a mechanism or a procedure for invoking the international responsibility of the host State.⁶²

He did, however, acknowledge that

diplomatic protection has been regarded from the outset as the corollary of the personal jurisdiction of the State over its population, when elements of that population, while in foreign territory, have suffered injury in violation of international law.⁶³

40. Article 1 does not purport to be a definition of diplomatic protection. It is a description of diplomatic protection as the term is understood in the language of international law. It substantially reflects the meaning given to the term by the Commission's Working Group on diplomatic protection:

On the basis of nationality of natural or legal persons, States claim, as against other States, the right to espouse their cause and act for their benefit when they have suffered injury and/or a denial of justice in another State. In this respect, diplomatic protection has been defined by the international jurisprudence as a right of the State ...⁶⁴

Article 1 seeks to avoid any suggestion that it is a primary rule by omitting any reference to the concept of "denial of justice".

B. MEANING OF THE TERM "ACTION"

41. Definitions of diplomatic protection fail to deal adequately with the nature of the actions open to a State in the exercise of diplomatic protection.

⁵⁸ Loc. cit., p. 1046.

⁵⁹ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

⁶⁰ The ICJ advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (I.C.J. Reports 1999*, p. 62) provides an illustration of how the right of functional protection may be used.

⁶¹ The 1997 Working Group on diplomatic protection took "no position on whether the topic of diplomatic protection should include protection claimed by international organizations for the benefit of their agents" (*Yearbook ... 1997* (see footnote 3 above), p. 61, para. 187).

⁶² *Yearbook ... 1998* (see footnote 19 above), p. 311, para. 10.

⁶³ *Ibid.*

⁶⁴ *Yearbook ... 1997*, vol. II (Part Two), p. 61, para. 182.

42. In the *Panevezys-Saldutiskis Railway* case, PCIJ appeared to distinguish between "diplomatic action" and "judicial proceedings"⁶⁵—a distinction repeated by ICJ in the *Nottebohm* case⁶⁶ and by the Iran-United States Claim Tribunal in case No. A/18.⁶⁷

43. In contrast, legal scholars draw no such distinction and use the term "diplomatic protection" to embrace consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, the final resort, the use of force.⁶⁸ Dunn, in his 1932 study, stated in respect of the term diplomatic action that:

It embraces generally all cases of official representation by one government on behalf of its citizens or their property interests within the jurisdiction of another, for the purpose, either of preventing some threatened injury in violation of international law, or of obtaining redress for such injuries after they have been sustained.

...

What ordinarily happens in a case of protection is that the government of an injured alien calls the attention of the delinquent government to the facts of the complaint and requests that appropriate steps be taken to redress the grievance.

...

[T]he term "diplomatic protection" is here used as a generic term covering the general subject of protection of citizens ... abroad, including those cases in which other than diplomatic means may be resorted to in the enforcement of obligations ... [I]t should be noted that we are here concerned only with representations or demands that are made (expressly or impliedly) under a *claim of right*. Governments often take action in behalf of their citizens abroad which is not based on any assertion of international obligation and does not fall within the category of protection in a technical sense.⁶⁹

44. Mr. Bennouna in his preliminary report on diplomatic protection to the Commission likewise recognizes the wide range of actions open to a State in the exercise of the right of diplomatic protection when he states:

The State retains, in principle, the choice of means of action to defend its nationals, while respecting its international commitments and the peremptory norms of international law. In particular, it may not resort to the threat or use of force in the exercise of diplomatic protection.⁷⁰

45. The choice of means of diplomatic action open to a State is limited by the restrictions imposed on countermeasures by international law, now reflected in the draft

⁶⁵ See footnote 12 above.

⁶⁶ See footnote 52 above.

⁶⁷ *Iran-United States, case No. A/18*, Decision of 6 April 1984, *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1985), vol. 5, p. 261.

⁶⁸ Borchard, *op. cit.*, pp. 439–447; Geck, *loc. cit.*, pp. 1061–1063; and Weis, "Diplomatic protection of nationals and international protection of human rights", p. 645.

⁶⁹ *Op. cit.*, pp. 18–20. Geck, *loc. cit.*, p. 1046, likewise makes it clear that demands not made under a claim of right do not constitute diplomatic protection:

"[D]iplomatic or consular actions to obtain concessions or other government contracts for nationals from the receiving State, or the arrangement of legal defense for a justly imprisoned national are not diplomatic protection in our sense; they are usually neither directed against the other State nor based on a real or alleged violation of international law."

See *Yearbook ... 1998* (footnote 19 above), p. 312, para. 12.

⁷⁰ *Yearbook ... 1998* (footnote 19 above), p. 312, para. 11.

articles on State responsibility.⁷¹ Whether the right to the use of force in the exercise of diplomatic protection is completely excluded is dealt with in article 2.

46. Diplomatic protection is essentially concerned with the treatment of nationals, both legal and natural, abroad. In exceptional circumstances a State may extend diplomatic protection to non-nationals. This matter is dealt with in articles 8 and 10.

Article 2

The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where:

(a) The protecting State has failed to secure the safety of its nationals by peaceful means;

(b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State;

(c) The nationals of the protecting State are exposed to immediate danger to their persons;

(d) The use of force is proportionate in the circumstances of the situation;

(e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.

Comment

47. As explained in article 1, the restrictions on the means of diplomatic action open to the protecting State are governed by general rules of international law, particularly those relating to countermeasures as defined in the draft articles on State responsibility.⁷² The use of force as the ultimate means of diplomatic protection is frequently considered part of the topic of diplomatic protection and therefore requires special attention in the present draft articles.

48. History, both past and present,⁷³ is replete with examples of cases in which the pretext of protecting nationals has been used as a justification for military intervention. The writings of the Argentine jurist, Carlos Calvo, which sought to restrict the right of diplomatic protection, were a response to military interventions in Latin America.⁷⁴ The Drago doctrine of 1903,⁷⁵ which sought to outlaw military intervention for the recovery of contract debts owed to foreign nationals, was a response to

the action taken by Italy, Germany and the United Kingdom against Venezuela in 1902 following its failure to pay contractual debts owed to the nationals of those States. This resulted in the Convention respecting the limitation of the employment of force for the recovery of contract debts (Porter Convention) (Convention II signed at the 1907 Peace Conference at The Hague), which in article 1 obliged States “not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals”. That this prohibition on the use of force was not absolute was made clear by the qualification to the article that:

[T]his undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.⁷⁶

49. This history, coupled with the prohibition on the use of force contained in article 2, paragraph 4, of the Charter of the United Nations, has prompted previous special rapporteurs of the Commission to assert that the use of force is prohibited as a means of diplomatic protection.

50. In 1956, Mr. García Amador produced a report containing a number of “bases of discussion” (as a prelude to draft articles) which stressed the need to settle claims relating to diplomatic protection by peaceful means and proclaimed:

In no event shall the direct exercise of diplomatic protection imply a threat, or the actual use, of force, or any other form of intervention in the domestic or external affairs of the respondent State.⁷⁷

Although the records of the discussions in the Commission do not indicate any objections to those paragraphs, the only views expressed in favour of the provisions were short notes of approval by Mr. Krylov and Mr. Spiropoulos.⁷⁸ In spite of this, the provision was omitted from all subsequent reports.

51. In his preliminary report, Mr. Bennouna declared, without qualification, that States “may not resort to the threat or use of force in the exercise of diplomatic protection”.⁷⁹

52. The wish to prohibit the threat or use of force in the exercise of diplomatic protection is laudable, but it takes little account of contemporary international law, as evidenced by interpretations of the Charter of the United Nations and the practice of States. The current dilemma facing international law is reflected in Nguyen Quoc Dinh, Daillier and Pellet, who boldly state that the use of force is prohibited in the case of diplomatic protection but then consider as “delicate” the legality of cases in which States have intervened militarily to protect their nationals.⁸⁰ The present report, in contrast with previous reports, seeks to describe the present state of international law and to pro-

⁷¹ See articles 47–50, *Yearbook ... 1996* (footnote 2 above), pp. 63–64; and *Yearbook ... 1999*, vol. II (Part One), p. 3, document A/CN.4/498 and Add.1–4.

⁷² Arts. 47–50 (see footnote 71 above).

⁷³ Perhaps the best-known interventions of this kind in recent times are those of the United States in Grenada in 1983 (footnote 14 above) and Panama in 1989 (footnote 15 above).

⁷⁴ See footnote 13 above.

⁷⁵ See *Yearbook ... 1956* (footnote 40 above), p. 217, para. 230; and *Papers relating to the Foreign Relations of the United States, with the annual message of the President transmitted to Congress: December 7, 1903* (Washington, Government Printing Office, 1904), pp. 1–5.

⁷⁶ *Yearbook ... 1956* (footnote 40 above), p. 217.

⁷⁷ *Ibid.*, Basis of discussion No. VII, para. (3), p. 221. See also pages 216–219 (*ibid.*).

⁷⁸ *Yearbook ... 1956*, vol. I, 371st meeting, pp. 234–235.

⁷⁹ *Yearbook ... 1998* (see footnote 19 above), p. 312, para. 11.

⁸⁰ *Droit International Public*, pp. 777 and 908. See also Verdross and Simma, *Universelles Völkerrecht: Theorie und Praxis*, p. 905, para. 1338.

pose limits to the use of force which reflect current State practice.

53. Article 2, paragraph 4, of the Charter of the United Nations contains a general prohibition on the use of force:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The only exception to this provision, permitting the unilateral use of force by States, is Article 51, which deals with the right of self-defence.

54. The use of force to recover contract debts is clearly prohibited by Article 2, paragraph 4.⁸¹ So too is any threat or use of force by way of reprisal action aimed at the protection of nationals. This is not the appropriate place for a discourse on reprisals and the use of force. Suffice it to say that forcible reprisals are condemned as contrary to the Charter of the United Nations by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,⁸² a conclusion confirmed by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*⁸³ and academic writings.⁸⁴ Suggestions by scholars that “reasonable” forcible reprisal action is tolerated by international law⁸⁵ are premised on the difficulties inherent in distinguishing between reprisal action taken some time after an armed attack designed to deter future armed attacks and self-defence. However important this debate may be, it has no relevance to the use of force to protect nationals, which involves an immediate response to secure the safety of the nationals and not subsequent punitive action.

55. The threat or use of force in the exercise of diplomatic protection can only be justified if it can be characterized as self-defence. It is this question that must be addressed in the present study of diplomatic protection. There is no suggestion that defence of nationals may be categorized as humanitarian intervention, despite the fact

⁸¹ Jennings and Watts, op. cit., p. 441.

⁸² General Assembly resolution 2625 (XXV) of 24 October 1970, annex. In the Declaration the General Assembly proclaims that “States have a duty to refrain from acts of reprisal involving the use of force” (part 1).

⁸³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 246, para. 46.

⁸⁴ Tomuschat, “Article 2(3)”, p. 105; Bowett, “Reprisals involving recourse to armed force”, p. 1; Partsch, “Reprisals”, p. 200; García Amador, first report, *Yearbook ... 1956* (see footnote 40 above), p. 217; Harvard Law School, *Research in International Law*, II, pp. 217–218, cited by García Amador, *ibid.*, p. 216; Higgins, *The Development of International Law through the Political Organs of the United Nations*, pp. 216–217; Brownlie, *International Law and the Use of Force by States*, p. 281; Verdross and Simma, op. cit., pp. 294–295, para. 480; Schachter, *International Law in Theory and Practice*, pp. 128–129; Bryde, “Self-defence”, pp. 361–363; Partsch, “Self-preservation”, p. 218, referring to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (see footnote 82 above) and the Final Act of the Helsinki Conference on Security and Cooperation in Europe of 1975; and Barsotti, “Armed reprisals”, pp. 79–80.

⁸⁵ See Bowett, loc. cit., p. 3; Shaw, op. cit., p. 786; Dinstein, *War, Aggression and Self-Defence*, p. 222; and Partsch, “Reprisals”, p. 332, and “Self-preservation”, pp. 218–219.

that some writers⁸⁶ fail to draw a clear distinction between humanitarian intervention to protect the nationality of the injuring State and intervention by a State to protect its own nationals.

56. The right of self-defence in international law was formulated well before 1945. It required action taken in self-defence to be an immediate and necessary response to a situation threatening a State’s security and vital interests. The response was to be kept within the bounds of proportionality. The scope of the right was wide and included both anticipatory self-defence and intervention to protect nationals.⁸⁷

57. Article 51 of the Charter of the United Nations is less generous. It provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Some writers⁸⁸ argue that Article 51 contains a complete and exclusive formulation of the right of self-defence, which limits it to cases in which an armed attack has occurred against a State, while others maintain that the phrase “inherent right” in Article 51 preserves the pre-Charter customary right.⁸⁹ In the *Military and Paramilitary Activities in and against Nicaragua* case ICJ gave support to the latter view when it held that “Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter”.⁹⁰ The Court confirmed this approach in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* when it declared that some of the constraints on the resort to self-defence “are inherent in the very concept of self-defence” while others “are specified in Article 51”. Moreover, said the Court,

The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.⁹¹

58. If Article 51 preserves the customary law right of self-defence, it is difficult to contend that the Charter’s

⁸⁶ Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*; Verwey, “Humanitarian intervention”, p. 57; Nguyen Quoc Dinh, Daillier and Pellet, op. cit., pp. 908–909.

⁸⁷ Bowett, *Self-Defence in International Law*, pp. 96–105.

⁸⁸ Brownlie, *International Law ...*, pp. 272–275; Verdross and Simma, op. cit., p. 288, para. 470; and Kelsen, *The Law of the United Nations: a Critical Analysis of its Fundamental Problems*, p. 791.

⁸⁹ Bowett, op. cit., pp. 184–186; Waldock, “The regulation of the use of force by individual States in international law”, pp. 496–497; and Franzke, “Die militärische Abwehr von Angriffen auf Staatsangehörige im Ausland: insbesondere ihre Zulässigkeit nach der Satzung der Vereinten Nationen”, pp. 169–170.

⁹⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 94.

⁹¹ I.C.J. Reports 1996 (see footnote 83 above), pp. 244–245, paras. 40–41.

prohibition on the use of force extends to the protection of nationals abroad.⁹² Such contention is made more difficult by the amount of State practice since 1945 in support of military intervention to protect nationals abroad in time of emergency⁹³ and the failure of courts⁹⁴ and political organs⁹⁵ of the United Nations to condemn such action. In the words of Jennings and Watts, “there has been little disposition on the part of states to deny that intervention properly restricted to the protection of nationals is, in emergencies, justified”.⁹⁶

59. There is, however, general agreement that the right to use force in the protection of nationals has been greatly abused⁹⁷ in the past and that it is a right that lends itself to abuse.⁹⁸ The right must therefore be narrowly formulated to make it clear, first, that it may not be invoked to protect the property of a State’s nationals abroad⁹⁹ and, secondly, that it may only be invoked in emergencies to justify the rescue of foreign nationals. The 1976 forcible intervention by Israeli commandos at Entebbe airport,¹⁰⁰ Uganda, may serve as a model for such a rescue operation. The present article, formulated on the basis of that precedent, aims to limit the right to use force to protect nationals to emergencies in which they are exposed to immediate danger and the territorial State lacks the capacity or willingness to protect them. This seems to reflect State practice

⁹² Bowett, *op. cit.*, pp. 87–105; Dinstein, *op. cit.*, p. 213; Barrie, “Forcible intervention and international law: legal theory and realities”, p. 800; and Dahm, *Völkerrecht*, p. 209. But *contra*, see Brownlie, *International Law ...*, pp. 289–301; *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 35; Ronzitti, *op. cit.*; Tunkin, “Politics, law and force in the interstate system”, pp. 337–338; and Menzhinsky, *Neprimeneniie sily v mezhdunarodnyh otnosheniiah*, pp. 97–98. It is not clear what inference should be drawn from the ICJ judgment in the *Military and Paramilitary Activities in and against Nicaragua* case on this subject. While the Court expressly left open the question of the lawfulness of anticipatory self-defence (see footnote 90 above), p. 103, para. 194, it made no mention of the current status of defence of nationals as a form of self-defence.

⁹³ Jennings and Watts, *op. cit.*, pp. 440–442.

⁹⁴ In the case of *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 18, ICJ declined to pronounce the legality of the unsuccessful United States attempt to rescue hostages “in exercise of its inherent right of self-defence”. Judges Morozov (p. 57) and Tarazi (p. 64) did, however, reject the United States argument and concluded that the rescue operation was not justified by Article 51. See D’Angelo, “Resort to force by States to protect nationals: the U.S. rescue mission to Iran and its legality under international law”, p. 485.

⁹⁵ In all instances in which force has been used to rescue or protect nationals the Security Council has been unable to reach a decision in favour or against the intervention. Following the Entebbe raid in 1976 a resolution condemning Israel was not put to the vote (draft resolution S/12139 of 12 July 1976, reproduced in ILM, vol. 15 (1976), p. 1227).

⁹⁶ *Op. cit.*, p. 440.

⁹⁷ See, for example, the criticisms of the military interventions of the United States in Grenada and Panama (footnotes 14–15 above); Joyner, “Reflections on the lawfulness of invasion”, p. 131; and Nanda, “The validity of United States intervention in Panama under international law”, p. 494.

⁹⁸ See Borchard, *op. cit.*, pp. 331 and 447; García Amador, first report (footnote 40 above), p. 216, para. 227; Guha Roy, *loc. cit.*, pp. 880 and 887; García Amador, *op. cit.*, p. 79; Lillich, *op. cit.*, pp. 14–15; and Orrego Vicuña, “The changing law of nationality of claims”. For views denying that diplomatic protection presents a real danger of abuse, see Dunn, *op. cit.*, p. 19.

⁹⁹ Jennings and Watts, *op. cit.*, p. 441; Shaw, *op. cit.*, p. 793; and Franzke, *loc. cit.*, p. 171.

¹⁰⁰ See Margo, “The legality of the Entebbe raid in international law”, p. 306; Boyle, “The Entebbe hostages crisis”, p. 32; *Yearbook of the United Nations 1976* (United Nations publication, Sales No. E.76.I.1), vol. 30, pp. 315–320; and ILM (footnote 95 above), p. 1224.

more accurately than an absolute prohibition on the use of force (which is impossible to reconcile with actual State practice) or a broad right to intervene (which is impossible to reconcile with the protests that have been made by the injured State and third States on the occasion of such interventions). From a policy perspective it is wiser to recognize the existence of such a right, but to prescribe severe limits, than to ignore its existence, which will permit States to invoke the traditional arguments in support of a broad right of intervention and lead to further abuse.

60. In practice the right to use force in the protection of nationals has been invoked to protect non-nationals where they are threatened, together with nationals of the protecting State.¹⁰¹ In an emergency situation it will be both difficult and unwise to distinguish sharply between nationals and non-nationals. There should be no objection to the protecting State rescuing non-nationals exposed to the same immediate danger as its nationals, provided the preponderance of threatened persons are nationals of that State. Where the preponderance of threatened persons are non-nationals the use of force might conceivably be justified as a humanitarian action but not as self-defence in the protection of nationals. Whether international law recognizes a forcible right of humanitarian intervention falls outside the scope of the present study.

Article 3

The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to article 4, the State of nationality has a discretion in the exercise of this right.

Comment

61. In doctrine the most controversial aspect of diplomatic protection concerns the question of *whose* rights are asserted when the State of nationality invokes the responsibility of another State for injury caused to its national. The traditional view maintains that the State of nationality acts on its own behalf since an injury to a national is an injury to the State itself. Today this doctrine is challenged on the ground that it is riddled with internal inconsistencies and is nothing more than fiction. Contemporary developments which grant individuals direct access to international judicial bodies to assert claims against both foreign States and their State of nationality lend support to this criticism.

62. The traditional view has its origin in a statement by Vattel that:

Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen.¹⁰²

This claimed indirect injury has been considered the basis of diplomatic protection for centuries. The thesis that the State has a general interest in the treatment of its nationals abroad and in ensuring respect for international law, and as a necessary corollary that it asserts its *own* right when it brings an international claim arising out of an injury to

¹⁰¹ Jennings and Watts, *op. cit.*, p. 442.

¹⁰² Vattel, *op. cit.*, p. 136.

a national, has repeatedly been confirmed by international tribunals. The classical formulation of the doctrine is to be found in the judgment of PCIJ in the *Mavrommatis* case, where the Court made the following statement:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.¹⁰³

This doctrine was endorsed by the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law (Guerrero report)¹⁰⁴ and the Harvard Law School draft of 1929.¹⁰⁵ The principle was also restated by ICJ in the *Nottebohm* case in 1955 after criticism of the traditional conception had been voiced by writers:¹⁰⁶

Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State.¹⁰⁷

At its 1965 Warsaw session the Institute of International Law resolved that:

An international claim presented in respect of an injury suffered by an individual possesses the national character of a State when the individual is a national of that State or a person which that State is entitled under international law to assimilate to its own nationals for purposes of diplomatic protection.¹⁰⁸

63. The basis of the State's right to ensure respect for international law in the person of its nationals has been claimed to lie in the "right of self-preservation, the right of equality, and the right of intercourse".¹⁰⁹ A more satisfactory explanation was given by Brierly in 1928 in his comment on the assertion that an injury to a national is an injury to the State of nationality:

Such a view does not, as is sometimes suggested, introduce any fiction of law; nor does it rest ... on anything so intangible as the "wounding of national honour"; rather it merely expresses the plain truth that the injurious results of a denial of justice are not, or at any rate are not necessarily, confined to the individual sufferer or his family, but include such consequences as the "mistrust and lack of safety" felt by other foreigners similarly situated ... Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case ...¹¹⁰

Brierly's view is premised on the inability of the individual to present an international claim himself,¹¹¹ a premise

emphasized by Geck in the *Encyclopedia of Public International Law* when he asserts that the traditional doctrine of diplomatic protection is a "necessary consequence of the lack of an international material right" on the part of the injured individual.¹¹²

64. The notion that an injury to the individual is an injury to the State itself is not consistently maintained in judicial proceedings. When States bring proceedings on behalf of their nationals they seldom claim that they assert their own right and often refer to the injured individual as the "claimant".¹¹³ In the *Interhandel* case ICJ speaks of the applicant State having "adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law".¹¹⁴

65. In these circumstances it is not surprising that some writers¹¹⁵ argue that when it exercises diplomatic protection a State acts as agent on behalf of the injured individual and enforces the right of the individual rather than that of the State. Logical inconsistencies in the traditional doctrine, such as the requirement of continuous nationality, the exhaustion of local remedies rule and the practice of fixing the quantum of damages suffered to accord with the loss suffered by the individual, lend support to this view. Some writers seek to overcome the flaws in the traditional doctrine by explaining that the material right is vested in the individual, but that the State maintains the procedural right to enforce it.¹¹⁶ Other writers are less patient with the traditional doctrine and prefer to dismiss it as a fiction that has no place in the modern law of diplomatic protection.¹¹⁷

66. Developments in international human rights law, which elevate the position of the individual in international law, have further undermined the traditional doctrine. If an individual has the right under human rights instruments to assert his basic human rights before an international body, against his own State of nationality or a foreign State, it is difficult to maintain that when a State exercises diplomatic protection on behalf of an individual it asserts its *own* right. Investment treaties which grant legal remedies to natural and legal persons before international bodies raise similar difficulties for the traditional doctrine.

67. No attempt is made to justify the traditional view as a coherent and consistent doctrine. It is factually inaccurate, for as Brierly pointed out,

¹¹² Loc. cit., p. 1057. See also García Amador, loc. cit., p. 471.

¹¹³ This approach was followed by the drafters of the 1960 draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School (Sohn and Baxter, loc. cit., art. 21, para. 5, p. 578). Writing in 1915, Borchard described diplomatic protection as an "extraordinary legal remedy granted to the citizen, within the discretion of the state", op. cit., p. 353.

¹¹⁴ *Interhandel, Judgment, I.C.J. Reports 1959*, p. 27.

¹¹⁵ For a detailed presentation of these arguments, see Mr. García Amador's first report (footnote 40 above), pp. 192–193; García Amador, loc. cit., pp. 413–428; and op. cit., pp. 497–501; *Yearbook ... 1998* (footnote 19 above), pp. 312–314, paras. 15–37, and p. 316, paras. 49–54; Orrego Vicuña, loc. cit., pp. 1–6; Geck, loc. cit., pp. 1057–1059; and Guha Roy, loc. cit., pp. 877–878.

¹¹⁶ Geck, loc. cit., p. 1058; and Guha Roy, loc. cit., p. 878.

¹¹⁷ *Yearbook ... 1998* (footnote 19 above), p. 313. See also Bennouna, "La Protection diplomatique, un droit de l'État?", p. 245.

¹⁰³ Fifteen years later the Court made the same statement in the *Panevezys-Saldutiskis Railway* case (see footnote 12 above).

¹⁰⁴ *Yearbook ... 1956* (see footnote 40 above), p. 192.

¹⁰⁵ Harvard Law School, Draft Convention on the responsibility of States for damage done in their territory to the person or property of foreigners, Supplement to the *American Journal of International Law*, vol. 23, special number (April 1929), art. 1, p. 133.

¹⁰⁶ For an example of such early criticism, see Jessup, *A Modern Law of Nations*, p. 116.

¹⁰⁷ See footnote 52 above.

¹⁰⁸ *Tableau des résolutions adoptées (1957-1991)* (Paris, Pedone, 1992), art. 3, p. 59.

¹⁰⁹ Borchard, op. cit., p. 353, citing Hall, Rivier, Despagnet, Pomeroy and Oppenheim.

¹¹⁰ Loc. cit., p. 48.

¹¹¹ *Ibid.* p. 47.

it is an exaggeration to say that whenever a national is injured in a foreign state, his state as a whole is necessarily injured too.¹¹⁸

Moreover, as a doctrine it is impaired by practices which contradict the notion that an injury to the individual is an injury to the State, and by contemporary developments in human rights law and foreign investment law which empower the individual to bring proceedings in his own right before international tribunals. It cannot therefore seriously be denied that the notion that an injury to a national is injury to the State is a fiction.

68. The present report is more concerned with the utility of the traditional view than its soundness in logic. As shown in the introduction,¹¹⁹ diplomatic protection, albeit premised on a fiction, is an accepted institution of customary international law, and one which continues to serve as a valuable instrument for the protection of human rights. It provides a potential remedy for the protection of millions of aliens who have no access to remedies before international bodies and it provides a more effective remedy to those who have access to the often ineffectual remedies contained in international human rights instruments.

69. The debate on the identity of the holder of the right of diplomatic protection has important consequences for the scope and effectiveness of the institution. If the holder of the right is the State, it may enforce its right irrespective of whether the individual himself has a remedy before an international forum. If, on the other hand, the individual is the holder of the right, it becomes possible to argue that the State's right is purely residual and procedural, that is, a right that may only be exercised in the absence of a remedy pertaining to the individual. This course is suggested by Orrego Vicuña in his final report to the International Law Association Committee on Diplomatic Protection of Persons and Property:

A residuary role for diplomatic protection seems more adequate to the extent that this mechanism might only intervene when there are no international procedures directly available to the affected individual. It should be noted, however, that if direct access is available diplomatic protection would be excluded altogether, except perhaps in order to ensure the enforcement of an award or secure compliance with a decision favoring that individual; in particular there would be no question of diplomatic protection after the individual has resorted to international procedures or in lieu thereof.

There is still the possibility of a parallel operation in which a State may spouse a claim at the same time that the individual pursues direct remedies, but this alternative would result in various kinds of interference with the orderly conduct of the procedures and eventually the outcome of the decision.¹²⁰

This view reflects the position advocated by Mr. García Amador in his reports to the Commission.¹²¹

70. A compromise solution is that proposed by Jessup¹²² and Sohn and Baxter in the 1960 draft Convention on the International Responsibility of States for Injuries to

Aliens,¹²³ which would allow both the injured individual and the State of nationality to pursue claims against the injuring State, but to give priority to the State claim. Article 3 is compatible with such a solution: it does not preclude the possibility of a claim being pursued by the individual on the international plane—*where there is a remedy available*. At the same time it places no restraint on the State of nationality to intervene itself.

71. Another solution offered by Doehring is that the State may bring the claim when its own rights are affected, which would also apply in the case of the expropriation of the property of a national. On the other hand, where the personal fundamental rights of the individual are affected, both the individual and the State may bring claims. This suggestion is also compatible with the proposal contained in article 3.¹²⁴

72. Another argument that seeks to “cure” diplomatic protection of its fictitious character, but which substantially reduces the scope of diplomatic protection, runs as follows: the doctrine that an injury to the individual is an injury to the State is only a fiction when the State intervenes to protect an isolated individual or small group of individuals whose human rights, including property rights, have been violated by the territorial State. Where the injury is systematic and directed at a substantial number of nationals, thereby providing evidence of a policy of discrimination against a particular State's nationals, the State of nationality is in fact injured as the conduct of the territorial State constitutes an affront to the State itself.¹²⁵ In the latter case, and the latter case only, the State of nationality may intervene.

73. Article 3 codifies the principle of diplomatic protection in its traditional form. It recognizes diplomatic protection as a right attached to the State, which the State is free to exercise in its discretion (subject to article 4) whenever a national is unlawfully injured by another State. The State of nationality is not limited in its right of diplomatic

¹²³ Sohn and Baxter, loc. cit., pp. 578–580. Article 22 permits the injured individual to present his own claim directly to the injuring State; and article 23 provides for claims by the State. Article 23, paragraph 1, provides that:

“If a claim is being presented both by a claimant and by the State of which he is a national, the right of the claimant to present or maintain his claim shall be suspended while redress is being sought by the State.”

¹²⁴ Doehring, “Handelt es sich bei einem Recht, das durch diplomatischen Schutz eingefordert wird, um ein solches, das dem die Protektion ausübenden Staat zusteht, oder geht es um die Erzwingung von Rechten des betroffenen Individuums?”, *Der diplomatische Schutz im Völker und Europarecht: Aktuelle Probleme und Entwicklungstendenzen*, pp. 18–20. See also similar comments by Ress and Stein, *ibid.*, pp. 22–23.

¹²⁵ See García Amador:

“[I]n any of the cases in which responsibility arises by reason of an injury caused to the person or property of the alien, the consequences of the acts or omissions may, owing to their gravity or to their frequency or because they indicate a manifestly hostile attitude towards the foreigner, extend beyond this specific personal injury. In other words, there may exist circumstances involving acts or omissions the consequences of which extend beyond the specific injury caused to the alien.”

(Loc. cit., p. 422). See also pages 466–467 and 473–474 (*ibid.*); *Yearbook ... 1956* (footnote 40 above), pp. 197 and 220 (Basis of discussion No. III (2) (b)); *Yearbook ... 1958* (footnote 121 above), pp. 62 and 65; and Jessup, *op. cit.*, pp. 118–120.

¹¹⁸ *The Law of Nations*, p. 276.

¹¹⁹ Paras. 17–31 above.

¹²⁰ “The changing law ...”, pp. 7–8.

¹²¹ First report, *Yearbook ... 1956* (footnote 40 above), pp. 215–217; third report, *Yearbook ... 1958*, vol. II, document A/CN.4/111, pp. 61–63; fifth report, *Yearbook ... 1960*, vol. II, document A/CN.4/125, pp. 51–55; and loc. cit., pp. 462–473.

¹²² *Op. cit.*, pp. 116–117. Jessup argues that the individual should be free to resort to international procedures only after the State has decided not to intervene.

intervention to instances of large-scale and systematic human rights violations. Nor is it obliged to abstain from exercising that right when the individual enjoys a remedy under a human rights or foreign investment treaty. In practice a State will no doubt refrain from asserting its right of diplomatic protection while the injured national pursues his international remedy. Or it may, where possible,¹²⁶ join the individual in the assertion of his right under the treaty in question. But in principle a State is not obliged to exercise such restraint as its *own* right is violated when its national is unlawfully injured.

74. The discretionary power of the State to intervene on behalf of its national is considered in the commentary on article 4.

Article 4

1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State.

2. The State of nationality is relieved of this obligation if:

(a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people;

(b) Another State exercises diplomatic protection on behalf of the injured person;

(c) The injured person does not have the effective and dominant nationality of the State.

3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.

Comment

75. According to the traditional doctrine of diplomatic protection, a State has the right to protect its national but is under no obligation to do so. Consequently, a national of the State injured abroad has no right to diplomatic protection under international law. That there is *no duty* on a State under international law to protect a national was clearly stated by Borchard in 1915:

Many writers¹²⁷ consider diplomatic protection a duty of the state, as well as a right. If it is a duty internationally, it is only a moral and not a legal duty, for there is no means of enforcing its fulfillment. Inasmuch as the state may determine in its discretion whether the injury to the citizen is sufficiently serious to warrant or whether political expediency justifies the exercise of the protective forces of the collectivity in his behalf,—for the interests of the majority cannot be sacrificed—it is clear that by international law there is no legal duty incumbent upon the state to extend diplomatic protection. Whether such a duty exists toward the citizen is a matter of municipal law of his own country, the general rule

¹²⁶ See, for example, *Soering v. The United Kingdom* and *Selmouni v. France* (footnote 37 above).

¹²⁷ Writers cited by Borchard include Grotius, book II, chap. XXV, paras. 1–2, and Vattel, vol. I, chap. II, paras. 13–16.

being that even under municipal law the state is under no legal duty to extend diplomatic protection.¹²⁸

Borchard was equally adamant that there is *no right* to diplomatic protection on behalf of the injured national:

It is hardly correct ... to speak of the citizen's power to invoke the diplomatic protection of the government as a "right" of protection ... his call upon the government's interposition is addressed to its discretion. At best, therefore, it is an imperfect right ... Being devoid of any compulsion, it resolves itself merely into a privilege to ask for protection. Such duty of protection as the government may be assumed to owe to the citizen in such cases is a political and not a legal one, responsibility for the proper execution of which is incurred to the people as a whole, and not to the citizen as an individual.¹²⁹

This position was reaffirmed by ICJ in the *Barcelona Traction* case in 1970:

[W]ithin the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress ...

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.¹³⁰

76. While most writers accept the traditional position,¹³¹ voices have been raised against it. Charles De Visscher stated that "the absolute political discretion left to the State in the exercise of protection goes ill with the principle that the treatment due to aliens is a matter of international law".¹³² Orrego Vicuña in his report to the International Law Association has described this aspect as one of the principal "disadvantages" of the current system.¹³³

77. While the institution of diplomatic protection may be seen as an instrument for the furtherance of the international protection of human rights, it is not possible to describe diplomatic protection as an individual human right.¹³⁴ This is confirmed by the two international human rights instruments concerned with the right of aliens—the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live¹³⁵ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families¹³⁶—which reaffirm the right of the alien to have recourse to his diplomatic or consular mission for protection but place no duty on the State of nationality to protect him.¹³⁷

¹²⁸ *Op. cit.*, p. 29.

¹²⁹ *Ibid.*, p. 356.

¹³⁰ *I.C.J. Reports 1970* (see footnote 16 above), p. 44, paras. 78–79.

¹³¹ Greig, *International Law*, p. 523; Jennings and Watts, *op. cit.*, p. 934; Geck, *loc. cit.*, pp. 1051–1052; García Amador, *loc. cit.*, p. 427; and van Panhuys, *The Role of Nationality in International Law: an Outline*, pp. 103 and 221.

¹³² Charles De Visscher, *Theory and Reality in Public International Law*, p. 275.

¹³³ "The changing law ...", p. 7. See also *Yearbook ... 1998* (footnote 19 above), p. 316, paras. 47–48.

¹³⁴ Skubiszewski, "Introduction", p. 10.

¹³⁵ Art. 10 (see footnote 32 above).

¹³⁶ Art. 23.

¹³⁷ Warbrick, "Protection of nationals abroad", p. 1004.

78. Recent discussions in the Sixth Committee of the General Assembly illustrate the divergence of views on this issue. Most speakers considered that the decision whether or not to exercise diplomatic protection was the sovereign prerogative of the State with a full discretion.¹³⁸ Mr. Baker (Israel) stated that States might be influenced by overriding foreign policy concerns in declining the exercise of that right. Moreover, as the individual's claim might be wrong or unfounded in international law, the exercise of diplomatic protection should remain within the discretion of the State in order to prevent the individual from putting the State in a "an unnecessary position".¹³⁹ In contrast, while agreeing that diplomatic protection was primarily the prerogative of States, Mr. Skrk (Slovenia) proposed an examination of the legislative practice of States that afforded the right of diplomatic protection to their nationals.¹⁴⁰

79. There was also a discussion of whether diplomatic protection should be considered a human right. Mr. Cede (Austria) expressed doubts about such a possibility, maintaining that such a view was not supported by existing international law and could not be expected to become part of the legal order in the near future.¹⁴¹ In a somewhat more liberal manner, Mr. Gray (Australia) called for the examination of the legal basis (in the views and practice of States) of the right possessed by the individual and pointed to the necessity of considering whether it could be categorized as a human right.¹⁴² Mr. Pérez Giralda (Spain) appeared to support the view that the right to diplomatic protection was a human right as he contended that the individual had a right to compensation for violations of his rights, as well as for the lack of diplomatic protection.¹⁴³

80. Discussions in the Sixth Committee revealed that some members of the international legal community believed that the individual should be entitled to diplomatic protection as a matter of right. Although limited, there is in fact some State practice to support this view. Constitutional provisions in a number of States, mainly those belonging to the former communist bloc, recognize the right of the individual to receive diplomatic protec-

tion for injuries suffered abroad. These include: Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Lao People's Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Viet Nam and Yugoslavia. Usually the relevant article of the Constitution contains formulations such as the "the State shall protect the legitimate rights of X nationals abroad" or "nationals of Y shall enjoy protection while residing abroad". The Italian, Spanish and Turkish constitutional provisions contain very vague and loose formulations, providing for the protection of certain rights of workers abroad, or in the case of Spain, state that the State "shall try to safeguard the economic and social rights" of its nationals working abroad.¹⁴⁴ The Constitution of the former Yugoslav Republic of Macedonia is even more limited, stating that the State "cares for" the well-being of its nationals abroad. At the other end of the spectrum, the Constitutions of the Republic of Korea and Guyana establish the "duty" of those States to protect their nationals abroad. Ukraine "guarantees" protection and the Polish Constitution talks about the right of the individual national to protection abroad, whereas the Hungarian Constitution states that "every Hungarian citizen is entitled to protection by the Republic of Hungary" while residing abroad.¹⁴⁵ It is uncertain whether and to what extent those rights are enforceable under the municipal law of those countries, and whether they go beyond the right of access to consular officials abroad.¹⁴⁶ On the other hand, they suggest that certain States consider diplomatic protection for their nationals abroad to be desirable.

81. State practice on this matter is difficult to trace. In his report on diplomatic protection to the International Law Association, Orrego Vicuña¹⁴⁷ refers to a nineteenth century Chilean law according to which the Ministry of Foreign Affairs was required to send any request for diplomatic protection to the Advocate General of the Supreme Court for a binding legal opinion as to whether the Government should exercise protection in the case. Geck, in turn, refers to unwritten constitutional rights to protection given to individuals by certain countries, and to an unwritten constitutional duty in other States to grant diplomatic protection.¹⁴⁸ He describes the constitutional tradition of Germany developed under the Constitutions of 1866, 1871 and 1919, and applied without constitutional provision to that effect since 1949 in the Federal Republic of Germany. According to this tradition, the German State has a constitutional duty to provide diplomatic protection if certain prerequisites have been met. The Federal Constitutional Court (Bundesverfassungsgericht) and other German courts have in their decisions confirmed this

¹³⁸ Mr. Sepulveda (Mexico), *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting (A/C.6/53/SR.16); Mr. Patriota (Brazil), *ibid.*; Mr. Benítez Saénz (Uruguay), *ibid.*; Mrs. Reza (Indonesia), *ibid.*, 15th meeting (A/C.6/53/SR.15); Mr. O'Hara (Malaysia), *ibid.*; Mr. Gray (Australia), *ibid.*, *Fifty-second Session, Sixth Committee*, 23rd meeting (A/C.6/52/SR.23); Mr. Longva (Norway), *ibid.*, *Fifty-third Session, Sixth Committee*, 14th meeting (A/C.6/53/SR.14); Sir Franklin Berman (United Kingdom), *ibid.*; Mr. Orrego Vicuña (Chile), *ibid.*; Mr. Fomba (Mali), arguing, however, that the development of human rights should be taken into account, *ibid.*, 13th meeting (A/C.6/53/SR.13); Mr. Caflisch (Observer for Switzerland), *ibid.*; Mr. Tomka (Slovakia), *ibid.*, 22nd meeting (A/C.6/53/SR.22); Mr. Omotosho (Nigeria), *ibid.*, 17th meeting (A/C.6/53/SR.17); and Mr. Al-Baharna (Bahrain), *ibid.*, 21st meeting (A/C.6/53/SR.21).

¹³⁹ *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 15th meeting (A/C.6/53/SR.15). On the first part of the argument, see also the statement by Mr. Abraham (France), *ibid.*, 14th meeting (A/C.6/53/SR.14).

¹⁴⁰ *Ibid.*, *Fifty-second Session, Sixth Committee*, 23rd meeting (A/C.6/52/SR.23).

¹⁴¹ *Ibid.*, *Fifty-third Session, Sixth Committee*, 15th meeting (A/C.6/53/SR.15).

¹⁴² *Ibid.*, *Fifty-second Session, Sixth Committee*, 23rd meeting (A/C.6/52/SR.23).

¹⁴³ *Ibid.*, *Fifty-third Session, Sixth Committee*, 18th meeting (A/C.6/53/SR.18).

¹⁴⁴ 1992 Constitution of Spain, art. 42.

¹⁴⁵ 1949 Constitution of the Republic of Hungary with amendments up to 1997, art. 69.

¹⁴⁶ Lee, *Consular Law and Practice*, chap. 8, pp. 124 et seq. Lee doubts whether the duty imposed on consular officials by many national statutes to safeguard the interests of nationals is justiciable (*ibid.*, pp. 125–127).

¹⁴⁷ Orrego Vicuña, "The changing law ...", p. 8. See also Orrego Vicuña, "Chile", pp. 138–141.

¹⁴⁸ Geck, *loc. cit.*, p. 1052.

obligation on the part of the German authorities.¹⁴⁹ Besides conditions imposed by international law, diplomatic protection must be granted only if it “does not run counter to truly overriding interests of the Federal Republic”.¹⁵⁰ This condition has been interpreted by the courts to give the political authorities a discretion to determine whether overriding interests of the State and the people as a whole preclude diplomatic protection.

82. Although Israel lacks any formal legal provisions requiring the State to protect Israeli nationals abroad and the exercise of such protection is usually seen to fall within the discretion of the Government, the Supreme Court held in 1952 that the State has a duty to protect a national in an enemy country “insofar as it is able to defend him through the good offices of a friendly government”.¹⁵¹ A similar decision was reached by the Haifa District Court in 1954.¹⁵²

83. In Switzerland, the Government does not have a duty to exercise diplomatic protection on behalf of its nationals¹⁵³ but, as pointed out by Caflisch, certain provisions of the Constitution and the 1967 Consular Regulations recognize a limited duty on the part of Swiss consular missions to protect Swiss nationals unless it would prejudice the interests of the Confederation.¹⁵⁴

84. The United Kingdom of Great Britain and Northern Ireland does not recognize the right of individuals to enforce the Crown’s duty of diplomatic protection before domestic courts.¹⁵⁵ However, according to Warbrick, it is possible to argue today that British citizens have at least a “legitimate expectation” that they will be afforded diplomatic protection if the conditions stated in the rules of the United Kingdom applying to international claims (continuous nationality, exhaustion of local remedies, etc.) are fulfilled.¹⁵⁶

85. In France, the right to exercise diplomatic protection is an *acte de gouvernement*—which is not subject to review by administrative bodies.¹⁵⁷ Although there is no general duty on the part of the executive to exercise diplomatic protection on behalf of nationals in the United States, the so-called Hostage Act of 27 July 1868 requires

the President to intervene whenever a United States citizen has been “unjustly deprived of his liberty by or under the authority of any foreign government”. In such a case the “President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release”.¹⁵⁸

86. In a number of cases, British, Dutch, Spanish, Austrian, Belgian and French claimants have attempted to assert a right to diplomatic protection.¹⁵⁹ Although the cases were not decided in their favour, the submission of the claims indicates that the claimants had reasons to believe that they had such a right.

87. In sum, there are signs in recent State practice, constitutions and legal opinion of support for the view that States have not only a right but a legal obligation to protect their nationals abroad. This approach is clearly in conflict with the traditional view. It cannot, however, be dismissed out of hand as it accords with the principal goal of contemporary international law—the advancement of the human rights of the individual rather than the sovereign powers of the State. This issue is therefore one that needs to be considered, if necessary by way of progressive development. This would accord with the suggestion by Orrego Vicuña in his 2000 report to the International Law Association Committee on diplomatic protection that:

The discretion exercised by a government in refusing to spouse a claim on behalf of the individual should be subject to judicial review in the context of due process.¹⁶⁰

88. Article 4 seeks to give effect to developments of this kind. As it involves an exercise in progressive development, rather than codification, care is taken to limit the proposed duty on States to particularly serious cases, to give States a wide margin of appreciation, and to restrict the duty on States to nationals with a genuine link to the State of nationality.

89. Today there is general agreement that norms of *jus cogens* reflect the most fundamental values of the international community and are therefore most deserving of international protection.¹⁶¹ It is not unreasonable therefore

¹⁴⁹ *Rudolf Hess* case, ILR, vol. 90 (1992), p. 387; and the *Eastern Treaties Constitutionality* case, *ibid.*, vol. 78 (1988), p. 177. See also E. Klein, “Anspruch auf diplomatischen Schutz?”, p. 125, and related discussion.

¹⁵⁰ Geck, *loc. cit.*, p. 1052.

¹⁵¹ Blum, “Israel”, p. 314, citing *Hakim v. Minister of the Interior* (Piskei-Din, vol. 6 (1952), p. 642).

¹⁵² *Ibid.*, referring to *Attorney-General v. Steiner* (Pesakim Mehoziim, vol. 9 (1954), p. 489).

¹⁵³ This has been established in *Heirs Oswald v. Swiss Confederation* (1926), Arrêts du Tribunal fédéral 52 II 235; *Gschwind v. Swiss Confederation* (1932), *ibid.* 58 II 463; *Schoenemann v. Swiss Confederation* (1955), *ibid.* 81 I 159, cited by Caflisch, “Switzerland”, pp. 504–505.

¹⁵⁴ Caflisch “Switzerland”, pp. 506–508.

¹⁵⁵ *Mutasa v. Attorney-General*, *The All England Law Reports* 1979, vol. 3 (London, Butterworths, 1979), pp. 257 and 261–262; ILR, vol. 78 (1988), p. 490; *R v. Secretary of State for Foreign and Commonwealth Affairs*, *ex parte Ferhut Butt*, unreported judgment of the Court of Appeal (9 July 1999), *ibid.*, vol. 116 (2000), p. 608. See also the response of the United Kingdom to the Commission (July 1999), para. 3.

¹⁵⁶ *Loc. cit.*, p. 1009.

¹⁵⁷ Nguyen Quoc Dinh, Daillier and Pellet, *op. cit.*, p. 777.

¹⁵⁸ *United States Code*, 1994 edition, vol. 11, title 22, sect. 1732, p. 755 (Washington, D.C., United States Government Printing Office). See further Young, “Torture and inhumane punishment of United States citizens in Saudi Arabia and the United States Government’s failure to act”, p. 663; and Hughes, “Hostages’ rights: the unhappy legal predicament of an American held in foreign captivity”, p. 555. In *Redpath v. Kissinger* the Court held that the discretion of the President to enter into diplomatic negotiations to secure the release of an American national was not subject to judicial control (415 F. Supp. 566 (W.D. Tex. 1976), *aff’d.*, 545 F.2d 167 (5th Cir. 1976)).

¹⁵⁹ *United States Code* (see footnote 158 above), sect. 1004, p. 648; *Mutasa v. Attorney-General* (see footnote 155 above); *R v. Secretary of State for Foreign and Commonwealth Affairs*, *ex parte Ferhut Butt* (ditto); *Van Damme* case, *NRC Handelsblad* (5 January 2000); *HMHK v. Netherlands*, ILR vol. 94, p. 342; *Comercial F v. Council of Ministers*, *ibid.*, vol. 88 (1992), p. 694; cases cited in Seidl-Hohenveldern, “Austria”, p. 31; *Manderlier* (1966), *Journal des tribunaux*, vol. 81, p. 721 and (1969) *Pasicrisie belge* (II) 246, cited in Waelbroeck, “Belgium”, p. 59; and cases cited in Weil, “France”, pp. 278–279.

¹⁶⁰ “The changing law ...”, p. 26, rule 2.

¹⁶¹ See article 53 of the 1969 Vienna Convention. Article 19 of the Commission’s draft articles on State responsibility adopted on first reading (*Yearbook ... 1996* (see footnote 2 above), p. 60) characterizes the

to require a State to react by way of diplomatic protection to measures taken by a State against its nationals which constitute the grave breach of a norm of *jus cogens*.¹⁶² If a State party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress,¹⁶³ there is no reason why a State of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad.

90. Obviously a State should be given a wide margin of appreciation in the exercise of this duty. Article 4, paragraph 2 (a), permits a State to refuse to exercise diplomatic protection where to do so would jeopardize both its national and its international interests. Article 4, paragraph 3, however, subjects the decision of the State to review by a court or other independent national authority. This accords with the proposal made by Orrego Vicuña in his report to the International Law Association.¹⁶⁴

91. Article 4, paragraph 1, relieves the State of the obligation to protect if the national has a remedy himself or herself before a competent international body. Thus where the injuring State is a party to a human rights instrument which provides for access on the part of the injured individual to a court or other body, the State of nationality is under no obligation to exercise diplomatic protection.

92. In certain circumstances the injured national may be protected by another State. This would occur where the individual is a multiple national and another State of nationality has extended diplomatic protection to the individual. Another State of which the injured individual is not a national might also decide to extend diplomatic protection to the individual.¹⁶⁵ In these circumstances the State of nationality will be under no duty to extend diplomatic protection.

(Footnote 161 continued.)

breaches of norms protecting the most fundamental interests of the international community as international crimes. Although that provision makes no reference to *jus cogens* there is a clear correlation between norms of *jus cogens* and the examples cited, namely aggression, denial of the right of self-determination, slavery, genocide, apartheid and massive environmental pollution.

¹⁶² Doehring distinguishes between fundamental human rights norms and other norms for the purpose of diplomatic protection and claims:

“If ... compensation or another form of reparation is provided for the violation of a right which concerns so-called absolute human rights, i.e. those which the person holds in any case as a subject of international law, ... it is also the affected individual who is entitled to reparation* ...”

(Loc. cit., p. 19. See also pages 14–15). Moreover, while submitting that international law neither prohibits nor establishes an obligation on the part of the State to protect or a corresponding right on the part of the individual under municipal law, he claims that such an obligation may be derived from the application of the principle of *pacta sunt servanda* in municipal law (Doehring, *Die Pflicht des Staates zur Gewährung diplomatischen Schutzes*, p. 15).

¹⁶³ See article 2 of the International Covenant on Civil and Political Rights; article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; and articles 13–14 of the Convention against torture and other cruel and inhuman or degrading treatment or punishment.

¹⁶⁴ See paragraph 87 above.

¹⁶⁵ See article 10 (this article will deal with the controversial question of whether a State may protect a non-national in the case of the violation of an obligation *erga omnes*).

93. Finally the State will be under no obligation to protect a national who has no effective or genuine link with the State of nationality. Although this requirement proclaimed in the *Nottebohm* case¹⁶⁶ is rejected where the State of nationality chooses to exercise its *right* to intervene on behalf of an injured national (see article 5 below) with whom it has a bona fide link, it seems justified to accept this requirement in respect of the *duty* to exercise diplomatic protection.

Article 5

For the purposes of diplomatic protection of natural persons, the “State of nationality” means the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization.

Comment

94. According to traditional doctrine, as shown in the commentary on article 3, the State’s right to exercise diplomatic protection is based on the link of nationality between the injured individual and the State. Consequently, except in extraordinary circumstances, a State may not extend its protection to or espouse claims of non-nationals.¹⁶⁷

95. In 1923, PCIJ stated in the *Nationality Decrees Issued in Tunis and Morocco* case that:

[I]n the present state of international law, questions of nationality are ... in principle within this reserved domain.¹⁶⁸

This principle was confirmed by article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws:

It is for each State to determine under its own law who are its nationals.

96. More recently it has been endorsed by the European Convention on Nationality¹⁶⁹ and it is difficult to resist the conclusion that it has acquired the status of customary law.¹⁷⁰

¹⁶⁶ See footnote 52 above.

¹⁶⁷ Van Panhuys, op. cit., pp. 59–73; Jessup, op. cit., p. 99; Orrego Vicuña, “The changing law ...”, p. 8; third report of Mr. García Amador, *Yearbook ... 1958* (see footnote 121 above), p. 66, para. 22; Geck, loc. cit., p. 1049; Ohly, “A functional analysis of claimant eligibility”, p. 284; García Amador, op. cit., p. 501; Jennings and Watts, op. cit., p. 512; *Nottebohm* case (see footnote 52 above), p. 23; Harvard Law School, draft Convention (footnote 105 above), art. 15 (a); Basis of Discussion No. 28, Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930), League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), reproduced in *Yearbook ... 1956* (see footnote 40 above), p. 225; 1960 draft Convention prepared by the Harvard Law School, arts. 2 (b) and 23, para. 3, in Sohn and Baxter, loc. cit., pp. 548 and 579; and 1965 Institute of International Law resolution on the national character of an international claim presented by a State for injury suffered by an individual, art. 1(a) (see footnote 108 above), p. 57.

¹⁶⁸ *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, p. 24.

¹⁶⁹ Art. 3, para. 1.

¹⁷⁰ Bar-Yaacov, *Dual Nationality*, p. 2.

97. A State's determination that an individual possesses its nationality is not lightly to be questioned. According to Jennings and Watts:

It creates a very strong presumption both that the individual possesses that state's nationality as a matter of its internal law and that that nationality is to be acknowledged for international purposes.¹⁷¹

98. The State's right to determine the nationality of the individual is not, however, absolute. This was made clear by PCIJ in the *Nationality Decrees Issued in Tunis and Morocco* case when it stated that the question whether a matter was "solely within the jurisdiction of a State"—such as the conferment of nationality—"is an essentially relative question; it depends upon the development of international relations".¹⁷² Moreover, even if a State in principle has an absolute right to determine nationality, other States may challenge this determination where there is insufficient connection between the State of nationality and the individual or where nationality has been improperly conferred.¹⁷³

99. Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws confirmed this by qualifying its proclamation that "[it] is for each State to determine under its own law who are its nationals" with the provision that:

This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.¹⁷⁴

100. Today, conventions, particularly in the field of human rights,¹⁷⁵ require States to comply with international standards in the granting of nationality. This was stressed by the Inter-American Court of Human Rights in its advisory opinion on *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State "with the further principle that international law imposes certain limits on the State's power, which limits are linked to the demands imposed by the international system for the protection of human rights".¹⁷⁶

101. International custom and general principles of law likewise set limits on the conferment of nationality by describing the linkages between State and individual that will result in the nationality conferred by a State being recognized by international law for the purpose of diplomatic protection. Birth, descent and naturalization are the connections generally recognized by international law. Whether in addition to one of these connecting factors,

and particularly in the case of naturalization, there must be a "genuine" or "effective" link between State and individual, as held in the *Nottebohm* case,¹⁷⁷ is a matter that requires serious consideration.

102. Birth (*jus soli*) and descent (*jus sanguinis*) are recognized by international law as satisfactory connecting factors for the conferment of nationality. Some writers describe this recognition as a customary rule,¹⁷⁸ others as a general principle of law.¹⁷⁹ Treaties¹⁸⁰ and judicial decisions¹⁸¹ confirm this recognition.

103. Naturalization is, in principle, also recognized as a satisfactory link for the conferment of nationality for purposes of diplomatic protection. The circumstances in which States confer nationality by means of naturalization vary considerably from State to State.¹⁸² Some confer nationality automatically (without the consent of the individual) by operation of law,¹⁸³ for example in the cases of marriage and adoption. Others confer nationality by naturalization only on application by the individual after a prescribed period of residence or on marriage to a national.¹⁸⁴

104. International law will not recognize naturalizations in all circumstances. Fraudulently acquired naturalization¹⁸⁵ and naturalization conferred in a manner that discriminates¹⁸⁶ on grounds of race or sex provide examples of naturalization that may not be recognized. Probably naturalization would not be recognized for the purpose of diplomatic protection if it was conferred in the absence of any link whatsoever, or, possibly, a very tenuous link. Here the refusal to recognize would be based on the abuse of right on the part of the State conferring nationality, which would render the naturalization process *mala fide*.¹⁸⁷ Recognition would be withheld also in the case of forced naturalization, whether or not it reflected a substantial connection between State and individual.¹⁸⁸

¹⁷⁷ See footnote 52 above.

¹⁷⁸ Brownlie, *Principles ...*, pp. 390–391; and van Panhuys, *op. cit.*, pp. 160–161.

¹⁷⁹ Brownlie, "The relations of nationality in public international law", pp. 302 and 314.

¹⁸⁰ Article 20 of the American Convention on Human Rights: "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."

¹⁸¹ *Flegenheimer* case, decision No. 182 of 20 September 1958 (UNRIAA, vol. XIV (Sales No. 65.V.4), p. 327).

¹⁸² For circumstances in which nationality may be acquired by naturalization, see article 6 of the European Convention on Nationality.

¹⁸³ See *Yearbook ... 1952* (footnote 173 above), p. 8.

¹⁸⁴ See generally, Brownlie, *Principles ...*, pp. 394–397; and O'Connell, *International Law*, p. 682.

¹⁸⁵ Brownlie, *Principles ...*, p. 402; Weis, *Nationality and Statelessness in International Law*, pp. 218–220 and 244; Bar-Yaacov, *op. cit.*, p. 143; *Flegenheimer* case (see footnote 181 above), pp. 338–340; *Salem* case (1932), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1184; and *Eshahanian v. Bank Tejarat*, Award No. 157 (29 March 1983), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1984), vol. 2, p. 166.

¹⁸⁶ *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (see footnote 176 above), p. 304.

¹⁸⁷ Jennings and Watts, p. 855. See also van Panhuys, *op. cit.*, pp. 158–165.

¹⁸⁸ Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law", pp. 196–201; and Jones, *British Nationality Law*, p. 15.

¹⁷¹ *Op. cit.*, p. 856.

¹⁷² See footnote 168 above.

¹⁷³ *Yearbook ... 1952*, vol. II, document A/CN.4/50, report by Mr. Manley O. Hudson on nationality, including statelessness, p. 10; and Verdross and Simma, *op. cit.*, pp. 788–789, paras. 1192 and 1194.

¹⁷⁴ See also article 3, paragraph 2, of the European Convention on Nationality.

¹⁷⁵ See article 20 of the American Convention on Human Rights; article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination; and article 9 of the Convention on the Elimination of All Forms of Discrimination against Women. See also the Commission's draft articles on nationality of natural persons in relation to the succession of States, *Yearbook ... 1999*, vol. II (Part Two), p. 20.

¹⁷⁶ *Advisory Opinion OC-4/84*, ILR, vol. 79 (1989), p. 296.

105. There is, however, a presumption in favour of good faith on the part of the State.¹⁸⁹ Moreover, as the Inter-American Court of Human Rights stressed in the *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, the State conferring nationality must be given a “margin of appreciation” in deciding upon the connecting factors that it considers necessary for the granting of nationality.¹⁹⁰

106. The *Nottebohm* case¹⁹¹ is seen as authority for the position that there should be an “effective” or “genuine” link between the individual and the State of nationality, not only in the case of dual or plural nationality (where such a requirement is generally accepted¹⁹²), but also where the national possesses only one nationality. Here ICJ stated:

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.¹⁹³

107. Before addressing the question whether customary international law recognizes the requirement of an “effective” link of nationality for the purpose of diplomatic protection, it is necessary to stress two factors that may serve to limit *Nottebohm* to the facts of the case in question.

108. First, it seems that ICJ was concerned about the manner in which Liechtenstein conferred nationality upon Nottebohm as, in order to accommodate the urgency of his application for naturalization, Liechtenstein had waived some of its own rules relating to the length of residence required. Faced with the choice between finding that Liechtenstein had acted in bad faith in conferring nationality on Nottebohm and finding that he lacked a “genuine” link of attachment with Liechtenstein, the Court preferred the latter course as it did not involve condemnation of the conduct of a sovereign State. This view, which draws some support from the dissenting opinions,¹⁹⁴ relies heavily on the operation of an inarticulate judicial premise on the part of the majority and is insufficient to provide a satisfactory basis for limiting the scope of the Court's judgment. Nevertheless, it does suggest that the judgment should not too readily be applied in different situations in which there is no hint of irregularity on the part of the State of nationality.

109. Secondly, ICJ was clearly concerned about the “extremely tenuous”¹⁹⁵ links between Nottebohm and Liechtenstein compared with the close ties between Nottebohm

and Guatemala over a period of 34 years. It therefore found it unfair to allow Liechtenstein to protect Nottebohm in a claim against Guatemala. This explains its repeated assertion that Liechtenstein was “not entitled to extend its protection to Nottebohm vis-à-vis Guatemala”.¹⁹⁶ The crucial dictum in this case is not therefore that referred to above on the “genuine” link¹⁹⁷ but the following:

[The] facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.¹⁹⁸

110. ICJ did not purport to pronounce on the status of Nottebohm's Liechtenstein nationality vis-à-vis all States. It carefully confined its judgment to the right of Liechtenstein to exercise diplomatic protection on behalf of Nottebohm vis-à-vis Guatemala. It therefore left unanswered the question whether Liechtenstein would have been able to protect Nottebohm against a State with which he had no close connection.¹⁹⁹ This question is probably best answered in the affirmative as the Court was determined to propound a relative test only,²⁰⁰ i.e. that Nottebohm's close ties with Guatemala trumped the weaker nationality link with Liechtenstein. In these circumstances the *Nottebohm* requirement of a “genuine” link should be confined to the peculiar facts of the case and not seen as a general principle applicable to all cases of diplomatic protection.

111. The suggestion that the *Nottebohm* principle of an effective and genuine link be seen as a rule of customary international law in cases not involving dual or plural nationality enjoys little support. The dissenting opinion of Judge Read that the principle found no support outside the field of dual nationality²⁰¹ was shortly thereafter endorsed by the Italian-United States Conciliation Commission in the *Flegenheimer* case. In that decision the Commission limited the applicability of the principle to cases involving dual nationals, stating that:

[W]hen a person is vested with only one nationality, which is attributed to him or her either *jure sanguinis* or *jure soli*, or by a valid naturalization entailing the positive loss of the former nationality, the theory of effective nationality cannot be applied without the risk of causing confusion. It lacks a sufficiently positive basis to be applied to a nationality which finds support in a state law.²⁰²

The Commission furthermore stated that it was “doubtful that the International Court of Justice intended to establish a rule of general international law” in the *Nottebohm* case.²⁰³ That States are unwilling to support such a principle is evidenced by the failure in practice of the attempt

¹⁸⁹ Brownlie, *Principles ...*, pp. 402–403.

¹⁹⁰ *Advisory Opinion OC-4/84* (see footnote 176 above), p. 303.

¹⁹¹ See footnote 52 above.

¹⁹² See articles 6–7 below.

¹⁹³ *I.C.J. Reports 1955* (see footnote 52 above), p. 23.

¹⁹⁴ *Ibid.*, dissenting opinions of Judges Read, pp. 37–39, and Klaested, pp. 29–33. See also Kunz, “The Nottebohm judgment (second phase)”, pp. 548–560; and Parry, “Some considerations upon the protection of individuals in international law”, pp. 707–708.

¹⁹⁵ *I.C.J. Reports 1955* (see footnote 52 above), p. 25.

¹⁹⁶ *Ibid.* p. 26.

¹⁹⁷ See paragraph 106 above.

¹⁹⁸ *I.C.J. Reports 1955* (see footnote 52 above), p. 26.

¹⁹⁹ See Leigh, loc. cit., p. 468; and van Panhuys, op. cit., p. 99.

²⁰⁰ See the *Flegenheimer* case (footnote 181 above); and the *Barcelona Traction* case (footnote 16 above), p. 42.

²⁰¹ *I.C.J. Reports 1955* (see footnote 52 above), pp. 41–42.

²⁰² *Flegenheimer* case (footnote 181 above), p. 377.

²⁰³ *Ibid.*, p. 376.

to apply the genuine link principle to ships,²⁰⁴ a field in which social and economic considerations probably justify such a rule. Available State practice also shows little support for the *Nottebohm* principle.²⁰⁵

112. Academic opinion is divided on this issue. Geck,²⁰⁶ Randelzhofer,²⁰⁷ Parry,²⁰⁸ Kunz²⁰⁹ and Jones²¹⁰ do not accept the genuine link requirement as a rule of customary international law. Many of these scholars have pointed out that there is often little connection between the individual upon whom nationality has been conferred *jure soli* or *jure sanguinis* and that it is difficult to limit the genuine link requirement to cases of naturalization. Other scholars²¹¹ are well disposed towards the genuine link requirement. Brownlie contends that it is supported by pre-*Nottebohm* literature and national judicial decisions and that it has a “role as a general principle with a variety of possible applications”²¹² outside the context of dual nationality. He does, however, suggest that the principle should not be applied in “too exacting” a manner.²¹³

113. Support for the principle of effectiveness is to be found in other quarters. Several members of the Commission gave it their support in the fifth session debate on nationality, including statelessness.²¹⁴ Mr. García Amador proposed the codification of a similar rule in article 23, paragraph 3, of his last report to the Commission in 1961:

A State may not bring a claim on behalf of an individual if the legal bond of nationality is not based on a genuine connexion between the two.²¹⁵

More recently one of the Rapporteurs for the International Law Association Committee on Diplomatic Protection of Persons and Property, Orrego Vicuña, has proposed the following rule as one that reflects “contemporary realities and trends”:

²⁰⁴ See article 91 of the United Nations Convention on the Law of the Sea; and the United Nations Convention on Conditions for Registration of Ships. Cf. article III, paragraph 3, of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.

²⁰⁵ The rules regarding international claims made by the British Government make no mention of the “genuine link requirement” in relation to individuals (rule I) (Warbrick, loc. cit., p. 1006). Cf. rule IV in which this principle is applied to corporations (p. 1007).

²⁰⁶ Loc. cit., p. 1050.

²⁰⁷ “Nationality”, p. 507.

²⁰⁸ Loc. cit., p. 707.

²⁰⁹ Loc. cit., p. 536.

²¹⁰ “The *Nottebohm* case”, pp. 239–240 and 243–244.

²¹¹ Van Panhuys, op. cit., pp. 158 and 161; Fitzmaurice, loc. cit., pp. 206–207; Ruzié, “Nationalité, effectivité et droit communautaire”, p. 113; de Castro, “La nationalité, la double nationalité et la supra-nationalité”, p. 582; and Bojars, *Grazhdanstvo gosudarstv mira*, pp. 308–310.

²¹² Brownlie, “The relations of nationality ...”, p. 349. See also page 364. See further Brownlie, *Principles ...*, p. 412. See also page 415.

²¹³ *Ibid.*, “Principles ...”, p. 423. Other writers also stress the need to limit the scope of application of the effective link test: Combacau and Sur, *Droit international public*, p. 325.

²¹⁴ *Yearbook ... 1953*, vol. I, p. 180, para. 24; p. 186, paras. 5 and 7; p. 239, paras. 45–46 (Mr. Yepes); p. 181, paras. 32–33; p. 218, para. 63 (Mr. Zourek); p. 184, para. 57; p. 237, para. 24 (Mr. François); p. 239, para. 50 (Mr. Amado).

²¹⁵ *Yearbook ... 1961* (see footnote 46 above), p. 49.

The link of nationality to the claimant State must be genuine and effective.²¹⁶

He does, however, recognize that the rule will have to be applied with “greater flexibility and adaptation to changing needs”.²¹⁷

114. The Commission’s draft articles on nationality of natural persons in relation to the succession of States,²¹⁸ in article 19, recognize the concept of effective link in relation to nationality but make no judgement as to its current status in the context of diplomatic protection.

115. In 1965 the Institute of International Law adopted a resolution on the national character of an international claim presented by a State for injury suffered by an individual, which gives some support to the genuine link principle:

An international claim presented by a State for injury suffered by an individual may be rejected by the respondent State or declared inadmissible when, in the particular circumstances of the case, it appears that naturalization has been conferred on that individual in the absence of any link of attachment.²¹⁹

116. The *Nottebohm* case featured prominently in the arguments before ICJ in the *Barcelona Traction* case.²²⁰ Although the Court distinguished *Nottebohm* on the facts and in law, it did find that there was a “permanent connection” between the Company and Canada.²²¹ The Court, however, carefully refrained from asserting that the principle expounded in *Nottebohm* reflected a principle of customary international law.

117. The genuine link requirement proposed by *Nottebohm* seriously undermines the traditional doctrine of diplomatic protection if applied strictly, as it would exclude literally millions of persons from the benefit of diplomatic protection. In today’s world of economic globalization and migration, there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire.²²² Moreover, there are countless others who have acquired nationality by birth, descent or operation of law of States with which they have a most tenuous connection. Even supporters of *Nottebohm*, like Brownlie and van Panhuys, accept the need for a liberal application of *Nottebohm*.²²³

118. Customary international law recognizes that a nationality acquired by fraud, negligence or serious error may not be recognized²²⁴ and that it is the function of

²¹⁶ “The changing law ...”, p. 27, rule 6.

²¹⁷ *Ibid.* p. 12.

²¹⁸ *Yearbook ... 1999* (see footnote 175 above). Article 19 reads:

“Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.” (p. 22)

²¹⁹ Art. 4 (c) (see footnote 108 above).

²²⁰ *I.C.J. Reports 1970* (see footnote 16 above), p. 42.

²²¹ *Ibid.*

²²² See Hailbronner, “Diplomatischer Schutz bei mehrfacher Staatsangehörigkeit”, p. 36.

²²³ Brownlie, *Principles ...*, p. 423; and van Panhuys, op. cit., pp. 99 and 158.

²²⁴ *Flegenheimer* case (see footnote 181 above), pp. 348–349 and 379–380; *Salem* case (see footnote 185 above), p. 1185; Brownlie,

an international tribunal, with due regard to the presumption in favour of the validity of a State's conferment of nationality²²⁵ and allowance for a margin of appreciation on the part of the State of nationality,²²⁶ to investigate and, if necessary, set aside a conferment of nationality.²²⁷ This principle may be consolidated into a requirement of good faith. A conferment of nationality will be recognized for the purpose of diplomatic protection provided it is not made in bad faith, the onus of proof being on the respondent State to produce evidence of such bad faith.²²⁸

119. In effect the Institute of International Law's 1965 resolution supports such a rule, as nationality conferred in the absence of "any link of attachment"²²⁹ is *prima facie* conferred in bad faith.

120. In *Nottebohm* ICJ was faced with an extreme situation in which the link between the respondent State and the individual was very strong, and the link with the plaintiff State very weak, with the hint that nationality had been conferred in bad faith. It is therefore wiser to confine the rule expounded in this case to the peculiar facts of the case and to adopt a rule which allows the conferment of nationality to be challenged on grounds of bad faith.

Article 6

Subject to article 9, paragraph 4,²³⁰ the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual's [dominant] [effective] nationality is that of the former State.

Comment

121. Dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* and *jus sanguinis* and of the conferment of nationality by naturalization, which does not result in the renunciation of a prior nationality. This phenomenon has given rise to difficulties in respect of military obligations and diplomatic protection, where one State of nationality seeks to protect a dual national against another State of nationality.

(Footnote 224 continued.)

Principles ..., p. 422; and Jennings, "General course on principles of international law", p. 458. See also footnote 185 above; and Bar-Yaacov, *op. cit.*, pp. 150–152 and 158.

²²⁵ See footnotes 174 and 189 above; and Jennings, *loc. cit.*, p. 459.

²²⁶ See footnote 190 above.

²²⁷ *Flegenheimer* case (footnote 181 above), pp. 336–349, especially pp. 338, 341–342 and 344; *Flutie* cases in Ralston and Doyle, *Venezuelan Arbitrations of 1903*, p. 34; and van Panhuys, *op. cit.*, pp. 153–155.

²²⁸ *Flegenheimer* case (see footnote 181), pp. 338–339, 344 and 347.

²²⁹ Art. 4 (c) (see footnote 108 above).

²³⁰ This will read: "Diplomatic protection may not be exercised by a new State of nationality against a previous State of nationality for injury incurred during the period when the person was a national only of the latter State." (*Yearbook ... 2000*, vol. II (Part Two), p. 86.) See also Fitzmaurice, *loc. cit.*, p. 193.

122. The Conference for the Codification of International Law, held at The Hague in 1930, set out to reduce or abolish dual and multiple nationality,²³¹ but ended up recognizing its existence in article 3 of the Convention on Certain Questions relating to the Conflict of Nationality Laws, which provides:

... a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.

Subsequent international attempts to eliminate dual and multiple nationality have likewise failed. The European States attempted to abolish it in the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality,²³² whose preamble declares "that cases of multiple nationality are liable to cause difficulties and that joint action to reduce as far as possible the number of cases of multiple nationality, as between member States, corresponds to the aims of the Council of Europe". However, once again, the Convention stopped short of achieving its goal. Discussions on the issue continued throughout the following decades, and in the end resulted in the European Convention on Nationality,²³³ which deals with dual nationality in a more liberal manner, reflecting the division of interests within the Council, with many members increasingly accepting the phenomenon.

123. Although many national laws prohibit their nationals from holding the nationality (passports?) of other countries, international law contains no such prohibition. It is therefore necessary to address the question whether one State of nationality may exercise diplomatic protection against another State of nationality on behalf of a dual or multiple national. Codification attempts, State practice, judicial decisions and scholarly writings are divided on this subject, but the weight of authority seems to support the rule advocated in article 6.

124. The 1929 Draft Convention on the responsibility of States for damage done in their territory to the person or property of foreigners declared that:

A state is not responsible if the person injured or the person on behalf of whom the claim is made was or is its own national.²³⁴

This principle was endorsed by the Convention on Certain Questions relating to the Conflict of Nationality Laws, which provides in article 4 that:

A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.

Differences of opinion, however, were apparent at the Conference for the Codification of International Law. A suggestion qualifying the above provision with the inclusion of the expression "if he is habitually resident in the latter state" was rejected by the majority. Some delegations would have preferred the provision omitted altogether. There were also suggestions which, if adopted, would

²³¹ Hudson, "The First Conference for the Codification of International Law", pp. 450–451.

²³² Similar attempts have been made in the League of Arab States in the framework of the Nationality Agreement between them. See Brownlie, "The relations of nationality ...", p. 351.

²³³ Chap. V on multiple nationality.

²³⁴ Art. 16 (a) (see footnote 105 above), p. 135.

have made the exercise of diplomatic protection in such cases possible if humanitarian concerns justified such intervention. Therefore, the rule represented a difficult compromise.²³⁵

125. That the concept of dominant or effective nationality was to be considered in the treatment of dual nationals was made clear by article 5 of the Convention on Certain Questions relating to the Conflict of Nationality Laws, which provides:

Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

Although this treaty came into force in 1937, only some 20 States are parties to it.

126. The 1960 draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School,²³⁶ does not clearly permit or deny the right of a State of nationality to make a claim on behalf of a dual national against another State of nationality.²³⁷ However, it leans against such a claim by providing that:

A State is entitled to present a claim of its national arising out of the death of another person only if that person was not a national of the State alleged to be responsible.²³⁸

127. A further attempt to formulate a rule on this subject was made by the Institute of International Law in 1965. Article 4 (a) of the resolution adopted at the Warsaw session provided that:

An international claim presented by a State for injury suffered by an individual who possesses at the same time the nationalities of both claimant and respondent States may be rejected by the latter and is inadmissible before the court (*jurisdiction*) seized of the claim.²³⁹

It is interesting to note that although the claim is inadmissible before a court, diplomatic or consular channels of diplomatic protection by one State of nationality against another are apparently not in principle excluded. The practical significance of this deviation from the language of article 4 of the Convention on Certain Questions relating to the Conflict of Nationality Laws is, however, limited.

128. Before 1930, there was considerable support for the application of the principle of dominant nationality in arbitration proceedings involving dual nationals.²⁴⁰ The

first claim decided on the basis of dominant nationality was the case of *James Louis Drummond*, a French-British dual national whose property was expropriated by the French Government in 1792. In its decision of 1834, the British Privy Council rejected Drummond's claim, holding that:

Drummond was technically a British subject, but in substance, a French subject, domiciled (at the time of seizure) in France, with all the marks and attributes of French character ... The act of violence that was done towards him was done by the French Government in the exercise of its municipal authority over its own subjects.²⁴¹

129. Another often cited case, that of *de Hammer and de Brissot*, concerned reparation to the widows and children of two United States nationals killed by Venezuelan rebels. The claims of the widows (Venezuelan nationals by birth and United States nationals by marriage) and their children (dual nationals by birth to an American father and to a Venezuelan mother in Venezuela) were rejected by the United States-Venezuelan Claims Commission in 1885 on the ground that in case of conflict between several nationalities, the nationality acquired by birth in the territory and domicile should be considered decisive.²⁴²

130. The *Miliani, Brignone, Stevenson and Mathison* cases decided by the Venezuelan Arbitral Commissions between 1903 and 1905 also support the dominant nationality principle. The last of these concerned a claim brought by a British-Venezuelan national before the British-Venezuelan Mixed Claims Commission for loss caused by the Venezuelan Government. Umpire Plumley, having established the fact that Mathison was a British national, declared that:

It is admitted that if he is also a Venezuelan by the laws of Venezuela, then the law of the domicile prevails and the claimant has no place before this Mixed Commission.²⁴³

131. The *Canevaro* case,²⁴⁴ decided by the Permanent Court of Arbitration in 1912, may also be cited in support of the principle of dominant nationality. Here the question before the Court was whether the Italian Government could bring a monetary claim on behalf of Rafael Canevaro, a dual Italian-Peruvian national, for damages suffered due to non-payment of cheques by the Peruvian Government. Having reviewed the life of Canevaro and found that he had repeatedly acted as a Peruvian national, even running for the Senate, and having been Peru's Consul General for the Netherlands, the Court concluded that the Peruvian Government was entitled to reject the claim of the Italian Government.

132. The *Hein* case concerned a claim for reparation for damage suffered by Hein, a British, but formerly German national. In response to the German contention that Hein was a German national and therefore Germany was not

doctrine of dominant nationality", pp. 140–141; and Weis, op. cit., pp. 160–176.

²⁴¹ 2 Knapp, P. C. Rep. p. 295, 12 Eng. Rep. p. 492, cited in Rode, loc. cit., p. 140.

²⁴² Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, pp. 2456–2459.

²⁴³ *Mathison* case, in Ralston and Doyle, op. cit., p. 433. See also the *Brignone, Miliani* and *Stevenson* cases, *ibid.*, pp. 710, 754, 438, respectively.

²⁴⁴ *Canevaro* case (Italy v. Peru), award of 3 May 1912 (UNRIAA, vol. XI (Sales No. 61.V.4), p. 397).

²³⁵ Flournoy, Jr., "Nationality convention, protocols and recommendations adopted by the First Conference on the Codification of International Law", p. 471; and *American Journal of International Law*, vol. 24 (1930), pp. 192–233.

²³⁶ Sohn and Baxter, loc. cit., p. 548.

²³⁷ The definition of "national" in article 21, paragraph 3 (a), is wide enough to include multiple and dual nationals and article 23, paragraph 1, which deals with State claims, is silent on the question of claims on behalf of dual nationals against a State of nationality (*ibid.*, pp. 578–579).

²³⁸ *Ibid.*, p. 579, art. 23, para. 5.

²³⁹ See footnote 108 above.

²⁴⁰ See Joseph, op. cit., pp. 19–21; Leigh, loc. cit., pp. 462–464; Brownlie, *Principles ...*, pp. 403–404; Rode, "Dual nationals and the

internationally responsible for damage caused to him, the Anglo-German Mixed Arbitral Tribunal held that whether or not Hein was still formally a German national had no relevance for the claim, as:

He had become a British national, and as he was residing in Great Britain at the time of the entrance into force of the Treaty he had acquired the right to claim ...²⁴⁵

133. In 1923, the question arose again, this time before the French-German Mixed Arbitral Tribunal in the *Blumenthal* case, in which the Tribunal reached a similar conclusion.²⁴⁶ In 1925, the Tribunal was called upon to decide whether a State could claim for damage to its national who was also a national of the respondent State. That case concerned a claim by Madame Barthez de Montfort, a French national by birth who became a German subject as a result of her marriage to a German national. The Commission considered that it had jurisdiction to hear the claim as the claimant had “never abandoned her French domicile”, and as

the principle of active nationality, *i.e.* the determination of nationality by a combination of elements of fact and of law, must be followed by an international tribunal, and ... the claimant was accordingly a French national and was entitled to judgment accordingly.²⁴⁷

134. The French-Mexican Mixed Claims Commission dealt with the right of the Mexican Government to claim on behalf of Georges Pinson, born in Mexico but subsequently naturalized in France. As the evidence showed that prior to the claim the Mexican Government had consistently treated Pinson as a French national, the Commission concluded that even if the dual nationality of Pinson could be established, the Mexican Government would not be entitled to bring a case on his behalf.²⁴⁸

135. In *Tellech*, decided by the Tripartite Claims Commission (United States, Austria and Hungary) in 1928, the United States brought a claim on behalf of Alexander Tellech for compensation for having subjected him to compulsory military service in Austria. The claim was rejected on the ground that Tellech had spent 28 of his 33 years in Austria and by voluntarily residing in Austria, being a dual national, he had taken the risk of having to comply with his obligations under Austrian laws.²⁴⁹

136. The interpretation of the above decisions has been questioned by Iranian judges in the Iran-United States Claims Tribunal, who have concluded that the correct interpretation of some of these cases (even those commonly interpreted in support of the dominant nationality doctrine) supports the doctrine of the non-responsibility of States for claims of dual nationals. In addition, the rest are, in their opinion, simply irrelevant as they were decided by commissions and tribunals established between a victori-

ous Power and a defeated State based on treaties, leading to a basic asymmetry in their jurisdiction.²⁵⁰ However, it is undeniable that, as the *de Hammer and de Brissot* case²⁵¹ demonstrates, there are decisions that adopt the dominant nationality principle which rejects the claims of nationals of the victorious Powers.

137. There was, however, also judicial support for the rule of non-responsibility of States for claims of dual nationals in judicial decisions before *Nottebohm*.²⁵²

138. One of the best-known of these is the *Alexander* case, which concerned the claim of a British-United States dual national brought before the United States-British Claims Commission under the Treaty of Washington of 1871. Following the establishment of Alexander's dual nationality, the Tribunal rejected his claim, holding that:

To treat his grievances against that other sovereign as subject of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no government would recognize the right of another to interfere thus in behalf of one whom it regarded as a subject of its own.²⁵³

139. Similarly, in the *Oldenbourg* and *Honey* cases decided by the British-Mexican Claims Commission in 1929 and 1931, respectively, the Commission rejected the claims with reference to the principle, later considered by it an

accepted rule of international law that such a person (a dual national) cannot make one of the countries to which he owes allegiance a defendant before an international tribunal.²⁵⁴

The British agent accepted this view and withdrew all claims on behalf of dual-national claimants.²⁵⁵ The same Commission reached similar conclusions in the *Adams and Blackmore* case in 1931.²⁵⁶

140. Dealing with a somewhat different claim, the Arbitral Tribunal in the *Salem* case was faced with the claim of a naturalized American national born in Egypt. Despite his birth in Egypt, evidence indicated that Salem had been born as a Persian national and was, therefore, Persian rather than Egyptian by birth. Still, Egypt, the respondent, contended that the Tribunal did not have jurisdiction over him as his effective nationality was Egyptian. In response, the Tribunal declared that:

The principle of the so-called “effective nationality” the Egyptian Government referred to does not seem to be sufficiently established in international law. It was used in the famous *Canevaro* case; but the decision of the Arbitral Tribunal appointed at that time has remained isolated ... Accordingly the Egyptian Government need not refer to the rule of

²⁴⁵ *Annual Digest of Public International Law Cases 1919 to 1922*, Sir John Fischer Williams and H. Lauterpacht, eds. (London, Longmans, Green, 1932), case No. 148, p. 216.

²⁴⁶ *Recueil des décisions des tribunaux mixtes institués par les traités de paix*, vol. III (Paris, Sirey, 1924), p. 616.

²⁴⁷ *Annual Digest of Public International Law Cases 1925 and 1926*, Arnold D. McNair and H. Lauterpacht, eds. (London, Longmans, Green, 1929), case No. 206, p. 279.

²⁴⁸ *Annual Digest of Public International Law Cases 1927 and 1928*, Arnold D. McNair and H. Lauterpacht, eds. (London, Longmans, Green, 1931), cases Nos. 194–195, pp. 297–301.

²⁴⁹ *Alexander Tellech (United States) v. Austria and Hungary* (1928), UNRIAA, vol. VI (Sales No. 1955.V.3), pp. 248–249.

²⁵⁰ Dissenting opinion of Dr. Shafie Shafeiei on the issue of dual nationality, cases Nos. 157 and 211, *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1984), vol. 2, p. 194. This view is shared by Bar-Yaacov, *op. cit.*, pp. 214, 226, and 233–235.

²⁵¹ See footnote 242 above.

²⁵² See footnote 52 above.

²⁵³ *Executors of R. S. C. A. Alexander v. The United States*, in Moore, *History and Digest ...*, p. 2531.

²⁵⁴ Cited in Rode, *loc. cit.*, p. 141: *Oldenbourg* case, Decisions and Opinions of the Commissioners, 5 October 1929 to 15 February 1930, p. 97; and *Honey* case, Further Decisions and Opinions of the Commissioners, subsequent to 15 February 1930, p. 13.

²⁵⁵ Bar-Yaacov, *op. cit.*, p. 212.

²⁵⁶ *Frederick Adams and Charles Thomas Blackmore (Great Britain) v. United Mexican States*, UNRIAA, vol. V (Sales No. 1952.V.3), pp. 216–217.

“effective nationality” to oppose the American claim if they can only bring evidence that Salem was an Egyptian subject ...²⁵⁷

141. In 1949 in its advisory opinion in the case concerning *Reparation*, ICJ described the practice of States not to protect their nationals against another State of nationality as the “ordinary practice”.²⁵⁸

142. The strongest support for the application of the dominant or effective nationality principle in claims involving dual nationals is to be found in *Nottebohm*²⁵⁹ and the *Mergé Claim*.²⁶⁰

143. The *Nottebohm* case, which held that the nationality of the claimant State should be effective and reflect a “social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”,²⁶¹ is fully considered in the commentary to article 5. Although ICJ was concerned with a case of single nationality, the judgment was premised largely on precedents in the field of dual nationality. Thus the Court stated:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of diplomatic protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.²⁶²

Indeed Judge Read in his dissenting opinion contended that the requirement of genuine or effective link was limited to claims involving dual nationals.²⁶³

144. The application of the principle expounded in *Nottebohm* to cases of dual nationality was confirmed in the same year by the Italian-United States Conciliation Commission in the *Mergé Claim*, which concerned the claim of Florence Mergé, American national by birth but Italian national by marriage to an Italian national, for compensation for the loss of a piano and other personal property,

²⁵⁷ UNRIAA (see footnote 185 above), p. 1187.

²⁵⁸ *I.C.J. Reports 1949* (see footnote 59 above), p. 186.

²⁵⁹ See footnote 52 above.

²⁶⁰ *Mergé Claim*, Italian-United States Conciliation Commission (10 June 1955), ILR, vol. 22 (1958), p. 443. According to P. De Visscher, “Cours général de droit international public”, p. 161:

“It is in the area of diplomatic protection for dual nationals that the link doctrine, seen as a specific requirement under international law, has made slow but steady progress.”

See also P. Klein, “La protection diplomatique des doubles nationaux: reconsidération des fondements de la règle de non-responsabilité”, p. 184; and Tunkin, ed., *Mezhdunarodnoye pravo*, p. 221.

According to Leigh, the *Nottebohm* decision

“may have the effect of ensuring that a State may bring a claim on behalf of a national effectively connected with it, even when the claim is against another State of which the individual is also formally a national. In such cases, the principle of effectiveness acts to permit the bringing of claims, whereas the principle of equality would have barred them.”

(Loc. cit., p. 469)

²⁶¹ *I.C.J. Reports 1955* (see footnote 52 above), p. 23.

²⁶² *Ibid.* p. 22.

²⁶³ *Ibid.*, pp. 41–42.

attributable to Italy. Here the Conciliation Commission stated that:

The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.²⁶⁴

In its opinion the Conciliation Commission made it clear that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted, together with the criteria cited above, was applied by the Conciliation Commission in over 50 subsequent cases concerning dual nationals. In each case the Conciliation Commission referred to its decision in the *Mergé Claim* case.²⁶⁵

145. Relying on these cases, the Iran-United States Claims Tribunal has applied the principle of dominant and effective nationality to a great number of cases concerning claims of dual Iran-United States nationals against Iran. In its first dual national case, the *Esphahanian* case,²⁶⁶ in which it was established for the first time that the Tribunal had jurisdiction over such claims, the decision of Chamber Two of the Tribunal was based on the above jurisprudence and support in doctrine for the principle of dominant nationality. The authorities referred to in the majority opinion, namely Basdevant,²⁶⁷ Maury²⁶⁸ and Paul De Visscher, confirmed the validity and prevalence of the dominant and effective nationality theory.²⁶⁹ The following passage of De Visscher was quoted with approval:

The effective link or dominant attachment doctrine was applied consistently in the nineteenth century; however, because it was usually applied in order to reject claims, ... it came to be seen as indicating that claims on behalf of dual nationals were generally inadmissible ... [T]he idea established itself that any claim for protection on behalf of a dual national should be declared inadmissible.

That rule ... which the Institute of International Law considered it necessary to reaffirm in 1965, does not accurately reflect current law ... in rendering the *Nottebohm* judgment, the International Court really did intend to state a general principle.²⁷⁰

²⁶⁴ *Mergé Claim* (see footnote 260 above), p. 455, para V (5). See also UNRIAA, vol. XIV (Sales No. 65.V.4), p. 247.

²⁶⁵ See, for example, the *Spaulding* claim (1956), ILR, vol. 24 (1957), p. 452; the *Zangrilli Claim*, *ibid.*, p. 454; the *Cestra Claim* (1957), *ibid.*, p. 454; the *Puccini Claim*, *ibid.*; the *Salvoni Estate* claim, *ibid.*, p. 455; the *Ruspoli* claim, *ibid.*, p. 457; the *Ganapini* claim (1959), ILR, vol. 30 (1966), p. 366; the *Turri* claim (1960), *ibid.*, p. 371; the *Graniero* claim (1959), *ibid.*, p. 451; and the *Di Ciccio* claim (1962), *ibid.*, vol. 40 (1970), p. 148. See also Verdross and Simma, *op. cit.*, p. 791, para. 1197.

²⁶⁶ *Esphahanian* case (see footnote 185), pp. 157–170, see also the dissenting opinion of Dr. Shafie Shafeiei (footnote 250 above), pp. 178–225. For a criticism of this decision, see Khan, *The Iran-United States Claims Tribunal: Controversies, Cases and Contribution*, p. 120; and Rezek, “Le droit international de la nationalité”, p. 368.

²⁶⁷ “Conflits de nationalités dans les arbitrages vénézuéliens de 1903–1905”, pp. 41–63, cited in Verwilghen, “Conflits de nationalités”, p. 459.

²⁶⁸ “Du conflit de nationalités et en particulier du conflit de deux nationalités étrangères devant les autorités et les juridictions françaises”, p. 365.

²⁶⁹ *Esphahanian* case (see footnote 185 above), p. 164.

²⁷⁰ “Cours général de droit international public”, p. 162.

Turning to the most recent literature, the majority (i.e. Judges Bellet and Aldrich) found support for the effective nationality theory also in the works of Rousseau,²⁷¹ Batifol and Lagarde,²⁷² Chappez,²⁷³ Rode²⁷⁴ and the Commission.²⁷⁵ The majority furthermore held that tribunals had generally only held that one State of nationality might not claim on behalf of a dual national where the dual national was physically present in the respondent State of nationality.

146. That jurists are divided on the applicability of the principle of dominant nationality to cases involving dual nationals was emphasized by Judge Shafeiei²⁷⁶ in dissent when he cited Borchard²⁷⁷ and the 1965 discussion on the issue at the Institute of International Law,²⁷⁸ Oppenheim,²⁷⁹ Bar-Yaacov,²⁸⁰ Nguyen Quoc Dinh, Daillier and Pellet,²⁸¹ and von Glahn²⁸² in support of the principle of non-responsibility.

147. *Esphahanian* was confirmed by the Full Tribunal in *Iran-United States, case No. A/18*.²⁸³ Again, the majority,²⁸⁴ comprising non-Iranian judges, and the minority²⁸⁵ claimed the preponderance of academic writings to support their respective positions.

148. The Iran-United States Claims Tribunal, established by the Algiers Declarations of 1981,²⁸⁶ does not provide for inter-State claims on behalf of nationals. It is

²⁷¹ *Droit international public*, p. 112.

²⁷² *Droit international privé*.

²⁷³ "Protection diplomatique", part 250–B.

²⁷⁴ *Loc. cit.*, p. 139.

²⁷⁵ *Yearbook ... 1961* (see footnote 46 above), pp. 46 and 49.

²⁷⁶ Dissenting opinion of Dr. Shafie Shafeiei (see footnote 250 above), pp. 199–201 and 207.

²⁷⁷ "Protection diplomatique des nationaux à l'étranger", p. 289; and "La protection diplomatique des nationaux à l'étranger" (supplementary report), p. 278.

²⁷⁸ *Annuaire de l'Institut de Droit International* (Basel, 1965), vol. 51, parts I–II (Warsaw session, September 1965).

²⁷⁹ *International Law: A Treatise*, p. 348.

²⁸⁰ *Op. cit.*, p. 238.

²⁸¹ *Op. cit.*, p. 774. Combacau and Sur also doubt whether the traditional rule expounded in the Convention on Certain Questions relating to the Conflict of Nationality Laws has been reversed by the *Merge Claim*, *op. cit.*, pp. 327–328.

²⁸² *Law Among Nations: an Introduction to Public International Law*, p. 207.

²⁸³ See footnote 67 above.

²⁸⁴ The majority added the following authors to those who support the dominant nationality principle: Reuter, *Droit international public*, p. 236; Yanguas Messia, "La protection diplomatique en cas de double nationalité", p. 556; Donner, *The Regulation of Nationality in International Law*, p. 94; Leigh, *loc. cit.*, pp. 453 and 475; and Griffin, "International claims of nationals of both the claimant and respondent States: the case history of a myth", pp. 400–402.

²⁸⁵ The voluminous dissent of the Iranian judges relied on the authors cited in Judge Shafeiei's dissenting opinion in *Esphahanian* (see footnote 250 above), adding Fitzmaurice, *loc. cit.*, p. 193, and Jessup, *op. cit.*, p. 100. (See *Iran-United States, case No. A/18* (footnote 67 above), pp. 327–328.)

²⁸⁶ Declaration of the Government of the Democratic and Popular Republic of Algeria, ILM, vol. 20 (1981), pp. 224–229; and Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, *ibid.*, pp. 230–233.

not a typical exercise of diplomatic protection of nationals in which a State, seeking some form of international redress for its nationals, creates a tribunal to which it, rather than its nationals, is a party. In that typical case, the State espouses the claims of its nationals, and the injuries for which it claims redress are deemed to be injuries to itself; here, the Government of the United States is not a party to the arbitration of claims of United States nationals, not even in the small claims where it acts as counsel for those nationals.²⁸⁷

Despite this institutional peculiarity there is no doubt that the jurisprudence of the Tribunal has added considerably to the support for the dominant nationality principle.²⁸⁸ Some 130 cases involving dual nationals have been brought before the Tribunal.²⁸⁹

149. Another institution which gives support to the dominant nationality principle is UNCC, established by the Security Council to provide for compensation for damages caused by Iraq's occupation of Kuwait. The condition applied by UNCC for considering claims of dual citizens possessing Iraqi nationality is that they must possess bona fide nationality of another State.²⁹⁰

150. The principle of dominant nationality was adopted in Mr. García Amador's reports to the Commission. Article 21, paragraph 4, of his third report states:

In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties.²⁹¹

It is also supported by Orrego Vicuña in his 2000 report to the International Law Association.²⁹²

151. The European Convention on Nationality fails to take sides on this issue. In article 17, paragraph 2, it provides that its provisions on multiple nationality do not affect

the rules of international law concerning diplomatic or consular protection by a State Party in favour of one of its nationals who simultaneously possesses another nationality.

152. As demonstrated by the decisions of the Iran-United States Claims Tribunal, academic opinion is divided on the dominant nationality test in claims involving dual nationals. However, even writers²⁹³ who are cited against such a test accept its utility. The latest edition of *Oppenheim's International Law*, which endorses the rule contained in article 4 of the Convention on Certain Questions relating to the Conflict of Nationality Laws (which

²⁸⁷ *Esphahanian* (see footnote 185 above), p. 165.

²⁸⁸ See, generally, Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, pp. 44–79; and Brower and Brueschke, *The Iran-United States Claims Tribunal*, pp. 32–42 and 288–323.

²⁸⁹ Aghahosseini, "The claims of dual nationals before the Iran United States Claims Tribunal: some reflections", p. 22.

²⁹⁰ Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992: criteria for additional categories of claims (S/AC.26/1991/7/Rev.1), para. 11.

²⁹¹ *Yearbook ... 1958* (see footnote 121 above), p. 61.

²⁹² Orrego Vicuña proposed the following rule:

"In cases of dual nationality the effectiveness of the link should prevail over other considerations, allowing if justified for claims against the State of which the individual is also a national."

("The changing law ...", p. 27, rule 11)

²⁹³ Brownlie, *Principles ...*, p. 404; Geck, *loc. cit.*, p. 1051; and Parry, *loc. cit.*, p. 699.

it states is “probably” a rule of customary international law), concedes that the conflict between articles 4 and 5 of the Convention is often settled in favour of article 5 in cases involving one State of nationality against the other, provided the dominant nationality of the individual is that of the claimant State.²⁹⁴

153. One of the principal objections to the dominant or effective nationality principle is its indeterminacy. While some authorities stress domicile²⁹⁵ or residence²⁹⁶ as evidence of an effective link, others point to the importance of allegiance²⁹⁷ or the voluntary act of naturalization.²⁹⁸ The jurisprudence of the Iran-United States Claims Tribunal has made a major contribution to the elucidation of the factors to be considered in determining the effectiveness of the individual’s link with his or her State of nationality. Factors it has considered in a large number of cases include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e. the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country, the nationality of the family and the registration of birth and marriage at the embassy of the other State of nationality; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality and other ties with it; possession and use of passport of the other State; renunciation of one nationality; and military service in one State. None of these factors was given a decisive role, and the weight attributed to each factor varied according to the circumstances of the case.²⁹⁹ The Tribunal has also had regard to factors indicating mala fide acquisition or use of nationality.³⁰⁰

154. Records of current State practice concerning diplomatic protection of dual nationals against another State of which they are also nationals are rare. However, available

²⁹⁴ Jennings and Watts, op. cit., p. 516.

²⁹⁵ Borchard, op. cit., p. 589; and Parry, loc. cit., p. 711.

²⁹⁶ Art. 5 of the Convention on Certain Questions relating to the Conflict of Nationality Laws; Bar-Yaacov, op. cit., pp. 136–137 and 260; and Fitzmaurice, loc. cit., p. 193.

²⁹⁷ Judge Read in his dissenting opinion in the *Nottebohm* case (see footnote 52 above), pp. 44–45; and Brownlie, *Principles* ..., p. 422.

²⁹⁸ Jennings, loc. cit., p. 459; and Randelzhofer, loc. cit., p. 507.

²⁹⁹ Brower and Brueschke, op. cit., pp. 32–42.

³⁰⁰ For the treatment of these factors and the caveat concerning fraudulent acquisition or use of nationality, see, for example, the *Espahanian* case (footnote 185 above), p. 166; *Golpira v. Iran* (1983), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1985), vol. 2, p. 174; *Danielpour (M.) v. Iran* (1989), *ibid.* (1990), vol. 22, p. 121; *Danielpour (S. J.) v. Iran*, *ibid.*, p. 126; *Berookhim v. Iran* (1990), *ibid.* (1992), vol. 25, p. 285; *Nemazee v. Iran*, *ibid.*, p. 159; *Golshani v. Iran* (1989), *ibid.* (1990), vol. 22, p. 159; *Etezadi v. Iran* (1990), *ibid.* (1992), vol. 25, p. 270; *Hemmat v. Iran* (1989), *ibid.* (1990), vol. 22, p. 136; *Ebrahimi v. Iran*, *ibid.*, p. 144; *Perry-Rohani v. Iran*, *ibid.*, p. 198; *Abrahamian v. Iran*, *ibid.* (1991), vol. 23, p. 287; *Ghaffari v. NIOC* (1990), *ibid.* (1992), vol. 25, p. 184; *Mahmoud v. Iran* (1985), *ibid.* (1987), vol. 9, p. 350; *Malek v. Iran* (1988), *ibid.* (1989), vol. 19, p. 52; *Nourafchan v. Iran* (1989), *ibid.* (1991), vol. 23, p. 310; etc. See also Aldrich, op. cit., pp. 61–80; Brower and Brueschke, op. cit., pp. 298–305 and 315–316; and Bederman, “Nationality of individual claimants before the Iran-United States Claims Tribunal”, p. 129.

records suggest change in favour of the acceptance of the principle of dominant or effective nationality.³⁰¹

155. In his treatise on dual nationality, Bar-Yaacov states that contemporary United States practice rejects diplomatic protection for dual nationals against the other State of nationality, especially if they have taken up residence in that State. No protection was given to nationals who did not express a preference for United States nationality upon election, or when the individual elected United States nationality but subsequently took up residence in the other State of nationality. Concerning naturalized citizens, the original United States position was not to afford protection against the State of origin. However, in 1859, the policy was reversed. Denying the non-responsibility doctrine, the Department of State claimed that once an individual became a United States citizen, its alliance to the United States was exclusive. Based on that argument the Government of the United States attempted on several occasions to exercise diplomatic protection on behalf of naturalized Americans against their State of other nationality, even when they had returned to that country.³⁰² British practice demonstrated similar patterns. Protection was denied against the other State of nationality as long as the person was residing there. In contrast to United States policy, the United Kingdom did not expand protection to British nationals who were naturalized in the United Kingdom if they decided to return to their State of origin.³⁰³

156. However, owing to changes of policy in both States, Bar-Yaacov’s conclusions have become outdated. Currently the United States Department of State applies the principle of effective nationality³⁰⁴ and, according to the 1985 rules of the British Government,

HMG will not normally take up [a dual national’s] claim as a UK national if the respondent State is the State of his second nationality, but may do so if the respondent State has, in the circumstances which gave rise to the injury, treated the claimant as a UN [*sic* U.K.] national.³⁰⁵

157. In the 1970s, the Chilean Government refused diplomatic protection against another State of nationality.³⁰⁶ At the same time, the Federal Republic of Germany was not opposed to the informal exercise of such protection,³⁰⁷ whereas Switzerland, although considering non-responsibility to be the general rule, did not deny the possibility of protection against another State of nationality in exceptional cases.³⁰⁸

158. Inevitably the application of the principle of effective or dominant nationality in cases of dual nationality

³⁰¹ Hailbronner has argued, with reference to contemporary State practice and legal developments in the field of human rights law granting protection also against the State of nationality, that although there is not yet a clear uniform practice in this field and although the majority of States may be opposed to protection in such cases, there is at least a slow change towards acceptance of the principle of effectiveness in this context (loc. cit., pp. 30–36.) But *contra* Lee, op. cit., p. 159.

³⁰² Bar-Yaacov, op. cit., pp. 64–72 and 147–155.

³⁰³ *Ibid.* pp. 72–75 and 155–157.

³⁰⁴ Brownlie, *Principles* ..., p. 404, citing the *Digest of US Practice* (1979). See also Lee, op. cit., p. 160. The Netherlands follows the same principle, *ibid.* p. 161.

³⁰⁵ Rule III of the rules applying to international claims, quoted in Warbrick, loc. cit., p. 1007.

³⁰⁶ Orrego Vicuña, “Chile”, p. 141.

³⁰⁷ Seidl-Hohenveldern, “Federal Republic of Germany”, p. 247.

³⁰⁸ Caflich, “Switzerland”, p. 499.

will invoke a balancing of the strengths of competing nationalities. A tribunal should be cautious in applying the principle of preponderance of effectiveness where the links between the dual national and the two States are fairly evenly matched, as this would seriously undermine the equality of the two States of nationality.³⁰⁹

159. A helpful manner of resolving disputes between States of nationality over dual nationals is to be found in the caveat expounded by the Iran-United States Claims Tribunal in case No. A/18:

In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.³¹⁰

According to this rule the Tribunal must examine the circumstances of the case at the merits stage. If it finds that the dual national used the nationality of the respondent State to secure benefits available only to nationals of the respondent State, it may refuse to make an award in favour of the claimant State.³¹¹

160. The weight of authority supports the dominant nationality principle in matters involving dual nationals. Moreover, both judicial decisions and scholarly writings have provided clarity on the factors to be considered in making such a determination. The principle contained in article 6 therefore reflects the current position in customary international law and is consistent with developments in international human rights law, which accords legal protection to individuals even against the State of which they are nationals.³¹²

Article 7

1. Any State of which a dual or multiple national is a national, in accordance with the criteria listed in article 5, may exercise diplomatic protection on behalf of that national against a State of which he or she is not also a national.

2. Two or more States of nationality, within the meaning of article 5, may jointly exercise diplomatic protection on behalf of a dual or multiple national.

Comment

161. The effective or dominant nationality principle has also been applied where a State of nationality seeks to protect a dual national against a third State. In the *de Born* case decided by the Yugoslav-Hungarian Mixed Arbitral Tribunal in 1926 concerning the claim of a dual Hungarian German national against Yugoslavia, the

³⁰⁹ Rezek, loc. cit., pp. 266–267. See also P. Klein, loc. cit., p. 184. This is the way the *Mergé Claim* (footnote 260 above), p. 455, para. V (5), quoted above in the commentary to article 6 (para. 144) has been interpreted: see van Panhuys, op. cit., p. 78; Verdross and Simma, op. cit., p. 905, para. 1338; Jürgens, *Diplomatischer Schutz und Staatenlose*, p. 206; and Leigh, loc. cit., p. 472.

³¹⁰ Decision of 6 April 1984 (see footnote 67 above), pp. 265–266.

³¹¹ See *Khosrowshahi v. Iran* (1990), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1991), vol. 24, p. 45; and *James M. Saghí v. Iran* (1993), Award No. 544–298–2. See further, Aldrich, op. cit., pp. 76–79; and Brower and Brueschke, op. cit., pp. 296–322.

³¹² See Hailbronner, loc. cit., p. 35.

Tribunal declared that it had jurisdiction, having established that:

[I]t was the duty of the tribunal to examine in which of the two countries existed the elements essential in law and in fact for the purpose of creating an effective link of nationality and not merely a theoretical one ...

It was the duty of a tribunal charged with international jurisdiction to solve conflicts of nationalities. For that purpose it ought to consider where the claimant was domiciled, where he conducted his business, and where he exercised his political rights. The nationality of the country determined by the application of the above test ought to prevail.³¹³

162. This principle received some support from article 5 of the Convention on Certain Questions relating to the Conflict of Nationality Laws, which provides:

Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

Although the article makes no specific mention of diplomatic protection, it can be applied to the protection of dual nationals.

163. Subsequent codification proposals adopted a similar approach. In 1965, the Institute of International Law, at its Warsaw session, adopted a resolution which stated in article 4 (b):

An international claim presented by a State for injury suffered by a individual who, in addition to possessing the nationality of the claimant State, also possesses the nationality of a State other than the respondent State may be rejected by the latter and is inadmissible before the court (*jurisdiction*) seized of the claim unless it can be established that the interested person possesses a closer (*prépondérant*) link of attachment with the claimant State.³¹⁴

164. The draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School,³¹⁵ gave implicit support to this rule as its general support for the principle of effective nationality may be interpreted to apply to all cases involving the diplomatic protection of dual nationals. Mr. García Amador adopted a similar approach in his third report, which contained a proposal to the effect that no diplomatic protection should be possible on behalf of dual or multiple nationals unless it can be demonstrated that the individual has “stronger and more genuine legal and other ties” with the State offering such protection than with any other States.³¹⁶

165. The weight of judicial opinion is against the requirement of a dominant or effective nationality where proceedings are brought on behalf of a dual national against a third State, of which the injured person is not a national.

166. In the *Salem* case the Arbitral Tribunal held that Egypt could not raise the fact that the injured individual

³¹³ *Baron Frédéric de Born v. Yugoslavian State*, *Annual Digest of Public International Law Cases 1925 and 1926* (see footnote 247 above), case No. 205, p. 278.

³¹⁴ See footnote 108 above.

³¹⁵ Art. 23, para. 3, in Sohn and Baxter, loc. cit., p. 579.

³¹⁶ *Yearbook ... 1958* (see footnote 121 above), p. 61, art. 21, para. 4.

had effective Persian nationality against a claim from the United States, another State of nationality. It held that:

[T]he rule of international law [is] that in a case of dual nationality a third power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power.³¹⁷

167. A similar conclusion was reached by the Italian-United States Conciliation Commission in the *Vereano* claim, which concerned a claim on behalf of an American national who had acquired Turkish nationality by marriage. There the Commission quoted its decision in the *Mergé Claim*, according to which:

United States nationals who did not possess Italian nationality but the nationality of a third State can be considered “United Nations nationals” under the Treaty, even if their prevalent nationality was the nationality of a third State.³¹⁸

168. This rule was confirmed in 1958 by the Italian-United States Conciliation Commission in the *Flegenheimer* claim.³¹⁹

169. In the *Stankovic* claim, the same Commission dealt with a claim brought by the United States on behalf of a Yugoslavian national who had emigrated to Switzerland after the establishment of the Federal Republic of Yugoslavia and obtained a stateless passport there in 1948. In 1956, he became a naturalized citizen of the United States. Following objection by the Italian authorities, the Commission stated that the United States was entitled to espouse Stankovic’s claim even if he was also a national of another State. In their opinion a change from the nationality of one United Nations member to that of another member would not affect the jurisdiction of the Commission.³²⁰

170. The above conflict over the requirement of an effective link in cases of dual nationality involving third States is best resolved by a compromise which requires the claimant State only to show that there exists a bona fide link of nationality between it and the injured person. This rule has been followed by the Iran-United States Claims Tribunal in a number of cases concerning claimants who were at the same time nationals of the United States and a third State.³²¹ Even where the issue of dominant nationality was raised in such cases, the required proof was often considerably less strict than in cases concerning Iran-United States dual nationals.³²² However, in some cases the Tribunal indicated that if it could be proved that the claimant also possessed the nationality of a third State, it would be necessary to determine his or her dominant nationality.³²³

³¹⁷ *Salem* case (see footnote 185 above), p. 1188.

³¹⁸ *Mergé Claim* (see footnote 260 above), p. 456, para. V (8), cited in the *Vereano* claim (1957), ILR, vol. 24, p. 465.

³¹⁹ *Flegenheimer* case (see footnote 181 above), p. 149.

³²⁰ *Stankovic* claim (1963), ILR, vol. 40 (1970), p. 155.

³²¹ See, for example, *Dallal v. Iran* (1983), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1984), vol. 3, p. 23; and *Bederman*, loc. cit., pp. 123–124.

³²² See, for example, *Saghi v. Iran* (1987), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1988), vol. 14, pp. 4 and 6; and *McHarg, Roberts, Wallace and Todd v. Iran* (1986), *ibid.*, vol. 13, p. 289. See further Aldrich, op. cit., pp. 56–57.

³²³ *Uiterwyk Corporation v. Iran* (1988), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1989), vol. 19, p. 118 (Aldrich considers that this case supports the view that less strict evidence was

171. UNCC follows the same approach, as it will not consider claims “on behalf of Iraqi nationals who do not have bona fide nationality of any other State” while there is no restriction on claims by dual nationals of States other than Iraq.³²⁴

172. Where the State of nationality claims from another State of nationality on behalf of a dual national there is a clear conflict of laws.³²⁵ No such problem arises, however, where one State of nationality seeks to protect a dual national against a third State. Consequently there is no reason to apply the dominant or effective nationality principle.³²⁶ This approach is adopted in British State practice.³²⁷

173. The respondent State is, however, entitled to object where the nationality of the claimant State has been acquired in bad faith to bring the proceedings in question. Diplomatic protection should therefore be possible in cases of multiple nationals by any of the States with which they have a bona fide link of nationality against any third State. A multiple national should be allowed to bring a claim for reparation under any arrangement which makes it possible for a national of any of the States with which (s)he has a bona fide link of nationality to bring an international claim.

174. In principle there is no reason why two States of nationality may not jointly exercise a right that attaches to each State of nationality. The joint exercise of diplomatic protection by two or more States with which the injured individual has a bona fide link should therefore be permissible.³²⁸

Article 8

A State may exercise diplomatic protection in respect of an injured person who is stateless and/or a refugee when that person is ordinarily a legal resident of the claimant State [and has an effective link with that State?]; provided the injury occurred after that person became a legal resident of the claimant State.

required in these types of cases, op. cit., p. 57); *Asghar v. Iran* (1990), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1991), vol. 24, pp. 242–243; and *Daley v. Iran* (1988), *ibid.* (1989), vol. 18, pp. 236–237.

³²⁴ See footnote 290 above.

³²⁵ Parry, loc. cit., p. 707.

³²⁶ See, for example, Jennings and Watts, op. cit., p. 883. See also Chernichenko, *Mezhdunarodno-pravovye voprosy grazhdanstva*, pp. 110–112; Ushakov, ed., *Kurs mezhdunarodnogo Prava*, pp. 80–82; and Hailbronner, loc. cit., p. 36. According to Lee, consular protection is usually rendered in such cases without the objection of the host State (op. cit., p. 159).

³²⁷ The first sentence of rule III of the British Government’s rules applying to international claims, cited in Warbrick, loc. cit., pp. 1006–1007, states that:

“Where the claimant is a dual national, HMG may take up his claim (although in certain circumstances it may be appropriate for HMG to do so jointly with the other government entitled to do so).”

³²⁸ Van Panhuys, op. cit., p. 80; Ohly, loc. cit., p. 289; and Warbrick, loc. cit., pp. 1006–1007.

Comment

175. As shown in article 1, paragraph 1, and the commentary thereto, diplomatic protection is traditionally limited to nationals.³²⁹ That it did not extend to stateless persons was made clear in the *Dickson Car Wheel Company* case, when the Tribunal stated:

A State ... does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury.³³⁰

The traditional rule fails to take account of the position of both stateless persons and refugees and accordingly is out of step with contemporary international law, which reflects a concern for the status of both these categories of persons.³³¹ This is evidenced by such conventions as the Convention on the reduction of statelessness and the Convention relating to the Status of Refugees.

176. Refugees present a particular problem as they are “unable or ... unwilling to avail [themselves] of the protection of [the State of nationality]”.³³² If a refugee requests and enjoys the protection of her State of nationality, she loses her refugee status.³³³ Moreover, it is argued by Grahl-Madsen that the State of nationality loses its right to exercise diplomatic protection on behalf of the refugee.³³⁴

177. Some protection is offered to stateless persons and refugees by human rights conventions which confer rights on all persons resident in a State party. This protection is inevitably limited, as a majority of States do not accept these instruments or the right of individual complaint.

178. Conventions on refugees and statelessness fail to address the question of diplomatic protection satisfactorily. The Schedule to the Convention relating to the Status of Refugees provides for the issue of travel documents,³³⁵ but makes it clear that “the issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not confer on these authorities a right of protection”.³³⁶ On the other hand, Goodwin-Gill states that “[i]n practice ... diplomatic assistance falling short of full protection is often accorded by issuing States”.³³⁷ The

³²⁹ At the Conference for the Codification of International Law in 1930 the Netherlands proposed that the right of the host State to protect refugees should be recognized. This proposal was not adopted. See van Panhuys, *op. cit.*, p. 72.

³³⁰ *Dickson Car Wheel Company (U.S.A. v. United Mexican States)*, decision of July 1931 (UNRIAA, vol. IV (Sales No. 1951.V.1), p. 678.

³³¹ See Jennings and Watts, *op. cit.*, pp. 886–887 and 890–896.

³³² Art. 1 A (2) of the Convention relating to the Status of Refugees.

³³³ Grahl-Madsen, “Protection of refugees by their country of origin”, p. 392.

³³⁴ *Ibid.*, pp. 389, 391 and 394. For a discussion of this issue, see Lee, *op. cit.*, pp. 352–359.

³³⁵ In terms of article 28.

³³⁶ Para. 16.

³³⁷ *The Refugee in International Law*, p. 305. Switzerland takes the position that it will protect refugees who are no longer attached de facto to their home State, with the consent of the State against which the claim is presented: see Caflisch, “Pratique suisse en matière de droit international public”, note of 26 January 1978, p. 113. Belgium provides administrative and consular protection abroad to non-Belgian nationals who have refugee status in Belgium (Lee, *op. cit.*, p. 358).

Convention relating to the Status of Stateless Persons suggests that stateless persons might be considered by the State of residence as “having the rights and obligations which are attached to the possession of the nationality of that country”.³³⁸ It further provides in the context of administrative assistance that:

When the exercise of a right by a stateless person would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting State in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities.³³⁹

In contrast, the Convention on the reduction of statelessness is silent on the subject of protection.

179. In these circumstances it has been suggested that the State in which the refugee or stateless person has been resident for a substantial period of time and with which that person has an effective link should be entitled to exercise diplomatic protection on his or her behalf.³⁴⁰ This would accord with the view expressed by Grahl-Madsen that:

[A]n application for asylum or refugee status is not merely an expression of a desire, but is a definite legal step that may result in the granting of asylum or refugee status. If granted, such status resembles acquisition of a new nationality.³⁴¹

This view is supported by Lee, who states:

Indeed, there are grounds for supporting the analogy of the status of a refugee with that of a national of the state of asylum. For, from the standpoint of the refugee, his application for political asylum demonstrates his intent to sever his relationship with the country of origin, on the one hand, and his willingness to avail himself of the protection of the State of asylum, on the other. The State of asylum by granting asylum to a refugee and issuing identity and travel documents to him demonstrates its willingness to accept and protect him.³⁴²

180. Residence is an important feature of the effective link requirement, as demonstrated by the jurisprudence of the Iran-United States Claims Tribunal.³⁴³ It is also recognized as a basis for the bringing of a claim before UNCC.³⁴⁴

181. The European Convention on Consular Functions (not yet in force) establishes a similar system of protection for stateless persons based on habitual residence rather than on nationality:

A consular officer of the State where a stateless person has his habitual residence, may protect such a person as if Article 2, paragraph 1, of the present Convention applied, provided that the person concerned is not a former national of the receiving State.³⁴⁵

³³⁸ Art. 1, para. 2 (ii).

³³⁹ Art. 25, para. 1. See also article 14 with regard to artistic rights and industrial property.

³⁴⁰ Brownlie, *Principles ...*, p. 423; and Ohly, *loc. cit.*, p. 313, footnote 81. See also Jennings and Watts, *op. cit.*, pp. 886–887; and Jürgens, *op. cit.*, p. 218.

³⁴¹ *Loc. cit.*, p. 381.

³⁴² *Op. cit.*, p. 358. See also decision No. 60 VIII 59 of 4 August 1959 of the Verwaltungsgerichtshof Munich, cited by Lee, *ibid.*

³⁴³ See the discussion of effective link in paragraph 145 above.

³⁴⁴ Article 51 (a) of the UNCC Provisional Rules for Claims Procedure provides that: “A Government may submit claims on behalf of its nationals and, at its discretion, of other persons resident in its territory.” (S/AC.26/1992/10, annex).

³⁴⁵ Art. 46, para. 1.

The Protocol to the European Convention on Consular Functions concerning the Protection of Refugees lays down a similar rule:

The consular officer of the State where the refugee has his habitual residence shall be entitled to protect such a refugee and to defend his rights and interests in conformity with the Convention, in consultation, whenever possible, with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it.³⁴⁶

182. Article 8 is therefore in line with contemporary developments relating to the protection of refugees and stateless persons. It is furthermore supported by the draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School,³⁴⁷ which defines a “national” for the purposes of the Convention as “a stateless person having his habitual residence in that State”. Orrego Vicuña in his 2000 report to the International Law Association³⁴⁸ also recommends that it should be possible for claims to be brought on behalf of non-nationals in case of “humanitarian concerns or where the individual would have no other alternative to claim for his rights”.

183. Article 8 is an exercise in progressive development rather than codification. For this reason it is important to attach conditions to the exercise of that right. The proviso to article 8 restricts the exercise of that right to injuries to the individual that occurred after he or she became a resident of the claimant State. As the freedom of the refugee or stateless person to travel abroad will generally be limited by the reason of the absence of a passport or other valid travel document, this is a right that will rarely be exercised in practice.

184. The proviso contains an important qualification to the right to exercise diplomatic protection: in many cases the refugee will have suffered injury at the hands of his State of nationality, from which he has fled to avoid persecution. It would, however, be improper for the State of refuge to exercise diplomatic protection on behalf of the refugee in such circumstances. The objection to allowing a State of subsequent nationality to protect a national

³⁴⁶ Art. 2, para. 2.

³⁴⁷ See Sohn and Baxter, loc. cit., p. 578, art. 21, para. 3 (c).

³⁴⁸ “The changing law ...”, p. 27, rule 7.

against a State of prior nationality applies *a fortiori* to the protection of refugees. This subject is discussed in the article dealing with continuous nationality.

Future reports (and articles)

185. A report will be submitted at a later stage dealing with two matters:

(a) The right of a State of which an injured person is not a national to exercise diplomatic protection on behalf of a person if a breach of a *jus cogens* norm has caused the injury and the State of nationality has refused to exercise protection. This draft article will examine the controversial question whether the doctrine of obligations *erga omnes* has any application to diplomatic protection;

(b) The requirement of continuous nationality and the transferability of claims.

186. Subsequent reports will deal with:

(a) The exhaustion of local remedies;

(b) Waiver of diplomatic protection on behalf of the injured person;

(c) Denial of consent to diplomatic protection on behalf of the injured person;

(d) Protection of corporations.

187. The protection of an agent of an international organization by the organization—“functional protection”—raises special issues distinct from diplomatic protection. At the current stage, the Special Rapporteur has not decided whether to include this topic in his study. The advice of the Commission on this subject will be of assistance.

188. “Denial of justice” is a topic closely associated with diplomatic protection. Nevertheless it seems to represent a primary rather than a secondary rule. Again, the advice of the Commission on whether to include this topic would be appreciated.

CHAPTER III

Continuous nationality and the transferability of claims

Article 9

1. Where an injured person has undergone a bona fide change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury, provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs.

2. This rule applies where the claim has been transferred bona fide to a person or persons possessing the nationality of another State.

3. The change of nationality of an injured person or the transfer of the claim to a national of another State does not affect the right of the State of original nationality to bring a claim on its own behalf for injury to its general interests suffered through harm done to the injured person while he or she was still a national of that State.

4. Diplomatic protection may not be exercised by a new State of nationality against any previous State of nationality in respect of an injury suffered by a person when he or she was a national of the previous State of nationality.

Comment

189. The rule relating to the continuity of nationality is stated by Oppenheim as follows:

[F]rom the time of the occurrence of the injury until the making of the award the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.³⁴⁹

Although this rule is well established in State practice and has received support in many judicial decisions, it may cause great injustice where the injured individual has undergone a bona fide change of nationality, unrelated to the bringing of an international claim, after the occurrence of the injury, as a result, inter alia, of voluntary or involuntary naturalization (e.g. marriage), cession of territory or succession of States. Doctrinally it is difficult to reconcile the rule with the Vattelian fiction that an injury to a national is an injury to the State itself, as this would vest the claim in the State of nationality once the injury to a national had occurred. The rule is also in conflict with the modern tendency to view the individual as a subject of international law. There is therefore a need for a reassessment of the continuity of nationality rule, which this article 9 seeks to achieve.

A. The classical formulation of the rule and its justification

190. The rule of continuous nationality is seen as a “collary of the principle that diplomatic protection depends on the individual’s nationality”.³⁵⁰ It was explained by Umpire Parker in Administrative Decision No. V in the following terms:

It is no doubt the general practice of nations not to espouse a private claim against another nation unless in point of origin it possesses the nationality of the claimant nation. The reason of the rule is that the nation is injured through injury to its national and it alone may demand reparation as no other nation is injured. As between nations the one inflicting the injury will ordinarily listen to the complaint only of the nation injured. A third nation is not injured through the assignment of the claim to one of its nationals or through the claimant becoming its national by naturalization. While naturalization transfers allegiance, it does not carry with it existing state obligations.³⁵¹

191. The rule is primarily justified on the ground that it prevents abuse by individuals (who might otherwise engage in protection shopping) and States (which might otherwise acquire old claims for the purpose of putting political pressure on the respondent State).³⁵² In Administrative Decision No. V, Umpire Parker stated that:

³⁴⁹ Jennings and Watts, op. cit., p. 512.

³⁵⁰ Geck, loc. cit., p. 1055; and Leigh, loc. cit., p. 456. See also the *Panevezys-Saldutiskis Railway* case (footnote 12 above).

³⁵¹ *American Journal of International Law*, vol. 19 (Washington, D.C., 1925), pp. 613–614.

³⁵² See Borchard, “The protection of citizens abroad and change of original nationality”, pp. 377–380; Brownlie, *Principles* ..., p. 483; Wyler, op. cit., pp. 35–36 and 253–259; and Geck, loc. cit., p. 1056.

Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal of their claims.³⁵³

To this Moore adds the exaggerated comment that the absence of the continuous nationality requirement

would allow [a person] to call upon a dozen governments in succession, to each of which he might transfer his allegiance, to urge his claim. Under such a rule the government supposed to be indebted could never know when the discussion of a claim would cease. All governments are, therefore, interested in resisting such pretensions.³⁵⁴

192. Another explanation for the origin of the rule is that mixed claims commissions set up to adjudicate on injuries to aliens were limited in their jurisdiction by the terms of the ad hoc convention under which they were established and a “strict interpretation of the terms of the convention in question generally resulted in dismissal of the claim unless the claimant was able to prove that he possessed the nationality of the demanding state at the time of the presentation of the claim”.³⁵⁵ There was no need to insert in the terms of the convention any clause relating to the requirement of continuous nationality because the ordinary rules of treaty interpretation ensured that the nationality of the injured person was required both at the time of injury and at the time the claim was presented for adjudication.³⁵⁶

B. Status of the rule

193. The assertion is often made that the continuity of nationality rule has become a customary rule as a result of its endorsement by treaties, State practice, judicial decisions, attempted codifications and restatements and the writings of publicists.

194. The “rule has recurred in innumerable treaties, for instance, in nearly all of the 200 lump sum agreements concluded after World War II”.³⁵⁷ It is to be found in the Declaration establishing the Iran-United States Claims Tribunal, which provides that:

“Claims of nationals” of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that State ...³⁵⁸

³⁵³ *American Journal of International Law* (see footnote 351 above), p. 614. See also *Albino Abbiatti v. Venezuela*, in Moore, *History and Digest* ..., p. 2348.

³⁵⁴ *A Digest of International Law*, p. 637. See also Ohly, loc. cit., p. 285.

³⁵⁵ Sinclair, “Nationality of claims: British practice”, p. 127. See also Jennings, loc. cit., pp. 476–477. Jennings, relying on Sinclair, says that there are good grounds for holding that the rule of continuous nationality of claims is “procedural and not substantive”.

³⁵⁶ Wyler, op. cit., pp. 259–262; and O’Connell, op. cit., p. 1037.

³⁵⁷ Geck, loc. cit., p. 1055. See also Sinclair, loc. cit., p. 142; and Wyler, op. cit., pp. 43–48.

³⁵⁸ Art. VII, para. 2 (see footnote 286 above), p. 230.

It features in the practice rules of both the United States³⁵⁹ and the United Kingdom.³⁶⁰ And it has been confirmed by the decisions of mixed claims commissions, arbitral tribunals and international courts.³⁶¹ In the *Kren* claim, for example, the United States-Yugoslavia Claims Commission held, in 1953, that:

It is a well settled principle of international law that to justify diplomatic espousal, a claim must be national in origin; that it must, in its inception, belong to those to whom the state owes protection and from whom it is owed allegiance (Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 666). Further, although the national character will attach to a claim belonging to a citizen of a state at its inception, the claim ordinarily must continue to be national at the time of its presentation, by the weight of authority (Borchard, *supra*, p. 666), and there is a general agreement that it have a continuity of nationality until it is filed (Feller, *The Mexican Claims Commission*, p. 96).³⁶²

³⁵⁹ In 1982, the Assistant Secretary of State for Congressional Relations, Powell A. Moore, wrote a letter to the Chairman of the House Committee on Foreign Affairs, in which he stated that:

“Under the long-established rule of international law of continuous nationality, no claimant is entitled to diplomatic protection of the state whose assistance is invoked unless such claimant was a national of that state at the time when the claim arose and continuously thereafter until the claim is presented. In effect, a claim must be a national claim not only at the time of its presentation, but also at the time when the injury or loss was sustained”.

(Nash Leich, “Contemporary practice of the United States relating to international law” (1982), p. 836)

³⁶⁰ In 1985, the British Government published its rules applying to international claims. These include the following rules:

“Rule I

“HMG will not take up the claim unless the claimant is a United Kingdom national and was so at the date of the injury.

“Comment International law requires that for a claim to be sustainable, the claimant must be a national of the State which is presenting the claim both at the time when the injury occurred and continuously thereafter up to the date of formal presentation of the claim. In practice, however, it has hitherto been sufficient to prove nationality at the date of injury and of presentation of the claim (see “Nationality of Claims: British Practice”, by I. M. Sinclair: (1950) XXVII B.Y.B.I.L. 125–144).

“... ”

“Rule II

“Where the claimant has become or ceases to be a UK national after the date of the injury, HMG may in an appropriate case take up his claim in concert with the government of the country of his former or subsequent nationality.

“... ”

“Rule XI

“Where the claimant has died since the date of the injury to him or his property, his personal representatives may seek to obtain relief or compensation for the injury on behalf of his estate. Such a claim is not to be confused with a claim by a dependant of a deceased person for damages for his death.

“Comment Where the personal representatives are of a different nationality from that of the original claimant, the rules set out above would probably be applied as if it were a single claimant who had changed his national status.”

(Warbrick, loc. cit., pp. 1006–1008). See further on British practice, Sinclair, loc. cit., pp. 131–144.

³⁶¹ *Minnie Stevens Eschauzier (Great Britain) v. United Mexican States*, UNRIAA, vol. V (Sales No. 1952.V.3), p. 209; the *Gleadell* case, *ibid.*, p. 44; the *Stevenson* case, *ibid.*, vol. IX (Sales No. 59.V.5), p. 494; the *Miliani* case, *ibid.*, vol. X (Sales No. 60.V.4), p. 591; and the *Bogovic* claim, ILR, vol. 21 (1954), p. 156.

³⁶² ILR, vol. 20 (1953), p. 234.

PCIJ was less explicit in its support for the rule in the *Panevezys-Saldutiskis Railway* case, but it made it clear in a matter involving the rule of continuity of nationality that diplomatic protection was limited to the protection of nationals and that “[w]here the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection ...”³⁶³ More recently the rule has been reaffirmed by the Iran-United States Claims Tribunal.³⁶⁴

195. Many attempts have been made to codify the rule of continuity of nationality. One of the earliest of such attempts was Project No. 16 on diplomatic protection, prepared by the American Institute of International Law, which in 1925 proposed that:

In order that a diplomatic claim may be admissible, the individual in whose behalf it is presented must have been a national of the country making the claim at the time of the occurrence of the act or event giving rise to the claim, and he must be so at the time the claim is presented.³⁶⁵

In 1929, the draft Convention on the responsibility of States for damage done in their territory to the person or property of foreigners, prepared by the Harvard Law School, provided that:

(a) A state is responsible to another state which claims in behalf of one of its nationals only insofar as a beneficial interest in the claim has been continuously in one of its nationals down to the time of the presentation of the claim.

(b) A state is responsible to another State which claims in behalf of one who is not its national only if

- (1) the beneficiary has lost its nationality by operation of law, or
- (2) the interest in the claim has passed from a national to the beneficiary by operation of law.³⁶⁶

A year later, the Preparatory Committee of the Conference for the Codification of International Law formulated a more restrictive rule in Basis of discussion No. 28:

A State may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided.

...

³⁶³ *Panevezys-Saldutiskis Railway* (see footnote 12 above), p. 16. In this case the Court declined to rule on the preliminary objection relating to continuous nationality on the ground that it belonged to the merits.

³⁶⁴ The requirement has been imposed on the claim rather than the claimant. Where the nationality of the claim changed between the jurisdictional cut-off date mentioned in the Algiers Declarations (i.e. 19 January 1981, the date of the entry into force of the Declaration concerning the Settlement of Claims (see footnote 286 above)) and the date of filing, proof of nationality on the cut-off date has been held to be sufficient for purposes of jurisdiction (*Gruen Associates, Inc. v. Iran Housing Company* (1983), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1984), vol. 3, p. 97; and *Sedco, Inc. v. National Iranian Oil Company* (1985), *ibid.* (1987), vol. 9, p. 248). The Tribunal has held that the date of injury rather than the date of signature of the contract which was violated is the starting date required for jurisdiction (*Phelps Dodge Corp. and Overseas Private Investment Corp. v. The Islamic Republic of Iran* (1986), *ibid.*, vol. 10, pp. 121 and 126). If these requirements have not been fulfilled the Tribunal dismissed the claim for lack of jurisdiction (e.g. *Jonathan Ainsworth v. The Islamic Republic of Iran* (1988), *ibid.* (1989), vol. 18, p. 95; and *International Systems & Controls Corporation v. Industrial Development and Renovation Organization of Iran* (1986), *ibid.* (1988), vol. 12, p. 259). On the relevant jurisprudence of the Tribunal, see Aldrich, *op. cit.*, pp. 45–46, and Brower and Brueschke, *op. cit.*, pp. 76–80.

³⁶⁵ Art. VIII, *Yearbook ... 1956*, vol. II, p. 227.

³⁶⁶ Art. 15, *ibid.*, p. 229.

In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the State whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that State and to the extent to which they are interested.³⁶⁷

The continuity requirement appeared again in Mr. García Amador's third report presented to the Commission, which set out the following rule:

1. A State may exercise the right to bring a claim referred to in the previous article on condition that the alien possessed its nationality at the time of suffering the injury and conserves that nationality until the claim is adjudicated.

2. In the event of the death of the alien, the right of the State to bring a claim on behalf of the heirs or successors in interest shall be subject to the same conditions.³⁶⁸

In 1932, the Institute of International Law refused, by a small majority, to approve the traditional rule on continuity of nationality.³⁶⁹ In 1965, however, it adopted a resolution which reaffirmed the traditional rule by stressing that the claim must possess the national character of the claimant State both at the date of its presentation and at the date of injury. On the other hand, it abandoned the requirement of continuity between the two dates. The resolution provided:

First Article

(a) An international claim brought by a State for injury suffered by an individual may be rejected by the State to which it is presented unless it possessed the national character of the claimant State both at the date of its presentation and at the date of the injury. Before a court (*jurisdiction*) seized of such a claim, absence of such national character is a ground for inadmissibility.

(b) An international claim presented by a new State for injury suffered by one of its nationals prior to the attainment of independence by that State, may not be rejected or declared inadmissible in application of the preceding paragraph merely on the ground that the national was previously a national of the former State.

Article 2

When the beneficiary of an international claim is a person other than the individual originally injured, the claim may be rejected by the State to which it is presented and is inadmissible before the court seized of it unless it possessed the national character of the claimant State both at the date of injury and at the date of its presentation.

Article 3

(a) ...

(b) By date of injury is meant the date of the loss or detriment suffered by the individual.

(c) By date of presentation is meant, in case of a claim presented through diplomatic channels, the date of the formal presentation of the claim by a State and, in case of resort to an international court (*jurisdiction*), the date of filing of the claim before it.³⁷⁰

³⁶⁷ Basis of discussion No. 28, *ibid.*, p. 225.

³⁶⁸ *Yearbook ... 1958* (see footnote 121 above), p. 61, art. 21.

³⁶⁹ *Annuaire de l'Institut de Droit International* (Brussels, 1932), vol. 37 (Oslo session, August 1932), p. 278. See further Wyler, *op. cit.*, p. 41. Cf. Borchard, "The protection of citizens abroad ...". Borchard was the Special Rapporteur whose proposal that the traditional rule be reaffirmed was rejected.

³⁷⁰ Resolution on the national character of an international claim presented by a State for injury suffered by an individual (see footnote 108 above), pp. 57 and 59.

196. Most writers are at best equivocal in their support for the continuity rule. Few display the unqualified enthusiasm for the rule manifested by Borchard, who saw the reasons to sustain it to be "of fundamental and impregnable validity".³⁷¹ Instead opinions range from a questioning of the customary status of the rule³⁷² to criticism of its fairness from the perspective of both the State and the individual.³⁷³ Wyler, in his comprehensive study, rightly concluded that few jurists are prepared to defend the rule without qualification.³⁷⁴

197. The continuity of nationality rule is supported by *some* judicial decisions, *some* State practice, *some* codification attempts and *some* academic writers. On the other hand, there is strong opposition to it.

198. In Administrative Decision No. V, Umpire Parker repeatedly stated that the requirement of continuous nationality was not a general principle of international law. He declared:

The general practice of nations not to espouse a private claim against another nation that does not in point of origin possess the nationality of the claimant nation has not always been followed. And that phase of the alleged rule invoked by the German Agent which requires the claim to possess continuously the nationality of the nation asserting it, from its origin to the time of its presentation or even to the time of its final adjudication by the authorized tribunal, is by no means so clearly established as that which deals with its original nationality. Some tribunals have declined to follow it. Others, while following it, have challenged its soundness.³⁷⁵

In 1932, the Institute of International Law was unable to reach agreement on the continuity rule. Special Rapporteur Borchard's proposal that the rule be endorsed was powerfully challenged by Politis, who stated:

The Rapporteur relies on the practice of diplomacy and jurisprudence in order to state the rule that protection ought not to be given or can no longer be exercised when the injured person has changed his nationality since the date of injury. The real situation is entirely different. A great number of cases apply a contrary theory. In truth, protection ought to be exercised in favour of the individual, despite his change of nationality, except in those cases in which he makes a claim against the government of his origin, or decides to acquire a new nationality only for a fraudulent purpose, in seeking the protection of a strong government, capable of giving more influence to his claim. The objection raised by the Rapporteur of the difficulty of proving this fraud is not conclusive. Diplomatic practice shows numerous cases in which it has been possible to offer similar proof; there are celebrated cases, chiefly in the field of divorce, in which fraud has been held established and as a result no

³⁷¹ *Loc. cit.*, p. 373. See also pages 300 and 377–380. See further Borchard, *op. cit.*, pp. 660–667.

³⁷² O'Connell, *op. cit.*, p. 1036.

³⁷³ Balladore Pallieri, "La determinazione internazionale della cittadinanza ai fini dell'esercizio della protezione diplomatica", p. 123; Geck, *loc. cit.*, pp. 1055–1056; van Panhuys, *op. cit.*, p. 90; Joseph, *op. cit.*, p. 29; Ohly, *loc. cit.*, p. 72; and Brownlie, *Principles ...*, p. 483. Ohly has contended that

"by leaving such claims uncompensated, strict application of the continuous nationality doctrine allows wrongful international conduct to remain unretributed, rewarding the State whose actions gave rise to the claim with additional incentive to conduct itself in a similarly wrongful manner in the future".

(*Loc. cit.*, p. 286)

³⁷⁴ *Op. cit.*, pp. 228–231. See also Joseph, *op. cit.*, pp. 26–29.

³⁷⁵ *American Journal of International Law* (see footnote 351 above), p. 614.

account has been taken of the change of nationality, which had been effected.³⁷⁶

This failure to reach consensus influenced van Eysinga to find in his dissenting opinion in the *Panevezys-Saldutiskis Railway* case that the continuity practice had not “crystallized” into a general rule.³⁷⁷

199. Codification proposals are likewise inconsistent in support for the rule. The draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by Harvard Law School, proposed that:

A State has the right to present or maintain a claim on behalf of a person only while that person is a national of that State. A State shall not be precluded from presenting a claim on behalf of a person by reason of the fact that that person became a national of that State subsequent to the injury.

The right of a State to present or maintain a claim terminates, if, at any time during the period between the original injury and the final award or settlement, the injured alien, or the holder of the beneficial interest in the claim while he holds such interest, becomes a national of the State against which the claim is made.³⁷⁸

More recently Orrego Vicuña, Rapporteur to the International Law Association Committee on Diplomatic Protection of Persons and Property, has advanced the following proposal:

8. Continuance of nationality may be dispensed within the context of global financial and service markets and operations related thereto or other special circumstances. In such context the wrong follows the individual in spite of changes of nationality and so does his entitlement to claim.

9. Transferability of claims should be facilitated so as to comply with the standard set out under 8 above.

10. Only the State of the latest nationality should be able to bring a claim under the rule set out in 8 above. This claim shall not be made against the former State of nationality. It is a requirement that changes of nationality and transferability of claims be made *bona fide*.³⁷⁹

C. Uncertainty about the content of the rule

200. The dubious status of the requirement of continuity of nationality as a customary rule is emphasized by the uncertainties surrounding the content of the alleged rule. There is no clarity on the meaning of the date of injury, nationality, continuity and the *dies ad quem* (the date until which continuity of the claim is required).

³⁷⁶ *Annuaire de l'Institut de Droit International* (see footnote 369 above), p. 488. For the Rapporteur's response, see Borchard, “The protection of citizens abroad ...”. For an account of this matter, see Briggs's report to the 1965 session of the Institute of International Law, “La protection diplomatique des individus en droit international: la nationalité des réclamations”, pp. 157–178.

³⁷⁷ *Panevezys-Saldutiskis Railway* (see footnote 12 above), p. 35.

³⁷⁸ Art. 23, paras. 6–7, in Sohn and Baxter, loc. cit., p. 579. See also article 24, paragraph 2, which provides:

“A State is not relieved of its responsibility by having imposed its nationality, in whole or in part, on the injured alien or any other holder of the beneficial interest in the claim, except when the person concerned consented thereto or nationality was imposed in connection with a transfer of territory. Such consent need not be express ...”

(Ibid., p. 580)

³⁷⁹ “The changing law ...”, p. 27, rules 8–10.

201. The “date of injury”³⁸⁰ is usually construed to mean the date on which the alleged injurious act or omission of the respondent which caused damage to a national of the claimant State took place. Article 3 (b) of the 1965 resolution of the Institute of International Law confirmed this interpretation.³⁸¹ However, the argument has been advanced that the *dies a quo* is that on which the international delict occurred, that is, the date on which the respondent State failed to pay compensation or the date of the denial of justice.³⁸² International tribunals have, however, refused to draw such a distinction.³⁸³

202. Another issue which has been raised with regard to the requirement of nationality at the time of injury is the definition of national. It has been contended before various claims commissions that a declaration of intention to become a national filed at the time of the injury should be sufficient to satisfy the continuous nationality rule. Although the United States-Mexican General Claims Commission on occasion accepted such a declaration of intention supported by residence in the new State of nationality as equivalent to nationality at the origin of the claim, this contention has not been seen as satisfactory by subsequent international claims commissions.³⁸⁴

203. The term “continuity of nationality” is misleading as in practice little attempt is made to trace the continuity of nationality from the date of injury to the date of presentation of the claim. Instead only these two dates are considered.³⁸⁵ Consequently the 1925 American Institute of International Law³⁸⁶ and the 1965 Institute of International Law³⁸⁷ proposals require that the holder of the claim be a national of the claimant State at the time of injury and presentation only. Thus a claim could be espoused by the original State of nationality if, after subsequent changes of nationality by its holder or its transfer to nationals of other States, the claim ends up in the hands of a national of the State whose national the injured person was at the time of the injury. The practical relevance of this rule is, however, questionable. This was stressed by Briggs in his report to the Institute of International Law:

If the judicial decisions of international tribunals have thus established the rule that, in order to be admissible, a claim must possess the nationality of the State asserting it not only at the origin but also on the date of its presentation to an international tribunal, is there an additional requirement, namely: that such a claim must have been *continuously* national during the period between those two dates? Tribunals are seldom confronted by such a problem. In most instances where a tribunal has stated, *in expressis verbis*, that a claim must be “continuously” national, from the origin to its presentation, what the tribunal has actually had to decide was whether or not a claim possessed the nationality of the claimant State on one or both of the two crucial dates. (See the *Gleadell* and *Flack* cases, above; and the *Benchiton* case, below.) Cases where a tribunal has had to deal with a claim that possessed the required nationality on both of the crucial dates, but lost or re-acquired that nationality in the period between those two dates have seldom arisen and have been controversial.³⁸⁸

³⁸⁰ See generally on this subject, Wyler, op. cit., p. 53.

³⁸¹ See footnote 108 above.

³⁸² Joseph, op. cit., p. 25.

³⁸³ Borchard, op. cit., p. 663.

³⁸⁴ Ibid., pp. 662–663; and Wyler, op. cit., p. 91.

³⁸⁵ Cf. Joseph, op. cit., pp. 24–26, who sees continuity as a third and separate requirement.

³⁸⁶ *Yearbook ... 1956* (see footnote 365 above).

³⁸⁷ See footnote 108 above.

³⁸⁸ Loc. cit., pp. 72–73.

204. The absence of agreement over the content of the continuity rule is nowhere more apparent than in the dispute over the meaning to be given to the *dies ad quem*, the date until which continuous nationality of the claim is required. The following dates have been suggested and employed as the *dies ad quem*: the date on which the Government endorses the claim of its national, the date of the initiation of diplomatic negotiations on the claim, the date of filing of the claim, the date of the signature, ratification or entry into force of the treaty referring the dispute to arbitration, the date of presentation of the claim, the date of conclusion of the oral hearing, the date of judgement and the date of settlement.³⁸⁹ The practical significance of the dispute over the *dies ad quem* is illustrated by the case of *Minnie Stevens Eschauzier*, whose claim was rejected because she lost her British nationality when she married an American national between the presentation of the claim and the award.³⁹⁰ The disagreement over the *dies ad quem* can largely be explained on the grounds that different conventions have been interpreted to set different dates. This was made clear by Umpire Parker in Administrative Decision No. V:

When the majority decisions in these cases come to be analyzed, it is clear that they were in each case controlled by the language of the particular protocol governing the tribunal deciding them, which language limited their jurisdiction to claims possessing the nationality of the nation asserting them not only in origin but continuously—in some instances to the date of the *filing* of the claim, in others to the date of its *presentation* to the tribunal, in others to the date of the *judgment* rendered, and in still others to the date of the *settlement*. This lack of uniformity with respect to the period of continuity of nationality required for jurisdictional purposes results from each case being controlled by the language of the particular convention governing.³⁹¹

However satisfactory this explanation may be, it hardly succeeds in providing evidence of clear State practice to found a customary rule.

205. The element of the continuous nationality rule that has attracted least contention is the requirement that the claim must have originated in an injury to a national of the claimant State. According to Borchard:

Few principles of international law are more firmly settled than the rule that a claim, in order to justify diplomatic support, must *when it accrued* have belonged to a citizen. This principle that a claim must be national in origin arises out of the reciprocal relation between the government and its citizens, the one owing protection and the other allegiance ... To support a claim, originally foreign, because it happened to come into the hands of a citizen would make of the government a claim agent.³⁹²

³⁸⁹ Wyler, *op. cit.*, pp. 75–80; Briggs, *loc. cit.*, pp. 24 et seq.; Sinclair, *loc. cit.*, pp. 128–130; Brownlie, *Principles ...*, pp. 483–484; Schwarzenberger, *International Law*, pp. 597–598; and García Amador, *op. cit.*, p. 504.

³⁹⁰ See footnote 361 above.

³⁹¹ *American Journal of International Law* (see footnote 351 above), pp. 616–617.

³⁹² *Op. cit.*, p. 660. See also pages 462, 627–629 and 637–638 (*ibid.*); Geck, *loc. cit.*, p. 1055; Shaw, *op. cit.*, p. 565; Brownlie, *Principles ...*, p. 483; Joseph, *op. cit.*, pp. 24–25; Parry, *loc. cit.*, p. 702; Sinclair, *loc. cit.*, p. 126; and the *Benchiton* case, *Annual Digest and Public International Law Cases 1923 to 1924*, Sir John Fischer Williams and H. Lauterpacht, eds. (London, Longmans, Green, 1933), p. 189. On this issue Schwarzenberger states:

“Unless the governing instrument calls for a different interpretation, the individual, corporation or ship must possess the nationality of the claimant State at the time of the injury (*dies a quo*). The reason is that the claim is that of the subject of international law which puts forward its claim. If, at the time of the injury, the individual

Thus a State may not claim on behalf of an individual who became its national by naturalization after the date of injury. To allow this, several decisions assert, would permit the new State of nationality to act as a claim agent.³⁹³ Naturalization is not retroactive, it transfers allegiance, it does not transfer existing obligations. However, where the injury is a continuing one the new State of nationality may institute a claim.³⁹⁴ The same principle has been applied to the claim of foreign heirs to deceased nationals, the assignment of claims to foreign assignees³⁹⁵ and insurance subrogation.³⁹⁶ Inevitably this leads to inequities in individual cases.

D. Jurisprudential and policy challenges to the continuity rule

206. The objections to the continuity rule are not confined to its uncertain content and unfairness. From a theoretical perspective it is out of line with both the Vattelien fiction that an injury to the individual is an injury to the State itself and the growing tendency to see the individual as a subject of international law. Moreover, there are strong policy objections to it. For these reasons it is a rule ripe for reassessment.

207. Diplomatic protection is premised on the Vattelien notion that an injury to a national is an injury to the State.³⁹⁷ Logic would seem to dictate that an injury to an alien accrues to the State of nationality immediately at the time of injury and that subsequent changes to the person or nationality of the individual are irrelevant for the purposes of the claim.³⁹⁸ Yet in the *Stevenson* case³⁹⁹ this argument was dismissed by the British-Venezuelan Claim Commission of 1903. Here a British subject, long resident in Venezuela, had suffered an injury at the hands of the Venezuelan authorities. Before the claim was arbitrated, the injured national died, and his claim passed by operation of law to his widow, a Venezuelan national according to Venezuelan law, and his 12 children, 10 of whom were also Venezuelan nationals according to Venezuelan law. The British agent argued that in a claim brought by one State against another, the claimant State seeks redress for an injury to itself and does not merely act as representative for its injured national. Thus the fact that the injured national has since acquired the nationality of the respondent State should not bar the claim, which is founded on an injury to the claimant State *through* its national. Umpire Plumley rejected this argument:

concerned had another nationality or was stateless, the claimant State has received no injury.”

(*Op. cit.*, p. 597)

³⁹³ Administrative Decision No. V (see footnote 351 above), p. 614; and the *Albino Abbiatti* case (see footnote 353 above).

³⁹⁴ Borchard, *op. cit.*, p. 661. The notion of “continuous wrong” was raised by Austria to allow it to protect “Czech-Germans” naturalized in Austria after the Second World War, arising from confiscatory measures against their property taken by Czechoslovakia (van Panhuys, *op. cit.*, p. 95).

³⁹⁵ *Stevenson* case (see footnote 361 above).

³⁹⁶ Borchard, *op. cit.*, pp. 627–629 and 636–638; and Brownlie, *Principles ...*, pp. 484–485.

³⁹⁷ See the commentary to article 3 above, para. 62.

³⁹⁸ O’Connell, *op. cit.*, p. 1034; Geck, *loc. cit.*, p. 1056; and Jennings, *loc. cit.*, pp. 475–476.

³⁹⁹ *Stevenson* (see footnote 361 above).

The attention of the umpire has not been brought to an instance where the arbitrators between nations have been asked or permitted to declare the money value of an indignity to a nation simply as such. While the position of the learned agent for Great Britain is undoubtedly correct, that underlying every claim for allowance before international tribunals there is always the indignity to the nation through its national by the respondent government, there is always in Commissions of this character an injured national capable of claiming and receiving money compensation from the offending and respondent government. In all of the cases which have come under the notice of the umpire—and he has made diligent search for precedents—the tribunals have required a beneficiary of the nationality of the claimant nation lawfully entitled to be paid the ascertained charges or dues. They have required that this right should have vested in the beneficiary up to and at the time of the treaty authorizing and providing for the international tribunal before which the claim is to appear.⁴⁰⁰

Other claims commissions have endorsed this approach.⁴⁰¹

208. There are sound logical reasons for rejecting the continuity rule and simply recognizing as the claimant State the State of nationality at the time of injury to the national. Indeed this is the solution advocated by Wyler.⁴⁰² Nevertheless, such a solution is not without its weaknesses, which is conceded by Wyler.⁴⁰³ In particular, it fails to take account of the new role of the individual in the international legal order.

209. While the individual person may not yet qualify as a subject of international law,⁴⁰⁴ the individual's basic rights are today recognized in both conventional and customary international law. Neither the continuity of nationality rule nor the Vattelian notion that gives the State of nationality at the time of injury the sole right to claim, acknowledge the place of the individual in the contemporary international legal order. This was stressed as early as 1932 by Politis when he successfully challenged Borchard's proposal that the Institute of International Law adopt the traditional rule on continuity of nationality.⁴⁰⁵ Subsequently jurists such as Geck,⁴⁰⁶ O'Connell⁴⁰⁷ and Jennings⁴⁰⁸ have criticized the rule on similar grounds. It therefore seems preferable to reject the doctrine of continuous nationality as a substantive rule of customary international law. Although the doctrine of continuous nationality creates particular hardships in the case of involuntary change of nationality, as in the case of State succession, it would be wrong to reject it in this case only. Marriage, for instance, may involve a change of nationality which is involuntary, but there seems to be no good reason why it should affect the

operation of the rule of nationality of claims differently from cases of State succession.⁴⁰⁹

210. Article 3 of the present draft articles affirms the right of the State of nationality alone to exercise diplomatic protection on behalf of an injured individual, principally on the grounds that this affords the most effective protection to the individual. Article 9 does not depart from this principle in allowing the new State of nationality to institute proceedings on behalf of the individual. By permitting the claim to follow the changed circumstances of the individual it does, however, introduce an element of flexibility into the bringing of claims which accords greater recognition to the rights of the individual while at the same time recognizing that the State is likely to be the most effective protector of individual rights.

211. The principal policy reason for the rule of continuous nationality is that it prevents abuse of diplomatic protection.⁴¹⁰ Today the suggestion made by Moore that without this rule an injured person could "call upon a dozen governments in succession, to each of which he might transfer his allegiance, to urge his claim"⁴¹¹ is rightly seen as fanciful. Modern States are cautious in their conferment of nationality and generally require prolonged periods of residence before naturalization will be considered. It is ridiculous to presume or even to suggest that the powerful industrialized nations, which are most able to assert an effective claim of diplomatic protection, would fraudulently grant naturalization in order to "buy" a claim.⁴¹² Even if this was done the defendant State would in most instances successfully be able to raise the absence of a genuine link, as required in the *Nottebohm* case,⁴¹³ as a bar to the action.⁴¹⁴ In his separate opinion in the *Barcelona Traction* case, Sir Gerald Fitzmaurice stated:

[T]oo rigid and sweeping an application of the continuity rule can lead to situations in which important interests go unprotected, claimants unsupported and injuries unredressed, not on account of anything relating to their merits, but because purely technical considerations bring it about that no State is entitled to act. This situation is the less defensible at the present date in that what was always regarded as the other main justification for the continuity rule (and even sometimes thought to be its real *fons et origo*), namely the need to prevent the abuses that would result if claims could be assigned for value to nationals of powerful States whose governments would compel acceptance of them by the defendant State, has largely lost its validity.⁴¹⁵

E. Conclusion

212. The traditional "rule" of continuous nationality has outlived its usefulness. It has no place in a world in which individual rights are recognized by international law and in which nationality is not easily changed. It is difficult not to agree with Wyler's concluding comment that:

⁴⁰⁹ O'Connell, op. cit., p. 1036; and van Panhuys, op. cit., pp. 92–94.

⁴¹⁰ See paragraph 192 above.

⁴¹¹ See footnote 354 above.

⁴¹² Van Panhuys, op. cit., p. 92.

⁴¹³ *I.C.J. Reports 1955* (see footnote 52 above), p. 23.

⁴¹⁴ See Ohly, loc. cit., pp. 288–289.

⁴¹⁵ *Barcelona Traction* case (see footnote 16 above), pp. 101–102. See also Ohly, loc. cit., p. 286.

⁴⁰⁰ *Ibid.*, p. 506.

⁴⁰¹ In the *Miliani* case the Italian-Venezuelan Commission stated:

"While it remains true that an offense to a citizen is an offense to the nation, nevertheless the claimant before an international tribunal is ordinarily the nation on behalf of its citizen. Rarely ever can the nation can be said to have a right which survives when its citizen no longer belongs to it."

(See footnote 361 above). See also the *Studer* case discussed by Hurst, "Nationality of claims", p. 168.

⁴⁰² Op. cit., p. 264.

⁴⁰³ *Ibid.*

⁴⁰⁴ See paragraph 189 above.

⁴⁰⁵ *Annuaire de l'Institut de Droit International* (see footnote 369 above), pp. 487–488. See also Mr. García Amador's first report, *Yearbook ... 1956* (footnote 40 above), p. 194.

⁴⁰⁶ Loc. cit., p. 1055.

⁴⁰⁷ Op. cit., pp. 1034–1036.

⁴⁰⁸ Loc. cit., pp. 476–477.

Anyway, the effectiveness of diplomatic protection would be appreciably enhanced if it were freed from the continuity rule.⁴¹⁶

Article 9 seeks to free the institution of diplomatic protection from the chains of the continuity rule and to establish a flexible regime that accords with contemporary international law but at the same time takes account of the fears of the potential abuse that inspired the rule.

213. Article 9, paragraph 1, allows a State to bring a claim on behalf of a person who has acquired its nationality bona fide after suffering an injury attributable to a State other than the person's previous State of nationality, provided that the original State of nationality has not exercised or is not exercising diplomatic protection in respect of the injury.

214. A number of factors ensure that the rule will not lead to instability and abuse. First, it recognizes, in accordance with the Vattelien fiction, that priority should be given to a claim brought by the original State of nationality. Only when this is not done and the individual changes her/his nationality does the claim follow the individual. Secondly, the injured individual who changes nationality is not able to choose which State may claim on his/her behalf: the original State of nationality or the new State of nationality. Only the new State of nationality may institute a claim and only when it—the State—elects to do so.

215. Thirdly, the new nationality must have been acquired in good faith.⁴¹⁷ Where a new nationality is acquired for the sole purpose of obtaining a new State protector, this will normally provide evidence of a mala fide naturalization.⁴¹⁸ Borchard's criticism, made in 1934, that this "confuses motive with illegality or bad faith"⁴¹⁹

⁴¹⁶ Op. cit., p. 268.

⁴¹⁷ This requirement is included in Orrego Vicuña's proposal to the International Law Association, "The changing law ...", rule 10.

⁴¹⁸ See *Annuaire de l'Institut de Droit International* (footnote 369 above), pp. 487–488.

⁴¹⁹ "The protection of citizens abroad ...", p. 384.

is not without substance. However, in the post-*Nottebohm* world no State is likely to initiate proceedings on behalf of a naturalized national where there is any suggestion that naturalization has not been obtained in good faith and where there is no connecting factor between the individual and the State.

216. Article 9, paragraph 2, extends the above principle to the transfer of claims.

217. Article 9, paragraph 3, ensures the right of the State of original nationality to bring a claim where its own national interest has been affected by the injury to its national. The proviso to paragraph 1 also recognizes the special rights of the State of original nationality. This reaffirms the principle contained in article 3 of the present draft articles.

218. The abolition of the continuity rule must not result in the State of new nationality being allowed to bring a claim on behalf of its new national against the State of previous nationality in respect of an injury attributable to that State while the person in question was still a national of that State. The hostile response to the Helms-Burton legislation,⁴²⁰ which purports to permit Cubans naturalized in the United States to institute proceedings for the recovery of loss caused to them by the Government of Cuba at the time when they were still Cuban nationals,⁴²¹ illustrates the unacceptability of such a consequence. Article 9, paragraph 4, which ensures that this may not happen, draws support from the proposal of Orrego Vicuña to the International Law Association.⁴²²

⁴²⁰ Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, ILM, vol. XXXV, No. 1 (January 1996), p. 357.

⁴²¹ See Lowe, "US extraterritorial jurisdiction: the Helms-Burton and D'Amato acts", pp. 386–388.

⁴²² "The changing law ...", rule 10. See also the statement by Politis to the Institute of International Law, *Annuaire de l'Institut de Droit International* (footnote 369 above), pp. 487–488.

UNILATERAL COSTS OF STATES

[Agenda item 7]

DOCUMENT A/CN.4/505

Third report on unilateral acts of States, by Mr. Victor Rodríguez Cedeño, Special Rapporteur

[Original: English/French/Spanish]

[17 February 2000]

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	<i>Source</i>
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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.
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Introduction

I. GENERAL OBSERVATIONS AND OUTLINE OF THE THIRD REPORT

1. The topic of unilateral acts of States is a particularly complex one, mainly because of the diversity of such acts from the material point of view, which makes it difficult to establish common rules that apply to all of them.

2. In order to move forward in the work undertaken by the International Law Commission, in particular since 1996, it is essential to consider, in the most appropriate manner, the comments and observations expressed by its members and by Governments, both in writing and in the Sixth Committee of the General Assembly.

3. Following the submission of reports on the topic in 1998¹ and 1999,² and bearing in mind those comments and observations, it seemed useful to present this third report in two parts: a first part, which would clarify, complete and even revise some of the concepts already presented, and a second part, containing some draft articles and comments thereon concerning the issues that the Commission itself had suggested should be addressed.

4. During its fifty-first session in 1999, the Commission considered the topic at its 2593rd to 2596th meetings and at its 2603rd meeting. On that occasion, the Commission established a Working Group, at the request of the Special Rapporteur, whose task was “(a) to agree on the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (b) to set the general guidelines according to which the practice of States should be gathered; and (c) to point the direction that the work of the Special Rapporteur should take in the future”.³ The Working Group produced a report⁴ containing thought-provoking comments; these were taken into account in the preparation of this third report and also produced an interesting debate in the Commission.⁵

5. Although the doctrine and precedents relating to the topic have been considered extensively, practice has been looked at comparatively less. Since the study of practice is at times difficult to systematize, the Commission, with a view to making the topic easier to study, requested the Secretariat, after consultation with the Special Rapporteur, to distribute a questionnaire to Governments about their practice in the area of unilateral acts, in particular about the categories of such acts, capacity to act on behalf of the State through unilateral acts, formalities for such acts, their content, legal effects, importance, use-

fulness and value, rules of interpretation that apply to such acts, and their duration and possible revocability.⁶ The Secretariat sent the questionnaire to all Governments on 30 September 1999, and the General Assembly, in paragraph 4 of its resolution 54/111 of 9 December 1999, invited Governments to respond by 1 March 2000. Some delegations in the Sixth Committee, it is worth noting, had referred to specific aspects of the topic that were addressed in the questionnaire.⁷

6. Although at the time this report was prepared no information had yet been received from Governments, some State practice, as reflected in specialized publications in a number of countries, has been examined.

7. As indicated above, the third report is divided into two parts, preceded by three preliminary issues that need to be addressed: first, the relevance of the topic; secondly, the relationship between the draft articles on unilateral acts and the 1969 Vienna Convention on the Law of Treaties; and third, the question of estoppel and unilateral acts. Once these three issues have been dealt with, the third report will be organized as follows:

Reformulation of articles 1–7 of the previous draft articles

1. New draft article 1. Definition of unilateral acts.
2. Deletion of the previous draft article 1 on the scope of the draft articles.
3. Advisability of including a draft article based on article 3 of the 1969 Vienna Convention.
4. New draft article 2. Capacity of States to formulate unilateral acts.
5. New draft article 3. Persons authorized to formulate unilateral acts on behalf of a State.
6. New draft article 4. Subsequent confirmation of an act formulated by a person not authorized for that purpose.
7. Deletion of former draft article 6 on expression of consent.
8. New draft article 5. Invalidity of unilateral acts.

¹ *Yearbook ... 1998*, vol. II (Part One), p. 319, document A/CN.4/486.

² *Yearbook ... 1999*, vol. II (Part One), p. 195, document A/CN.4/500 and Add.1.

³ *Ibid.*, vol. II (Part Two), p. 137, para. 581.

⁴ *Ibid.*, pp. 137–139, paras. 577–597.

⁵ *Ibid.*, vol. I, 2603rd meeting, pp. 260–265, paras. 1–46.

⁶ *Ibid.*, vol. II (Part Two), pp. 138–139, paras. 593–594.

⁷ “Topical summary of the discussion in the Sixth Committee on the report of the Commission during the fifty-fourth session of the General Assembly” (A/CN.4/504), pp. 29–30, paras. 148–156.

II. PRELIMINARY ISSUES

8. It seemed appropriate to review three basic issues in the study of unilateral acts of States on which a firm position needs to be taken in order to move ahead in the work on the topic.

A. Relevance of the topic

9. In the first place, as illustrated by the nearly unanimous opinion of the members of the Commission and representatives of Governments in the Sixth Committee, there appears to be no doubt as to the increasingly frequent use by States of unilateral acts in their international relations, the importance of such acts and the need to elaborate specific rules to govern their functioning.

10. As may be recalled, the Working Group established in 1997 by the Commission at its forty-ninth session discussed the reasons why such acts should be considered, underlining the view that “[i]n their conduct in the international sphere, States frequently carry out unilateral acts with the intent to produce legal effects”.⁸ This idea was taken up again in 1997 and 1998 by the Commission at the suggestion of the working groups it had established to look into the topic.

11. The topic of the sources of international law, proposed for codification by the Secretariat in 1949, is not considered to have been exhausted. In this context, the report adopted by the Commission in 1996 at its forty-eighth session on its long-term programme of work notes that, among the topics which had been proposed, that of unilateral acts was a proper subject for immediate consideration. The Commission expressed the view that the topic was rather well delimited, that States had abundant recourse to unilateral acts and that their practice could be studied with a view to drawing general legal principles.⁹

12. At its fifty-first session, in 1999, the Commission made commentaries in favour of this proposal. One member indicated that “such acts were the most common means of conducting day-to-day diplomacy and there was uncertainty, both in the literature and in practice, regarding the legal regime that was applicable to them. As it was the function of international law to ensure stability and predictability in international relations, some regime was needed in order to prevent unilateral acts from becoming a source of disputes or even conflicts”.¹⁰

13. In the Sixth Committee, some representatives stressed the relevance of the topic. It was noted, in this connection, that a complex situation arose in both the doctrine and the practice of international law, not only because of the extraordinary variety of unilateral acts, but also because they were omnipresent in international relations, constituted the most direct means that States had of expressing their will and were a means of conducting day-to-day diplomacy. State practice and precedents con-

firmed that they could create legal effects, engendering rights and obligations for States.¹¹

14. Accordingly, there appears to be no doubt about the relevance of the work and the need to go on with it, in order to respond to the General Assembly’s request and give continuity to what was expressed in the Commission itself.

B. Relationship between the draft articles on unilateral acts and the 1969 Vienna Convention

15. In the second place, and also as a preliminary step, the importance of the 1969 Vienna Convention should be reconsidered as an essential source of inspiration for the Commission’s work on the topic.

16. In the view of some members of the Commission and representatives in the Sixth Committee, the approach that has been taken thus far to the topic follows the 1969 Vienna Convention too closely, while for others, on the contrary, the work on unilateral acts has become separated from treaty law, and some have mentioned the need to take the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations into account as well.

17. The previous reports on the topic pointed out that the 1969 Vienna Convention was an extremely useful source of inspiration for the Commission’s work on the topic. This relationship has been commented on by several members of the Commission¹² and some State representatives in the Sixth Committee, several of whom endorsed the Special Rapporteur’s statement, while others, as indicated, felt that a close relationship should be established with the 1986 Vienna Convention as well as with the 1969 Convention. Still others, however, noted that it was not necessary to follow the 1969 Convention too closely, in view of the differences between treaty acts and unilateral acts.¹³

18. The report on the long-term programme of work adopted by the Commission in 1996 states that “[a]lthough the law of treaties and the law applicable to unilateral acts of States differ in many respects, the existing law of treaties certainly offers a helpful point of departure and a scheme by reference to which the rules relating to unilateral acts could be approached”.¹⁴

19. Although it was indicated when the second report was introduced in the Commission in 1999 that the 1969 Vienna Convention constituted a very important point of reference for the work on unilateral acts,¹⁵ this certainly did not mean that all the rules of that Convention were automatically transferred to the draft articles.

⁸ *Yearbook ... 1997*, vol. II (Part Two), p. 64, para. 196.

⁹ *Yearbook ... 1996*, vol. II (Part Two), annex II, addendum 3, p. 141, paras. 1–3.

¹⁰ *Yearbook ... 1999*, vol. I, 2595th meeting, statement by Mr. Hafner, pp. 204–205, para. 27.

¹¹ A/CN.4/504 (see footnote 7 above), p. 25, para. 115.

¹² *Yearbook ... 1999*, vol. II (Part Two), pp. 133–134, paras. 534–535.

¹³ A/CN.4/504 (see footnote 7 above), pp. 28–29, paras. 140–145.

¹⁴ *Yearbook ... 1996* (see footnote 9 above), para. 3 (d).

¹⁵ *Yearbook ... 1999* (see footnote 12 above), p. 136, para. 567.

20. The referential criterion should be conceived, of course, in a flexible way, bearing in mind the specificity of unilateral acts, which are admittedly characterized mainly by their unilateral formulation without the participation of the addressee State. It is true that there are important differences, as indicated, between the two categories of acts, but it is equally true that common elements exist that must be taken into account in this study.

21. In the view of the Special Rapporteur, it is very useful to follow the methodology and structure of the 1969 Vienna Convention, which served, moreover, as a model for the 1986 Vienna Convention. It is equally important to bear in mind also, in the most appropriate way, the work of the Commission when the draft 1969 Vienna Convention was being drafted, together with the debates in the Sixth Committee and during the United Nations Conference on the Law of Treaties in Vienna, which reflected the sense of the rules as elaborated at that time.

22. The issue should therefore be settled definitively, accepting a flexible parallelism with the work on the law of treaties and the 1969 Vienna Convention, adapted to the category under consideration here.

C. Estoppel and unilateral acts

23. Thirdly, before beginning the first part of the report, which amounts to a recapitulation of the treatment of the topic, it would seem helpful to refer briefly to the issue of estoppel and its relationship to unilateral acts, an issue that has been mentioned on various occasions by representatives of Governments in the Sixth Committee.

24. The principle of preclusion or estoppel (in Spanish law, *regla de los actos propios*) is a general principle of law whose validity in international law has generally been admitted, as illustrated by various judicial decisions, including that of ICJ on the *Arbitral Award Made by the King of Spain*¹⁶ and in the *Temple of Preah Vihear*¹⁷ case, both of which have been commented on in previous reports.

¹⁶ *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, pp. 213–214.

¹⁷ *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6.

25. There is no doubt about the relationship between unilateral acts and acts pertaining to estoppel. The act that may give rise to recourse to estoppel is a unilateral State act; its importance, however, is perhaps less related to the definition of a unilateral act than to the application of such an act.

26. It is important to note that estoppel may arise not only from an act but also from an omission, as in the *Temple of Preah Vihear* case, when ICJ stated that “[e]ven if there were any doubt as to Siam’s acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and ... Cambodia, relied on Thailand’s acceptance...”.¹⁸ In this case, the Court applied estoppel, but Thailand’s view, as expressed by its representative at the United Nations Conference on the Law of Treaties of 1968–1969, was that Thailand had been the “victim of the application of estoppel by ICJ”.¹⁹ Also in the case of the *Arbitral Award Made by the King of Spain*, the Court indicated that “Nicaragua, by express declaration and by conduct, recognized the Award as valid”.²⁰

27. It should be borne in mind, as noted in previous reports, that the precise objective of acts and conduct relating to estoppel is not to create a legal obligation on the State using it; moreover, the characteristic element of estoppel is not the State’s conduct but the reliance of another State on that conduct.

¹⁸ *Ibid.*, p. 32.

¹⁹ Statement by Mr. Suphamongkhon, cited in Verhoeven, “Les nullités du droit des gens”, p. 83.

²⁰ *I.C.J. Reports 1960* (see footnote 16 above), p. 213.

Reformulation of articles 1–7 of the previous draft articles

I. GENERAL OBSERVATIONS

28. Without the least doubt, the work of the Special Rapporteur, in the view of the Commission, is to facilitate the Commission’s study of the topic on the basis of his reports, which should take into account not only the doctrine, precedents and available practice of States, but also the commentaries made by the members of the Commission and Governments, both in writing and in the General Assembly.²¹

²¹ On the functions of special rapporteurs, see *Yearbook ...1996* (footnote 9 above), pp. 90–92, paras. 185–201.

29. On the basis of the foregoing, the definition of unilateral acts, presented earlier in draft article 2, shall be discussed and the conclusion will be a new version. It shall also be considered whether it is necessary to retain the previous article 1, on the scope of the draft articles, and the advisability of including a provision based on article 3 of the 1969 Vienna Convention concerning the legal force and international law applicable to international agreements not included in the scope of the Convention.

II. DEFINITION OF UNILATERAL ACTS OF STATES

A. Observations of the Special Rapporteur

30. One of the most complex issues facing the Special Rapporteur and the Commission is that of defining unilateral acts of States, on the basis of which the draft articles on unilateral acts of States will be elaborated. Progress on the work on the topic necessarily depends on reaching ultimate agreement on the definition of unilateral acts of States.

31. In particular, the following are reconsidered:

- (a) Intention of the author State;
- (b) Use of the term “act”, which most view as broader than the term “declaration”;
- (c) Legal effects of unilateral acts: rights and obligations;
- (d) “Autonomy” or non-dependence of unilateral acts;
- (e) “Unequivocal” character of unilateral acts;
- (f) “Publicity” of unilateral acts.

1. THE INTENTION OF THE AUTHOR STATE

32. Since its initial consideration of this topic, the Commission, after ruling out certain State conduct and acts, has carefully considered the various unilateral acts of States and concluded that some of these may produce legal effects; this fact distinguishes them from other acts that are merely political and therefore do not produce such effects, which does not diminish their importance in international relations.

33. Some unilateral acts admittedly produce or may produce legal effects at the international level, while others, which should be definitively ruled out, have only political intentions. It is quite evident that it is difficult to separate these categories of acts, not only from the conceptual point of view, but also in relation to the very nature of the act. It is hard to determine in all cases whether or not an act produces legal effects, that is, whether or not it was formulated with that intention.

34. The intention of the author of the act is fundamental, a fact that raises some concerns, because it is impossible to determine the element of intent in all cases. It might be affirmed, as did a representative in the Sixth Committee, that all acts of States are in principle political, and that some of them may be legal if that is the intention of the author State,²² although it has been recognized that intent is always difficult to prove, and even that States might perform unilateral acts without realizing their intention;²³ the Special Rapporteur does not agree with this latter position, if it is accepted that the legal act translates into the manifestation of will and reflects the State’s intention.

35. An act cannot be defined as a unilateral act, within the present meaning, if the State does not understand that

it assumes a legal commitment in formulating it. If the State does not understand that it has assumed such a commitment, the act is more like a conduct or attitude which, although it may produce legal effects, cannot be considered a legal act in the strict meaning of the term.

36. Despite the doubts that might arise about the criterion for determining the existence of a unilateral act that produces legal effects, the Special Rapporteur believes that the reference to the intention of the State is absolutely valid.

2. USE OF THE TERM “ACT”

37. The use of the term “unilateral act” in the new draft article 1 instead of the term “unilateral declaration” as in the previous text is intended to meet the concerns expressed by some members and representatives in the Sixth Committee, although it should be pointed out that the workable definition, which the Working Group and the Commission adopted in 1999, refers to a unilateral declaration.

38. It is worth noting that the term “unilateral declaration” has appeared in earlier works of the Commission although then it was within the context of treaty law. Draft article 22 submitted by the Special Rapporteur, Sir Gerald Fitzmaurice, in his fifth report, in 1960, states that “[w]here a State makes a unilateral declaration in favour of, or assuming obligations towards, one or more, or all, other States, in such a manner, or in such circumstances that, according to the general rules of international law, a legally binding undertaking will result for the declarant State, the other State or States concerned can claim as of right the performance of the declaration”.²⁴

39. This wording, even though it is placed in that part of the draft articles submitted by the Special Rapporteur concerning *in favorem* effects resulting from the act of the parties to a treaty or of a single party, is important for the study of unilateral acts.

40. In the view of the Special Rapporteur, the comments made on the term “declaration” are useful in that, as has been pointed out, most if not all unilateral acts of a State are formulated in declarations which, in turn, contain a variety of material acts such as protests, waivers, recognitions, promises and declarations of war, of cessation of hostilities and of neutrality.

41. Unilateral acts can take a variety of forms. Acts formulated by means of oral declarations or by means of written declarations can be seen in practice. Declarations whereby a State formulates a unilateral act are not necessarily written declarations. In practice, some unilateral declarations have been formulated orally, although they have subsequently been confirmed in writing, as in the case of the Ihlen declaration formulated by the Minister for Foreign Affairs of Norway on 22 July 1919.²⁵

²⁴ *Yearbook ... 1960*, vol. II, document A/CN.4/130, art. 22, “Unilateral declarations conferring rights on other States”, p. 81, para. 1.

²⁵ See *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 69–70.

²² A/CN.4/504 (see footnote 7 above), p. 26, para. 119.

²³ *Ibid.*, para. 120.

42. Unilateral acts relating to the cancellation of the external debt of some countries are an important example in the recent practice of States. These unilateral acts are formulated by an internal organ and brought to the attention of the addressee States by the foreign affairs organs of the State making the declaration.

43. After Hurricane Mitch caused enormous damage in Central America, the Council of Ministers of Spain, in a decision taken on 13 November 1998, cancelled the development assistance funds debt of Belize, the Dominican Republic, El Salvador, Honduras and Nicaragua. This act was made public when it appeared in the *Boletín Oficial del Estado* and the addressee States were informed of it through the diplomatic channel.

44. It could be said that Spain's act was a unilateral act; it was formulated by a competent organ of the State with the intention to produce legal effects on the international plane, made public and brought to the attention of the addressee.

45. Moreover, a written unilateral declaration can also be issued, made public or brought to the attention of the addressee by means of a variety of documents, including through declarations or communiqués which might be called unilateral even though two or more States participated in their elaboration—as in the case of the joint declaration by the Governments of Mexico and Venezuela referred to in the first report of the Special Rapporteur.²⁶ Such unilateral declarations can also be formulated by means of an unsigned press release issued by a State as, for example, the act of recognition by the Government of Venezuela formulated through a press release of 3 September 1998, whereby it decided to recognize the Palestine Liberation Organization as the legitimate representative of the Palestinian people.²⁷

46. In this connection, it should be noted that form does not affect the legal validity of an international act; the important thing is the determination of the will of the State or States to make a legal commitment, as was pointed out by ICJ in the *Aegean Sea Continental Shelf* case when it considered that a press release issued at the close of a meeting of ministers for foreign affairs could reflect the agreement between the parties, independently of its content,²⁸ which view is entirely applicable in the context of unilateral acts when an unsigned declaration is issued which reflects, as can be deduced from interpretation of the release, the intention of the State to commit itself in relation to another State or States or in relation to one or more international organizations.

47. Notwithstanding the foregoing, in order to satisfy an important body of opinion, the term “act”, which many consider broader and less restrictive, has been used, thus dispelling any doubts which may have arisen regarding possible exclusion from the scope of the draft articles of any acts other than declarations, which are hard to deter-

mine, although some people feel differently.²⁹ Thus the mandate entrusted to the Commission regarding consideration of unilateral acts of States has been respected.

3. LEGAL EFFECTS OF UNILATERAL ACTS

48. Draft article 2, which was submitted in the second report of the Special Rapporteur,³⁰ stated that the expression of will was related to the obligations assumed by the State in relation to one or more other States or one or more international organizations but made no general reference to legal effects. These legal effects can cover not only the assumption of obligations but also the acquisition of rights.

49. The State formulating the unilateral act can either acquire obligations or confirm its rights. However, it cannot, by means of a unilateral act, impose obligations on another State or on an international organization without the latter's consent; this is based on a clearly established and accepted general principle of law—*pacta tertiis nec nocent nec prosunt*—which is applied in treaty law and which must be considered together with the equally recognized principle *res inter alios acta*, a direct consequence of which is that the implementation of a treaty is limited, in principle, to the parties to the treaty. In principle, as Rousseau said, treaties merely have a relative effect. They can neither harm nor benefit third parties. Their legal effects are strictly limited to the circle of contracting parties.³¹

50. This theory is also confirmed in practice; the declaration by the Government of Nicaragua concerning the treaty delimiting the maritime boundary in the Caribbean Sea between Colombia and Honduras, which might affect Nicaragua's rights, states that this treaty is, for Nicaragua, what in legal terms is called *res inter alios acta*, that is to say, that it does not create any right for either Colombia or Honduras in relation to Nicaragua. It is also a rule of customary international law and of treaty law that a legal instrument does not create any obligations or rights for a third State without its consent.³²

51. Other judicial precedents are also clear on this matter, as can be seen, in particular, from the PCIJ decisions in the case concerning *Certain German Interests in Polish Upper Silesia*³³ and in that concerning the *Free Zones of Upper Savoy and the District of Gex*.³⁴

52. Legal doctrine reflects the almost unanimous view that a State cannot impose obligations on another State without the latter's consent. As Dupuy points out, classical voluntarist positivism sees an obstacle of principle to the suggestion that a State should be able, by the unilateral expression of its own will, to determine that of other

²⁹ Switzerland stated in the Sixth Committee that (unilateral) acts will often, but not always, take the form of a declaration; see Caffisch, “La pratique suisse en matière de droit international public 1998”, p. 651.

³⁰ See footnote 2 above.

³¹ Rousseau, *Droit international public*, pp. 453–454.

³² *Consideraciones sobre un tratado entre terceros Estados que pretende lesionar la soberanía de Nicaragua*, Part IV: Conclusions (Managua, Ministry of Foreign Affairs, December 1999).

³³ *Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 29.

³⁴ *Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 141.

²⁶ *Yearbook ... 1998* (see footnote 1 above), p. 329, para. 83.

²⁷ *Libro Amarillo de la República de Venezuela* (Caracas, Ministry of Foreign Affairs, 1999), p. 1020.

²⁸ *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, pp. 41–44, paras. 100–108.

equally sovereign States.³⁵ Of course, a State can act unilaterally in exercise of its sovereign rights in order to reaffirm its rights, but not in order to acquire new rights by imposing obligations on third parties without the latter's consent. As pointed out by Skubiszewski: "No unilateral act can impose obligations on other States, but it can activate certain duties these States have under general international law or treaties."³⁶

53. However, a review of practice reveals that a State can impose obligations by formulating a formal unilateral act, provided the addressee States agree, as would seem to be the case in declarations of neutrality; the declaration formulated by Austria is a good example of this.³⁷ It was indicated, in the Commission, in this connection, that a declaration of neutrality did not affect the other State unless they endorsed it.³⁸

54. The State can also impose obligations on one or more States by means of a unilateral act, which may originate internally, but be applicable internationally under international law. That would be the case with the above-mentioned unilateral declarations intended to establish the exercise of sovereign rights, especially in relation to the exclusive economic zone, which is based on a rule of general international law set out in the United Nations Convention on the Law of the Sea, although some writers believe that these acts belong more to internal law than to international law.³⁹

55. It is also possible that rights acquired by a State through an earlier agreement may be lessened by a unilateral act of a State as, for example, in the case of the unilateral measures adopted by the Government of Nicaragua on the basis of articles XXI, paragraph (b) (iii), of the Marrakesh Agreement establishing the World Trade

³⁵ Dupuy, *Droit international public*, pp. 317–318, para. 335.

³⁶ Skubiszewski, "Unilateral acts of States", p. 233.

³⁷ Concerning a unilateral act by Austria, see Zemanek, "Unilateral legal acts revisited", pp. 212–213:

"Unilateral acts which establish obligations only for the author State do not require formal acceptance to become legally effective. However, if unilateral acts affect other States they must be made known to and received by them, to give them an opportunity to react.

"In a class of their own are unilateral acts which ... may, implicitly, affect the rights of other States. They then need acceptance or, at least, acknowledgment to achieve legal force. The following example shows the difficulty of an exact determination: On 6 November 1990 the Austrian Government declared in a note addressed to the four signatories of its 'State Treaty' of 1955 (France, UK, USA, USSR), that six articles of that treaty had become obsolete. The declaration seemed to state an already accomplished fact. In support the Austrian Government argued that the articles related to the previously existing situation in Germany which had been changed by the treaty of 12 September 1990 between Germany and the same four powers. This new treaty demonstrated, in the view of the Austrian Government, a change of opinion by the powers concerning their rights; moreover, the articles had never been applied. While the answer of the US Government that 'the United States concurs with the Austrian Government view' supports the declaratory nature of the Austrian statement, the reply by the USSR that the Soviet Government 'has no objection' or by the French Government that it 'donne son consentement ... la communication autrichienne' seemed to point rather to a constitutive unilateral act requiring acceptance."

³⁸ *Yearbook ... 1999* (see footnote 10 above), 2596th meeting, p. 212, para. 43.

³⁹ Reuter, *Droit international public*, p. 144.

Organization and XIV *bis*, paragraph (1) (b) (iii), of the General Agreement on Trade in Services.

56. In this case Nicaragua adopted unilateral measures which might affect the rights of Colombia and Honduras, considering that its national security could be jeopardized by the treaty delimiting the maritime boundary in the Caribbean Sea between these two countries, which was signed on 2 August 1986; the issue is now the subject of consultations in WTO.

57. The Government of Nicaragua imposed special measures on imports of goods from Colombia and Honduras, which could affect the rights that these countries had acquired under earlier universal and subregional trade agreements. Again, this is not a case of imposing obligations on third parties by means of a unilateral act, but of reducing rights already acquired on the basis of earlier treaty provisions that permit exceptions to the established regime, as is the case of the previously quoted article from the Marrakesh Agreement.

58. Another issue which merits further comment, even though it has already been referred to, is the adoption by one or more States of unilateral measures based on internal legal acts which have no basis in pre-existing agreements or in any rule of international law. This would be the case, for example, of the trade blockade imposed unilaterally by one State, in particular the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act),⁴⁰ whereby one State seeks to impose obligations on other States, a step which, according to general opinion, is contrary to international law.

59. The expression "to produce legal effects", which is broader given that it covers a variety of situations, cannot be interpreted as a permissive provision enabling States to impose, by means of these acts, obligations on other States without the latter's consent, even though they can certainly reaffirm them. When submitting the report of the Working Group set up in 1999, the Special Rapporteur noted that, following the discussion in the Commission and the Working Group, it had been concluded that the best wording would be "with the intention to produce legal effects on the international plane".⁴¹

4. "AUTONOMY" OF UNILATERAL ACTS

60. Another issue that merits special attention is the characteristic of non-dependence of these acts. On the one hand, it can be stated that unilateral acts do not depend on an earlier act, that is to say, on an earlier expression of will, although it is true that all unilateral acts are based on international law; on the other hand, unilateral acts produce legal effects irrespective of whether or not they are accepted by the addressee; on this point there are different positions and views within the Commission.

61. Such a criterion cannot be interpreted too broadly. While it is true that a legal act is linked to earlier rules, particularly rules of general international law, this very broad approach cannot be the yardstick for determining

⁴⁰ ILM, vol. XXXV, No. 2 (March 1996), p. 359.

⁴¹ *Yearbook ... 1999* (see footnote 10 above), 2603rd meeting, p. 261, para. 4.

the autonomy of the act. The point is to exclude, by means of this criterion, acts linked to other regimes, such as all acts linked to treaty law.

62. The unilateral act concerned with here arises at the time it is formulated—provided, of course, that the necessary requirements for validity are met—there being no need for acceptance or any act or conduct along those lines by the addressee State or States or by the addressee organization or organizations.

63. In earlier reports it was considered appropriate to use the term “autonomous”; this produced some contrary reactions from some members when the second report of the Special Rapporteur was discussed and, particularly, when the draft report of the Working Group established in 1999 was discussed. Some members said that the issue of autonomy was not essential;⁴² that the notion of autonomy had nothing to do with the definition of a unilateral act;⁴³ that the autonomous or non-autonomous nature of an act was of secondary importance;⁴⁴ that the term should be eliminated;⁴⁵ and that “the notion of autonomy was ... ambiguous”.⁴⁶ Nevertheless, and this reflects the complexity of the issue, other members considered that “if an act ... was unilateral, then the autonomous element was implicit”;⁴⁷ and that “autonomy was an important feature of unilateral acts”.⁴⁸

64. Certainly, the issue of autonomy as a constituent element of the unilateral act—as the debate in the Commission reveals—is extremely important and complex and it should therefore continue to be very carefully considered. As one member of the Commission suggested, everything regulated by treaty law should be excluded from the study on unilateral acts; the relevant criteria were “whether the act was unilateral and whether it produced legal effects”.⁴⁹

65. Representatives of Governments in the Sixth Committee also referred to this issue. One representative in particular pointed out that:

[T]he “autonomy” of unilateral acts was totally conditional since the legal obligation that they created arose not from the unilateral expression of the will of the State that issued them, but rather from the compatibility between that will and the interests of other States. It was unimaginable that a unilateral act would have legal effects in the relations between its author and another subject of international law if the latter had raised objections. Furthermore, a State that made a unilateral declaration took into consideration the reactions of those to whom it was addressed.⁵⁰

66. Others in the Sixth Committee felt that the specific reference to the term “autonomy” was appropriate. One representative said that his delegation “concurred with the concept of autonomy ... as a first step towards defining

the scope of unilateral acts”⁵¹ and he questioned its elimination from the definition proposed by the Commission.

67. In recent articles, some experts on public law also considered that the term was appropriate to identify those acts which did not fall within the contractual sphere. As Zemanek states: “Autonomous unilateral acts are intended to create rights and/or obligations under international law for the author State.” He goes on to add that “[s]ome autonomous unilateral legal acts, such as recognition, protest, declarations of war or neutrality, and possibly renunciation are standardized, or typified unilateral transactions”.⁵²

68. According to a fairly widely held view, it can be stated that there is a possibility that a unilateral act by a State may have a scope which is not dependent. ICJ in its well-known rulings on nuclear tests which, although controversial, are important for the study of this category of acts, and to which extensive reference has been made in previous reports, recognizes this possibility when it concludes that such acts can produce legal effects independently of whether they are accepted by the addressee, which reflects one of the forms of autonomy to which reference has been made.⁵³ There is no reason to conclude that a promise, for example, is not binding upon the State that makes it, whatever the position of the addressee may be; this is based on the principle of good faith and, more particularly, on the obligation to respect convictions arising from its conduct.⁵⁴

69. Although the term “autonomous” is not included in the definition submitted in the present report, it can be assumed that these acts are independent in the sense mentioned above, although this issue will have to be discussed further in the Commission so as to define and delimit such acts.⁵⁵

5. “UNEQUIVOCAL” CHARACTER OF UNILATERAL ACTS

70. The definition of unilateral acts that was submitted in the second report of the Special Rapporteur⁵⁶ stated that the expression of will must not only be autonomous or non-dependent, but must be formulated unequivocally and publicly; these terms must now be clarified so as to support the new draft article.

71. With regard to the unequivocal character of the act, the issue that arises is whether that character must be linked to the expression of will or to the content of the act. Some members said that it should be related to the intention, whereas others felt that that did not properly reflect State practice in the formulation of unilateral acts and the conduct of their foreign policy.

⁵¹ Statement by Chile, *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 16th meeting (A/C.6/54/SR.16), para. 11.

⁵² Zemanek, loc. cit., p. 212.

⁵³ *Nuclear tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 267–272, paras. 42–60; and *ibid. (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, pp. 472–477, paras. 45–63.

⁵⁴ Reuter, op. cit., p. 142.

⁵⁵ *Yearbook ... 1999* (see footnote 10 above), 2603rd meeting, pp. 264–265, para. 40 (Mr. Baena Soares), p. 263, para. 29 (Mr. Gaja), and p. 264, para. 38 (Mr. Melescanu).

⁵⁶ See footnote 2 above.

⁴² *Ibid.*, para. 13 (Mr. Pellet).

⁴³ *Ibid.*, p. 263, para. 28 (Mr. Candioti).

⁴⁴ *Ibid.*, p. 264, para. 32 (Mr. Addo).

⁴⁵ *Ibid.*, paras. 33 and 37 (Mr. Simma and Mr. Dugard).

⁴⁶ *Ibid.*, para. 35 (Mr. Pellet).

⁴⁷ *Ibid.*, p. 262, para. 17 (Mr. Rosenstock).

⁴⁸ *Ibid.*, para. 18 (Mr. Lukashuk).

⁴⁹ *Ibid.*, p. 263, para. 28 (Mr. Candioti).

⁵⁰ A/CN.4/504 (see footnote 7 above), pp. 26–27, para. 127.

72. It would seem that the link must be established in relation to the expression of will, that is to say, that what is important is to specify that the act must be formulated unequivocally.

73. The term “unequivocal” can be likened to the term “clarity”, as was pointed out by one representative in the Sixth Committee when he said that it was clear that there was no unilateral legal act except insofar as the State formulating the act clearly intended to produce a normative effect.⁵⁷

74. It was pointed out in the Sixth Committee that, under the judicial practice of some countries, acts that did not intend to produce legal effects sometimes produced them,⁵⁸ which would seem to contradict the accepted position that the act is based on the State’s intention.

75. This assertion would seem to be contrary to legal security and confidence in international relations which is what has prompted the Commission to undertake the study of unilateral acts of States and to prepare specific rules to regulate their operation.

76. In order to ensure legal security it would seem obvious that there must be certainty; this is another term that was used, together with the term “predictability” in the 1997 report of the Working Group which the Commission adopted.⁵⁹

77. Accordingly, it has been deemed appropriate to include in draft article 1, which is submitted in this report, the term unequivocal, linked to the expression of will.

6. “PUBLICITY” OF UNILATERAL ACTS

78. It appears, from the debate on this issue, that it is essential that a unilateral act formulated by a State should be known, at least to the addressee of the act. As some

⁵⁷ Statement by Switzerland referred to in Caflisch, “La pratique suisse ... 1998”, p. 651.

⁵⁸ A/CN.4/504 (footnote 7 above), p. 26, para. 120.

⁵⁹ *Yearbook ... 1997* (see footnote 8 above), p. 64, para. 196.

members of the Commission and some representatives in the Sixth Committee have noted, the basic requirement is that the addressee of an act unilaterally formulated by a State should be aware of the act. In this connection, it is interesting to note what was said by the Legal Counsel of the Federal Department of Foreign Affairs of Switzerland with respect to the consideration of unilateral legal acts, to the effect that unilateral declarations made by a State were binding on the latter to the extent that the State intended to commit itself legally and provided that the other States concerned were aware of that commitment.⁶⁰

79. Thus, the definition presented in the present report specifies that the act must be “known to that State or international organization”. This primarily reflects the requirement that the act should be public and should be known, at least, to the addressee. The criterion of publicity had been introduced into the previous definition, as the Special Rapporteur himself noted upon introducing his second report, and “had to be understood in connection with the State to which the act in question was addressed, which must be aware of the act in order for it to produce effects”.⁶¹

B. New draft article 1. Definition of unilateral acts

80. In view of the foregoing, the Special Rapporteur proposes the following article 1, which replaces the previous draft article 2:

“Article 1. Definition of unilateral acts

“For the purposes of the present articles, “unilateral act of a State” means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization.”

⁶⁰ Caflisch, “La pratique suisse en matière de droit international public 1995”, p. 596.

⁶¹ *Yearbook ... 1999* (see footnote 12 above), p. 137, para. 574.

III. DELETION OF THE PREVIOUS DRAFT ARTICLE 1 ON THE SCOPE OF THE DRAFT ARTICLES

81. At this point, it would be appropriate to consider two issues that were raised at the beginning of the present report: first, whether or not to include a provision specifying the scope of the draft articles; and secondly, whether or not to include a provision based on article 3 of the 1969 Vienna Convention.

82. As to the first point, some members of the Commission and representatives of Governments were in favour of deleting draft article 1, which was presented in the second report of the Special Rapporteur, and merging it with article 2,⁶² although it was also noted that draft articles 1

and 2 were complementary and that their wording should be strictly consistent.

83. The 1969 Vienna Convention refers only to agreements concluded between States in written form, in accordance with the definition laid down in article 2, paragraph 1 (a), of the Convention, and the article specifying its scope refers to treaties, in line with that definition.

84. In the case of unilateral acts, the draft refers to a category of acts which is much broader than what seems to be covered by the definition contained in draft article 1, which does not seem to allow the consideration of other acts; this will be discussed later in the context of the issue

⁶² *Ibid.*, p. 135, para. 548.

of whether or not to include a provision based on article 3 of the 1969 Vienna Convention.

85. Since it appears that the scope of application of the draft articles is specified in the new draft article 1 and that the draft applies only to unilateral acts formulated by a State with the intention of producing legal effects at

the international level, the inclusion of a specific article defining the scope of application seems unnecessary, as had been suggested in the second report of the Special Rapporteur;⁶³ this, then, represents a departure from the model of the 1969 Vienna Convention.

⁶³ See footnote 2 above.

IV. ADVISABILITY OF INCLUDING A DRAFT ARTICLE BASED ON ARTICLE 3 OF THE 1969 VIENNA CONVENTION

86. Another question that arises is whether or not to include a provision based on article 3 of the 1969 Vienna Convention concerning the legal force of international agreements not within the scope of the Convention and the provisions of international law which apply to them.

87. Certainly, the situation referred to in the context of the 1969 Vienna Convention, as indicated above, is different from the one referred to in relation to unilateral acts of States. It therefore seems appropriate to depart from the model of the 1969 Convention.

88. The 1969 Vienna Convention refers to international treaties, as defined in its article 1, while recognizing the existence of other agreements not in written form which may be outside the scope of the Convention, for which reason article 3 was included in the Convention.

89. In the case of unilateral acts, although this issue was raised by a member of the Commission, the inclusion of such an article seems unnecessary because the draft refers to unilateral acts; this term is broad enough to cover all unilateral expressions of will formulated by a State. This might not have been the case if the draft had referred to unilateral declarations, since that term was rejected by the majority and was considered more restrictive, and therefore could have excluded from the scope of application certain unilateral acts other than declarations.

90. This assessment agrees with the view expressed by the majority of members, to the effect that unilateral acts should be considered primarily as physical rather than formal acts; in the latter case, the discussions would have revolved around declarations.

V. CAPACITY OF STATES TO FORMULATE UNILATERAL ACTS

A. Observations by the Special Rapporteur

91. Article 3 of the draft articles presented in the second report of the Special Rapporteur has been essentially retained, and reflects the equivalent provision of the 1969 Vienna Convention. However, the drafting suggestions put forward by the members of the Commission have been duly taken into account in the formulation of the new text.

B. New draft article 2. Capacity of States to formulate unilateral acts

92. Accordingly, the Special Rapporteur proposes the following article:

“Article 2. Capacity of States to formulate unilateral acts

“Every State possesses capacity to formulate unilateral acts.”

VI. PERSONS AUTHORIZED TO FORMULATE UNILATERAL ACTS ON BEHALF OF A STATE

A. Observations by the Special Rapporteur

93. The second report of the Special Rapporteur,⁶⁴ submitted in 1999, contained a proposed draft article on representatives of a State authorized to act on its behalf and to engage the State at the international level through the formulation of a unilateral act.

94. As indicated in that report, “[t]he 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”.⁶⁵ Accordingly, the essence of that article of the Convention has been retained, while authorization to represent the State has been extended to other persons who may act on behalf of the State in specific areas of competency through the formulation of unilateral acts.

95. The issue that arises in relation to a provision concerning the authorization of persons to act on behalf of the State and engage it at the international level through unilateral acts is whether such authorization should be limited to Heads of State, Heads of Government and Ministers for Foreign Affairs, or whether it should also extend to heads

⁶⁴ Ibid.

⁶⁵ Ibid., para. 75.

of diplomatic missions, representatives to an international conference, other persons who are granted full powers for that purpose and others who may be considered competent to act on behalf of the State by reason of accepted practice or other circumstances.

96. In the debate that took place in the Commission on draft article 4 proposed by the Special Rapporteur in his second report,⁶⁶ some members felt that it followed too closely article 7 of the 1969 Vienna Convention and that its contents were not sufficiently supported by State practice. Other members, however, felt that this was an instance in which the analogy with the Convention was fully justified.

97. The point was made in this connection that the range of persons formulating unilateral acts tended in practice to be wider than that of persons empowered to conclude treaties, but that that point was adequately covered by paragraph 2 of the proposed article. In one view, paragraphs 2 and 3 could be deleted, since Heads of State, Heads of Government and Ministers for Foreign Affairs were the only persons with the capacity to commit the State internationally through a unilateral act. The view was also expressed, as regards paragraph 3 of the draft articles then under consideration, that it was doubtful that heads of diplomatic missions or the representatives accredited by a State to an international conference or to an international organization had the power to bind a State unilaterally. Practice showed that that power was not normally included in the full powers of such persons.⁶⁷

98. With respect to the capacity of heads of mission and heads of delegation, there seems to be no doubt that they may also act on behalf of the State, in terms similar to those laid down in the 1969 Vienna Convention, namely, in relation to the accrediting State and in the context of an international conference or meeting.

99. Nonetheless, it was indicated in the Commission that a head of delegation could not engage the State in the context of a conference, and a specific case was recalled in which a head of delegation at an international conference had made a commitment which subsequently had been considered not to be binding on the Government he represented.⁶⁸

100. In relation to this issue, it seems important to distinguish between the various types of declarations which may be formulated by a State through the head of its delegation in the context of an international conference.

101. Some declarations are made in the context of ongoing negotiations and, of course, cannot be viewed so rigidly as to prevent the State from subsequently changing or withdrawing them. This seems to have been the case of the above-mentioned declaration, which was made by the head of the delegation of the United States of America at the Third United Nations Conference on the Law of the Sea.

102. In contrast, other declarations may have a different meaning when the State formulates them outside the context of ongoing negotiations. In any event, as noted in the Commission in 1999, an international conference presents a perfectly appropriate opportunity for a person to formulate a unilateral act on behalf of the State.⁶⁹

103. In such cases, it seems that the State can formulate a unilateral act and, if its intention is to bind itself legally, that its declarations should produce legal effects. This would be the case of unilateral declarations formulated in the context of pledging conferences, at which States pledge to provide voluntary contributions which may then be demanded by the recipients. This issue was also referred to by one member in the 1999 discussions.⁷⁰

104. It may be asked whether unilateral acts formulated by a State at a pledging conference are merely political or legally binding. This is the case of special conferences such as the one held in Stockholm in 1998 to consider the impact of Hurricane Mitch on Central America. On that occasion, as at other meetings of this kind, States offered voluntary contributions, sometimes on condition that practical development programmes and plans be elaborated. Are these declarations opposable in respect of the State issuing them? Is the declaring State obligated to honour the promise or offer made in the context of a high-level formal meeting such as the one mentioned above? In practice, there do not seem to have been any cases in which a State to which such a declaration was addressed has subsequently demanded the fulfilment of the promise made by the declaring State. The nature of such acts is therefore hard to determine.

105. In his second report,⁷¹ the Special Rapporteur raised the issue of whether such authorization should extend to other persons who act on behalf of the State in specific areas, such as technical ministers who carry out functions which, in some cases, fall within the scope of foreign relations. This issue has arisen with increasing frequency in international relations.

106. In the Sixth Committee, it was noted that article 4, paragraph 3, as proposed by the Special Rapporteur, might not reflect State practice. Only Heads of States or Governments, Ministers for Foreign Affairs or expressly empowered officials could commit the State by means of unilateral acts. This international rule was now fully recognized and its importance was fundamental. Since the contemporary world was characterized by the multiplication of communications and relations between institutions and by acts carried out outside the country by agents of the State, it was important to know precisely who could commit the State by a statement or a unilateral act. Moreover, the conclusion of a treaty, an instrument which involved rights and obligations, required the presentation of credentials signed by the Minister for Foreign Affairs unless it was concluded by one of the three aforementioned persons. It was easy to understand that an official, even one at the highest level, could not create international obligations for his State by carrying out a unilateral act.

⁶⁶ Ibid., para. 71.

⁶⁷ *Yearbook ... 1999* (see footnote 12 above), p. 135, paras. 550–551.

⁶⁸ Ibid., vol. I, 2596th meeting, statement by Mr. Kateka, p. 209, para. 19.

⁶⁹ Ibid., 2594th meeting, statement by Mr. Pellet, p. 194, paras. 9–10.

⁷⁰ Ibid., 2595th meeting, statement by Mr. Hafner, p. 205, para. 28.

⁷¹ See footnote 2 above.

Anything one might want to add to that established rule of customary law would have to be considered from a restrictive angle. The only course was to seek to improve the formulation presented by the Special Rapporteur by taking contemporary international realities into account.⁷²

107. In practice, certain persons other than Heads of State, Heads of Government and Ministers for Foreign Affairs act at the international level and formulate, with some frequency, declarations within the scope of their competencies in their relations with other States.

108. The question that arises is whether these declarations should be covered by the draft articles or whether, on the contrary, they should be excluded from the articles' scope of application. In the latter case, it would seem that declarations made by certain persons acting on behalf of the State would remain outside the scope of the draft articles. This would not contribute to the established purpose of guaranteeing international confidence and legal security.

109. It is true that the issue is controversial. Is a restrictive interpretation called for in this regard? It seems that, in this case, one could leave open the possibility that such acts could be covered by the draft articles.

110. Accordingly, draft article 3 proposed in the present report contains a second paragraph that could reflect this consideration by leaving open, through a broad interpretation, the possibility that persons other than those mentioned in the first paragraph could act on behalf of the State and commit the State internationally, if it appears from practice or other circumstances that the person is authorized to do so.

111. As was suggested in the Commission, the range of persons formulating unilateral acts tends in practice to be wider than that of persons empowered to conclude treaties, but this point is adequately covered by paragraph 2 of the article proposed below.

112. Another question that should be considered in this connection is whether the draft should refer to full powers, as does the 1969 Vienna Convention.

⁷² A/CN.4/504 (see footnote 7 above), p. 29, para. 149.

113. The inclusion of such a provision does not seem necessary. The authorization of the person or official arises from other acts and circumstances which do not require the granting of full powers in the sense of the 1969 Vienna Convention. One member noted in the Commission that it would be problematic to refer to full powers in connection with unilateral acts which evidently did not lend themselves to a reference to full powers.⁷³

114. Lastly, it should be noted that some members of the Commission indicated, in the discussion on the second report of the Special Rapporteur, that the term *habilitation*⁷⁴ was more appropriate than *autorisation* in the French version of the draft article under consideration and, with respect to paragraph 2 of that article, that the term "person" was more appropriate than "representative". Accordingly, those terms, which are certainly more appropriate, have been used.

B. New draft article 3. Persons authorized to formulate unilateral acts on behalf of a State

115. The Special Rapporteur proposes the following article:

"Article 3. Persons authorized to formulate unilateral acts on behalf of a State

"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 to be authorized to formulate unilateral acts on behalf of the State if it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as authorized to act on behalf of the State for such purposes."

⁷³ *Yearbook ... 1999* (see footnote 10 above), 2594th meeting, statement by Mr. Pellet, p. 197, para. 26.

⁷⁴ *Ibid.*, statement by Mr. Pambou-Tchivounda, p. 199, para. 50.

VII. SUBSEQUENT CONFIRMATION OF AN ACT FORMULATED BY A PERSON NOT AUTHORIZED FOR THAT PURPOSE

A. Observations by the Special Rapporteur

116. The second report, submitted in 1999,⁷⁵ includes a draft article 5 on the subsequent confirmation of an act when the person having formulated it is not authorized for that purpose.

117. Two different issues arise in relation to the importance of including such a provision. First, a person may act on behalf of the State without being authorized to do so; secondly, a person may act on behalf of the State

because he or she is authorized to do so, but either the action in question is not within the competencies accorded to that person, or he or she acts outside the scope of such competencies. In either case, the State may repudiate the act or consider that it is not bound thereby, or it may subsequently confirm the act.

118. According to the 1969 Vienna Convention, which, in principle, seems to apply, the confirmation of the act may be either explicit or implicit. In the draft submitted at the Commission's fifty-first session, in 1999, a change was introduced which is considered applicable to unilateral acts.

⁷⁵ See footnote 2 above.

119. It was suggested at that time that, in contrast to the relevant provision of the 1969 Vienna Convention, the confirmation of the act had to be explicit, since this appeared to be more in line with the restrictive approach that must be taken to the formulation of unilateral acts of States.

120. If a unilateral act is formulated by a person who is not authorized or who exceeds his or her powers in formulating the act, the State may confirm the act. However, given the particular characteristics of unilateral acts, such confirmation must be explicit, although it is understood that, in general, consent may be expressed through conclusive acts or conduct.

VIII. DELETION OF THE PREVIOUS DRAFT ARTICLE 6 ON EXPRESSION OF CONSENT

A. Desirability of deleting the draft article

122. Another question that was discussed in the Commission at its 1999 session had to do with whether to include a provision referring to the expression of consent, to which draft article 6, as presented in the second report of the Special Rapporteur,⁷⁶ referred.

123. It was pointed out in the Commission that it was difficult to speak of the consent of a State to be bound by a unilateral act, as that was too suggestive of treaty language,⁷⁷ a point also made by a representative in the Sixth Committee: as regards possible areas where provisions on treaty law and on unilateral acts might differ, the example was given of article 6 on expression of consent, an expression taken from the 1969 Vienna Convention, “which did not convey very clearly what was intentional about the act”.⁷⁸

124. Several members stated in the Commission that that provision should be deleted, although it was also suggested that it should be retained with separate commentaries.

125. If it is considered that articles 3 and 4 can, in fact, cover the expression of consent, then a specific provision on the manifestation of will or expression of consent would not be necessary. Clearly, it should be inferred that the will of the State to bind itself legally at the international level is expressed at the time of the formulation of the act, a question that would also be governed by a specific provision, which is examined in the second part of this draft.

B. New draft article 4. Subsequent confirmation of an act formulated by a person not authorized for that purpose

121. Accordingly, the Special Rapporteur proposes the following draft article:

“Article 4. Subsequent confirmation of an act formulated by a person not authorized for that purpose

“A unilateral act formulated by a person who is not authorized under article 3 to act on behalf of a State is without legal effect unless expressly confirmed by that State.”

B. Silence and unilateral acts

126. Although this provision could be deleted, it is appropriate to comment briefly on two questions raised during the discussion on the topic in the Commission in 1999, specifically silence, which was not taken into account in the preparation of draft article 6 as presented in the second report of the Special Rapporteur,⁷⁹ and the question of the consensual tie, which arises when the unilateral act has legal effect.

127. In this regard it is worth noting that, as mentioned in the first report of the Special Rapporteur,⁸⁰ silence is not a legal act in the strict sense of the term, although, to be sure, the legal effect that such conduct can entail cannot be overlooked. A member of the Commission, agreeing with the Special Rapporteur, also stated that “[s]ilence [wa]s not strictly a legal act, although it produced legal effects. The element of intent was missing”.⁸¹ Some representatives in the Sixth Committee have expressed a similar view.⁸²

128. An important question has been raised concerning silence and the formulation of a unilateral act from a material standpoint. It is worth asking whether a State can formulate a unilateral act through silence.

129. In examining each of these unilateral acts it can be concluded that in the case of a promise, for example, it would appear impossible for a State to promise or offer something by means of silence. The same observation can be made with regard to a declaration of war, cessation of hostilities or neutrality.

130. On the other hand, in cases involving waiver, protest or recognition, it might be thought that the State can

⁷⁶ Ibid.

⁷⁷ *Yearbook ... 1999* (see footnote 10 above), 2594th meeting, statement by Mr. Pellet, p. 197, para. 26.

⁷⁸ *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 25th meeting (A/C.6/54/SR.25), statement by Argentina, para. 64.

⁷⁹ See footnote 2 above.

⁸⁰ See footnote 1 above.

⁸¹ *Yearbook ... 1999* (see footnote 10 above), 2596th meeting, statement by Mr. Rodríguez Cedeño, p. 212, para. 41.

⁸² See the statement by Switzerland in Caflisch, “La pratique Suisse ... 1998”, p. 651.

certainly formulate a legal act by means of silence. Such would be the case, for example, where a State recognizes an armed group as a belligerent in a conflict situation by means of silence. The same observation can be made with regard to protest and, to a lesser degree, waiver. Regardless of that, however, it would also be necessary to ask whether such conduct, which clearly has legal effect, is or is not linked to a previous act and, accordingly, whether it can be understood as a legal act encompassed by the study of unilateral acts that are now being considered.

131. In the view of the Special Rapporteur, silence cannot be an independent manifestation of will, since it is a reaction to a pre-existing act or situation, which takes us away from the concept of the unilateral act that is being

considered, whose functioning will be governed by the rules being elaborated.

132. It was stated in the Commission, moreover, that it had not been taken into account that by having effect, any unilateral act creates a bilateral tie—an important question that bears a relationship, as shall be seen below, to the modification, revocation and suspension of the effect of a unilateral act.

133. Of course, as was noted in previous reports, while the formulation of an act is unilateral, its legal effect must be seen as reaching beyond the unilateral context, into the bilateral context, which does not, however, mean that the act takes place in a treaty context.

IX. INVALIDITY OF UNILATERAL ACTS

A. Comments by the Special Rapporteur

134. The second report of the Special Rapporteur⁸³ presented a draft article 7, on invalidity of unilateral acts, on which comments were made in both the Commission and the Sixth Committee. Some stated at the time that it was not appropriate to follow the 1969 Vienna Convention so closely, while others indicated that, on the contrary, it seemed appropriate to follow the rules laid down in the Convention.

135. In this case the comparison with the 1969 Vienna Convention appears to be appropriate. The causes of invalidity of an act are, in general, similar to those which may arise in a treaty context, as rightly noted by a representative in the Sixth Committee, who said that: “draft article 7 [on invalidity of unilateral acts] should follow more closely the corresponding provision in the Vienna Convention. Since the consent to be bound by a treaty and the consent to a unilateral commitment were both expressions of the will of State, it seemed logical that the same reasons for invalidity should apply to both types of statements”.⁸⁴ Undoubtedly, a unilateral act is impugnable, as is a treaty, if the expression of will is vitiated by flaws.

136. Clearly, the special nature of unilateral acts and the evolution of international relations and international law open up the possibility of including a cause not provided for in the corresponding article of the 1969 Vienna Convention, such as one concerning the infringement of a decision of the Security Council by a unilateral act, a question that will be addressed below.

137. When former draft article 7 was considered in the Commission, some members stated that it was preferable in any event to distinguish between the causes of invalidity and to draft separate articles, following the structure of the 1969 Vienna Convention—a question that is not being considered here, as it is believed to be more of a drafting question.

138. In re-examining each of the causes included in the draft article, reference is made in the first place to paragraph 1, on error, about which it was stated in the Commission that it could not be applied in the same way as in the law of treaties. It was stated that an error of fact should be easier to correct than an error committed by a State in adopting the text of a treaty.

139. As is well known, error has been the subject of consideration by international tribunals, particularly PCIJ and ICJ, in several cases, such as *Eastern Greenland*, *Temple of Preah Vihear* and *Mavrommatis*, to name but a few.⁸⁵

140. The question that arises is whether the cause of invalidity based on error—referring, of course, to the substance and not to the expression of consent—applies to unilateral acts on the same terms as in the law of treaties. If unilateral error is possible in a treaty context, there seems to be no reason to deny that it might also be considered in the context of unilateral acts.

141. A State’s expression of will can certainly be based on error, and that is a justified cause of invalidity in this context, although error cannot be invoked in certain circumstances, as ICJ noted in rejecting Siam’s arguments in the *Temple of Preah Vihear* case: “It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent, if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error.”⁸⁶

142. Some doubts were expressed with regard to fraud, referred to in paragraph 2 of former article 7, on the consideration that that provision “might encroach on certain accepted ways whereby States led their foreign policy and convinced other States to join in that policy”.⁸⁷

⁸³ See footnote 2 above.

⁸⁴ *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee, 25th meeting, statement by Poland (A/C.6/54/SR.25), para. 120.*

⁸⁵ *Legal Status of Eastern Greenland* (see footnote 25 above), p. 22; *Temple of Preah Vihear* (see footnote 17 above); and *Readaptation of the Mavrommatis Jerusalem Concessions, Judgment No. 10, 1927, P.C.I.J., Series A, No. 11.*

⁸⁶ *I.C.J. Reports 1962* (see footnote 17 above), p. 26.

⁸⁷ *Yearbook ... 1999* (see footnote 12 above), p. 135, para. 555.

143. It was deemed appropriate to retain this cause of invalidity, which is applied in the context of the law of treaties, on the consideration that the general practice of States does not exactly appear to be one of inducing other States to assume certain obligations based on deceit. Policies differ, of course, but a statement to that effect does not conform to reality. Widespread practice along those lines could impair international relations and undermine the necessary confidence and transparency in relations between States.

144. In practice, of course, there do not appear to be any examples of an act liable to be invalidated by fraud, except in the case of the Webster-Ashburton Treaty, concerning the north-eastern boundary between the United States and Canada.⁸⁸ “That, however, was a case of non-disclosure of a material map by the United States in circumstances in which it was difficult to say that there was any legal duty to disclose it, and Great Britain did not assert that the non-disclosure amounted to fraud.”⁸⁹ It was considered, however, that that clause should be retained in the draft articles.

145. Paragraph 3 retains the reference to corruption of the person formulating a unilateral act on behalf of a State. Corruption is a practice regrettably common and international, while also condemned by the entire international community, which has made very serious efforts to combat it by adopting legal instruments, such as the Inter-American Convention against Corruption.

146. The inclusion of a paragraph referring to corruption as affecting the validity of unilateral acts still appears to be necessary; it has, therefore, been retained with some drafting changes which bring it into line with the comments made.

147. Paragraph 4 of former article 7 refers to coercion of the person formulating the unilateral act, which is presented in the same way in article 51 of the 1969 Vienna Convention. The practice relating to coercion of the representative of a State in negotiations for the conclusion of a treaty is well known.

148. The cause of invalidity relating to the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations, which is restated in article 52 of the 1969 Vienna Convention, has also been retained.

149. As is well known, resort to force, which was accepted in eras preceding the League of Nations, is prohibited by international law—mainly since the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), on which the Charter of the United Nations is based—as confirmed by subsequent resolutions and declarations, such as the Manila Declaration on the Peaceful Settlement of International Disputes,⁹⁰ which has now been corroborated by international doctrine as a whole.

⁸⁸ Treaty between Great Britain and the United States (Washington, 9 August 1842), *British and Foreign State Papers, 1841–1842*, vol. XXX (London, Ridgway, 1858), p. 360.

⁸⁹ *Yearbook ... 1963*, vol. II, document A/CN.4/156 and Add.1–3), p. 47, para. 1 of the commentary to article 7.

⁹⁰ General Assembly resolution 37/10 (15 November 1982), annex.

150. A unilateral act that conflicts with these principles, mainly those included in the Charter of the United Nations and, more specifically, the obligation contained in Article 2, paragraph 4, of the Charter, which for many is a peremptory norm of *jus cogens*, is *nulo ab initio* (void from its inception).

151. The cause of invalidity relating to a unilateral act that conflicts with a peremptory norm of international law—a question which arose in the Commission in 1966 and which elicited an interesting debate at the 1968–1969 United Nations Conference on the Law of Treaties—was included in paragraph 6 of former article 7. There are, of course, many divergent positions on the existence of such norms, as was evidenced by the failure to define them at the Conference.

152. One member of the Commission stated at the fifty-first session in 1999 that such a norm should be applied more flexibly in the case of unilateral acts. The question that arises is how such a provision can be made more flexible. The wording of a rule based on this cause of invalidity cannot be distinct from the wording in the 1969 Vienna Convention, which was the result of an intense process of negotiations, notwithstanding the fact that, as noted above, such peremptory norms were not defined in the Convention. Endeavouring to make them more flexible could reopen the debate on a question that continues to be controversial in international law and that should be retained as drafted for the time being.

153. In former article 7, paragraph 7, reference is made to the invalidity of a unilateral act formulated in clear violation of a norm of fundamental importance to the domestic law of the State which formulates it. This cause would be closely related to the authorization of the person who formulates the act, a question to which reference has been made above.

154. An act formulated by an unauthorized person would be invalid unless it is subsequently confirmed by the State.

155. Another question that arose at the fifty-first session of the Commission in 1999 had to do with the invalidity of a unilateral act that conflicts with a resolution of the Security Council, particularly in the context of Chapter VII of the Charter of the United Nations, a question that was addressed by other members of the Commission and by some representatives in the Sixth Committee.

156. The suggestion by one member of the Commission that under the causes of invalidity, mention should be made of the fact that a unilateral act may conflict with a decision of the Security Council appeared to be very apt. The member of the Commission then stated that “article 7 should include Security Council resolutions among the factors that could be invoked to invalidate a unilateral act. For example, if a State made a declaration that conflicted with a Council resolution, particularly under Chapter VII of the Charter of the United Nations, that called on Members not to recognize a particular entity as a State, it could be argued that such a unilateral act was invalid”.⁹¹ That view was reiterated by a representative in the Sixth

⁹¹ *Yearbook ... 1999* (see footnote 10 above), 2595th meeting, statement by Mr. Dugard, p. 204, para. 24.

Committee, who stated that “a unilateral act in violation of a Security Council resolution adopted under Chapter VII of the Charter”, should be invalid.⁹²

157. For this reason it was deemed appropriate to include in the draft article on invalidity of unilateral acts a cause relating to their conflict with a resolution, or rather, a decision of the Security Council—a term that the Special Rapporteur considers more appropriate because of its legal significance—a view that was also expressed by a member of the Commission, who in 1999 referred to “another cause of invalidity, namely, conflict between a unilateral act and decisions of the Security Council. Clearly, what was intended were binding decisions of that body”.⁹³

158. In drafting this new paragraph, it was deemed necessary to stipulate that what is involved are decisions, in order to distinguish them from recommendations of the Security Council, without expressly referring, furthermore, to Chapter VII of the Charter of the United Nations, since the Council can also adopt decisions in the framework of Chapter VI of the Charter.

159. Article 25 of the Charter of the United Nations confers on the Security Council the authority to adopt decisions, stating that: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” The Council can adopt resolutions having the value of recommendations in the context of both Chapters VI and VII of the Charter, but it can also adopt decisions in both contexts.

160. In the case of Chapter VI, while in principle the Security Council can adopt binding resolutions or decisions from the legal standpoint, such as those adopted under Article 34 of the Charter of the United Nations, concerning investigation,⁹⁴ the Council also has the option of taking decisions under Chapter VII of the Charter, such as those adopted pursuant to Articles 41 and 42,⁹⁵ which is evidenced clearly by the very wording of those provisions.

161. Undoubtedly, it is Security Council decisions that must be involved and not other acts, such as recommendations, which are not legally binding. Such would be the case with regard to the resolutions adopted by the Council on Iraq, particularly resolutions 660 (1990) and 661 (1990), which contain mandatory and comprehensive sanctions under Chapter VII of the Charter of the United Nations; it is also worth mentioning that the term “sanctions” is not used in the Charter, which uses the term “measures”.

162. Collective security, as provided for in the Charter of the United Nations, is a question of general interest which is based on two groups of Charter articles that should be

⁹² *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee, 25th meeting, statement by Poland (A/C.6/54/SR.25)*, para. 122.

⁹³ *Yearbook ... 1999* (see footnote 10 above), 2596th meeting, statement by Mr. Rodríguez Cedeño, p. 212, para. 39.

⁹⁴ Di Qual, *Les effets des résolutions des Nations Unies*, pp. 81 et seq.

⁹⁵ Goodrich and Hambro, *Commentaire de la Charte des Nations Unies*, cited in Di Qual, op. cit., p. 276.

mentioned: Articles 2, paragraphs 3–4, 51, and 41–42, the last two referring to collective measures. This assessment reflects the importance of the Security Council’s decisions relating to the maintenance and re-establishment of international peace and security, and provides the basis for invalidating unilateral acts formulated by a State that conflict with them.

163. Lastly, a point was raised in the Commission at the fifty-first session in 1999 concerning the invalidity of unilateral acts that conflict with a norm of general international law. One member stated at the time that:

he could not agree that a unilateral act could not depart from customary law. Such an act could not produce legal effects if it was not accepted by the addressee States. The problem was one of legal effects rather than invalidity. States could derogate from customary law by agreement. He saw no reason why the declaring State should not, as it were, make an offer to its treaty partners, and still less why it should not make a unilateral declaration extending or amplifying its obligations under the customary rule in question.⁹⁶

164. A unilateral act that is not consistent with a norm of general international law can be declared invalid if it is not accepted by the State or States to which it is addressed. An important example that is worth considering is the unilateral act formulated by the United States in 1945, known as the Truman Proclamation,⁹⁷ on the extension of the continental shelf.

165. This act marked an important milestone in the formulation of the international law of the sea, and while it was not consistent with a pre-existing customary norm, it had a decisive influence on the formulation of a new norm when States accepted it and it was later reflected in the conventions on the law of the sea.

166. It was not deemed appropriate to include a norm along these lines as a cause of invalidity because, in fact, such an act, which conflicts with a norm of general international law, is not invalid if the States concerned or affected agree that, while it is not consistent with existing general international law, it is part of the process of formulating a new customary norm, and that the norm was not rejected by States and did not give rise to protest.

B. New draft article 5. Invalidity of unilateral acts

167. On the basis of the foregoing, the Special Rapporteur proposes the following article:

“Article 5. Invalidity of unilateral acts

“A State may invoke the invalidity of a unilateral act:

“(a) If the act was formulated on the basis of 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

⁹⁶ *Yearbook ... 1999* (see footnote 10 above), 2593rd meeting, statement by Mr. Pellet, p. 189, para. 54.

⁹⁷ Proclamation on the “Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf” of 28 September 1945 (Whiteman, *Digest of International Law*, pp. 756–757).

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 act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State;

“(d) If the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him;

“(e) If the formulation of the 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, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council;

“(h) If the unilateral act as formulated conflicts with a norm of fundamental importance to the domestic law of the State formulating it.”

UNILATERAL ACTS OF STATES

[Agenda item 7]

DOCUMENT A/CN.4/511

Replies from Governments to the questionnaire: report of the Secretary-General

[Original: English/French/Spanish]
[6 July 2000]

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Multilateral instruments cited in the present report

	<i>Source</i>
Treaty of Peace with Finland (Paris, 10 February 1947)	United Nations, <i>Treaty Series</i> , vol. 48, No. 746, p. 203.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, No. 18232, p. 331
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

1. At its fifty-first session, in 1999, the International Law Commission decided that the Secretariat, in consultation with the Special Rapporteur on the topic “Unilateral acts of States”, should elaborate and send to Governments a questionnaire requesting materials and inquiring about their practice in the area of unilateral acts, as well as their position on certain aspects of the Commission’s study on the topic. Pursuant to that request, the Secretary-General, on 30 September 1999, circulated to Governments the text of a questionnaire on unilateral acts of States.

2. As at 6 July 2000 replies to the questionnaire had been received from the Governments of the following States: Argentina, Austria, El Salvador, Finland, Georgia, Germany, Israel, Italy, Luxembourg, Netherlands, Sweden and United Kingdom of Great Britain and Northern Ireland.

3. Below is to be found the text of the replies received, which have been broken down and grouped into general comments and replies to each of the questions comprising the questionnaire, with appropriate cross-references.

Replies from Governments to the questionnaire

General comments

Austria

[Original: English]
[2 March 2000]

1. The term “unilateral acts of States” encompasses a wide variety of acts. Given the very different legal and political natures of the various categories of unilateral acts, it does not seem possible to supply uniform answers to the questions contained in the Commission’s questionnaire. In fact, any attempt to do so would, in the view of Austria, run a serious risk of creating a distorted impression of the legal situation. On the other hand, owing to the multitude of categories of unilateral acts and the different legal issues which they respectively raise, it seems neither feasible nor particularly helpful to address each question contained in the questionnaire in relation to each category of unilateral act. Austria will, therefore, limit its comments to some general observations. (See Austria’s observations on question 1 below.)

2. Austria hopes that the comments and the examples given demonstrate the difficulty of giving answers to the questions contained in the Commission’s questionnaire which are both generally valid *and* helpful for legal practice. In the view of Austria this is at least partly attributable to the very different nature of the various acts and categories of acts described as unilateral acts.

Finland

[Original: English]
[3 March 2000]

1. As most of the questions in the questionnaire that covers a wide range of unilateral acts are inappropriately general or even obscure, Finland finds it somewhat difficult to respond. Given that Finland has doubts as to the usefulness of the study in its present rather general form, and as to whether the topic as such is suitable for a detailed codification, Finland wishes the Commission to consider if there are certain types of unilateral acts which are found particularly problematic and need a comprehensive study by the Commission, before further steps are taken.

2. Despite the general nature of the questions in the questionnaire, Finland wishes to provide the following

remarks. (See Finland’s remarks on questions 1, 2, 5, 7 and 9 below.)

3. The answers regarding questions 3, 4, 6 and 8 depend on the context. As to question 3, there are no predetermined formalities. Everything depends on the context as the purpose is to protect legitimate expectations and not to create another category of agreements.

4. As far as Finnish practice is concerned, reference may be made to a number of statements by the President of Finland (e.g. concerning Norway’s claim to maritime jurisdiction in the waters off the Norwegian mainland in 1977¹ or the interpretation of the Treaty of Peace with Finland in 1990) that have been held to create legal consequences. The practice is recognized and followed in Finland.

¹ Act No. 91 of 17 December 1976 relating to the Economic Zone of Norway, *The Law of the Sea: National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone* (United Nations publication, Sales No. E.85.V.10), p. 229.

Germany

[Original: English]
[7 March 2000]

1. Germany is, like others, in some difficulty in responding to the questions put forward to Governments in the questionnaire. This is because of the wide range of unilateral acts in respect of which the questions are posed (promise, protest, recognition, waiver, etc.), as well as the fact that the questions do not admit of the same answer in respect of each of the acts concerned. The question, for example, whether an act is capable of revocation (question 9) will depend upon the particular category of act under consideration, e.g. a “promise”, a “protest” or “an act of recognition”. Besides, there is also the main difficulty that a genuine assessment of the legal effects of unilateral acts (question 5) cannot be made in the abstract without regard to the concrete circumstances of the act in question and the effect of relevant rules of law. In order to evaluate the legal effects of a specific unilateral act, it will be necessary to be fully cognizant of the factual and legal context in which, for example, a “promise”, “protest” or “failure to protest” occurs.

2. Germany considers that an approach, as reflected in the questionnaire and suggested in the reports of the Special Rapporteur, which seeks to subject unilateral acts to a single body of rules across the board, is not well founded. Consequently, the question of an appropriate approach to the issue of unilateral acts of States for further efforts to contribute to the progressive development of international law also in this field should be discussed again at the next session of the Commission.

Italy

[Original: French]
[16 May 2000]

1. To begin with, Italy had some difficulty in answering the questions, in view of their excessively general and often obscure nature.

2. Italy has some doubts as to the usefulness of a study conducted on such a general basis, as there is not one general category of unilateral acts, but several types, some of which are fairly problematic and require detailed consideration.

3. Nevertheless, Italy endeavoured to supply answers, albeit general ones, while noting at the outset that the answers must be different depending on the category of unilateral acts in question.

4. In particular, Italy classified unilateral acts into the following three categories:

(a) *Unilateral acts referring to the possibility of invoking a legal situation.* Recognition, protest and waiver belong to this category. These three types of acts require an explicit expression of consent so as to ensure certainty and security in international relations;

(b) *Unilateral acts that create legal obligations.* This category includes promise, an act by which a State obligates itself to adhere or not to adhere to a certain course of conduct. A promise has value only if the State which made it really had the intention of obligating itself by this means. It is difficult, however, to ensure that there is a real willingness to undertake obligations;

(c) *Unilateral acts required for the exercise of a sovereign right.* Such acts are a function of the exercise of powers by States as authorized under international law (delimitation of territorial waters or of an exclusive economic zone, attribution of nationality, registration of a vessel, declaration of war or neutrality).

Luxembourg

[Original: French]
[12 April 2000]

1. Since the questions concern a very wide variety of unilateral acts and the same reply cannot be given for each of the acts concerned, it is rather difficult for Luxembourg to reply to the questions. An evaluation cannot be made in the abstract without considering the circumstances and the effects of the relevant decisions.

2. Moreover, Luxembourg feels that an approach, as reflected in the questionnaire and proposed in the Special Rapporteur's reports, which seeks to subject unilateral acts to a single set of rules, like the 1969 Vienna Convention, is not justified.

3. In the present circumstances, therefore, Luxembourg intends to refrain for the time being from replying to the questionnaire.

Netherlands

[Original: English]
[24 March 2000]

Introduction

1. The response of the Netherlands, with the exception of the examples of State practice given below, and the response to question 6, is based on the advice of the Netherlands independent Advisory Committee on Issues of Public International Law.

(a) State practice

2. An example of a unilateral act by the Netherlands is the international notification of the Netherlands Territorial Sea (Demarcation) Act of 9 January 1985¹ concerning the demarcation of its territorial waters. It should be noted that this unilateral act does not meet the criteria set by the Special Rapporteur and would hence be excluded from the purview of a "unilateral act", as it is related to pre-existing law. An example that does meet at least one of the criteria set in the questionnaire ("that a unilateral statement could be made by one or more States jointly or in a concerted manner") is the recognition of Croatia and Slovenia in 1991, given that this recognition was based on criteria developed jointly within the European Union. Another example that could be cited in this context is the recognition, in January 1992, of all republics of the Commonwealth of Independent States that had responded positively to the guidelines on the recognition of new States in Eastern Europe and the Soviet Union drawn up in the framework of the European Community. It should be noted that specific recognition of the Russian Federation was not considered necessary, as that State may be considered the continuation of the former Soviet Union.

3. Another example of a unilateral act is the 1994 written declaration in which the Minister of Defence of the Netherlands notified the States participating in a NATO training exercise, which was to be held in the Netherlands under the NATO Partnership for Peace programme, of the various legal requirements for entry and temporary stay of their personnel, members of military forces, in the Netherlands. The declaration was addressed in particular to the participating non-NATO States, that is, States which were not parties to the NATO status-of-forces agreement, and contained a promise to provide to members of their military forces similar facilities, exemptions and waiver of jurisdiction for crimes and offences as contained in the agreement.

¹ United Nations, *Law of the Sea Bulletin*, No. 6 (October 1985), p. 16.

(b) *General observations (general approach and scope of the topic)*

4. Before responding to the specific questions addressed in the questionnaire, the Netherlands wishes to comment, as invited in the questionnaire's closing comments, on the general approach and scope of the topic.

5. The questionnaire covers a wide range of types of unilateral acts. It is difficult to provide very specific answers to the questions posed without differentiating between the various types of unilateral acts such as promise, notification, recognition, waiver and protest.

6. Furthermore, the criteria that the Special Rapporteur has adopted for "unilateral acts" define the subject very narrowly. The Netherlands realizes that the Special Rapporteur was concerned to exclude the many acts and statements that derive their binding character from pre-existing norms, but nonetheless believes that the Special Rapporteur's chosen definition may lead to an unnecessarily reductive approach to the topic. For instance, unilateral acts involving the State's international responsibility and those leading to estoppel are excluded from the definition. The sustainability of this approach is open to question. The Netherlands therefore welcomes the approach of the Working Group appointed by the Commission and the fact that the Working Group's recommendations have been adopted by the Commission. In the Netherlands' view, this approach leads to a certain widening of the definition of "unilateral acts".

7. In his first report,² the Special Rapporteur stated that the unilateral acts of international organizations should be excluded from the topic. The Commission endorsed this restriction. At the same time, there is a consensus that the unilateral acts of international organizations are gaining in significance. The Netherlands would urge the Commission to address this issue too, after the unilateral acts of States have been dealt with, as was done in the 1969 and 1986 Vienna Conventions. The Netherlands would like to see the topic of "unilateral legal acts of international organizations" placed on the agenda of the Commission. The Netherlands acknowledges that the unilateral acts of international organizations present other aspects and problems, but cannot see any reason to delay taking stock of them. The importance of the topic is universally acknowledged. The Commission itself has sometimes come near to addressing the topic.³ The Commission sometimes appears to be reluctant to codify sections of the law of international organizations. The Netherlands, which hosts numerous international organizations, attaches importance to this topic being dealt with by the Commission.

8. Regarding the definition agreed by the Commission and reproduced in the questionnaire, the Netherlands would note that while a State may intend to produce legal effects by means of a unilateral declaration, this intention may not suffice actually to produce such effects under international law. It is ultimately international law itself (or

a general principle of such) that can provide the binding force intended. The Commission should give this matter further consideration.

Sweden

[Original: English]
[28 April 2000]

1. Unilateral acts occur in a number of circumstances, but the legal consequences thereof are not always clear. Nevertheless, the unilateral act is sometimes a useful alternative to other legal instruments.

2. Like others, Sweden is not yet convinced that it is possible to formulate rules which apply to all unilateral acts. Certain issues are surely relevant for all unilateral acts, such as the question of the capacity to bind a State. Other issues must be treated differently for different acts; for instance, the issue of revocation might not be acted in the same fashion with regard to promises as with regard to acts of recognition.

3. Whether particular rules should be conceived as exceptions to general rules or as special regimes is both a conceptual and a practical problem. For instance, should an analysis of unilateral acts include only the general rule, if there are any, or also the particular rules dealing with different forms of unilateral acts?

4. These difficulties may not necessarily render the project impossible, but they do call for some caution. Therefore, as was suggested in the statement of the Nordic countries in the Sixth Committee on 3 November 1999,¹ it may be advisable to proceed in a step-by-step manner, starting with acts creating obligations. It might appear at a later stage that the Commission should limit its work to certain types of unilateral acts.

5. What follows is an effort to respond to the questionnaire. In line with the foregoing it must be stated that it has not always been possible to supply answers which are valid for all types of unilateral acts. The responses are of course only of a preliminary nature, and Sweden looks forward to following the further developments of the discussion, be it within the Commission, in the Sixth Committee or in other forums.

¹ *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee, 25th meeting (A/C.6/54/SR.25)*, para. 70.

United Kingdom

[Original: English]
[3 March 2000]

1. In view of the wide range of unilateral acts in respect of which the questions are posed and the fact that the questions do not admit of the same answer in respect of each of the acts concerned, the United Kingdom is in some difficulty in responding to the questionnaire. The question, for example, whether an act is capable of revocation (question 9) will depend upon the particular category of act under consideration, for example, a "promise", a "protest" or "an act of recognition". There is also the difficulty that, in terms of the core issue of the legal effects of unilat-

² *Yearbook ... 1998*, vol. II (Part One), p. 319, document A/CN.4/486.

³ See *Yearbook ... 1999*, vol. II (Part Two), p. 138, para. 589: "It was also noted in the Working Group that a unilateral statement could be made by one or more States jointly or in a concerted manner."

eral acts (question 5), much will depend on the context in which, for example, a “promise”, “protest” or “failure to protest” occurs. An assessment cannot be made in the abstract without regard to the surrounding circumstances and the effect of relevant rules of law.

2. The United Kingdom considers that an approach, as reflected in the Commission questionnaire and suggested in the reports of the Special Rapporteur, which seeks to subject unilateral acts to a single body of rules across the board, is not well founded and may even prove unhelpful.

Moreover, the approach being taken seems to give inappropriate prominence to the 1969 Vienna Convention. The United Kingdom is not convinced that the provisions of the Convention can be applied *mutatis mutandis* to all categories of unilateral acts of States.

3. The United Kingdom suggests that the Commission might wish to consider, if necessary with the help of a questionnaire, whether there are specific problems in relation to specific types of unilateral act which might usefully be addressed in an expository study.

QUESTION 1

To what extent does the Government believe that the rules of the 1969 Vienna Convention could be applied *mutatis mutandis* to unilateral acts?

Argentina

[Original: Spanish]

[18 May 2000]

Argentina believes that there are many points of contact between the law of treaties and unilateral acts. Both belong in the category of juridical acts and, as such, they theoretically share the regimes of errors of intent, nullity, existence, etc. Many of the rules of the 1969 Vienna Convention can therefore be adapted to the sphere of unilateral acts. However, the Commission should avoid the temptation to transpose these rules automatically. It must not be forgotten that these are acts which do not require a concurrent statement of intent on the part of other subjects of law, as opposed to treaties, where others state their consent to be bound by the provisions of the treaty.

Austria

[Original: English]

[2 March 2000]

1. Austria is not convinced that the provisions of the 1969 Vienna Convention can automatically be applied *mutatis mutandis* to all categories of unilateral acts of States. It is well known that the term “unilateral act” may be understood as describing both autonomous acts independent from treaty relations as well as so-called “adjunctive unilateral acts” which fall within the scope of treaty law. Since the Commission is perfectly aware of the treatment of the latter category under international law, no further elaboration on this topic is needed. Suffice it to say that under Austrian national law the legal treatment of such “adjunctive unilateral legal acts” largely follows the rules governing international treaties. The categories of autonomous unilateral acts, on the other hand, are too heterogeneous to allow clear answers under national or international law. Thus it could be argued that the rule contained in article 7, paragraph 2 (a), of the 1969 Vienna Convention, which provides for a legal presumption for Heads of State, Heads of Government and Ministers for Foreign Affairs as representing their State is equally applicable to unilateral acts on the basis of customary inter-

national law. However, as the *Nuclear Tests* cases¹ have shown, in relation to unilateral acts ICJ views the presumption of persons empowered to represent their State in virtue of their functions as going beyond the scope of article 7, paragraph 2 (a), of the above-mentioned Convention.

2. The legal situation regarding the rules of interpretation applicable to unilateral acts seems equally unclear. In the *Fisheries Jurisdiction* case,² ICJ considered the regime relating to the interpretation of unilateral declarations made under Article 36 of the Statute of the Court not to be identical with that established for the interpretation of treaties by the 1969 Vienna Convention. The Court observed that the provisions of that Convention might only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court’s jurisdiction. The Court explained further that it would interpret the relevant words of such a declaration, including a reservation contained therein, in a natural and reasonable way, having due regard for the *intention* of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. Moreover, the intention of the State concerned could be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served. With respect to the interpretation of these unilateral acts, therefore, it appears that the Court attaches much higher interpretative significance to the subjective element than would be permissible under the rules of “objective” treaty interpretation pursuant to articles 31–32 of the Convention. How far this subjective element can be taken and whether or to what extent the same reasoning is applicable to other categories of unilateral acts remains unclear.

¹ *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.

² *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432.

El Salvador

[Original: Spanish]
[13 April 2000]

1. Under the legal system of El Salvador, the 1969 Vienna Convention does not constitute a law in force; it constitutes *jus cogens* and is a supplementary source of international law.

2. As a supplementary source, the rules of the 1969 Vienna Convention can be adapted to serve as principles and provisions for the regulation of unilateral acts, but with substantial changes, since, unlike treaties in which there are two or more wills in agreement, acts are per se unilateral. The Convention defines treaties as international agreements concluded between States in written form and governed by international law, whereas the unilateral acts of a State on the international plane are acts emanating from a single State which have legal effects with regard to another State or the international community, in what is a clear expression of the State's sovereignty.

3. El Salvador can, for instance, declare war on another State (art. 131, para. 25, of the Constitution of the Republic) when the Legislative Assembly so decides. To inform the other State and the international community of such declaration of war, it makes a declaration to the State concerned and gives notification to the international community, both of these being unilateral acts. Such declaration and notification are made through an official vested with full powers, as established in the relevant article of the 1969 Vienna Convention. The act must also be in written form, making its nature similar to that of a treaty (art. 1 (a) of the Convention).

4. The 1969 Vienna Convention also provides expressly for such unilateral acts as reservations (sect. 2, arts. 19 et seq.), in which the provisions of the Convention are applied directly.

Finland

[Original: English]
[3 March 2000]

1. The formulation of the question is inappropriately general. Whether or not two or more reciprocal or parallel unilateral acts can be said to form an agreement must be interpreted from the context. The interpretative context is not identical with that of the 1969 Vienna Convention as the binding force of unilateral acts is not simply a contractual matter but one of protecting legitimate expectations.

2. The principles of interpretation of unilateral acts are to a large extent similar to those in articles 31–33 of the 1969 Vienna Convention. It is doubtful whether it is reasonable to draft a separate instrument to cover them. The capacity to bind a State by a unilateral declaration follows from article 7 of the Convention. However, many of the formal provisions of the Convention on reservations, entry into force, amendment or invalidity are not applicable as such.

Georgia

[Original: English]
[3 March 2000]

The rules in the 1969 Vienna Convention cannot be adapted *mutatis mutandis* to unilateral acts because of the different character of the former. The unilateral act is the expression of the will of a single State (or of a collective nature by two or several States), whereas the rules in the Convention have been drafted taking into consideration the specifics of meeting wills of Contracting Parties. But that does not mean that rules designed to govern unilateral acts may neglect the rules of the Convention. On the contrary, the rules must adhere generally to the nature and idea of the above-mentioned multilateral treaty.

Israel

[Original: English]
[21 June 2000]

1. As Israel noted in its statement before the Sixth Committee¹ in 1999, the law of treaties could be a source of inspiration for the development of principles regarding unilateral acts despite the fact that treaty law is designed to regulate legal undertakings which involve two or more States parties. This is surely the case with respect to those formal unilateral acts executed under the law of treaties, such as signatures, ratification, reservations and denunciation. However, several provisions of the 1969 Vienna Convention may also be applicable, to some extent, with respect to unilateral acts of a more general nature.

2. Clearly, those provisions of the 1969 Vienna Convention which relate, by their very nature, to reciprocal commitments between States would not be relevant in the context of general unilateral undertakings. However, certain other aspects of the Convention could be adapted, *mutatis mutandis*, to unilateral acts. In particular, consideration should be given to the following: the duty to perform legal obligations in good faith; principles of interpretation; principles related to third States; and possibly some of the provisions related to invalidity and termination (for example, coercion, supervening impossibility of performance and the *rebus sic stantibus* principle).

¹ *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee, 28th meeting (A/C.6/54/SR.28)*, paras. 26–37.

Italy

[Original: French]
[16 May 2000]

With regard to the question concerning the rules of interpretation applying to unilateral acts, there is a tendency to apply to them the principles of interpretation referred to in articles 31–33 of the 1969 Vienna Convention. On the other hand, the other provisions of that Convention do not apply, in view of the nature of unilateral acts, which is inherently different from that of treaties.

Luxembourg

[Original: French]
[12 April 2000]

Luxembourg feels that an approach, as reflected in the questionnaire and proposed in the Special Rapporteur's reports, which seeks to subject unilateral acts to a single set of rules, like the 1969 Vienna Convention, is not justified.

Netherlands

[Original: English]
[24 March 2000]

Testing for compatibility with the 1969 Vienna Convention is a logical step as a frame of reference when codifying rules on unilateral acts of States. The main ingredients of the Convention (the conclusion of conventions, their interpretation, application and termination) may be deemed partly applicable, *mutatis mutandis* to unilateral acts. However, all aspects of this compatibility must be examined in full before an adequate response to the question can be given. Only at the end of such an exercise can it be determined whether analogous application of the rules of the Convention to unilateral acts is not only possible but also necessary.

Sweden

[Original: English]
[28 April 2000]

To a large degree, the same considerations are valid for unilateral acts and for treaties. Consequently, the law of treaties will be a useful guide, *mutatis mutandis*, regarding the issues of capacity to commit the State, observance of obligations arising out of a unilateral act, the relevance of internal law, the application of obligations, the interpretation of unilateral acts, the effect on third States, invalidity, impossibility of performance, fundamental change of circumstances (with some reservations), *ius cogens*, as well as consequences of invalidity, termination or suspension. On the other hand, those parts of the 1969 Vienna Convention which relate to the conclusion and the entry into force of treaties (save articles 6–7) seem to be less relevant, and great caution should be used with regard to provisions of the Convention on withdrawal, termination and suspension, even though there are some similarities in this regard.

United Kingdom

[Original: English]
[3 March 2000]

The approach being taken seems to give inappropriate prominence to the 1969 Vienna Convention. The United Kingdom is not convinced that the provisions of the Convention can be applied *mutatis mutandis* to all categories of unilateral acts of States.

QUESTION 2

Who has the capacity to act on behalf of the State to commit the State internationally by means of a unilateral act?**Argentina**

[Original: Spanish]
[18 May 2000]

1. Who has the capacity to act unilaterally on behalf of the State depends on the circumstances of the case, the internal institutional organization of the State and the nature of the unilateral act. According to a well-established norm of general international law, acts of the Head of State, Head of Government or Minister for Foreign Affairs are attributable to the State. However, there is a possibility that other ministers or officials, in certain specific circumstances, may also act unilaterally on behalf of the State. As a result, the powers of the official or officials carrying out the unilateral act are especially important. Moreover, the unilateral act may take the form of a series of concordant or convergent expressions or statements of intent on the part of not one but several organs of the State, as in the *Nuclear Tests* cases.¹

¹ *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.

2. It must not be forgotten, however, that in today's world, in which government officials increasingly communicate, maintain institutional relations and act at the external level, it is necessary to safeguard the certainty and clarity needed to determine the existence of an international act of a State. The norm concerning the three State authorities (Head of State, Head of Government and Minister for Foreign Affairs) has the advantage of guaranteeing the necessary legal security and stability in international relations. As a result, any addition of other persons or organs to this established norm of customary law must be approached restrictively, bearing in mind contemporary international realities.

Austria

[Original: English]
[2 March 2000]

See the reply to question 1.

El Salvador

[Original: Spanish]
[13 April 2000]

1. The person with this capacity is the person vested with full powers to that end by the Government of El Salvador. This accords with article 7 of the 1969 Vienna Convention and article 168 of the Constitution of El Salvador.
2. Generally speaking, the following persons have full powers: the President of the Republic; the Minister for Foreign Affairs; the head of a diplomatic mission for the performance of unilateral acts ordered by El Salvador and directed at the State to which the head of mission is accredited; representatives accredited by the State to an international organization for the performance of a unilateral act; and officials granted full powers on a special basis for the performance of a unilateral act.

Finland

[Original: English]
[3 March 2000]

Article 7, paragraph 2, of the 1969 Vienna Convention is probably fully applicable.

Georgia

[Original: English]
[3 March 2000]

1. According to chapter 3, article 48, of the Constitution of Georgia, the "Parliament of Georgia [is] the supreme representative body of the country, which ... exercise[s] legislative power, determine[s] the main directions of domestic and foreign policy". A law adopted or a decision taken by Parliament may constitute a unilateral act.
2. According to chapter 4, article 69, paragraph 2, the "President of Georgia ... direct[s] and exercise[s] the domestic and foreign policy of the State".
3. According to article 12, paragraph 1, of the Law on International Treaties of Georgia, the Minister for Foreign Affairs of Georgia may act without full powers on certain occasions.

Israel

[Original: English]
[21 June 2000]

In general, Israel supports the principles elaborated in draft article 4 of the second report on unilateral acts of States¹ regarding the representatives of a State for the purpose of formulating unilateral acts. However, it should be emphasized that persons may only be considered to be representing the State if as draft article 4 provides, "it appears from the practice of the States concerned" that there was an intention to view them as such. In this context, it will be necessary to determine in any given case

whether the person in question has the authority, at the domestic level, to engage the State by a unilateral legal act. In this regard, it is suggested that a very rigid approach be adopted with respect to the determination of whether such officials are authorized to bind the State through unilateral legal acts. It should be noted that according to Israeli practice, ministers or high-ranking officials require specific and express authorization in order to engage the State by way of unilateral legal acts.

Italy

[Original: French]
[16 May 2000]

1. As to the national authority competent to formulate unilateral acts, this depends on the type of unilateral act. For unilateral acts referring to the possibility of invoking a legal situation and unilateral acts that create legal obligations (see reply under question 4), competence, under the Italian system, resides in the executive branch, which is also responsible for maintaining relations with other States.

2. For unilateral acts required for the exercise of a sovereign right (see reply under question 4), it is not possible to give a precise answer, for competence may vary depending on the nature of the act. If what is involved is a legislative act, the Chambers (Chamber of Deputies, Senate) are responsible; other acts may fall within the purview of the central Government or another administration concerned, a region, and so on.

Netherlands

[Original: English]
[24 March 2000]

Taking as a basis the application by analogy of the rules of the 1969 Vienna Convention, it must be assumed that the same categories of persons that are listed in article 7 of the Convention have the capacity to commit the State internationally by means of a unilateral act, namely, Heads of State, Heads of Government, Ministers for Foreign Affairs and, to a limited extent, heads of diplomatic missions. Others would require full powers. The approach adopted in the Convention is highly formalistic in this regard. It could be argued that in the realm of unilateral acts, all persons who may be deemed mandated by virtue of their tasks and powers to make pronouncements that may be relied upon by third States can be regarded as having the capacity to commit the State. A case in point is France's nuclear tests, when it was not only the French President's statement to which weight was attached, but also that made by the French Minister of Defence. Other examples include statements by ministers' spokespersons. Reference may also be made to the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case,¹ which concerned the question of whether letters from

¹ *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1.

¹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246.

junior Canadian civil servants and the prolonged failure of the United States of America to reply to them sufficed to conclude that the United States had given its tacit consent to the Canadian proposals for delimitation of maritime boundaries. Another example might be an undertaking given by the commander of a warship that if persons possessing the same nationality as the warship are evacuated from a war zone, other nationals will be evacuated along with them. Depending on the nature of the unilateral statement, one might consider drafting a restrictive definition of the conditions subject to which a unilateral statement would produce legal effects. After all, most kinds of unilateral statements entail incurring obligations. Protests are an exception to this rule. Thus the capacity to commit the State is variable, and depends on the category of unilateral act involved.

Sweden

[Original: English]
[28 April 2000]

As indicated above, article 7 of the 1969 Vienna Convention is highly relevant for this question (as are articles 46–47). Article 7 (g) of the Special Rapporteur's draft articles provides that a unilateral act is invalid if the act was "in clear violation of a norm of fundamental importance to its domestic law".¹ Since the intention is not to express a different position than that of article 46 of the Convention,² the word "clear" should be changed to "manifest".

¹ *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1, para. 109.

² *Ibid.*, para. 141.

QUESTION 3

**To what formalities are unilateral acts subjected—
(a) written statements; (b) oral statements; (c) Context in which acts
may be issued; (d) individual, joint or concerted acts?**

Argentina

[Original: Spanish]
[18 May 2000]

With regard to the formalities which such acts must observe, neither State practice nor jurisprudence or legal doctrine require any specific formality, provided that the content of the act is clear and precise and the intent of the State is obvious. In other words, the necessary requirement is that States and other subjects of international law, at which the unilateral act may be directed, should be aware of the expression of intent.

El Salvador

[Original: Spanish]
[13 April 2000]

1. The formalities that each unilateral act must observe are that it must be performed by a given State through officials with full powers, and it must be an express, formal communication or statement.

2. In exceptional cases, the act may be performed tacitly, as happens with recognitions and waivers.

Finland

[Original: English]
[3 March 2000]

There are no predetermined formalities. Everything depends on the context as the purpose is to protect legitimate expectations and not to create another category of agreements.

Georgia

[Original: English]
[3 March 2000]

(a) The ordinary form of a unilateral act must be a written statement;

(b) An oral statement may be considered as an act, but preferably a statement must be reflected in a procès-verbal, signed by the author. The legal effect more efficiently proceeds from a document, to be referred;

(c) As for the context in which acts may be issued, it may range from legal to political or economic, but having legal consequences;

(d) A unilateral act may be individual or joint.

Israel

[Original: English]
[21 June 2000]

1. As indicated in its statement before the Sixth Committee referred to above, Israel does not consider that unilateral acts should be subject to formalities. As ICJ held in the *Nuclear Tests* cases, international law does not impose strict requirements with respect to the form which a unilateral act should take. Indeed, the Court stated that "[w]hether a statement is made orally or in writing makes no essential difference ... the question of form is not decisive".¹

¹ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 267–268, para. 45; and *ibid. (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 473, para. 48.

2. What is relevant in determining the possible legal effects of a unilateral act is not the form which the act takes, but the intention of the State to produce legally binding commitments. The problem lies not with determining the formalities to which a unilateral act must be subjected but in the need to interpret the State's intention, given the circumstances in which the unilateral act has been made, and the actual content of the act itself. It is in this context only that the form of the unilateral act may be of relevance.

Italy

[Original: French]
[16 May 2000]

As to the form that unilateral acts may take, this also depends on the type of act. For unilateral acts referring to the possibility of invoking a legal situation and unilateral acts that create legal obligations (see the reply under question 4), the choice of form is limited, as it is mostly legislative acts that are involved. For unilateral acts required for the exercise of a sovereign right (see the reply under question 4), however, the requisite form depends on the nature of the act.

Netherlands

[Original: English]
[24 March 2000]

(a) *Written statements*

(b) *Oral statements*

1. Both written and oral statements must be unambiguous. As ICJ remarked in the *Nuclear Tests* cases,¹ the question of form is not the decisive factor. In some cases one might envisage a formal notification procedure being required, as in the statements accepting the ICJ jurisdiction on the basis of the optional clause. According to the Special Rapporteur's criteria and those of the Working Group of the Commission, however, these statements must be assumed to lie outside the purview of the concept of a unilateral act.

(c) *Context in which acts may be issued*

2. In the *Nuclear Tests* cases, the Court held that, to be binding, an undertaking must be given publicly and with an intent to be bound. However, that case concerned an undertaking that was made not only vis-à-vis the plaintiffs, Australia and New Zealand, but an undertaking *erga omnes*. An example of a protest that, while intended primarily for the addressee State, was also considered relevant for the international community at large, was when United States warships sailed through the Gulf of Sidra, openly demonstrating that the Libyan claim that the Gulf belonged totally to the Libyan Arab Jamahiriya's—historical—inland waterways was unacceptable to the United

States. In other situations, however, it is entirely conceivable that an undertaking or protest may be confidential in nature and intended solely for another State (e.g. a confidential undertaking by an ambassador to the ambassador of another State).

3. The public nature of a unilateral statement is therefore not decisive as to its binding nature. Where a public unilateral act does appear to be necessary, the publicity requirement (as stipulated by ICJ in the *Nuclear Tests* cases) is also intended to provide for external scrutiny of its lawfulness. The desirability of a public statement may also be based on other public interest considerations, and is not solely for the purposes of determining its lawfulness.

4. The authenticity of a unilateral act must obviously be indisputable. It is worth adding this caveat given the current state of information technology; websites of government bodies abound and the phenomenon of bogus websites has already made its appearance.

5. As for the context in which unilateral acts may be issued, the status of statements made by States members of international organizations is worth considering. They can probably be regarded in many cases as statements made by the State itself. But a State may sometimes not be acting exclusively on its own behalf, but at the same time, for instance, on behalf of other States, as in the non-plenary executive boards of IMF and the World Bank. The Netherlands is a member of those organs, but also acts as a representative of other member States. A statement made by the Netherlands in those executive boards can therefore not be regarded automatically as a unilateral act of the Netherlands.

(d) *Individual, joint or concerted acts*

6. The Netherlands considers that the requirements as described above apply regardless of whether individual, joint or concerted acts are involved.

Sweden

[Original: English]
[28 April 2000]

For all unilateral acts, it must be clear who performs the act, on behalf of whom and when. Further, the intended binding legal effect must appear from the text or otherwise be clearly ascertainable from the circumstances. The act, which may be oral or in written form, shall also be communicated to the relevant addressee, either by notification to those concerned or through a public statement made in an appropriate public form of which the addressees may take part, for instance in the General Assembly of the United Nations. It follows that an undertaking does not necessarily have to be public as long as it is directed to and delivered to those concerned.

¹ *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, pp. 267–268; and *ibid. (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 473, para. 48.

QUESTION 4

Types and possible contents of unilateral acts**Argentina**

[Original: Spanish]
[18 May 2000]

1. A clear distinction must be drawn among the four traditional kinds of unilateral act: promise, waiver, recognition and protest. These obviously have elements in common, but the Commission must be aware that each of them may also have its own characteristics which ought to be properly identified and studied in its future work.

2. With regard to the content of unilateral acts, their aim must be to produce legal effects which will alter the legal situation of the State carrying out the unilateral act and, indirectly, that of the State or States at which the act is directed. Moreover, there are unilateral acts whose content consists in the definition or clarification of legal concepts in the international sphere, as can be seen, for example, in the history and evolution of some law-of-the-sea institutions.

El Salvador

[Original: Spanish]
[13 April 2000]

The unilateral acts of a State on the international plane can be of various kinds, namely:

(a) *Notification*. The act whereby a State officially informs another State of a fact or situation. As a result of this act, the notified State cannot claim to be unaware of the fact or the situation of which it has been notified;

(b) *Recognition*. The act or series of acts whereby a State confirms and accepts a fact, a situation, an act or a claim. The recognizing State may not subsequently reject the existence, validity or legitimacy of what it has recognized. The following, among others, may be recognized: States, Governments, a territorial situation, the validity of a treaty or judgement or the nationality of persons;

(c) *Protest*. The express act whereby a State declares its intention not to accept or recognize as legitimate a given claim or situation. This is the counterbalance to recognition;

(d) *Waiver*. A statement of intent to relinquish a right, a power, a claim or a demand. Its effect is to extinguish the right or claim in question;

(e) *Unilateral promise*. A written statement of intent made by a State with the clear intention of binding itself to adopt certain behaviour towards other States;

(f) *Declaration*. A unilateral statement of intent by a State on a foreign policy matter, which produces legal effects between the party making the declaration, the party harmed by it and the international community in general;

(g) *Appeal*. An express statement by one State with regard to another that it intends to submit a dispute to an international judicial or diplomatic organ, or any other

international body, for consideration with a view to resolving it or bringing the parties closer together;

(h) *Resolution*. An act of unilateral intent by a State in the application and interpretation of international law.

Georgia

[Original: English]
[3 March 2000]

Declaration, proclamation and notification can be considered as the main types of unilateral acts.

Israel

[Original: English]
[21 June 2000]

In addition to the formal categories of unilateral acts undertaken in the context of treaties (such as ratification, reservation and denunciation) and those which are expressly recognized in international law (such as recognition and protest), there exists a wide variety of possible types and contents of unilateral acts. Thus, for example, a State may undertake a legal commitment to one or more other States, or to the international community as a whole, with respect to the use of its natural resources; to activities on its sovereign territory; to its conduct in international or regional forums; or to its involvement in military operations outside its borders. In general terms, however, it does not seem possible to specify a determinate category of unilateral acts which could produce legal effects.

Italy

[Original: French]
[16 May 2000]

Italy classified unilateral acts into the following three categories:

(a) *Unilateral acts referring to the possibility of invoking a legal situation*. Recognition, protest and waiver belong to this category. These three types of acts require an explicit expression of consent so as to ensure certainty and security in international relations;

(b) *Unilateral acts that create legal obligations*. This category includes promise, an act by which a State obligates itself to adhere or not to adhere to a certain course of conduct. A promise has value only if the State which made it really had the intention of obligating itself by this means. It is difficult, however, to ensure that there is a real willingness to undertake obligations;

(c) *Unilateral acts required for the exercise of a sovereign right*. Such acts are a function of the exercise of powers by States as authorized under international law (delimitation of territorial waters or of an exclusive economic zone, attribution of nationality, registration of a vessel, declaration of war or neutrality).

Netherlands

[Original: English]
[24 March 2000]

1. The contents of unilateral statements are not restricted to certain categories of subject matter. The Netherlands therefore considers the contents of the statement of secondary importance for the purpose of producing legal effects. Of greater relevance are formal criteria such as the unambiguity of the statement and the objectified intention of producing legal effects, that is to say an intention that can be demonstrated objectively.

2. Where statements made by representatives of a State during international legal proceedings are concerned, undertakings should be distinguished from statements encapsulating an interpretation of a particular rule of international law. In the latter case, any objection to the statement can in principle only be addressed to the State in whose name it was made, in the context of the legal proceedings concerned. Nonetheless, such a statement could conceivably also be objected to in bilateral negotiations imposed on both parties by an international court or recommended to the State in question (see the *Gabčíkovo-Nagymaros Project* case¹).

¹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7.

3. Unilateral statements concerning the acceptance of the jurisdiction of ICJ on the basis of the optional clause are in a category of their own, although, as noted above, these statements would be excluded from the definition of unilateral acts on the basis of the Special Rapporteur's and the Working Group of the Commission's criteria.

4. Finally, the Netherlands has the impression that the Special Rapporteur intends to exclude "soft law" (e.g. the Rio Declaration on Environment and Development² or the Ministerial Declaration of the Fourth International Conference on the Protection of the North Sea³) from the scope of the concept. It is not impossible, however, that such declarations would have to be regarded as falling within the scope of joint or concerted statements (see section 2 of the Netherlands' response under "General comments").

² *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.

³ Held in Esbjerg, Denmark, on 8–9 June 1995.

Sweden

[Original: English]
[28 April 2000]

A unilateral act may relate to any subject matter.

QUESTION 5**What legal effects do the acts purport to achieve?****Argentina**

[Original: Spanish]
[18 May 2000]

Normally, the effect will be the creation or modification of an obligation or the waiver of a right of the issuing State, effects governed by the international legal system. The effect may also be to enforce or preserve a right, as in the case of protest. The purpose of a unilateral act may also be to define a legal concept or situation, as can be seen in the development of some law-of-the-sea institutions.

El Salvador

[Original: Spanish]
[13 April 2000]

Generally speaking, once they gain legitimacy, unilateral acts as an expression of the sovereign will of a given State have the effect of creating, extinguishing or modifying obligations of that State vis-à-vis the international community, another State or an international body. The effects vary according to the specific nature of each act, which can be determined by reference to question 4 above.

Finland

[Original: English]
[3 March 2000]

A unilateral act is not only binding to the extent that it intends to be so, but also inasmuch as it creates expectations. Thus it may become binding irrespective of the intention of the person making it.

Georgia

[Original: English]
[3 March 2000]

Unilateral acts may:

- (a) Create obligations for the author State;
- (b) Create rights for other States;
- (c) Revoke rights of the author State;
- (d) Determine the limits of the rights of the author State within certain constraints (Law concerning the Naval Space of Georgia (24 December 1998), determining the maritime zone in the Black Sea);
- (e) Initiate multilateral action;
- (f) Declare on abstaining from participation.

Israel

[Original: English]
[21 June 2000]

A unilateral act with legal effect creates a legal obligation which assumes an objective quality. The State which has engaged in such an act has thus expressed its intention to be regarded as legally bound. The fact that established mechanisms of enforcement may not be available does not alter the status of the unilateral act as a legal obligation, nor does it affect the legal rights of the addressee of the act in the event of breach. In addition, it should also be noted that unilateral acts may contribute to the development of norms of customary law.

Italy

[Original: French]
[16 May 2000]

In answering the questions on the purpose of unilateral acts and the legal effects they purport to achieve, here too it is necessary to make distinctions in accordance with the type of act (see the reply under question 4), and therefore it is impossible to provide a general answer. It is obvious that the purpose of the act varies in each case, as do the legal effects deriving therefrom. There are unilateral acts that achieve immediate legal effects and others that create expectations, often irrespective of the real intention of the subject which formulated the act. In any event, the effects of unilateral acts can never be similar to those of treaties, in order to avoid jeopardizing the security of international relations. Of course, the legitimate expectations of the parties should be safeguarded, but not to the point of creating a new category of agreement.

Netherlands

[Original: English]
[24 March 2000]

If the State on whose behalf a unilateral statement is made intends to produce binding legal effects, these effects are limited by the requirement of lawfulness. In other words, a statement cannot set out to produce effects incompatible with general rules of international law, in particular *jus cogens*. A statement does not necessarily have to be made in all cases with the intention of avoiding any conflict with existing obligations under international law. This raises the question of the hierarchy to be observed between treaty obligations and rights or obligations arising from unilateral acts. It might be held (but this would be a policy decision by the international community) that a treaty obligation always takes precedence, or that the presumption is that the legal effects of a unilateral statement are not incompatible with treaty obligations and that the statement will be interpreted in line with this.

Sweden

[Original: English]
[28 April 2000]

1. The legal effect may be different for different kinds of unilateral acts. The following remarks are fully relevant to promises, whereas the effect of other unilateral acts may be governed by particular regimes.

2. A unilateral act binds the enacting State, through its expressed intention to become bound. However, owing to the element of good faith, the crucial factor is not the "real" intention itself, but its manifestation and a bona fide interpretation of the act. Even though it is true that the State enacting a unilateral act should be protected from unintended and unforeseen consequences, one must also consider the legitimate interests of other parties. This aspect is relevant also for the interpretation of unilateral acts.

QUESTION 6

What is the importance, usefulness and value States attach to their own unilateral acts on the international plane and to the unilateral acts of other States?

Argentina

[Original: Spanish]
[18 May 2000]

1. The performance of unilateral acts is an important means of conducting the State's international relations. That is why Argentina wishes to emphasize the importance of an in-depth analysis of the issue, given the current imprecision of the legal regime governing such acts. The importance of unilateral acts as a means of conducting international relations makes it necessary that the rules governing their requirements, validity and effects, as well as their classification, should be properly formulated. In this connection, systematizing and clarifying this area of

law will doubtless introduce greater legal security and confidence into international relations.

2. Without going into the rather academic issue of whether or not unilateral acts are a source of international law within the meaning of Article 38 of the ICJ Statute, it seems to be established that they can give rise to international rights and obligations for States. In any event, the fact cannot be avoided that a considerable part of legal doctrine has opposed the existence of unilateral acts as sources per se of international obligations. In this respect, Argentina believes that it would be very useful to make a comparison between unilateral acts and other related juridical situations, such as acquiescence and estoppel. A study of such institutions would be very useful for clarifying these issues.

El Salvador

[Original: Spanish]
[13 April 2000]

El Salvador attaches full importance to its own unilateral acts, in the sense of considering itself bound by the terms of any unilateral act emanating from it, this being an authentic source of international law. Of course, from the standpoint of reciprocity, El Salvador also accords full validity to the unilateral acts of other States, provided that they are performed with due formality and acquire authenticity by being expressed by an authority with full powers.

Georgia

[Original: English]
[3 March 2000]

The importance of a unilateral act is determined from the essence of the notion. When a State is able to make any statement feasible of producing international legal effects, the possibility must be underestimated. The unilateral act is a flexible means for a State to express its will in day-to-day diplomacy. A State must respect the unilateral acts of other States, especially of friendly States, at least on the principle of reciprocity.

Israel

[Original: English]
[21 June 2000]

1. In the view of Israel, the vast majority of unilateral acts of States are political in nature and do not produce legal effects. Such acts may involve obligations at the moral or political level, but they are not regulated by international law. In State practice, unilateral declarations are generally designed to allow a Government to express its political will, or to achieve certain political objectives, without involving legal obligations. Their importance and usefulness lie primarily on the political plane, in the realm of inter-State relations.

2. As a matter of course, unilateral declarations are not subjected to a preliminary legal examination by the State

in order to determine whether a legal obligation has been undertaken since it is generally assumed that the declaration is a political rather than a legal act. States will as a rule be reluctant to undertake legal obligations or restrictions on a unilateral basis. Only when there exists a clear and unequivocal intention to that effect will Israel attribute legal significance to its own unilateral acts or to those of other States.

Italy

[Original: French]
[16 May 2000]

The answer to the question concerning the importance, usefulness and value attached to unilateral acts is similar to the preceding one: it depends on the type of act under consideration (see the reply under question 4). In any event, with regard to unilateral acts of other countries or its own acts, Italy does not attach the same binding value to them as to treaties, for what is involved after all are internal acts, even if they are addressed to other States, and they cannot achieve the same effects as treaties, taking into account the need for certainty and security in international relations to which reference has been made above.

Netherlands

[Original: English]
[24 March 2000]

The Netherlands acknowledges the importance of unilateral acts at the international level, while at the same time noting that, in view of the large variety of types of unilateral acts, it is difficult to identify common legal effects and provide specific answers to questions posed.

Sweden

[Original: English]
[3 March 2000]

The unilateral act may be convenient in situations where a treaty would be too cumbersome or in situations where it might be politically difficult for parties to negotiate directly with one another.

QUESTION 7**Which rules of interpretation apply to unilateral acts?****Argentina**

[Original: Spanish]
[18 May 2000]

One area where a distinction must be made between the rules of the law of treaties and those applicable to unilateral acts is that of the interpretation of unilateral acts. As stated by ICJ in the *Nuclear Tests* cases,¹ when a State

¹ *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.

makes a declaration limiting its future freedom of action, a restrictive interpretation must be made. This is simply a corollary of the famous PCIJ dictum in the "*Lotus*" case,² to the effect that restrictions on the sovereignty of States cannot be presumed. As in any unilateral juridical act, the intention of the author of the act (in this case, the State or, more precisely, the organ of the State) plays a fundamental role. For this, one crucial element must be borne in mind, namely, the circumstances surrounding the act; in other words, the context in which the act takes place

² "*Lotus*", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10.

may determine its interpretation. Another rule stipulated by ICJ, in the *Anglo-Iranian Oil Co.* case,³ is that the act must be interpreted in such a way that it produces effects which are in conformity with, and not contrary to, existing law.

³ *Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952, p. 93.*

Austria

[Original: English]
[2 March 2000]

In the *Fisheries Jurisdiction* case,¹ ICJ considered the regime relating to the interpretation of unilateral declarations made under Article 36 of the ICJ Statute not to be identical with that established for the interpretation of treaties by the 1969 Vienna Convention. The Court observed that the provisions of that Convention might only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction. The Court explained further that it would interpret the relevant words of such a declaration including a reservation contained therein in a natural and reasonable way, having due regard for the *intention* of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. Moreover, the intention of the State concerned could be deduced not only from the text of the relevant clause, but also from the context in which the clause was to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served. With respect to the interpretation of these unilateral acts, therefore, it appears that the Court attaches much higher interpretative significance to the subjective element than would be permissible under the rules of "objective" treaty interpretation pursuant to articles 31–32 of the Convention. How far this subjective element can be taken and whether or to what extent the same reasoning is applicable to other categories of unilateral acts remain unclear.

¹ *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432.*

El Salvador

[Original: Spanish]
[13 April 2000]

Unilateral acts must be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in the light of their object and purpose. A special meaning can be given to a term only if it is established that the State performing the unilateral act so intended.

Finland

See the reply to question 1.

Georgia

[Original: English]
[3 March 2000]

Treaty bodies of intergovernmental organizations with appropriate competence, such as ICJ, may consider the will and validity of unilateral acts.

Israel

[Original: English]
[21 June 2000]

1. As stated above (question 3), the process of defining a unilateral act as one which produces legal effects is essentially an exercise in interpreting the intention of the State which engages in the unilateral act. It is because of the difficulty associated with ascertaining the true intention of the State that strict rules of interpretation should be applied in order to determine whether a unilateral act produces legal effects. In this regard, the need to subject the unilateral act to a good faith interpretation in accordance with its ordinary meaning, along the lines of article 31 of the 1969 Vienna Convention, is an important, though insufficient, part of the interpretation process. In addition, and as indicated in draft article 2 of the second report of the Special Rapporteur on unilateral acts of States,¹ the unilateral legal act must be an unequivocal and autonomous expression of will, formulated publicly and directed in explicit terms to the addressee of the act.

2. In this context, it should be emphasized that the failure to adopt rigid standards of interpretation would, in the view of Israel, not only undermine the effectiveness of the legal regime regulating unilateral acts, but would also place States in an impossible position by threatening to attribute legal consequences to unilateral acts which were not intended to have such an effect. This is especially so in the light of the fact that unilateral acts of a strictly political nature are a matter of course in contemporary inter-State practice and are prevalent, inter alia, in declarations made in international forums, in the course of informal consultations, and in the context of negotiations between States.

¹ *Yearbook ... 1999, vol. II (Part One), document A/CN.4/500 and Add.1, para. 38.*

Italy

[Original: French]
[16 May 2000]

With regard to the question concerning the rules of interpretation applying to unilateral acts, there is a tendency to apply to them the principles of interpretation referred to in articles 31–33 of the 1969 Vienna Convention. On the other hand, the other provisions of that Convention do not apply, in view of the nature of unilateral acts, which is inherently different from that of treaties.

Netherlands

[Original: English]
[24 March 2000]

The obvious solution would be to apply by analogy the rules of interpretation enshrined in the 1969 Vienna Convention.

Sweden

[Original: English]
[28 April 2000]

While the provisions of articles 31–32 of the 1969 Vienna Convention are relevant for the interpretation of unilateral acts, the special character of the unilateral act has to be taken into account (see the response to question 5).

QUESTION 8

Duration of unilateral acts**El Salvador**

[Original: Spanish]
[13 April 2000]

The duration of unilateral acts depends solely on the time which the State performing the act considers necessary for its validity, since it is an act of full sovereignty. As a result, the State could very well revoke the act itself if it sees fit.

Georgia

[Original: English]
[3 March 2000]

1. If the author State considers the effects of the act to be no longer expedient, it may revoke it.
2. The act may be terminated after a fundamental change of circumstances has occurred.

Israel

[Original: English]
[21 June 2000]

It is doubtful whether one can establish a uniform rule regarding the duration of unilateral acts. In principle, the duration of a unilateral undertaking will be determined by the nature of the obligation, the specific content of the unilateral act and the circumstances in a given case. In addition, it is reasonable to assume that, in certain cases, the legal effects of a unilateral undertaking would come to an end as a result of extraneous events. This could be the case, for example, in the event of a supervening impossibility of performance or owing to a fundamental change of circumstances.

Italy

[Original: French]
[16 May 2000]

The answer to the question concerning the duration of unilateral acts depends on the context in which the act is implemented and on its purpose. In general, it is not possible to specify the duration of unilateral acts. Indeed, it is difficult, if not impossible, to envisage an unlimited duration for such acts, which are by their nature informal, for otherwise the result would be the creation of a new category of agreement.

Netherlands

[Original: English]
[24 March 2000]

In this respect also, the relevant provisions of the 1969 Vienna Convention apply by analogy. In principle, there are no limits to the duration of the validity of unilateral acts. They nonetheless cease to apply as a result of desuetude or if set aside by bilateral treaties. A change of government does not affect the validity of acts, unless they are expressly revoked. Finally, the duration of the validity of a unilateral statement may be restricted because it contains a time limit or an explicit condition that ceases to apply at a particular time.

Sweden

[Original: English]
[28 April 2000]

It is probably not possible to make a general distinction between unilateral acts and treaties in this respect, but it seems likely that the special character of different types of unilateral acts must be taken into account.

QUESTION 9

Possible revocability of a unilateral act**Argentina**

[Original: Spanish]
[18 May 2000]

With regard to the possible revocability of unilateral acts, Argentina believes that the author of a unilateral act,

once its intent has been externalized, does not have an arbitrary power to review the act and thus cannot revoke *ad libitum* the promise, waiver or other act concerned. Of course, the author may make the act subject to a time limit or to a resolution, or make express provision for the possibility of revoking it. It should be mentioned that a part of legal doctrine maintains that if the possibility of revo-

cation does not arise from the context or the nature of the unilateral act, promises or waivers are, in theory, irrevocable. Another part, however, maintains that they can, in theory, be revoked, but not arbitrarily or contrary to good faith. In any event, it is clear that the resulting legal situation cannot be immutable. General rules, such as force majeure, chance and, especially, *rebus sic stantibus*, apply here. Moreover, some unilateral acts, such as protest, are generally revocable.

El Salvador

[Original: Spanish]
[13 April 2000]

If one applies the 1969 Vienna Convention, a unilateral act may be modified or revoked because it is an expression of the sovereign will of a State, but notice of such modification or revocation must, without question, be given through the same channels as the State used originally for the act.

Finland

[Original: English]
[3 March 2000]

A unilateral act can be revoked under the formula elaborated by ICJ in the *Nuclear Tests* case.¹

¹ *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.

Georgia

[Original: English]
[3 March 2000]

Reasons for the revocation can be:

- (a) An error in act;
- (b) The fraudulent conduct of another State;
- (c) Bribery of the official making the declaration;
- (d) Contradiction with a general rule of international law;
- (e) Contradiction with the commitment of a State under international treaties.

Israel

[Original: English]
[21 June 2000]

1. In general terms, it does not seem logical to enable a State to produce legal effects through a unilateral act, but not to recognize its capacity to revoke that act on a unilateral basis in certain circumstances. Naturally, a State may undertake an obligation which would limit its right of revocation. However, in the absence of such an undertaking the possibility of revocation, subject to certain conditions, should be accepted.

2. Clearly, the specific character and content of the unilateral act may indicate the circumstances under which re-

vocation is possible. However, several other factors should be considered. In this regard it is worth examining whether the principle of good faith, for example, should require that reasonable notice be given prior to revocation, though such a condition may not be practical in every instance.

Italy

[Original: French]
[16 May 2000]

As to the possibility of revoking a unilateral act, a unilateral act may be revoked in accordance with the formula arrived at by ICJ in the *Nuclear Tests* case¹ (judgment of 20 December 1974).

¹ *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.

Netherlands

[Original: English]
[24 March 2000]

The revocation of a unilateral act is also, in the view of the Netherlands, subject to the analogous application of the relevant provisions on the termination of treaties, as set down in the 1969 Vienna Convention. The Netherlands would suggest that the Commission consider the question of the application and invocation of the *rebus sic stantibus* proviso with regard to unilateral acts.

Sweden

[Original: English]
[28 April 2000]

1. While treaty regimes usually contain provisions on issues like termination, suspension and withdrawal, it is in the nature of unilateral acts that they do not regulate the corresponding issues. For this reason, there is a need for general rules on the subject. On the other hand, it is necessary to take into account the fact that these issues have to be treated differently for different forms of unilateral acts. The question whether a unilateral act can be revoked, and under what conditions, is difficult and can be answered only by taking into account the circumstances of each particular case. For example, it does not seem possible to revoke a recognition, unless there is ground to revoke it (for example, that a State no longer exists).

2. However, a few observations can be offered. Obligations arising out of unilateral acts are affected by later treaties in analogy with articles 58–59 of the 1969 Vienna Convention, just as supervening impossibility of performance or fundamental change of circumstances affect such obligations. Even if there is no element of *quid pro quo* in the origin of a unilateral act, there is often an element of reciprocity in the legal relationship arising out of these acts. It would not seem unreasonable if a State were able to withdraw a promise if another subject took advantage of that promise in bad faith. Similar considerations apply to modifications.

3. Lastly, it seems logical to hold that unilateral acts can be invalidated in cases of error, fraud, corruption, coercion, use of force or *jus cogens*. In this context, it should be noted that the

1969 Vienna Convention makes a certain distinction between voidable and void treaties, whereas draft article 7 does not make such a distinction with regard to unilateral acts.

CHECKLIST OF DOCUMENTS OF THE FIFTY-SECOND SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/502	Filling of casual vacancies in the Commission (article 11 of the statute): note by the Secretariat	Reproduced in the present volume.
A/CN.4/503	Provisional agenda	Mimeographed. For agenda as adopted, see <i>Yearbook ... 2000</i> , vol. II (Part Two), p. 14, para. 12.
A/CN.4/504 and Add.1	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-fourth session of the General Assembly	Mimeographed.
A/CN.4/505	Third report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	Reproduced in the present volume.
A/CN.4/506 [and Corr.1] and Add.1	First report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur	Idem.
A/CN.4/507 and Add.1 [and Add.1/Corr.1], Add.2 [and Add.2/Corr.1 and 2], Add.3 [and Add.3/Corr.1] and Add.4	Third report on State responsibility, by Mr. James Crawford, Special Rapporteur	Idem.
A/CN.4/508 and Add.1-4	Fifth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	Idem.
A/CN.4/509	International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities): comments and observations received from Governments	Idem.
A/CN.4/510	Third 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.4/511	Unilateral acts of States: replies from Governments to the questionnaire	Idem.
A/CN.4/L.590	Draft report of the International Law Commission on the work of its fifty-second session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10)</i> . The final text appears in <i>Yearbook ... 2000</i> , vol. II (Part Two), p. 13.
A/CN.4/L.591	Idem: chapter II (Summary of the work of the Commission at its fifty-second session)	Idem, p. 15.
A/CN.4/L.592	Idem: chapter III (Specific issues on which comments would be of particular interest to the Commission)	Idem, p. 17.
A/CN.4/L.593 [and Corr.1] and Add.1-6	Idem: chapter IV (State responsibility)	Idem, p. 18.
A/CN.4/L.594	Idem: chapter V (Diplomatic protection)	Idem, p. 72.
A/CN.4/L.595 and Add.1	Idem: chapter VI (Unilateral acts of States)	Idem, p. 87.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.596 and Add.1-4	Idem: chapter VII (Reservations to treaties)	Idem, p. 101.
A/CN.4/L.597	Idem: chapter VIII (International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities))	Idem, p. 124.
A/CN.4/L.598 and Add.1	Idem: chapter IX (Other decisions and conclusions of the Commission)	Idem, p. 131.
A/CN.4/L.599	Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee: guidelines 1.1.8, 1.4.6 [1.4.6, 1.4.7], 1.4.7 [1.4.8], 1.7, 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4], 1.7.2 [1.7.5]	Text reproduced in <i>Yearbook ... 2000</i> , vol. I, summary record of the 2640th meeting (para. 61).
A/CN.4/L.600	State responsibility. Draft articles provisionally adopted by the Drafting Committee on second reading	Mimeographed. For the text, see <i>Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10)</i> . The final text appears in <i>Yearbook ... 2000</i> , vol. II (Part Two), chap. IV, annex.
A/CN.4/SR.2612-A/ CN.4/SR.2664	Provisional summary records of the 2612th to 2664th meetings	Mimeographed. The final text appears in <i>Yearbook ... 2000</i> , vol. I.