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NOTE

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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-third 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

CAHDI	Ad Hoc Committee of Legal Advisers on Public International Law
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
IMCO	Intergovernmental Maritime Consultative Organization (now IMO)
IMO	International Maritime Organization
ITU	International Telecommunication Union
OAS	Organization of American States
OUA	Organization of African Unity
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organization
SADC	Southern African Development Community
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHO	World Health Organization
WTO	World Trade Organization

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<i>I.C.J. Pleadings</i>	ICJ, <i>Pleadings, Oral Arguments, Documents</i>
<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 B</i>	PCIJ, <i>Collection of Advisory Opinions</i> (Nos. 1–18: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40–80: beginning in 1931)
<i>P.C.I.J., Series C</i>	PCIJ, <i>Pleadings, Oral Arguments, Documents</i> (Nos. 52–88: beginning in 1931)
RGDIP	<i>Revue générale de droit international public</i> (Paris)
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

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

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NOTE CONCERNING QUOTATIONS

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

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

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

STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/517 and Add.1

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

[Original: English]
[2 and 3 April 2001]

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Multilateral instruments cited in the present report

	<i>Source</i>
Convention for the pacific settlement of international disputes (The Hague, 29 July 1899)	James Brown Scott, ed., <i>The Hague Conventions and Declarations of 1899 and 1907</i> , 3rd ed. (New York, Oxford University Press, 1918), p. 41.
Convention for the pacific settlement of international disputes (The Hague, 18 October 1907)	<i>Ibid.</i>

	<i>Source</i>
American Treaty on Pacific Settlement (Pact of Bogota) (Bogotá, 30 April 1948)	United Nations, <i>Treaty Series</i> , vol. 30, No. 449, p. 55.
Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954)	<i>Ibid.</i> , vol. 249, No. 3511, p. 215.
European Convention for the peaceful settlement of disputes (Strasbourg, 29 April 1957)	<i>Ibid.</i> , vol. 320, No. 4646, p. 243.
Antarctic Treaty (Washington, D.C., 1 December 1959)	<i>Ibid.</i> , vol. 402, No. 5778, p. 71.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, No. 7310, p. 95.
Convention on the settlement of investment disputes between States and nationals of other States (Washington, D.C., 18 March 1965)	<i>Ibid.</i> , vol. 575, No. 8359, p. 159.
Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies (Moscow, London and Washington, 27 January 1967)	<i>Ibid.</i> , vol. 610, No. 8843, p. 205.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977)	<i>Ibid.</i> , vol. 1125, No. 17512, p. 3.
World Charter for Nature (New York, 28 October 1982)	<i>Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 51, resolution 37/7, annex.</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.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)	<i>Ibid.</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.
Convention on environmental impact assessment in a transboundary context (Espoo, 25 February 1991)	United Nations, <i>Treaty Series</i> , vol. 1989, No. 34028, p. 309.
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	<i>Ibid.</i> , vol. 2105, No. 36605, p. 457.
Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)	Council of Europe, <i>European Treaty Series</i> , No. 150.
Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994)	United Nations, <i>Treaty Series</i> , vol. 1867, No. 31874, p. 3.
Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, restructuring the control machinery established thereby (Strasbourg, 11 May 1994)	<i>Ibid.</i> , vol. 2061, No. 2889, p. 7.
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, vol. III, resolution 51/229, annex.</i>
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, <i>Treaty Series</i> , vol. 2187, No. 38544, p. 3.

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“‘Primary’ and ‘secondary’ rules in the law of State responsibility: categorizing international obligations”, *Netherlands Yearbook of International Law* (The Hague), vol. XVI, 1985, pp. 81–109.

MERRILLS, J. G.

International Dispute Settlement, 3rd ed. Cambridge, Cambridge University Press, 1998. 354 p.

Introduction¹

1. At the fifty-second session of the Commission in 2000, the Drafting Committee provisionally adopted a complete text of the substantive draft articles on second reading.² The articles have not yet been debated in plenary but they were included, as a provisional text, in the report of the Commission to the General Assembly on its fifty-second session.³ This was done in order to allow a further opportunity for comment. The Drafting Committee’s text was the subject of substantial discussion in the Sixth Committee⁴ and of further written comments by a number of Governments,⁵ as well as by an ILA study group.⁶

2. The comments made so far by Governments on the provisional text suggest that, overall, its basic structure and most of its individual provisions are acceptable. This includes many of the articles first proposed and adopted in 2000.⁷ For example, the distinction between the secondary obligations of the responsible State (part two) and the right of other States to invoke that responsibility (part two *bis*) was widely endorsed. Likewise the distinction in principle between “injured States” (art. 43) and other States with a legal interest in the obligation breached (art. 49) received general support, even if the formulation of the articles requires further attention. The same may

be said for articles omitted from the first reading text:⁸ there were few calls for their reinsertion, even for article [19].⁹ Generally the focus of the debate has been on a few remaining issues, especially the chapters dealing with “serious breaches” (part two, chap. III) and countermeasures (part two *bis*, chap. II).

3. Many of the comments made relate to questions of an essentially drafting character. These can conveniently be considered by the Drafting Committee in the course of its revision of the text as a whole. The annex to the present report sets out various drafting suggestions made, with brief comments on them. The report itself focuses only on those substantial issues which remain unresolved. They seem to be the following:

(a) The definition of “damage” and “injury” and its role in the articles, in conjunction with articles 43 and 49 which specify the States entitled to invoke responsibility;

(b) The retention of part two, chapter III, and possible changes to it;

(c) Whether a separate chapter dealing with countermeasures should be retained, or whether it is sufficient to expand the treatment of countermeasures in the context of article 23; if part two *bis*, chapter II, is retained, what changes are required to the three controversial articles (arts. 51, 53 and 54).

4. As will be seen from the annex, a number of the comments made relate not to the articles themselves, but to the need for their elaboration or explanation in the commentaries. The commentaries adopted on first reading are by no means consistent in their style or content. Those for part one are lengthy. They provide detailed substantive justifications and cite extensive authority, judicial and other, for the positions taken. Those on part two are shorter and are much more in the nature of comments on the language and intent of specific provisions. The Special Rapporteur has prepared commentaries which are something of a compromise between the two styles: more substantive and detailed than those for former part two, less argumentative and doctrinal than those for former part one. It will be for the Commission to decide whether an appropriate balance has been struck.

¹ The Special Rapporteur once again wishes to thank Mr. Pierre Bodeau, Research Fellow at the Research Centre for International Law, University of Cambridge; Ms. Jacqueline Peel, Lecturer in Law, Queensland University of Technology; Mr. Christian Tams, Gonville & Caius College, Cambridge; and the Leverhulme Trust for its generous financial support.

² See *Yearbook ... 2000*, vol. II (Part Two), chap. IV, annex, p. 65; and for the statement of the Chairman of the Drafting Committee, Mr. Giorgio Gaja, see *Yearbook ... 2000*, vol. I, 2662nd meeting, p. 386. In the present report, references to draft articles will use the numbering of the articles as provisionally adopted in 2000. First reading articles will be shown in square brackets.

³ *Yearbook ... 2000*, vol. II (Part Two), chap. IV, annex, p. 65.

⁴ See the topical summary of the discussion held in the Sixth Committee during the fifty-fifth session of the General Assembly (A/CN.4/513, sect. A).

⁵ See A/CN.4/515 and Add.1–3, reproduced in the present volume. References are made in the present report to the excerpts from the written comments of Governments in that document.

⁶ The Study Group’s first report was submitted on 8 June 2000. The Study Group consists of Peter Malanczuk (Netherlands, chair and convener), Koorosh Ameli (Islamic Republic of Iran); David Caron (United States of America), Pierre-Marie Dupuy (France), Malgosia Fitzmaurice (United Kingdom of Great Britain and Northern Ireland), Vera Gowlland-Debbas (Switzerland), Werner Meng (Germany), Shinya Murase (Japan), Marina Spinedi (Italy), Guido Soares (Brazil), Zhaojie Li (China) and Tiyanjana Maluwa (Malawi).

⁷ See footnote 3 above.

⁸ The following first reading articles (see *Yearbook ... 1996*, vol. II (Part Two), pp. 59–64) have been omitted altogether or have no direct equivalent on second reading: arts. [2], [11], [13], [18(3)–(5)], [19], [20], [21], [26] and [51].

⁹ See A/CN.4/513 (footnote 4 above), paras. 89–91.

CHAPTER I

Remaining general issues

5. It is necessary to begin with two general matters. They are, first, the question of dispute resolution, which is the subject of part three of the draft articles adopted on first reading,¹⁰ and secondly, the question of the form of the draft articles.¹¹ As to the first, the Commission has so far refrained from proposing dispute settlement procedures in its final articles.¹² But it has already departed from this practice in part three, which has in turn generated a substantial number of comments from Governments. As to the second, the Commission's practice has been to make some recommendation to the General Assembly on questions of form, and there is every reason to do so in the present case.

6. Of course the two questions are related. It is only if the draft articles are envisaged as an international convention that there is any point in making provision for third-party settlement of disputes. On the other hand, it is desirable to consider the question of settlement of disputes on its own merits, before turning to the question of form.

A. Settlement of disputes concerning State responsibility

1. THE SYSTEM OF PART THREE AS ADOPTED ON FIRST READING

7. As adopted on first reading, the draft articles made quite extensive provision for the settlement of disputes.

8. Specifically in relation to countermeasures, article [48], paragraph 2, linked the taking of countermeasures to binding dispute settlement procedures. If no other such procedures were in force for the parties, those under part three were made applicable. The effect of the linkage was that a State resorting to countermeasures could be required by the "target" State to justify its action before an arbitral tribunal.

9. More generally, part three dealt with the resolution of disputes "regarding the interpretation or application of the present articles".¹³ The parties to such a dispute had first, upon request, to seek to settle it by negotiation (art. [54]). Other States parties could tender their good offices or offer to mediate in the dispute (art. [55]). If the dispute was not settled within three months, any disputing party could submit it to conciliation in accordance

with annex I (art. [56]). The task of the Conciliation Commission was not to adjudicate but "to elucidate the questions in dispute ... by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement" (art. [57], para. 1). All the Conciliation Commission could do, if the parties did not agree to a settlement, was to issue a final report embodying its "evaluation of the dispute and ... recommendations for settlement" (art. [57], para. 5). The draft articles also provided for optional arbitration in accordance with annex II, either in lieu of or subsequent to conciliation (art. 58, para. 1). In case of arbitration under article [58], ICJ was given jurisdiction to confirm or set aside the arbitral award (art. [60]).

10. The only form of compulsory and binding third-party dispute settlement contemplated by part three, however, was arbitration at the instance of any State subjected to countermeasures (art. [58], para. 2). This provision was analysed in the Special Rapporteur's second report.¹⁴ The essential point is that article [58], paragraph 2, would have privileged the State which had committed an internationally wrongful act. By definition that State, as the target or object of countermeasures, would have committed an internationally wrongful act: the essence of countermeasures is that they are taken in response to such an act. Thus the effect of article [58], paragraph 2, was to give a unilateral right to arbitrate not to the injured, but to the responsible State. Such inequality as between the two States concerned could not be justified in principle, and could even give an injured State an incentive to take countermeasures in order to compel the responsible State to resort to arbitration. The Commission generally endorsed that criticism, although many members continued to stress the importance of peaceful third-party settlement of disputes as an alternative to the taking of countermeasures.¹⁵ The Commission's debate in 1999 led to two conclusions: first, that the specific form of unilateral arbitration proposed in article [58], paragraph 2, presented serious difficulties, and secondly, that the desirability of compulsory dispute settlement had to be considered both for the injured State and for the allegedly responsible State.

11. Both before and since 1999, the balance of Government comments has been against the linkage of countermeasures with compulsory dispute settlement.¹⁶

2. SPECIAL PROVISION FOR DISPUTE SETTLEMENT IN THE DRAFT ARTICLES?

12. Since provision for binding dispute settlement could only be included in a treaty, it is necessary to assume for the sake of discussion that this will be the form

¹⁰ See footnote 8 above.

¹¹ The reasons why these issues have so far been left to one side are explained in the Special Rapporteur's third report on State responsibility, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1-4, p. 12, para. 6.

¹² For example, the articles on the law of treaties made no provision for compulsory third-party adjudication of disputes concerning article 53 (Treaties conflicting with a peremptory norm of general international law ("*jus cogens*")); article 66 (Procedures for judicial settlement, arbitration and conciliation) was added at the United Nations Conference on the Law of Treaties (see the 1969 Vienna Convention).

¹³ *Yearbook ... 1996* (see footnote 8 above), art. 54, p. 64.

¹⁴ *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add. 1-4, pp. 94-95, paras. 386-389.

¹⁵ *Ibid.*, vol. II (Part Two), pp. 87-88, paras. 438-449.

¹⁶ See, for example, the comments in *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/488 and Add.1-3, pp. 169-172 (on the draft articles as adopted in 1996) and the more recent views reproduced

of the draft articles. Indeed, part three clearly does so assume, with its repeated reference to “States Parties to the present articles”.¹⁷ The question is whether, on that assumption, provision should be made for compulsory dispute settlement, open both to the injured State(s) and the allegedly responsible State.

13. In stating the question in this way, the Special Rapporteur discounts both optional arbitration and non-binding forms of dispute settlement. It is not necessary for the draft articles to provide yet another optional mechanism for the judicial settlement of disputes.¹⁸ As to non-binding forms of dispute settlement such as conciliation, mediation and inquiry, no doubt these have value, at least in specialized contexts. States may already resort to them pursuant to the general obligation of dispute settlement in Article 33 of the Charter of the United Nations, and specific provision is made, for example, in the two Conventions for the pacific settlement of international disputes of 1899 and 1907.¹⁹ The fact remains that, outside the context of maritime incidents, there has been little recourse to these methods in resolving disputes over State responsibility.²⁰ Moreover, in the light of the development of general and/or compulsory third-party dispute settlement in such major standard-setting treaties as the United Nations Convention on the Law of the Sea and the associated agreements for its implementation, the Marrakesh Agreement establishing the World Trade Organization, and Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, restructuring the control machinery established thereby, to provide only a “soft” form of dispute settlement in the draft articles might even appear a regressive step.

14. In considering the question of the compulsory judicial settlement of disputes under the draft articles, the first question is one of scope. Part three uses the standard formula of a “dispute regarding the interpretation or application of the present articles”.²¹ In the context of the text as a whole, especially articles 2 and 12, this formula potentially covers any and every dispute concerning the responsibility of a State for internationally wrongful conduct at the instance of any State referred to in article 43 or 49, whether the conduct involves breach of a treaty or of any other international obligation. In other words, the scope of such a provision would not be limited to disputes as to the specific application of particular provisions of the draft articles in themselves (e.g. those concerning attribution or the circumstances

precluding wrongfulness). It would extend to the application and interpretation of the primary rules, i.e. those laying down obligations for States’ breach of which entails their responsibility. In short, any dispute between States as to the responsibility of one of them for a breach of an international obligation, whatever its origin, would involve the application if not the interpretation of the draft articles.²²

15. Even if a narrower view were to be taken of the scope of the phrase “interpretation or application”, a huge swath of State responsibility disputes would still be covered. The following would be included, for example: any question concerning the attribution of conduct to a State (part one, chap. II); any question as to whether an obligation was in force for a State (art. 13) or as to the existence of a continuing breach of an obligation (art. 14); any question as to the existence of a circumstance precluding wrongfulness (part one, chap. V) or as to the nature and extent of the obligations of cessation and reparation for a breach (part two, chaps. I–II). Moreover, even if the core of a dispute was the interpretation or application of a particular primary rule or obligation rather than the resulting secondary obligations covered by the draft articles, it would be easy to present an international dispute so as to implicate the latter. On either view, compulsory dispute settlement would extend to all or virtually all matters of State responsibility. Indeed, given the close link between primary and secondary obligations of responsibility, it is natural and inevitable that this would be so.

16. There is a further difficulty which arises from the intertwining of primary and secondary obligations and the interconnectedness of the different “compartments” of international law. Not merely is it difficult to isolate a domain of the application of secondary obligations of State responsibility; it is difficult to isolate a domain of obligations of State responsibility as such, distinct from other fields. For example, questions essentially concerning the scope of land territory raised before ICJ may include allegations of State responsibility for the occupation of or incursions into the disputed territory,²³ or the exercise of enforcement powers in disputed maritime zones may involve issues of State responsibility.²⁴ State responsibility is an aspect

in A/CN.4/513 (footnote 4 above), paras. 19–21, and A/CN.4/515 and Add.1–3 (footnote 5 above).

¹⁷ *Yearbook ... 1996* (see footnote 8 above), p. 64.

¹⁸ Apart from the optional clause of the ICJ Statute and multilateral treaties providing for general recourse to judicial settlement (e.g. American Treaty on Pacific Settlement (Pact of Bogota); European Convention for the peaceful settlement of disputes), reference may be made to the *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States* (The Hague, International Bureau of the Permanent Court of Arbitration, 20 October 1992). No State in the world lacks access to one or more means of optional judicial settlement of disputes.

¹⁹ See articles 2–8 and 9–14 of the 1899 Convention, and the more detailed regulation in articles 2–8 and 9–36 of the 1907 Convention.

²⁰ For the experience of commissions of inquiry, see Merrills, *International Dispute Settlement*, chap. 3, pp. 44–61.

²¹ *Yearbook ... 1996* (see footnote 8 above), p. 64.

²² The phrase “dispute regarding the interpretation or application” of a treaty has been given a broad interpretation. See, for example, *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, pp. 15–16 and 28–29; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 427–428, paras. 81 and 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, pp. 615–616, paras. 31–32; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 820, para. 51; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 18, paras. 24–25; and *ibid.* (*Libyan Arab Jamahiriya v. United States of America*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 123.

²³ As in *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 317–319, paras. 95–102.

²⁴ See, for example, *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116.

of the structure of general international law as a whole. Not merely would it be very difficult to quarantine for the purposes of dispute settlement the issues specifically addressed in the draft articles; even if this could be done, it would produce very artificial results.

17. As noted above, the draft articles as adopted on first reading provided for compulsory arbitration only for disputes concerning countermeasures, and then only at the instance of the target State. So far as Government comments are concerned, while the importance of peaceful settlement of disputes has been stressed, few Governments have sought to go further than this. Most Governments have taken the view that general provisions for compulsory dispute settlement cannot realistically be included in the draft articles.²⁵

18. The Special Rapporteur agrees. For the reasons given above, a system of optional dispute resolution associated with the draft articles would add little or nothing to what already exists. A system of residual compulsory third-party dispute settlement would have the effect, for most purposes, of instituting third-party dispute settlement for the whole domain of international law, which is in so many ways concerned with the performance by a State of its international obligations. There is no indication that States are currently ready to undertake such a general commitment. Progress has been made in the context of particular fields of international law and particular regions, and this is surely the way forward.

19. Moreover, even if States were willing to undertake further commitments of a general character in relation to dispute settlement, there is no likelihood that they would do so in the framework of articles on State responsibility, aspects of which remain controversial. On the assumption that the articles were to be adopted by States in the form of a general convention, it cannot be expected that the convention would contain provisions for general and compulsory settlement of disputes by arbitration or adjudication. In the Special Rapporteur's view, part three and the two annexes should be deleted. Questions of dispute resolution in relation to State responsibility should be left to be resolved by existing provisions and procedures.

20. One further suggestion needs to be mentioned. China agrees that the existing provisions of part three on dispute settlement are inconsistent with the principle of free choice of means as stated in Article 33 of the Charter of the United Nations. However, it

does not agree with the simple deletion of all the articles concerning dispute settlement. Since the question of State responsibility involves rights and obligations between States as well as their vital interests, it is a sensitive area of international law in which controversy arises easily. In order to deal with these questions properly, it is necessary to set out general provisions to serve as principles for the settlement of disputes arising from State responsibility, including in particular strict compliance with the obligation to settle disputes peacefully as stipulated in Article 2, paragraph 3, and Article 33 of the Charter of the United Nations.²⁶

It accordingly proposes that part four should contain a general provision in relation to the peaceful settlement

of disputes concerning State responsibility. Such a provision, which could be modelled on Article 33 of the Charter, would go part of the way towards meeting the concern that claims of State responsibility not be the occasion for coercive unilateral measures by any State. The Commission may wish to consider the idea, even if, in the absence of a binding convention containing provision for compulsory settlement, no meaningful new obligation can be imposed in this field.

B. The form of the draft articles

21. Turning to the question of the form the draft articles might take, a range of views has been expressed by Governments as well as within the Commission.²⁷ The different considerations may be summarized as follows.

1. A CONVENTION ON STATE RESPONSIBILITY?

22. Those who favour this option note the stabilizing influence that the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention) has had, and its strong continuing influence on customary international law, irrespective of whether particular States are parties to it. According to this view, the lengthy and careful work of the Commission on State responsibility merits being reflected in a lawmaking text. The traditional and established way in which this is done is by a treaty adopted either by a diplomatic conference or within the framework of the Sixth Committee.²⁸

2. ADOPTION BY THE GENERAL ASSEMBLY IN SOME FORM?

23. Other Governments and commentators doubt the wisdom of attempting to codify the general rules of State responsibility in treaty form. They note the need for flexibility and for a continued process of legal development, as well as the rather tentative and controversial character of aspects of the text. They doubt that States would see it in their interests to ratify an eventual treaty, rather than relying on particular aspects of it as the occasion arises. They note the destabilizing and even "decodifying"²⁹ effect that an unsuccessful convention may have. In their view it is more realistic, and is likely to be more effective, to rely on international courts and tribunals, on State practice and doctrine to adopt and apply the rules in the text. These will have more influence on international law in the form of a declaration or other approved statement than they would have if included in an unratified and possibly controversial treaty. They note that ICJ has already applied provisions taken from the draft articles on a number of occasions,³⁰ even

²⁷ See A/CN.4/513 (footnote 4 above), paras. 22–24, and A/CN.4/515 and Add.1–3 (footnote 5 above).

²⁸ This general view is expressed, for example, by the Nordic countries, Slovakia and Spain (A/CN.4/515 and Add.1–3 (footnote 5 above)).

²⁹ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, pp. 51–52, para. 165.

³⁰ See, for example, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment*, *I.C.J. Reports 1997*, pp. 38–41, paras. 47 and 50–53; p. 46, para. 58; pp. 54–56, paras. 79 and 83; and *Difference*

²⁵ See paragraph 11 above.

²⁶ A/CN.4/515 and Add.1–3 (see footnote 5 above).

though they had still only been provisionally adopted by the Commission. This experience suggests that the articles may have long-term influence even if they do not take the form of a convention.³¹

3. THE ISSUE OF PROCESS

24. A number of Governments express concern about the issue of process. Whether the articles are embodied in a convention or a declaration is less important, in their view, than the question of whether and how the substance of the text is to be reviewed and considered. A preparatory commission process, as adopted for example for the draft statute for an international criminal court, is seen as extremely time-consuming. It is also much less appropriate for a statement of secondary rules of international law, abstracted from any specific field of primary legal obligations but with wide-ranging implications for international law as a whole. As noted by Austria, a diplomatic conference “would in all likelihood imply the renewal, not to say repetition, of a very complicated discussion, which could endanger the balance of the text attained by the Commission”.³² The same would be true of a preparatory commission process, which would have to precede any diplomatic conference but would also likely be involved in preparing for the adoption of the text by the General Assembly as a solemn declaration in quasi-legislative form. According to this view, a less divisive and more subtle approach would be for the Assembly simply to take note of the text and to commend it to States and to international courts and tribunals, leaving its content to be taken up in the normal processes of the application and development of international law.

Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, pp. 87–88, para. 62.

³¹ This general view is expressed, for example, by Austria, China, Japan, the Netherlands, the United Kingdom, the United States (A/CN.4/515 and Add.1–3 (see footnote 5 above)). The Netherlands affirms that the result should not be expressed in any weaker form than a General Assembly declaration (*ibid.*).

³² A/CN.4/515 and Add.1–3 (see footnote 5 above).

25. In the Special Rapporteur’s view, the arguments are rather finely balanced. On the one hand, the traditional mode of adoption of Commission texts has involved a diplomatic conference and a convention. In many cases (including, most recently, the Convention on the Law of the Non-navigational Uses of International Watercourses and the Rome Statute of the International Criminal Court), this has allowed States to have a full input into the text eventually adopted, and has given a durability and authority to the text which it would not otherwise have had. On the other hand, unlike some other texts which have to be embodied in a convention if they are to have legal effect, there is no reason in principle why a declaration on State responsibility or some similar instrument could not become part of the *droit acquis*. The law of State responsibility operates at an international level and does not require to be implemented in national legislation. States, tribunals and scholars will refer to the text, whatever its status, because it will be an authoritative text in the field it covers. The draft articles have already been frequently cited and have had a strong formative effect even as drafts. This process of endorsement and application of individual provisions can be expected to continue, and will be enhanced by the adoption of the text by the General Assembly.

26. In the end, the matter is one of policy for the Commission as a whole. Which recommendation the Commission should make to the General Assembly depends on a range of factors. These include: the view eventually taken on dispute settlement; the overall appreciation of the balance of the text (a balance arguably not yet achieved); and an assessment of the likely character and outcome of any preparatory commission process, whether leading to a declaration or to a diplomatic conference. For his part the Special Rapporteur inclines to the view that an Assembly resolution taking note of the text and commending it to Governments may be the simplest and most practical form, in particular if it allows the Assembly to avoid a lengthy and possibly divisive discussion of particular articles. He suggests that the Commission might return to the question later in the session, in the light of the balance eventually achieved in the text and, in particular, any decision reached as to the fate of present part three.

Chapter II

The invocation of responsibility: “damage”, “injury” and the “injured State”

27. Turning to questions of substance, the first general issue concerns the cluster of articles which define what constitutes “injury” and “damage” for the purposes of State responsibility (arts. 31 and 37), as well as the related provisions (arts. 43 and 49) dealing with the invocation of responsibility by “injured” and “other” States. The latter articles were introduced at the most recent session of the Commission in substitution for article [40] and in clarification of articles 42 and 44.³³

28. Governments have welcomed the distinction between “injured” and “other” States in articles 43 and 49, while raising a number of questions about the formulation of those articles as well as about the definition of “damage”. As to the latter, there seems to be general acceptance of the proposition that damage is not a necessary constituent of every breach of international law, and that articles 1–2 should not therefore include any specific reference to “damage”. It will be a matter for the primary rule in question to determine what is the threshold for a violation: in some cases this may be the occurrence of actual harm, in others a threat of such harm, in others again, the mere failure to fulfil a promise, irrespective of the consequences of the failure at the time. Similarly, it will be a matter for the primary rules and their interpretation to specify what are the range of interests protected by an international obligation, the breach of which will give rise to a corresponding secondary obligation of reparation. In the case of some obligations, those with a narrow focus or intended to protect a specific interest, not every consequence of a breach may be compensable. In other cases the position may be different. These issues concern above all the interpretation and application of the primary rule in question. They are not defined *a priori* by the secondary rules of State responsibility.³⁴ All that can be required is that the secondary rules be formulated so as to allow for the full range of possibilities.

29. It is here that difficulties have been identified, at least at the level of drafting and commentary. There are three distinct though related points: the use of terms such as “injury” and “damage” in parts two and two *bis*, the invocation of responsibility by an injured State as defined in article 43, and the scope of article 49, especially in the context of obligations for the protection of a collective interest.

A. “Injury” and “damage” in the draft articles

30. The terms “injury”, “harm”, “damage”, “loss”, etc. are not defined consistently in international law and there are no agreed or exact equivalences between

them in the official languages of the United Nations. A review of any given field will reveal a range of terms and definitions specific to the context. For example, in the field of environmental protection, the most common term used is “damage”. Sometimes it is used without qualification,³⁵ sometimes it is qualified by phrases such as “significant”³⁶ or even “irreversible”.³⁷ Sometimes terms are used without prejudice to questions of liability or responsibility, but in ways which indicate that the occurrence of damage is not a sufficient or even a necessary basis for responsibility.³⁸ Sometimes the general term “damage” is qualified by exclusions of particular heads of damages recoverable.³⁹ In its brief discussion in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, ICJ avoided any qualifying term whatever, using instead the vague verb “respect”.⁴⁰ In the field of international trade law, different standards are used: for example, article 3, paragraph 8, of the *Understanding on rules and procedures governing the settlement of disputes*, annexed to the Marrakesh Agreement establishing the World Trade Organization, provides that:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.⁴¹

This reflects long-established jurisprudence under the GATT/WTO system. Indeed there appears to be no case so far in which the presumption has been rebutted.

³⁵ As in principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (*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), repeated as principle 2 of the Rio Declaration on Environment and Development (*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), and taken up in many other instruments.

³⁶ As in the Convention on the Law of the Non-navigational Uses of International Watercourses, art. 7 (“significant harm”). See also the Convention on the Transboundary Effects of Industrial Accidents, art. 1 (*d*) (“‘Transboundary effects’ means serious effects ...”); the Convention on environmental impact assessment in a transboundary context, art. 2, para. 1 (“significant adverse transboundary environmental impact”); the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 35, para. 3 (“widespread, long-term and severe damage to the natural environment”), and also art. 55, para. 1.

³⁷ World Charter for Nature, para. 11 (*a*).

³⁸ For example, the Vienna Convention for the Protection of the Ozone Layer, art. 1, para. 2 (“Adverse effects”, defined as changes which have “significant deleterious effects” on human health or the ecosystem).

³⁹ For example, the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, art. 7 (*c*), limiting compensation in certain cases to costs of reinstatement.

⁴⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 242, para. 29.

⁴¹ United Nations, *Treaty Series*, vol. 1869, No. 31874, annex 2, p. 403.

³³ See the Special Rapporteur’s third report (footnote 29 above), pp. 25–38, paras. 66–118.

³⁴ See Combacau and Alland, “‘Primary’ and ‘secondary’ rules in the law of State responsibility: categorizing international obligations”, p. 108. See also the Special Rapporteur’s first report, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490 and Add. 1–7, pp. 27–29, paras. 108–117.

As the Panel in the *United States—Taxes on Petroleum and Certain Imported Substances* case, said,

A demonstration that a measure inconsistent with [a provision of a covered agreement] has no or insignificant effects would therefore ... not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.⁴²

31. In the current state of international law, it would be wrong to presume any specific definition of “injury” or “damage” which is applicable across the board. The many declarations and agreements which lay down primary rules of responsibility do not seem to derogate from any general rule about injury or damage. They do not embody so many special provisions given effect by way of the *lex specialis* principle (art. 56).⁴³ Each is tailored to meet the particular requirements of the context and the balance of a given negotiated settlement. Again, the most the articles can do is to use general terms in a broad and flexible way while maintaining internal consistency.

32. Turning to the relevant articles, the first point to note is that they set out two categories of secondary consequences of a breach: cessation and non-repetition (art. 30), and reparation (art. 31). Cessation is required in respect of any continuing breach of a subsisting obligation, and no separate issue of damage arises. Under article 30 (b), assurances or guarantees of non-repetition are exceptional remedies which may be called for in certain cases if there is reason to apprehend a further breach of the obligation. Neither remedy is, or should be, limited to “injured States” as defined in article 43.⁴⁴ Although certain questions have been raised about the content and formulation of article 30 (b),⁴⁵ this construction of the secondary consequences seems to be acceptable, and indeed it has been generally endorsed in the comments of Governments.

33. Article 31 contains the general obligation of reparation, the forms of which are further developed in chapter II. Article 31, paragraph 1, provides that the obligation is “to make full reparation for the injury caused by the internationally wrongful act”: this seems uncontroversial.⁴⁶ Article 31, paragraph 2, provides that “Injury consists of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State”. This was introduced by the Drafting Committee in 2000 in an attempt to provide some clarification of the

concept of “injury”. In the light of comments received, it seems problematic in three ways:

(a) First, it is surely an error to say that “injury”, i.e. the legal wrong done to another arising from a breach of an obligation, “consists” of damage. In some cases damage may be the gist of the injury, in others not; in still others there may be loss without any legal wrong (*damnum sine injuria*). It would be more accurate to say that the injury “includes any damage ...”;

(b) Secondly, in different legal traditions the notion of “moral damage” is differently conceived. In some systems it covers emotional or other non-material loss suffered by individuals; in some, “moral damage” may extend to various forms of legal injury, e.g. to reputation, or the affront associated with the mere fact of a breach. There are difficulties in using terms drawn from internal law which have arguably not developed autonomously in international law.⁴⁷ On the other hand, the term “moral damage” is used in the jurisprudence, and so long as the kinds of non-material loss which may be compensable are not forced into any single theory of moral damage, it seems appropriate to refer to it in paragraph 2;

(c) Thirdly, the phrase “arising in consequence of” in paragraph 2 stands in apparent contrast with “caused by” in paragraph 1. The Commission has taken the view that no single verbal test for remoteness of damage should be included in the text, whether by use of the term “direct” or “foreseeable” or by reference to the theory of an “unbroken causal link”.⁴⁸ As with national law, it seems likely that different tests for remoteness may be appropriate for different obligations or in different contexts, having regard to the interests sought to be protected by the primary rule. Hence it was decided to use only the term “caused”, and to cover the point in the commentary.⁴⁹ But it is confusing in the same article to use another phrase which might imply that consequential losses are invariably covered by reparation.

On balance the Special Rapporteur believes that article 31, paragraph 2, can usefully be retained, but that it should read: “Injury includes any damage, whether material or moral, caused by the internationally wrongful act.”⁵⁰

34. Some further clarification of the notion of damage is offered in article 37, paragraph 2, dealing with compensation. This provides that compensation “shall cover any financially assessable damage including

⁴² GATT, *Basic Instruments and Selected Documents—Thirty-fourth Supplement: Protocols, Decisions, Reports 1986–1987 and Forty-third Session* (Geneva, June 1988), p. 159, para. 5.1.9, approved and applied by the Appellate Body in the *European Communities—Regime for the Importation, Sale and Distribution of Bananas* case, WTO, *Dispute Settlement Reports 1997*, vol. II (Cambridge, Cambridge University Press, 2000), p. 690, para. 252.

⁴³ See *Yearbook ... 2000* (footnote 3 above), p. 71.

⁴⁴ *Ibid.*, article 49, paragraph 2 (a), p. 70.

⁴⁵ For these comments and observations thereon, see the annex to the present report, p. 19, below.

⁴⁶ In theory there might be a breach with respect to which no person suffered any actual injury or loss, and certainly there can be breaches with respect to which there is no injured State in the sense of article 43. But such cases are likely to be exceptional, and for paragraph 1 to read “any injury” (rather than “the injury”) might raise more difficulties than it resolved.

⁴⁷ Mr. Gaetano Arangio-Ruiz, Special Rapporteur, was of the view that “moral damage” to the State was a legally distinct conception from moral damage to individuals within the framework of human rights or diplomatic protection: see his second report on State responsibility, *Yearbook ... 1989*, vol. II (Part One), document A/CN.425 and Add.1, pp. 4–7, paras. 7–17. This may well be correct, but it hardly reduces the terminological confusion.

⁴⁸ See the Special Rapporteur’s third report (footnote 29 above), pp. 18–20, paras. 27–29 and 31–37.

⁴⁹ The term “caused” is also used in articles 27, 35, 37 and 38.

⁵⁰ Arguably this does not address the case where a particular obligation covers particular consequences only, so that others are not compensable. The Drafting Committee may wish to consider whether the phrase “any damage ... referable to the internationally wrongful act” might cover the point.

loss of profits insofar as it is established". The treatment of loss of profits in this paragraph has been generally welcomed, but some have queried whether the phrase "financially assessable" is any improvement on "economically assessable". In the Special Rapporteur's view the difference is marginal. The intention is to cover any case in which the damage is susceptible to evaluation in financial terms, even if these involve estimation, approximation, the use of equivalents, etc. There is certainly no intention to limit compensation to losses (e.g. proprietary losses) the value of which can be precisely calculated in money terms. It seems sufficient to explain this in the commentary.

B. The invocation of responsibility by an "injured State"

35. Despite general endorsement of the distinction between injured and other States, a number of issues have been raised with respect to article 43. The first concerns the very notion of invocation of responsibility, which is not specifically defined either in article 43 or 44. It is necessary to draw a distinction here between the bringing of a claim, which may be and usually is a relatively formal procedure, and "informal diplomatic exchanges" arising from concern at some situation or dispute.⁵¹ A State need not be "injured" in any sense in order to raise its concerns about some situation, including a breach of international law. Any legal constraints upon doing so would derive from the principle of the domestic jurisdiction of the State addressed, and not from the concept of "injury" or "damage". *Démarches* of this kind do not amount to invocation of responsibility, and no specific legal interest is required. It is true that the responsibility of a State can be (and usually is) invoked through the diplomatic channel or otherwise by direct State-to-State contact, without the matter ever being taken before any third-party procedure. There may indeed be no third party with jurisdiction over the dispute. Nonetheless one State invokes responsibility when it brings a claim against another State relying on any of the consequences of a breach of international law by that State covered by part two. The function of articles 43 and 49 is to define as a general matter (i.e. apart from article 56) when this may be done. By reason of the unsatisfied demand of the claimant State, a legal dispute arises which a court or tribunal would have jurisdiction to entertain, if the States concerned had consented thereto. Consistent with the general approach in the text, it does not seem necessary formally to define invocation. The Drafting Committee may wish to consider alternative formulations of article 43 or 44,⁵² or else the point can be reinforced in the commentary.

⁵¹ The phrase is taken from article 27, paragraph 2, of the Convention for the settlement of investment disputes between States and nationals of other States. See the Special Rapporteur's third report (footnote 29 above), p. 34, para. 105, footnote 197.

⁵² For example, article 43 might first create an entitlement on the part of an injured State to invoke the responsibility of another State in accordance with these articles, and then define the term "injured State" in a second paragraph. Article 44 might then deal with the mode of invocation. This suggestion was made by the United Kingdom (see A/CN.4/515 and Add.1-3 (footnote 5 above)).

36. Turning to the definition of "injured State", a number of Governments have suggested that the phrase "the international community as a whole" used in article 43 and elsewhere should read "the international community of States as a whole".⁵³ They point in particular to the definition of peremptory norms in article 53 of both the 1969 Vienna Convention and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The Special Rapporteur does not agree that any change is necessary in what has become a well-accepted phrase. States remain central to the process of international law-making and law-applying, and it is axiomatic that every State is as such a member of the international community. But the international community includes entities in addition to States: for example, the European Union, ICRC, the United Nations itself. ICJ used the phrase "international community as a whole" in the *Barcelona Traction* case,⁵⁴ and it has been used in subsequent multilateral treaties such as the Rome Statute of the International Criminal Court (art. 5, para. 1).⁵⁵

37. The use of the phrase is not, however, intended to imply that there is a legal person, the international community. Clearly there is not.⁵⁶ But while particular organs or institutions (e.g. the principal organs of the United Nations) may represent community interests, generally or for particular purposes, their failure to act in a given case should not entail that a State in breach of an obligation to the community as a whole cannot be called to account. This is the reason for the inclusion of the concept in article 49. For the purposes of article 43, all that needs to be said is that, even where an obligation is owed to the international community as a whole, some particular State may be especially affected by its breach. Hence the need to include such obligations in article 43 as well.

38. The remaining issue concerns article 43 (b) (ii), which deals with so-called "integral" obligations.⁵⁷ Although the term is sometimes used to cover obligations in the general interest (e.g. human rights obligations), the Special Rapporteur understands it to refer to obligations which operate in an all-or-nothing fashion. Under article 60, paragraph 2 (c), of the 1969 Vienna Convention, the breach of an integral obligation entitles any other party to suspend the performance of the treaty not merely vis-à-vis the State in breach but vis-à-vis all States. In other words, a breach of such an obligation

⁵³ The suggestion is made, for example, by France, Mexico and the United Kingdom, not only in relation to article 43, but also to articles 26, 34 and 41 (A/CN.4/515 and Add.1-3 (footnote 5 above)). See the annex to the present report, notes on article 26, at p.26, below.

⁵⁴ *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.

⁵⁵ The language of article 5, paragraph 1, ultimately derives from the preamble to the Commission's draft statute for an international criminal court, *Yearbook ... 1994*, vol. II (Part Two), pp. 26-27, but it has been substantially reinforced in the transition to a substantive article.

⁵⁶ See the dissenting opinion of Judge Sir Gerald Fitzmaurice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 241, para. 33. For similar reasons, it may be better in article 43 (b) to refer not to a "group" but to a "number" of States; likewise in article 49.

⁵⁷ For the development of the concept of integral obligations, see the Special Rapporteur's third report (footnote 29 above), para. 91.

threatens the treaty structure as a whole. Fortunately this is not true of human rights treaties; rather the reverse, since one State cannot disregard human rights on account of another State's breach. Treaties such as non-proliferation and disarmament treaties, or others requiring complete collective restraint if they are to work (as with the central obligations of States parties to the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, or the Antarctic Treaty), are integral in this sense. The category may be narrow but it is an important one. Moreover it has as much relevance for State responsibility as it has for treaty suspension. The other parties to an integral obligation which has been breached may have no interest in its suspension and should be able to insist, vis-à-vis the responsible State, on cessation and restitution. For these reasons the Special Rapporteur believes that article 43 (b) (ii) should be retained. The Drafting Committee might, however, usefully consider its wording, in accordance with several suggestions which have been made.⁵⁸

C. Other States entitled to invoke responsibility: art. 49

39. Although Japan suggests that article 49 is not a "core function"⁵⁹ of the law of State responsibility, most other Governments have accepted the principle it seeks to embody, and it was of course expressly accepted by ICJ in 1970. But a number of questions have been raised as to the formulation and intended function of the article.

40. The first concerns the notion of "the protection of a collective interest" in article 49, paragraph 1 (a). After all, which international obligations (beyond the purely bilateral) are not in some sense "established for the protection of a collective interest"? Even treaties that most closely approximate to the classical "bundle" of bilateral obligations are at a deeper level established for the protection of a collective interest. For example, it is usually thought that diplomatic relations between two States pursuant to the Vienna Convention on Diplomatic Relations are bilateral in character, and "ordinary" breaches

⁵⁸ These include the addition of the word "necessarily" and the change of "or" to "and" in the final phrase. Thus paragraph (b)(ii) could read: "Is of such a character as necessarily to affect the enjoyment of the rights and the performance of the obligations of all the States concerned."

⁵⁹ See footnote 5 above.

of that Convention vis-à-vis one State would hardly be considered as raising issues for the other States which are parties to it. But at some level of seriousness a breach of the Convention might well raise questions about the institution of diplomatic relations which would be of legitimate concern to third States.⁶⁰ It may be that article 49, paragraph 1 (a), should be further qualified so as to limit it to breaches which in themselves are such as to impair the collective interest of the States parties to the obligation.⁶¹

41. Indeed it has been suggested that a similar restriction should be applied to article 49, paragraph 1 (b). France suggests that the paragraph should be limited to the serious breaches covered by part two, chapter II.⁶² This suggestion has greater force in respect of claims for reparation as envisaged by article 49, paragraph 2 (b), than it has for claims to cessation. It does not seem disproportionate to allow all States to insist upon the cessation of a breach of an obligation owed to the international community as a whole. This would seem to follow directly from the ICJ dictum in the *Barcelona Traction* case.⁶³ Whether a claimant State should be able to seek reparation "in the interest of the injured State or of the beneficiaries of the obligation breached" is, perhaps, less clear. In particular, this is something the injured State, if one exists, might reasonably be expected to do for itself.

42. These are matters which the Commission may wish to revisit, and the Drafting Committee should certainly consider whether article 49, paragraph 1 (a) might be more tightly drawn. On the other hand, the Special Rapporteur believes that article 49 in general achieves a certain balance, *de lege ferenda*, between the collective interest in compliance with basic community values and the countervailing interest in not encouraging the proliferation of disputes. In his view a case for the fundamental reconsideration of article 49 has not been made.

⁶⁰ See *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 43, para. 92.

⁶¹ Such a suggestion would still allow for the paradigm case intended to be covered by subparagraph (a), viz. the interest of Ethiopia and Liberia in South Africa's performance of its obligations as mandatory of South West Africa (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6). See the third report of the Special Rapporteur (footnote 29 above), p. 29, para. 85 and pp. 31–32, para. 92.

⁶² See footnote 5 above.

⁶³ See footnote 54 above.

CHAPTER III

**“Serious breaches of obligations to the international community
as a whole”: part two, chapter III**

43. By contrast, the issues raised by part two, chapter III, continue to be divisive, just as they were in the old context of article [19]. A number of Governments (France, Japan, United Kingdom, United States)⁶⁴ continue to argue strenuously for the deletion of chapter III altogether, which one Government wittily described as still haunted by the ghost of “international crimes”. In their view, the seriousness of the breach of an obligation is a matter not of kind but degree, and gradations of seriousness can be taken into account in other ways. Moreover the vagueness and the non-inclusive character of articles 41–42 cast grave doubt upon their utility. As a minimum, they cannot in the view of these States be considered to reflect general international law; this is a serious defect in a text which can only take the form of a non-binding instrument. These Governments suggest an alternative in the form of a general savings clause, preserving the development of stricter forms of responsibility for serious breaches of international law.⁶⁵

44. On the other hand chapter III has attracted support. According to Denmark (on behalf of the Nordic countries):

The essential point is not the terminology, though the word “crime” in the context of State responsibility may give rise to false implications. The essential point is that some violations such as aggression and genocide are such an affront to the international community as a whole that they need to be distinguished from other violations ... as they are known from the laws of war, with the distinction drawn between “breaches” and “grave breaches” ... The Nordic countries therefore also continue to support the distinction in the context of State responsibility and agree with the solution now presented in part two, chapter III.⁶⁶

Other Governments (e.g. Austria,⁶⁷ the Netherlands,⁶⁸ Slovakia⁶⁹) also support the compromise embodied in chapter III, on the basis that its substantive provisions are reasonable and do not impose onerous burdens on third States. Chapter III is in their view a price worth paying for the dropping of former article [19].

45. Before addressing the general problem posed by part two, chapter III, it seems necessary to clarify the scope of one of the distinct consequences mentioned in article 42. Both supporters and opponents of chapter III agree that damages reflecting the gravity of the breach, as provided for in article 42, paragraph 1, must not be equated with punitive damages. There is a widespread view that such damages are not permit-

ted under international law, but some States interpret article 42, paragraph 1, as allowing punitive damages. The Special Rapporteur does not so interpret paragraph 1. Rather it allows for damages which reflect the gravity of a breach, which is not the same thing. Even in the context of lesser wrongs, such factors as the gravity of the breach may be taken into account, for example, in the assessment of compensation for moral damage. It seems especially appropriate to do so in the case of grave breaches of obligations to the international community as a whole. Punitive damages, on the other hand, are damages which are either arbitrarily multiplied or at least deliberately inflated in order to stigmatize and punish the respondent. This is not the purpose of paragraph 1.

46. As to the general question, in his first report on State responsibility, the Special Rapporteur sought to express the arguments against a separate category of internationally wrongful act for the purposes of part one, especially one designated by the title of “international crime”.⁷⁰ This involved in his view a misreading of the idea of obligations to the international community as a whole, which was the core of the idea and its essential justification. It is significant that no one has yet argued for a different set of rules for determining “State criminal responsibility”,⁷¹ e.g. in the field of attribution or excuses, let alone for a system embodying minimum guarantees of due process. Both are universally adopted in legal systems for the purposes of distinguishing criminal from delictual responsibility. For these and other reasons there is as yet no basis for such a distinction in international law. The deletion of article [19], and the very general acceptance in the Sixth Committee of its deletion, thus marks a real advance.

47. At the same time the notion of obligations to the international community as a whole—obligations the breach of which is to be determined in accordance with the common rules in part one—has a special significance. Genocide, aggression, apartheid, forcible denial of self-determination constitute wrongs which “shock the conscience of mankind”,⁷² and it seems appropriate to reflect this in terms of the consequences attached to their breach. No doubt it is true that other breaches of international law may have particularly serious consequences, depending on the circumstances. The notion of serious breaches of fundamental rules is without prejudice to this possibility, and to that extent the consequences referred to in article 42 are indicative and non-exclusive. They are nonetheless, in the Special Rapporteur’s view, appropriate at least *de lege*

⁶⁴ See footnote 5 above.

⁶⁵ Similar views were also expressed in the debate in the Sixth Committee by India and Sierra Leone (see A/CN.4/513 (footnote 4 above), paras. 89–94).

⁶⁶ A/CN.4/515 and Add. 1–3 (see footnote 5 above); see also the comments by Spain (*ibid.*).

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* (“a good compromise, with the added advantage that this wording does not put what has been agreed at risk”).

⁶⁹ *Ibid.* (“a promising step in the right direction”).

⁷⁰ See *Yearbook ... 1998* (footnote 34 above), pp. 9–23, paras. 43–95.

⁷¹ *Ibid.*, p. 14, para. 55.

⁷² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

ferenda. They have the additional merit that they seem to attract broad support within the Commission as a basis for the adoption of the text by consensus. For this reason, if no other, chapter III should be retained.

48. But the two articles comprising chapter III have been seriously criticized even by those who support their retention in principle.⁷³ These criticisms include the following:

(a) The proposed definition is full of ambiguous terms, such as “essential”, “serious”, etc.;

(b) The term “serious” is not always necessary; thus aggression or genocide would by definition be “serious”;

(c) The relationship between “fundamental interests” (art. 41), “essential interests” (art. 26) and “collective interests” (art. 49) needs to be justified and explained;

(d) There is a difference between the formulation of articles 49 (“established for the protection of a collective interest”) and 41 (“essential for the protection ...”);

(e) The commentary should explain how the “risk of substantial harm” should be assessed;

(f) Although article 41, paragraph 1, states that the chapter applies to “the international responsibility arising from” a serious breach as defined, in fact article 42 is largely directed to the “obligations” of third States, albeit that those obligations are vaguely defined.

More generally China, while supporting the deletion of article [19], notes that “fundamental questions still remain in the current text”, both in terms of the definition of the concept and its consequences. It calls for the commentary to provide “the necessary definition and clarification”.⁷⁴ It was also suggested by at least one Government that the relationship between obligations covered by article 41 and obligations *erga omnes* or peremptory norms needed to be clarified.

49. Before turning to questions of formulation and definition, it is appropriate to say something more on this underlying issue.⁷⁵ At the core of article 41 is the notion of an obligation owed to the international community as a whole, otherwise referred to as an obligation *erga omnes*. This is the concept adumbrated by ICJ in the *Barcelona Traction* case and subsequently.⁷⁶ It is better to use the vernacular rather than the Latin expression, the more so in that ICJ on several occasions has used the term “*erga omnes*” to mean some-

thing else, thereby risking confusion.⁷⁷ It is not necessary for present purposes for the Commission to take a general view as to the relations between peremptory norms and obligations to the international community as a whole. Two points may however be noted. First, there is at the very least a large area of overlap between them, since it is agreed that only a few rules of international law can be considered peremptory or give rise to obligations to the international community. Thus even if they are not different aspects of the one underlying idea, the two substantially overlap. Secondly, there is a difference of emphasis. In the context of peremptory norms the emphasis is on the primary rule itself and its non-derogable or overriding status. This is appropriate to the context of the validity of treaties, and equally to article 21 of the present text. By contrast, the emphasis with obligations to the international community is on the universality of the obligation and the persons or entities to whom it is owed, specifically all States and other legal entities which are members of that community. Since the context of chapter III is the consequences of a breach, just as article 49 is concerned with invocation by other States, the appropriate term is the second, viz. obligations to the international community as a whole.

50. There are certainly difficulties of formulation with chapter III, as has been observed. The chapter needs to be reconsidered as a whole by the Drafting Committee, alongside articles 43 and 49, with a view to achieving greater consistency. For example it is unclear why the phrase “essential for the protection of its fundamental interests” is necessary in article 41 but not in article 49. In the Special Rapporteur’s view, only obligations which are essential could be considered as owed to the international community as a whole, and the addition of the words in article 41 only creates unfortunate *a contrario* implications.

51. No doubt the problems of drafting and definition in chapter III are real. But they need to be considered in the context of what the chapter seeks to achieve, as well as the principles underlying the text as a whole. As the Netherlands perceptively observed:

[F]urther consideration should be given to the definition of “serious breaches” in articles 41 and 42, in their *chapeaux* and in the heading of part two, chapter III, in which the relevant articles are grouped. The Commission should harmonize the various definitions. The Netherlands also notes that the examples given in the previous article 19 to illustrate what was meant by an international crime have not been used to illustrate the corresponding concept of “serious breaches”. This is regrettable because the examples clearly illustrated the term “international crime”, which has now been abandoned. All that is left now ... is a framework, thus leaving a great deal to be filled in by case law and development of the law in general. At the same time, the Netherlands understands the Special Rapporteur’s wish to delete

⁷³ See the annex to the present report, notes on articles 41–42, below.

⁷⁴ A/CN.4/515 and Add. 1–3 (see footnote 5 above).

⁷⁵ See the third report of the Special Rapporteur (footnote 29 above), p. 12, para. 2 and pp. 34–35, para. 106, respectively. The matter is also usefully discussed in the ILA Study Group’s first report (see footnote 6 above).

⁷⁶ See the *Barcelona Traction* case (footnote 54 above), paras. 33–34; the *Namibia* case (footnote 56 above), p. 56, para. 126; *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 22 above), p. 626, para. 4, and p. 628, para. 6.

⁷⁷ Thus, in the *Nuclear Tests* cases, the Court referred to the President of France’s statement as “made ... publicly and *erga omnes*” (*Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 269, para. 50; (*New Zealand v. France*), *ibid.*, p. 474, para. 52). All it meant was that the statement was “conveyed to the world at large”, *ibid.*, para. 53; (*Australia v. France*), *ibid.*, p. 269, para. 51.

all the elements of the text that have no connection with secondary rules and to transfer them to the commentary.⁷⁸

To which can be added the comment that in the definition of acts of gross inhumanity, precision is not the only value.

52. In the Special Rapporteur's view, chapter III is indeed a framework for the progressive development, within a narrow compass, of a concept which is or ought to be broadly acceptable. On the one hand, it does not call into question established understandings of the conditions for State responsibility (part one). On the other hand, it recognizes that there can be egregious breaches of obligations owed to the community as a whole, breaches which

⁷⁸ A/CN.4/515 and Add.1-3 (see footnote 5 above).

warrant some response by the community and by its members. As to individual responses, the obligations imposed by article 42, paragraph 2, are not demanding. The most important, that of non-recognition, is the one element of article 42 which already arguably reflects general international law.⁷⁹ Provided it is made clear, in the text or in the commentary, that the obligations in article 42, paragraph 2, are neither exhaustive nor exclusive, their content seems broadly acceptable.

53. The Special Rapporteur accordingly recommends that chapter III be retained, but that its content be thoroughly reviewed in the light of the comments of Governments, in particular so as to ensure consistency with the provisions of articles 21, 26, 43 and 49.

⁷⁹ See the *Namibia* case (footnote 56 above), pp. 54 and 56, paras. 118 and 126, respectively.

CHAPTER IV

Countermeasures: part two *bis*, chapter II

54. The third area of general concern concerns the treatment of countermeasures in part two *bis*, chapter II. Concern arises at a number of levels. The first relates to the principle of including countermeasures in the text, either at all or in the context of implementation. The second involves the question of "collective" countermeasures in article 54, which is entitled "Countermeasures by States other than the injured State". The third goes to the formulation of the remaining articles, especially articles 51 and 53.

55. The debate on these issues in the Sixth Committee showed once again their extreme sensitivity, and the concern felt by many, especially but by no means only the developing countries, as to the dangers of abuse.⁸⁰ A few Governments hold the view that the danger of legitimizing countermeasures by regulating them is so great that chapter II should be deleted.⁸¹ At least one Government argued that countermeasures should be prohibited entirely.⁸² The United Republic of Tanzania warned that the tendency of the articles was "primarily ... to legitimize [countermeasures], through the development of legal rules on State responsibility based on western practice"; on the other hand it did not take this to the extent of supporting the deletion of the articles, arguing rather that "[i]t would be preferable for the Commission to discourage countermeasures by prescribing limits rather than leaving them open-ended and liable to abuse".⁸³

56. A number of Governments, by contrast, took the view that the articles in chapter II impose unjustified

and arbitrary limitations on resort to countermeasures. In particular, these Governments continue to be highly critical of the procedural conditions to the taking of countermeasures contained in article 53. They saw the solution in the deletion of the reference to the Charter of the United Nations and the incorporation of certain elements into article 23.⁸⁴

57. On the other hand, many Governments—a clear majority of those which have commented on chapter II—accepted that countermeasures have a place in the text, and they were for the most part supportive of the balance of the articles, as to both substance and procedure.⁸⁵

58. It should be noted that chapter II does not depart in most respects from part two, chapter III, as adopted

Iran, *ibid.*, 15th meeting (A/C.6/55/SR.15), para. 13; and Algeria, *ibid.*, 18th meeting (A/C.6/55/SR.18), paras. 2-3 and 8.

⁸⁴ *Ibid.* This view was taken, in particular, by the United States, 18th meeting (A/C.6/55/SR.18), paras. 68-70, and the United Kingdom, 14th meeting (A/C.6/55/SR.14), para. 33, and was repeated by both in their written comments (A/CN.4/515 and Add. 1-3 (see footnote 5 above)). In its written comments Japan made a similar suggestion (*ibid.*).

⁸⁵ In the Sixth Committee debate these included Argentina, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 15th meeting (A/C.6/55/SR.15), para. 66; Brazil, *ibid.*, 18th meeting (A/C.6/55/SR.18), paras. 64-65; Chile, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 48; China, *ibid.*, 14th meeting (A/C.6/55/SR.14), paras. 38-39 (but stressing the need for further improvement); Costa Rica, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 64; Croatia, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 72; Cuba, *ibid.*, 18th meeting (A/C.6/55/SR.18), paras. 60 and 62; Denmark (on behalf of the Nordic countries), *ibid.*, 15th meeting (A/C.6/55/SR.15), para. 58; Egypt, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 33; France, *ibid.*, 15th meeting (A/C.6/55/SR.15), para. 10; Hungary, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 57; Italy, *ibid.*, para. 26; Jordan, *ibid.*, 18th meeting (A/C.6/55/SR.18), paras. 15-16; New Zealand, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 7; Poland, *ibid.*, 18th meeting (A/C.6/55/SR.18), para. 48; Sierra Leone, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 51; Slovakia, *ibid.*, para. 66; South Africa, *ibid.*, 14th meeting

⁸⁰ For a summary of the Sixth Committee debate on countermeasures, see A/CN.4/513 (footnote 4 above), paras. 144-182.

⁸¹ *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 18th meeting (A/C.6/55/SR.18), statement by Cuba, para. 61; *ibid.*, 15th meeting, India (A/C.6/55/SR.15), para. 29; and *ibid.*, 20th meeting, Mexico (A/C.6/55/SR.20), paras. 37-38.

⁸² *Ibid.*, 17th meeting, Greece (A/C.6/55/SR.17), para. 85.

⁸³ *Ibid.*, 14th meeting, United Republic of Tanzania (A/C.6/55/SR.14), paras. 45 and 49. See also, for example, Islamic Republic of

on first reading.⁸⁶ In particular, article 53 follows the broad pattern of the compromise contained in former article [48], though with some refinements of language.⁸⁷ It is true that certain changes have been introduced to the chapter. These include: (a) much stronger emphasis on the reversibility of countermeasures; (b) refinements in former article [50] dealing with prohibited countermeasures; (c) express provision for countermeasures by States other than the injured State (art. 54); (d) a new article (art. 55) dealing with termination of countermeasures; and (e) the abandonment of an organic link between the taking of countermeasures and dispute settlement. Items (a) and (d) have been generally welcomed and seem unproblematic; item (e) has already been discussed.⁸⁸ As to item (b), article 51 (formerly [50]) needs further consideration.

59. The most controversial change to chapter II is item (c), i.e. the introduction of article 54. It should be noted, however, that its effect is to reduce the extent to which countermeasures can be taken in a community interest, as compared with the first reading text (art. [47] in conjunction with art. [40]). It may be that the separation of article [47] from article [40], and the convoluted character of the definition of “injured State” in article [40], prevented Governments from focusing on the problem. That is no longer the case.

60. In the Special Rapporteur’s view, there can be no question of deleting article 23, which has been part of the text for more than two decades and was affirmed by ICJ in the *Gabčíkovo-Nagymaros Project case*.⁸⁹ Nor, in his opinion, can article 23 simply envisage countermeasures as available to States under international law without qualification or condition (any more than it could envisage necessity or force majeure as unconditionally available). That being so, there are effectively three options:

(a) *Deletion of chapter II, with corresponding additions to article 23.* Article 23 recognizes that the taking of lawful countermeasures in response to a breach excludes the responsibility of the State taking the countermeasures.⁹⁰ At present (and rather inelegantly) article 23 refers forward to part two *bis*,

(A/C.6/55/SR.14), para. 24 (on behalf of the members of the Southern African Development Community); Spain, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 16; Switzerland, *ibid.*, 18th meeting (A/C.6/55/SR.18), para. 81. See also the written observations by China, Denmark (on behalf of the Nordic countries), the Netherlands, Slovakia and Spain (A/CN.4/515 and Add.1–3) (footnote 5 above).

⁸⁶ For the treatment of countermeasures by the Special Rapporteur, Mr. Arangio-Ruiz, see *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/440 and Add.1, pp. 1–35; and *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1–3, pp. 1–49. For the treatment by the present Special Rapporteur, see his second report, *Yearbook ... 1999* (footnote 14 above), pp. 86–96, paras. 357–392; and his third report, *Yearbook ... 2000* (footnote 11 above), pp. 77–97, paras. 285–367 and pp. 101–106, paras. 386–406.

⁸⁷ For the Special Rapporteur’s proposals on this point see his third report (footnote 29 above), pp. 93–94, paras. 355–360 and p. 96–97, para. 367.

⁸⁸ See paragraph 10 above.

⁸⁹ See footnote 30 above.

⁹⁰ It has been pointed out that the circumstance precluding wrongfulness is the continuation of the wrongful act of the target State which justifies the countermeasure; this refinement is taken into account in the language of article 23.

chapter II, for the conditions for taking countermeasures. These could be incorporated in whole or significant part into article 23, which would thus set out a regime for countermeasures in the way that article 26 does for necessity,⁹¹

(b) *Retention of chapter II with drafting improvements.* Alternatively, chapter II could be retained subject to clarifications and drafting improvements;

(c) *Retention of chapter II only so far as concerns countermeasures by an injured State.* Thirdly, the controversy surrounding article 54 could be addressed by deleting the article and dealing only with countermeasures by an injured State. It would need to be considered whether there should be a savings clause for the situations currently covered by article 54.

The Special Rapporteur regards the decision between the three options as essentially a policy matter for the Commission as a whole. Factors to be taken into account include the overall balance of the text as finally agreed, the proposed form of the draft articles, and estimates of the likely response of the Sixth Committee to the text with or without chapter II.

61. To assist the Commission in making this choice, it is proposed to discuss comments of Governments and others on the particular articles as they stand. In what follows, only issues of basic principle are discussed; specific drafting suggestions are set out in the annex to the present report.

Article 50. Object and limits of countermeasures

62. This provision has attracted a measure of support and only limited comment.⁹² A number of specific drafting suggestions are summarized in the annex to the present report. They do not appear to raise questions of principle about the article as a whole.

Article 51. Obligations not subject to countermeasures

63. Article 51, paragraph 1, sets out five limitations on the taking of countermeasures. Article 51, paragraph 2, makes it clear that a State taking countermeasures must fulfil its obligations under dispute settlement procedures

⁹¹ A revised version of article 23 might read as follows:

“1. The wrongfulness of an act of State not in conformity with its international obligations is precluded if and to the extent that the act constitutes a lawful countermeasure directed towards the State which is responsible for an internationally wrongful act, in order to induce that State to comply with its obligations under these articles.

“2. Countermeasures shall be proportionate.

“3. Countermeasures shall not involve the threat or use of force contrary to the Charter of the United Nations or any other violation of a peremptory norm of general international law.”

(Proposal made by the United Kingdom (see footnote 5 above))

⁹² During the debate in the Sixth Committee, a number of Governments expressed general support for article 50: *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, Croatia, 16th meeting (A/C.6/55/SR.16), para. 72; Denmark (on behalf of the Nordic countries), *ibid.*, 15th meeting (A/C.6/55/SR.15), para. 58; Hungary, 16th meeting (A/C.6/55/SR.16), para. 57; New Zealand, *ibid.*, para. 8.

in force between it and the target State: this is uncontroversial. The same cannot be said for paragraph 1.

64. While some Governments supported article 51, paragraph 1,⁹³ others raised questions about its general economy or about particular inclusions or exclusions.⁹⁴ The essential problem is that the list in article 51 appears to embody no clear principle. It is accepted that countermeasures may not involve the use of force contrary to the Charter of the United Nations, or any other violation of a peremptory norm.⁹⁵ To the extent that “fundamental human rights” may be considered peremptory, they are covered by subparagraph (d); but it is controversial how far this is the case, and the phrase “fundamental human rights” has no settled meaning. Prohibitions on reprisals contained in various humanitarian law instruments, drawn from article 60, paragraph 5, of the 1969 Vienna Convention, should certainly be given effect. But this is so whether or not any given prohibition is peremptory. Such prohibitions directly address the question of reprisals and should have effect, vis-à-vis States parties to them, by reason of the *lex specialis* principle.⁹⁶ Because of their importance there is certainly a case for referring to them in article 51, but this should be done in clear terms so as to include them all.⁹⁷ As to paragraph 1 (e) (inviolability of diplomatic agents, archives and documents), the question is why this particular non-peremptory exception is included, but not others.⁹⁸ Overall the Special Rapporteur is inclined to agree with the comment that

the Commission should look rigorously at the list. Since the objective of the provisions must be to facilitate the resolution of disputes

⁹³ See, for example, Algeria, *ibid.*, 18th meeting (A/C.6/55/SR.18), para. 4; Brazil, *ibid.*, para. 64; Chile, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 49; Costa Rica, *ibid.*, para. 65; Germany, *ibid.*, 14th meeting (A/C.6/55/SR.14), para. 56; Hungary, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 57; India, *ibid.*, 15th meeting (A/C.6/55/SR.15), para. 29; Iraq, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 36; Italy, *ibid.*, para. 26; Spain, *ibid.*, para. 17. See also the written observations of Spain (A/CN.4/515 and Add.1–3 (footnote 5 above)).

⁹⁴ See the written observations of the United Kingdom (proposing a single non-exhaustive formula illustrated in the commentary) and the United States (proposing its deletion altogether) (A/CN.4/515 and Add.1–3 (footnote 5 above)).

⁹⁵ The United States agrees but regards the matter as covered by the Charter itself (*ibid.*).

⁹⁶ Of course this will only be true to the extent that the State taking countermeasures is bound by the prohibition either under general international law or by treaty. A number of States (Germany, Italy, United Kingdom) have made reservations to these provisions. For example, Germany and Italy reserved the right to “react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I [to the Geneva Conventions of 12 August 1949] and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation” (United Nations, *Treaty Series*, vol. 1425, No. 17513, p. 440). For the United Kingdom’s reservation, see footnote 113 below.

⁹⁷ The Director of the International Standards Unit, Division of Cultural Heritage, UNESCO, pointed out that the language of subparagraph (c) did not appear to cover the prohibition of countermeasures concerning cultural property as set out in the Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 4, para. 4, as reconfirmed by article 53 (c) of the Protocol additional to the Geneva Conventions of 12 August 1949 (letter to the Secretary of the Commission of 23 January 2001). This was not intended, but it is unclear whether this is a prohibition of a humanitarian character. The matter should be reconsidered by the Drafting Committee.

⁹⁸ Thus some Governments favoured the reinsertion of the former prohibition on “extreme economic or political coercion” (United

rather than to complicate them, vagueness and duplication should be avoided.⁹⁹

Article 52. Proportionality

65. Article 52 has been generally accepted in principle, although comments continue to be made as to its exact formulation. One question is whether the element of necessity in the taking of countermeasures, which might be referred to as the “inducement factor”, should be taken into account in the determination of proportionality.¹⁰⁰ In the Special Rapporteur’s view this element is implicit in article 50, which specifies the purpose of countermeasures. The point of article 52 is to set a limit in any given case, based on considerations of proportionality. This point had been made by ICJ in the case concerning the *Gabčíkovo-Nagymaros Project*,¹⁰¹ in language now embodied in the text.¹⁰² However, several Governments preferred the traditional formulation in terms of proportionality,¹⁰³ or absence of disproportionality.¹⁰⁴ One Government formulated the test in terms of the least stringent measure necessary to ensure compliance.¹⁰⁵

66. In the Special Rapporteur’s view, there can be no doubt that the requirement of proportionality is part of the established law relating to countermeasures, and that it must be included in the text. The question is one of formulation, which can be considered by the Drafting Committee in the light of the comments made.

Article 53. Conditions relating to resort to countermeasures

67. Within chapter II, article 53 continues to create the most problems, as it did on first reading. Particular problems arise with respect to paragraph 2 (Duty to negotiate)

Republic of Tanzania, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 14th meeting (A/C.6/55/SR.14), para. 49; Islamic Republic of Iran, *ibid.*, 15th meeting (A/C.6/55/SR.15), para. 13; Guatemala, *ibid.*, para. 43. Others (e.g. Spain, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 16; and A/CN.4/515 and Add.1–3) (footnote 5 above) correctly noted that the issue was covered by article 52 (Proportionality). Some Governments favoured prohibitions on conduct which “could undermine the sovereignty, independence or territorial integrity of States” (Algeria, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 18th meeting (A/C.6/55/SR.18), para. 4; see also Chile, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 49). The Republic of Korea sought specific protection for “obligations to protect the natural environment against widespread, long-term and severe damage” (A/CN.4/515 and Add.1–3) (footnote 5 above)).

⁹⁹ United Kingdom, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 14th meeting (A/C.6/55/SR.14), para. 34.

¹⁰⁰ See Japan, *ibid.*, para. 69.

¹⁰¹ See footnote 30 above.

¹⁰² As noted with approval by the Netherlands (A/CN.4/515 and Add.1–3) (footnote 5 above)). On the other hand the Republic of Korea preferred the criterion of “the effects of the internationally wrongful act on the injured State” (*ibid.*).

¹⁰³ The United States subjected the passage to close analysis, and proposed alternative language (*ibid.*).

¹⁰⁴ Denmark (on behalf of the Nordic countries), *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 15th meeting (A/C.6/55/SR.15), para. 59.

¹⁰⁵ Colombia (on behalf of the Rio Group), *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 4.

and paragraph 5 (Duty to suspend countermeasures during dispute settlement). On the one hand, Governments continue to express concern at the possibility of unilateral determinations on the part of the State taking countermeasures.¹⁰⁶ On the other hand, the procedural conditions laid down in article 53 have been strongly criticized as unfounded in international law and as unduly cumbersome and restrictive.¹⁰⁷ For the opponents of countermeasures, article 53 does not do enough; for their proponents, it goes much too far.

68. No doubt the situation should not be overdrawn. Some Governments supported the requirement of prior negotiations subject to the possibility of “provisional and urgent” countermeasures.¹⁰⁸ But others thought the distinction artificial and unreal.¹⁰⁹ Some still argued that countermeasures of any kind should not be taken while negotiations were pending;¹¹⁰ others seemed to reject even the classical requirement of a prior demand (sommation). There are indications that the discussion is still polarized.

69. As a matter of principle, it seems clear that a State should not be able to take countermeasures, except those required in order to maintain the status quo, before calling on the responsible State to fulfil its obligations. The requirement that it first do so was stressed both by the Arbitral Tribunal in the *Air Service Agreement*¹¹¹ and by ICJ in the *Gabčikovo-Nagymaros Project case*.¹¹² It also appears to reflect a general practice.¹¹³ On the other

¹⁰⁶ For example, Chile, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 50; Croatia, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 72; and Greece, *ibid.*, 17th meeting (A/C.6/55/SR.17), paras. 85–86.

¹⁰⁷ For example, the United Kingdom, *ibid.*, 14th meeting (A/C.6/55/SR.14), paras. 35–36; and the United States, *ibid.*, 18th meeting (A/C.6/55/SR.18), para. 69. Several Governments expressed the view that the burden of initiating negotiations should be on the responsible State, not the State taking countermeasures (Chile, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 50; and the Republic of Korea, *ibid.*, 19th meeting (A/C.6/55/SR.19), para. 75).

¹⁰⁸ Brazil, *ibid.*, 18th meeting (A/C.6/55/SR.18), para. 64; Cameroon, *ibid.*, 24th meeting (A/C.6/55/SR.24), para. 60; Denmark (on behalf of the Nordic countries), *ibid.*, 15th meeting (A/C.6/55/SR.15), para. 59; and Germany, *ibid.*, 14th meeting (A/C.6/55/SR.14), para. 55. See also Costa Rica, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 65 (but excluding breaches of peremptory norms); and India, *ibid.*, 15th meeting (A/C.6/55/SR.15), para. 29.

¹⁰⁹ Hungary, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 58; and Japan, *ibid.*, 14th meeting (A/C.6/55/SR.14), para. 68.

¹¹⁰ For example, Bahrain, *ibid.*, 19th meeting (A/C.6/55/SR.19), para. 87; and Greece, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 85.

¹¹¹ *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), p. 444. See also ILR, vol. 54 (1979), pp. 338–339, paras. 85–87.

¹¹² *I.C.J. Reports 1997* (see footnote 30 above), p. 56, para. 84.

¹¹³ In this context one may note the United Kingdom’s reservation to articles 51–55 of the Protocol additional to the Geneva Conventions of 12 August 1949, which provides in part:

“If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus

hand, it is clear that the taking of countermeasures cannot reasonably be postponed until negotiations have broken down. In his third report on State responsibility, the Special Rapporteur concluded that article [48] should embody the following balance:

(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 the breach is not a continuing one.¹¹⁴

This is, broadly speaking, the system adopted by the Drafting Committee in what is now article 53. But it must be conceded at once that the distinction between urgent and definitive countermeasures does not correspond with existing international law.¹¹⁵ It was developed in the course of the first reading by way of a compromise between sharply opposed positions on the suspensive effect of negotiations.¹¹⁶ The distinction is more a guide to the application of principles of necessity and proportionality in the given case than it is a distinct requirement. Quite apart from questions of definition, there are also practical difficulties with it. For example, it has been pointed out that the mere agreement to submit a dispute to arbitration cannot require any suspension of countermeasures, since until the tribunal has been constituted and is in a position to deal with the dispute, even a power to order binding provisional measures will not help.¹¹⁷ Thus even if the distinction between provisional and other measures is retained, there is a good case for reconsidering this aspect of article 53, paragraph 5.

Article 54. Countermeasures by States other than the injured State

70. Article 54 deals with the taking of countermeasures by the States referred to in article 49, i.e. States other than the injured State. It deals rather succinctly with two different situations. The first concerns countermeasures

taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949, nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.”

(United Nations, *Treaty Series*, vol. 2020, No. A-17512, pp. 77–78)

¹¹⁴ *Yearbook ... 2000* (see footnote 11 above), p. 94, para. 360.

¹¹⁵ As noted, for example, by Italy, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 16th meeting (A/C.6/55/SR.16), para. 27; and the United Kingdom, *ibid.*, 14th meeting (A/C.6/55/SR.14), para. 36. The United Kingdom makes the point that such a requirement may deter a State from agreeing to third-party settlement (*ibid.*).

¹¹⁶ See *Yearbook ... 1996*, vol. I, 2457th meeting, pp. 171–176.

¹¹⁷ See United States, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 18th meeting (A/C.6/55/SR.18), para. 69; and Costa Rica, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 65. This is the basis for the provisional measures jurisdiction of the International Tribunal of the Law of the Sea in the period prior to the constitution of an arbitral tribunal (see the United Nations Convention on the Law of the Sea, art. 290, para. 5).

taken by an article 49 State “at the request and on behalf of any State injured by the breach” (para. 1). The second concerns countermeasures taken in response to serious breaches covered by part two *bis*, chapter II, paragraph 2. Paragraph 3 deals with the coordination of countermeasures taken by more than one State. Evidently the effect is as follows: within the general limits of chapter II, an article 49 State can take countermeasures in support of an injured State, or independently in the case of a serious breach. Otherwise such States are limited to the invocation of responsibility under article 49, paragraph 2. By contrast, under former article [40], any State could take countermeasures in the case of an “international crime”, a breach of human rights or the breach of certain collective obligations, irrespective of the position of any other State, including the State directly injured by the breach.

71. General international law on this subject is still rather embryonic, but that fact points both ways.¹¹⁸ Some Governments are concerned at the tendency to “freeze” the law while it is in a process of development. For others, article 54 raises highly controversial issues about the balance between law enforcement and intervention, in a field already controversial enough. It also reopens the questions of the linkage between individual State action and collective measures under the Charter of the United Nations or under regional arrangements.

72. The thrust of Government comments is that article 54, and especially paragraph 2, has no basis in international law and would be destabilizing.¹¹⁹ This is stressed both by those Governments which are generally worried about the “subjectivity” and risks of abuse inherent in the taking of countermeasures,¹²⁰ and by those who are more supportive of countermeasures as a vehicle for resolving disputes about responsibility.¹²¹

73. Besides this general concern, Governments have called for a clearer link between article 54 and the provisions of chapter VII of the Charter of the United Nations. Some argue that countermeasures in response to violations of community obligations should be taken through the United Nations,¹²² or that at least there should be a reference to Security Council action.¹²³ There is a dif-

ficulty in that action taken pursuant to the Charter falls outside the scope of the articles (see article 59), while action duly taken as between the parties to regional arrangements is covered either by article 20 (Consent) or article 56 (*Lex specialis*). It would no doubt be possible to subordinate action under article 54, paragraph 2, to action duly taken under Chapter VII of the Charter, but this would not deal with all situations. More generally, it is unclear how the articles (whether or not they were to take the form of a treaty) could resolve the issue of the interface between individual and genuinely collective action. This can be seen by reference to the comments of Governments concerning the duty of cooperation postulated in article 54, paragraph 3. Governments have doubted that it can have any real effect, given its vagueness and generality. Some have called for a more explicit formulation of article 54, paragraph 3,¹²⁴ and also for clarification as to the relation between article 54, paragraph 2, and article 42, paragraph 2 (c).¹²⁵ But at the normative level it is difficult to see what more can be said.

74. There is a further difficulty, in that the mere deletion of article 54 will carry the implication that countermeasures can only be taken by injured States, narrowly defined. The current state of international law on measures taken in the general or common interest is no doubt uncertain. But it cannot be the case, in the Special Rapporteur’s view, that countermeasures in aid of compliance with international law are limited to breaches affecting the individual interests of powerful States or their allies.¹²⁶ Obligations towards the international community, or otherwise in the collective interest, are not “second-class” obligations by comparison with obligations under bilateral treaties. While it can be hoped that international organizations will be able to resolve the humanitarian or other crises that often arise from serious breaches of international law, States have not abdicated their powers of individual action. Thus if article 54 were to be deleted, there would at least be a need for some form of savings clause.¹²⁷

Article 55. Termination of countermeasures

75. As noted, article 55 has been generally welcomed.

General conclusion on part two *bis*, chapter II

76. The Special Rapporteur regards it as a matter of general policy for the Commission to decide as between the available options on countermeasures set out in paragraph 60 above. His personal view is that, while there are

¹¹⁸ For a review of the practice, see *Yearbook ... 2000* (footnote 11 above), pp. 102–104, paras. 391–394.

¹¹⁹ For example, Israel, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 15th meeting (A/C.6/55/SR.15), para. 25.

¹²⁰ Botswana, *ibid.*, 15th meeting (A/C.6/55/SR.15), para. 63; China, *ibid.*, 14th meeting (A/C.6/55/SR.14), paras. 40–41; Cuba, *ibid.*, 18th meeting (A/C.6/55/SR.18), para. 59; Germany, *ibid.*, 14th meeting (A/C.6/55/SR.14), para. 54; Japan, *ibid.*, para. 67; Libyan Arab Jamahiriya, *ibid.*, 22nd meeting (A/C.6/55/SR.22), para. 52. Other Governments called for the problem to be studied further: for example, Algeria, *ibid.*, 18th meeting (A/C.6/55/SR.18), para. 5; Jordan, *ibid.*, para. 17; Poland, *ibid.*, para. 48; see also the Republic of Korea (A/CN.4/515 and Add.1–3 (footnote 5 above)).

¹²¹ For example, the United Kingdom, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 14th meeting (A/C.6/55/SR.14), paras. 31–32.

¹²² For example, Mexico, *ibid.*, 20th meeting (A/C.6/55/SR.20), paras. 35–36; and the Islamic Republic of Iran, *ibid.*, 15th meeting (A/C.6/55/SR.15), para. 17.

¹²³ For example, Cameroon, *ibid.*, 24th meeting (A/C.6/55/SR.24), paras. 63–64; and Greece, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 85.

¹²⁴ For example, Austria, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 79; Chile, *ibid.*, para. 48; Jordan, *ibid.*, 18th meeting (A/C.6/55/SR.18), para. 17. Some other Governments supported the flexibility of paragraph 3, e.g. Italy, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 28.

¹²⁵ Austria, *ibid.*, 17th meeting (A/C.6/55/SR.17), paras. 77–78.

¹²⁶ A number of Governments suggested that countermeasures could be taken by article 49 States, but only to ensure cessation of the breach: for example, Austria, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 76; Cuba, *ibid.*, 18th meeting (A/C.6/55/SR.18), para. 59; and Poland, *ibid.*, para. 48. Others would limit article 54 to cases of “serious breaches” as defined in article 41 (Costa Rica, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 63; Italy, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 28; Russian Federation, *ibid.*, 18th meeting (A/C.6/55/SR.18), para. 51; Spain, *ibid.*, 16th meeting (A/C.6/55/SR.16), para. 13).

¹²⁷ An idea suggested by the United Kingdom, *ibid.*, 14th meeting (A/C.6/55/SR.14), para. 32.

still problems in the drafting of the articles (especially article 51), the essential balance struck in chapter II is a reasonable one *de lege ferenda*. As to article 53, the existence of certain minimum procedural standards under international law for taking and maintaining countermeasures can hardly be denied, even if the articles go beyond those limits in referring to “provisional and urgent countermeasures”. As to article 54, it can hardly be argued in the light of recent practice that countermeasures are not

available to article 49 States in any circumstances. But the apparent paradox of “unilateral collective action” raises understandable concerns, and it may be that nothing more than a savings clause is appropriate at the present time. In the light of the debate in plenary and of the conclusions reached on issues such as dispute settlement and the form of the draft articles, it will be necessary to examine the possibilities for a balanced and generally acceptable text.

Annex

SPECIFIC AMENDMENTS TO THE DRAFT ARTICLES IN THE LIGHT OF COMMENTS RECEIVED

<i>Title/article</i>	<i>Suggestion</i>	<i>Comment</i>
Part one	The title, in French, should read: “Fait générateur de la responsabilité internationale des États”; the existing title is too general (France).	Title could be reconsidered by the Drafting Committee; no ready English equivalent of the phrase “ <i>fait générateur</i> ” exists.
Chapter II, titles	The titles to articles 4–9 are too long and should be brought into line with the title to article 10 (“Conduct of ...”).	To be reconsidered by the Drafting Committee.
Article 2	This should also make reference to the circumstances precluding wrongfulness under chapter V (Guatemala) .	These are certainly relevant to responsibility, but it seems sufficient to note this in the commentary.
Articles 4–5	The draft articles should provide guidance on what is meant by the term “exercising governmental authority”; there is at present no agreed definition (United Kingdom).	No specific form of words can resolve the problem of application; the matter can be addressed in the commentary.
Article 5	The phrase “by the law of that State” should be deleted; generally, the influence of internal law should not be overestimated (Japan).	Article 4 seeks to strike a balance between the role of internal and international law, both of which are relevant. Article 5 is to be read along with articles 6 (Actual direction or control) and 7 (<i>De facto</i> organs).
Article 7	In the title of the provision, the words “or default” should be added after the words “in the absence” (Republic of Korea).	To be considered by the Drafting Committee.
	The exceptional character of the provision should be stressed (United States).	The provision is indeed intended to be exceptional; at least this should be made clear in the commentary, but the Drafting Committee may wish to consider whether some further change in the language of article 7 is required.
Article 8	There should be a proviso for “joint responsibility” of both States involved, e.g. by inserting the words “without prejudice to that other State’s international responsibility” (Netherlands).	All of the articles in chapter II are cumulative; each applies separately in relation to conduct potentially attributable to a given State. The point can be made clear in the commentary.
Article 10	Articles 7 and 10 create the impression that all acts of unsuccessful insurrectional movements are attributable to the State; this is not the position under international law (Australia, Netherlands).	Clearly, it is only in exceptional cases that the conduct of an insurrectional movement is attributable to the State; articles 7 and 10 specify those exceptional cases. The point can be clarified in the commentary. The Drafting Committee may wish to consider whether paragraph 3 is necessary.
Article 11	Instead of speaking of “an act of that State under international law”, the provision should refer to “an act of that State”, as elsewhere in the text (Netherlands).	This seems right; the matter should be considered by the Drafting Committee.

Title/article	Suggestion	Comment
Article 14	The title should be replaced by “The moment and duration of the breach of an international obligation” (Republic of Korea).	To be considered by the Drafting Committee.
Article 15, paragraph 2	This should be limited to categories of composite acts which clearly appear as such (e.g. genocide) (United States).	To be considered by the Drafting Committee.
Chapter IV in general	Chapter IV contains primary rules and should be deleted (Guatemala).	Part four is concerned with a form of ancillary responsibility; its inclusion in the text has been generally approved.
	Articles 16–17 should not require that the obligation breached be binding on the assisting State (Israel).	The absence of such a requirement would raise even more difficult issues of knowledge; in the context of ancillary responsibility and having regard to the <i>pacta tertiis</i> rule, the text can be defended. See also the Special Rapporteur’s second report on State responsibility, <i>Yearbook ... 1999</i> , vol. II (Part One), document A/CN.4/498 and Add.1–4, pp. 49–51, paras. 180–186, and p. 54, paras. 201–202).
	The title, in French, should read: “Responsabilité d’un État à raison du fait d’un autre État” (France).	To be considered by the Drafting Committee.
Article 16	It is suggested to delete the phrase “knowledge of the circumstances” (Denmark, on behalf of the Nordic countries). Alternatively, article 16 (a) should read: “That State does so when it knows <i>or should have known</i> the circumstances of the internationally wrongful act” (Netherlands). The expression “knowledge of the circumstances” needs to be clarified (Republic of Korea, United Kingdom); similarly “in the commission”; both phrases should be read restrictively (United Kingdom, United States).	In general, a State is not responsible for the conduct of another State; article 16 is one of a limited number of exceptions to this rule. It is very doubtful whether under existing international law a State takes the risk that aid or assistance will be used for purposes which happen to be unlawful; hence some requirement of knowledge, or at least notice, seems inevitable. It is for consideration whether article 16 currently strikes the right balance; any eventual decision on the point must be adequately reflected in the commentary.
	The commentary to the provision should make clear what threshold of participation in the commission of the wrongful act is required (United States).	One possibility is to spell out the standard of materiality in relation to the aid or assistance; in any event the matter should be addressed in the commentary.
Article 17	Reference should be to “direction <i>or</i> control” (Netherlands).	The current formulation responds to the need for narrowly drawn criteria for responsibility under chapter IV, as contrasted, e.g. with article 6.
	The reference to “knowledge of the circumstances” of the internationally wrongful act in article 17 (a) should be deleted, as knowledge is implicit if a State directs and controls another State (Mexico).	The fact of direction and control of another State in doing a particular act does not necessarily imply awareness of all the circumstances, including circumstances entailing the wrongfulness of the act.
Article 18	The reference to “knowledge of the circumstances of the act” in article 18 (b) should be deleted; knowledge is implicit if a State coerces another State (Mexico).	The fact of coercion of another State in doing a particular act does not necessarily imply awareness of all the circumstances, including circumstances entailing the wrongfulness of the act.
Chapter V in general	It would be more in line with the general aim of the draft if chapter V dealt with “Circonstances excluant <i>la responsabilité</i> ” (Burkina Faso, France).	To be considered by the Drafting Committee.

Title/article	Suggestion	Comment
Chapter V in general (continued)	It is doubtful whether the provisions on consent, compliance with peremptory norms, self-defence and countermeasures should be included in the draft at all, as they evidently exclude the wrongfulness of an act entirely, and not merely responsibility for it (France).	The Commission decided in the context of article 20 (Consent) to take a broader view of chapter V, and this approach has been generally endorsed.
	There should be a new provision on humanitarian intervention as an exceptional circumstance excluding wrongfulness (Netherlands).	Chapter V does not deal with the substantive primary rules relating to the use of force, or indeed generally with the international law of humanitarian assistance. Cases not otherwise provided for may be dealt with in accordance with the criteria in article 26 (Necessity).
	The commentary should state clearly that the list of circumstances is meant to be exhaustive (Japan).	In accordance with articles 33 and 56, the draft does not intend to preclude further developments in international law. On the other hand, chapter V is thought to be exhaustive of the justifications or excuses generally available under international law as it stands, and this should be made clear in the commentary.
	The commentary should safeguard the rights of third States which might be affected by self-defence or countermeasures (Japan).	The Special Rapporteur agrees; the point will be covered in the draft commentary.
Article 20	The old proviso as to peremptory norms (old article 29, paragraph 2) should be reintroduced (Cyprus, Israel, Slovakia, Spain).	The reference to “valid” consent is intended, <i>inter alia</i> , to cover the point, which will also be made clear in the commentary.
Article 21	Could be deleted as superfluous: a conduct required by law is by definition not wrongful (Slovakia).	Chapter V is not confined to excuses such as <i>force majeure</i> but extends to justifications (consent, self-defence) which where applicable render conduct lawful by definition. In addition, circumstances can be envisaged where article 21 will resolve conflicts between generally valid obligations, thus going beyond article 53 of the 1969 Vienna Convention.
	Reference should also be made to decisions of the Security Council under Chapter VII of the Charter of the United Nations (Guatemala).	This is not necessary in the light of article 59; in any event article 21 raises distinct issues.
Article 22	The phrase “taken in conformity with the Charter of the United Nations” should be reconsidered. It is confusing and, because of article 59, unnecessary (Japan, Republic of Korea).	To be considered by the Drafting Committee in conjunction with article 59 itself.
Article 23	Those Governments favouring the deletion of part two <i>bis</i> , chapter II, on countermeasures would considerably expand this provision (United Kingdom, United States).	See main document, chapter IV, above.
Article 24	Paragraph 2 (a) should be redrafted as follows: “Wrongful conduct of the State invoking <i>force majeure</i> , either alone or in combination with other factors, has caused the irresistible force or unforeseen event” (United Kingdom).	To be considered by the Drafting Committee.
Article 25	Paragraph 2 (a) should be redrafted as follows: “Wrongful conduct of the State invoking distress, either alone or in combination with other factors, has caused the situation.” (United Kingdom).	To be considered by the Drafting Committee.

Title/article	Suggestion	Comment
Article 26	Article 26 (Necessity) should not be included in the draft articles as it is prone to abuse (United Kingdom).	Most Governments have supported the inclusion of article 26, and ICJ likewise endorsed the principle in the case concerning the <i>Gabčíkovo-Nagymaros Project</i> (<i>I.C.J. Reports 1997</i> (see main document, footnote 30 above), p. 7).
	If it is included, it should be titled simply “Necessity” (United Kingdom).	To be considered by the Drafting Committee.
	If it is included, then the reference, in paragraph 1 (<i>b</i>), to the “international community as a whole” should be changed to “the international community of States as a whole” (France, Mexico, United Kingdom).	ICJ used the phrase in the <i>Barcelona Traction</i> case (<i>I.C.J. Reports 1970</i> (see main document, footnote 54 above)), and it is used in subsequent multilateral treaties such as the Rome Statute of the International Criminal Court, art. 5, para. 1. See also paragraph 36 in the main document, above.
	The phrase “essential interest” raises questions by comparison with “fundamental interests” as in article 41 (Australia, United Kingdom).	An “essential interest” may be particular to one State, unlike the “fundamental interests” referred to in part two, chapter III.
	Paragraph 2 (<i>b</i>) should apply to other circumstances precluding wrongfulness, e.g. <i>force majeure</i> (United Kingdom).	This may be covered by article 24, paragraph 2 (<i>b</i>); the matter, however, merits consideration by the Drafting Committee.
	Paragraph 2 (<i>c</i>) should be redrafted as follows: “Wrongful conduct of the State, either alone or in combination with other factors, has caused the situation of necessity.” (United Kingdom).	To be considered by the Drafting Committee.
Article 27	Deletion proposed (France).	Article 27 (<i>a</i>) assists in avoiding confusion between circumstances precluding wrongfulness and the termination or suspension of the underlying obligation; this seems useful.
	Article 27 (<i>a</i>) should read: “the duty to comply with the obligation” (United Kingdom).	To be considered by the Drafting Committee.
	The circumstances in which article 27 (<i>b</i>) may apply need further explanation.	To be taken up in the commentary.
	Article 27 (<i>b</i>) should only refer to articles 24–26 (Netherlands); similarly France, which wants to delete article 27 (<i>b</i>) because it is too general.	To be considered by the Drafting Committee; however, article 27 (<i>b</i>) is a mere savings clause, and the point can be explained in the commentary.
Article 30	Article 30 (<i>b</i>) (Assurances and guarantees of non-repetition) should be deleted as it does not reflect international practice (United States).	To be considered in the light of the decision of ICJ in the <i>LaGrand</i> case (<i>Germany v. United States of America, Judgment, I.C.J. Reports 2001</i> , p. 9); article 30 (<i>b</i>) makes it clear in any event that this remedy is only available where the circumstances require.
	Article 30 (<i>b</i>) should read “to give appropriate assurances and guarantees” (United Kingdom).	The Special Rapporteur is inclined to agree with this suggestion; it should be considered by the Drafting Committee.
	The commentary to article 30 (<i>b</i>) should also refer to the gravity of the breach as one of the relevant circumstances (Netherlands).	The Special Rapporteur agrees.
Article 31	In view of the problems relating to the term “injury” (see article 43 below), article 31 should speak of “damage, whether material or moral”.	See main document, chapter II, above.

Title/article	Suggestion	Comment
Article 31 (continued)	Paragraph 2 is unhelpful and should be deleted (India, Japan, Slovenia).	
	The requirement of proportionality (arts. 36 (b) and 38, para. 3) should be applied generally to reparation (Czech Republic, Italy, Poland).	Compensation has its own built-in limitation, relating to the actual damage suffered. How the general principle of proportionality applies to restitution and satisfaction may differ; the issue is better addressed in the specific articles.
Article 32	The idea that the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under part two should be formulated in more general terms, possibly as a general provision which would belong in part four (France, Poland). Mexico, on the other hand, proposes that it be moved to a new article 28 <i>bis</i> , to stress its basic character.	The Drafting Committee should reconsider whether articles 3 and 32 should be merged into a single provision stating the irrelevance of internal law in more general terms, or whether article 32 should be relocated.
Article 33	Article 33 (Other consequences) should be placed in part four and formulated more generally (Netherlands, Poland, United Kingdom).	This is dealt with in a preambular paragraph of the 1969 Vienna Convention, and it seems necessary to clarify the point for present purposes. There is a case for transferring it to part four: this might be considered by the Drafting Committee.
	It should spell out more clearly what additional consequences could derive from customary international law (United Kingdom).	This can be dealt with in the commentary.
	If the Commission intends to codify the law of responsibility, article 33 is not helpful, as it limits the value of the draft (Mexico).	This depends in part on the eventual form of the articles; in any event, they do not intend to preclude developments in the law of responsibility, and thus some form of savings clause seems necessary.
Article 34	Paragraph 2 should be deleted as unnecessary in a text on State responsibility (Poland).	Article 34, which was new in 2000, has been generally welcomed, and clarifies the scope of parts two and two <i>bis</i> .
Article 35	Add the following sentence: “The determination of reparation shall take into account the nature (and gravity) of the internationally wrongful act”; this would highlight the relevance of the intentional or negligent character of the breach (Netherlands).	Chapter I is concerned with the forms of reparation in general. The extent to which questions of intention or fault are relevant in determining the modality or amount of reparation in any given case is a matter for chapter II, as well as for the primary rules. This point should be added, by way of explanation, in the commentary.
	“Injury” should be replaced by “damage” (Japan; see also article 31 above).	See main document, chapter II, above.
Article 36	The application of article 36 to questions of expropriation of foreign property is unclear (United Kingdom) and should be addressed at least in the commentary.	The articles are of course only applicable to breaches of international obligations, and thus not to that category of expropriations which are lawful <i>per se</i> . The relevant points should be covered, at least in general terms, in the commentary.
	A third exception should be added according to which restitution is not owed if it would necessarily entail the violation by the State of another obligation (“... n’entraîne pas nécessairement la violation par cet État d’une autre obligation internationale”) (France).	It is true that conflicting secondary obligations can be envisaged; restitution in respect of one State may preclude it in respect of another. Such conflicts, cannot, however be resolved by article 36, nor is it always a matter for the free choice of the responsible State. It seems better not to specify a precise rule on the point, but (as with other conflicting obligations) to leave it to the parties to resolve. See the Special Rapporteur’s second report, <i>Yearbook ... 1999</i> , vol. II (Part One), document A/CN.4/498 and Add.1–4, pp. 11–12, para. 9.

Title/article	Suggestion	Comment
Article 37	The draft should more clearly state that international law does not recognize compensation for moral damages (Austria). The opposite view (that moral damages are covered) is taken by the United States. Mexico also proposes that the position taken by the draft articles should be clarified, in particular taking into account the formulation of article 31, paragraph 2.	See main document, chapter II, above.
Article 37	The term “financial assessability” is unhelpful and should be reviewed (Austria, Republic of Korea).	See main document, chapter II, above.
	It should stress that “financial assessability” is to be determined by international law, not by national laws (United Kingdom).	This is plainly correct; the point can be covered in the commentary.
	The words “insofar as” should be replaced by the phrase “if and to the extent that” (Republic of Korea).	To be considered by the Drafting Committee.
Article 38	Other forms of satisfaction, such as nominal damages, might be added (Israel).	To be considered by the Drafting Committee.
	The words “of a similar character” should be inserted at the end of paragraph 2 (Mexico).	To be considered by the Drafting Committee.
	Delete the proviso pursuant to which satisfaction must not be “humiliating”, as this is not defined (Spain); it could be replaced by the phrase “impairing the dignity of the responsible State” (Republic of Korea).	The principle that satisfaction should not take a form which is “humiliating” or “impairs the dignity of the responsible State” seems important and was generally accepted within the Commission. Its precise formulation could be considered further by the Drafting Committee.
	The words “insofar as” should be replaced by the phrase “if and to the extent that” (Republic of Korea).	To be considered by the Drafting Committee.
	The word “injury” should be replaced by the word “damage” (Japan; see also article 31 above).	See main document, chapter II, above.
Article 39	Provision for interest should be included under the rubric of compensation under article 38, paragraphs 3–4 (Israel, Republic of Korea, Slovenia).	Interest can play a distinct role in the framework of reparation and a separate provision seems justified. See the Special Rapporteur’s third report, <i>Yearbook ... 2000</i> , vol. II (Part One), document A/CN.4/507 and Add.1–4, paras. 195–214.
Article 40	Article 40 (Contribution to the damage) should be moved to chapter I, possibly as article 31, paragraph 3, since it touches upon a general point (Republic of Korea, Slovakia).	Article 40 is concerned with the mitigation of responsibility which has arisen under part one, rather than its exclusion. Its language might, however, be reconsidered by the Drafting Committee in the light of a review of the terms “injury” and “damage” in the draft articles.
Chapter III generally	A number of Governments favour the deletion of chapter III (Serious breaches): France (but suggesting that the idea of “serious breaches” should be reformulated in a reformulated article 49), Japan, United Kingdom, United States.	See main document, chapter III, above.
Article 41	The proposed definition is full of ambiguous terms, such as “essential”, “serious”, etc. (Austria, Mexico, Republic of Korea, United Kingdom, United States). In particular: <ul style="list-style-type: none"> – The relationship between “fundamental interests” (art. 41), “essential interests” (art. 26) and “collective interests” (art. 49) needs to be explained (United Kingdom). 	See main document, chapter III, above.

Title/article	Suggestion	Comment
Article 41 (continued)	<ul style="list-style-type: none"> – There is a difference between the formulation of articles 49 (“<i>established</i> for the protection of a collective interest”) and 41 (“<i>essential</i> for the protection ...”) (United Kingdom). – The relationship between obligations covered by article 41 and obligations <i>erga omnes</i> or peremptory norms needs to be clarified (Republic of Korea). – The commentary should explain how the “risk of substantial harm” should be assessed (United Kingdom). – The term “serious” is not always necessary; aggression would, e.g. <i>per se</i> be “serious” (Netherlands). 	
Article 42	Include in article 42 (and not merely in article 58) an express reference to the provisions on international criminal responsibility under the Rome Statute of the International Criminal Court (Spain).	The distinction between State responsibility and individual criminal responsibility appears worth preserving.
Article 42, paragraph 1	In paragraph 1 the words “may involve” should be replaced by “involves” (Netherlands).	Exemplary or expressive damages are not necessarily entailed by every breach to which chapter III applies.
	If non-punitive damages providing for damages reflecting the gravity of a breach are recognized, this cannot be restricted to “serious breaches” in the sense of article 41 (United Kingdom).	Article 42, paragraph 1, does not exclude other possibilities, depending on the circumstances and the content of the relevant primary rules.
	The draft should state clearly that punitive damages are not recognized under international law (Austria, Republic of Korea, United States).	This should be made clear in the commentary, which should also explain the intent underlying paragraph 1.
Article 42, paragraph 2	Paragraph 2 could be deleted as it does not add obligations of substance (France).	See main document, chapter III, above.
	The duty of non-recognition may also apply to breaches, which are not “serious” in the sense of article 41; on the other hand, it seems too inflexible to cover <i>all</i> cases of serious breaches. Article 42, paragraph 2, generally should be replaced by a savings clause setting out possible further consequences (United Kingdom).	Article 42, paragraph 2 (<i>a</i>), does not exclude consequences of internationally wrongful acts attaching to breaches which are not “serious” in the sense of article 41. See main document, chapter IV, above.
	Clarify the relation between article 42, paragraph 2 (<i>c</i>), and article 54 (Austria, Spain).	See main document, chapter III, above.
	Delete the restriction “as far as possible” (Netherlands).	The qualification seems to be necessary, as the exact scope of the duty to cooperate is difficult to determine.
Article 42, paragraph 3	Unless concrete examples of further consequences can be envisaged, the provision should be deleted (United Kingdom).	See main document, chapter III, above.
Part two <i>bis</i>	Part two <i>bis</i> should become part three, consequent upon the deletion of existing part three (France).	The Special Rapporteur agrees.
Article 43	Articles 43 and 31, paragraph 2, need to be harmonized (Japan, Netherlands).	See generally main document, chapter II, above.
	The relation between article 43 and article 60 of the 1969 Vienna Convention (which influences the drafting of article 43) should be addressed (Japan).	

<i>Title/article</i>	<i>Suggestion</i>	<i>Comment</i>
Article 43 (continued)	The concept of “injury” should include all instances of article 49, which could be seen as “indirect injury” (Netherlands).	
	There should be a new subparagraph (c) which takes up the substance of what is now article 49, paragraph 1 (France).	
	The term “injury” should be defined by reference to concepts such as material, moral damage; the relation between the terms “affected” and “injured” is unclear (Japan).	
	The term “invocation of responsibility” should be defined (United Kingdom). Some forms of invocation would not require “injury” as defined in article 43 (United Kingdom).	
	The internal structure of the provision should be changed: it should first set out when a State is injured and secondly spell out the consequences (United Kingdom).	
Article 43 (a)	Outside the case of bilateral treaties, it is not clear when obligations are owed to a State “individually”, e.g. in cases of “multilateral treaties bilateral in application” (United Kingdom).	This will need to be clarified in the commentary; it is not the function of the text itself to give examples. See also main document, chapter II, above.
Article 43 (b) (ii)	The provision should be deleted as the category is controversial (Japan) or too broadly formulated (United States).	See generally main document, chapter II, above.
	The relation between “integral obligations” and situations coming within the scope of article 49 needs to be clarified (Austria, Mexico, Republic of Korea).	
Article 44	Contrary to its title, the provision does not define “invocation” (United Kingdom).	The meaning of “invocation” should be made clear, either in the text or the commentary; in this context the title to article 44 may also require reconsideration.
	The provision should list all remedies that an injured State has (United Kingdom).	In principle an injured State may claim all or any of the available forms of reparation in accordance with part two; this should be made clear.
Article 45	The earlier version (art. 22 of the 1996 draft) of the local remedies rule should be reintroduced (Spain).	Former article 22 embodied a “substantivist” conception of local remedies; the adoption of a more neutral formulation has been generally welcomed by Governments and writers.
	The words “by an injured State” ought to be included after “may not be invoked” (Republic of Korea).	The addition does not seem necessary in view of article 49, paragraph 3.
	The term “nationalité des réclamations”, which has no clear meaning in French, should be replaced by “nationalité dans le cadre de l’exercice de la protection diplomatique” (France).	The exhaustion of local remedies rule is not limited to diplomatic protection; however, the question of terminology should be further considered by the Drafting Committee.
	A new subparagraph should expressly state that the responsibility for violations of the rights of foreign nationals may not be invoked unless local remedies have been exhausted (Mexico).	Having regard to the Commission’s proposed work on diplomatic protection, it does not seem necessary to spell out here the detailed content of the rule and of the exceptions to it. Some further clarification can be offered in the commentary.

Title/article	Suggestion	Comment
Article 46	The possibility of waiving rights should be excluded in cases involving obligations <i>erga omnes</i> (Netherlands), or of peremptory norms (Republic of Korea).	As with article 20, the issue is covered by the term “valid”; it is not the function of the articles to spell out in which cases consent or waiver may operate in relation to these norms. However, something should be said on the point in the commentary.
	The expression “valid” is redundant; the qualification “unequivocal” is problematic (United Kingdom).	For the reasons given above, the term “valid” adds something. It seems that as a matter of international law a waiver must be unequivocal, although whether that is so in a given case is a question of interpretation.
Article 48	It is not clear whether several wrongful acts by several States each cause the paragraph 1 is intended to apply to situations where same damage. If this is so, the words “the same internationally wrongful act” should be amended (Republic of Korea).	The situations are at least analogous; the matter should be considered by the Drafting Committee in the light of its reconsideration of the terms “injury”, “damage”, etc.
	Paragraph 1 should not be read as a recognition of joint and several liability under international law; an alternative formulation is proposed.	As made clear in the third report, <i>Yearbook ... 2000</i> , vol. II (Part One), document A/CN.4/507 and Add.1–4, paras. 277–278 and 282 (and as will be further clarified in the commentary), this article is not intended to impose a regime of joint and several liability in all cases.
Article 49	Article 49 should be deleted, as it is not a core issue of the law of State responsibility (Japan).	See generally main document, chapter II, above.
	All parties to all multilateral treaties should have the status of “interested States”, although they would not necessarily have the same rights as “injured States” (United Kingdom).	
	Article 49 should be changed so as to entitle “other States” to invoke responsibility if the breach in question is “a serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests” (France).	
	There should be a savings clause in part two <i>bis</i> indicating that non-State entities may also be entitled to invoke responsibility (Netherlands).	
Article 49, paragraph 1	The expression “protection of a collective interest” is not clearly defined (United Kingdom).	See generally main document, chapter II, above.
Article 49, paragraph 2	It is questionable whether the right to demand reparation under article 49, paragraph 2 (b), is really recognized in international law (France, United Kingdom).	See generally main document, chapter II, above.
	There ought to be a procedure governing cases in which a multitude of States is entitled to demand compliance under article 49, paragraph 2 (b), possibly along the lines of article 54, paragraph 3 (Austria; see also United Kingdom).	
	Paragraph 2 (b) ought to apply to cases of serious breaches (arts. 41–42) as well (Netherlands). The procedure for claims for reparation under paragraph 2 (b) is unclear (United Kingdom).	
Article 49, paragraph 3	The words “ <i>mutatis mutandis</i> ” should be added after “under articles 44, 45, and 46 apply” (Republic of Korea).	This is clearly the intent of the article and can be explained in the commentary.

Title/article	Suggestion	Comment
Chapter II generally	A number of States argue against a detailed regulation of countermeasures in a separate chapter and instead favour an expanded version of article 23 (Japan, United Kingdom, United States); conversely, Mexico opposes any regulation, on the basis that this would tend to legitimize countermeasures.	See main document, chapter IV, above.
Article 50	Rights of third States should be more clearly safeguarded (Netherlands).	This is covered in paragraphs 1–2, and can be further clarified in the commentary.
	The object of countermeasures should be defined as “inducing compliance with the primary obligation”; countermeasures cannot be taken just to ensure reparation (Japan).	Inducing compliance with the primary obligation is covered by article 30; however, in certain circumstances countermeasures might also be justified in response to a failure to comply with other obligations in part two, provided the general conditions for taking countermeasures are met.
	The exceptional character of countermeasures should be stressed (Mexico).	See main document, chapter IV, above.
	It is necessary to ensure consistency between article 41, paragraph 1, article 49, paragraph 1 (b) and article 50, paragraph 1, especially as concerns “indirectly injured” States (Germany).	To be considered by the Drafting Committee.
	In article 50, paragraph 1, the phrase “to comply with its obligations under part two” should be replaced by the phrase “to comply with its obligations under international law” (Greece).	The existing phrase seems more precise; nonetheless the point should be considered by the Drafting Committee.
	In article 50, paragraph 3, the words “the resumption of performance of the obligation or obligations in question” should be replaced by the words “subsequent compliance with the obligation or obligations in question”, since some of the obligations might be instantaneous in character (Guatemala).	To be considered by the Drafting Committee.
Article 51	Delete the provision, which is unnecessary (as it would be covered by the Charter of the United Nations and/or an application of article 52) and introduces many uncertainties (United States).	See main document, chapter IV, above.
	The reference to “derogation” in the <i>chapeau</i> invites confusion with human rights derogability clauses; it should also be made clearer that the article refers to the obligations of the State taking the countermeasures (United Kingdom).	The Special Rapporteur agrees in principle; to be considered by the Drafting Committee.
	A proviso prohibiting countermeasures endangering the territorial integrity of another State should be reintroduced (Spain).	See generally main document, chapter IV, above.
	Include a reference to the prohibition of countermeasures concerning cultural property (comment by UNESCO).	
	A new subparagraph should exclude countermeasures violating “obligations to protect the environment against widespread, long-term and severe damage” (Republic of Korea).	

Title/article	Suggestion	Comment
Article 51 (continued)	Paragraph 1 (d) should become 1 (e), as the core of obligations in the field of diplomatic/ consular intercourse is of a peremptory character (Mexico).	
Article 52	Countermeasures should be justified to the extent that they are necessary to induce compliance with the obligation breached (Japan, United States).	This is implicit in article 50, paragraph 1; the criteria for proportionality in article 52 do not mean that the particular situation, including the relative situation of the States concerned, should not be taken into account, and this can be further clarified in the commentary.
	The term “commensurate”, which seems to suggest a more restrictive meaning, should be replaced by “proportional” (United States).	The term was used by ICJ in the case concerning the <i>Gabčíkovo-Nagymaros Project</i> (see main document, footnote 30 above), and seems useful.
	It would be more precise to refer to the “effects of countermeasures” (Slovakia, similarly Spain).	This may well be right, and should be considered by the Drafting Committee.
	The words “the rights in question” should be replaced by “the effects of the internationally wrongful act on the injured State”; otherwise it has to be explained more clearly what rights are envisaged (Republic of Korea; see also United States).	The term was used by ICJ in the case concerning the <i>Gabčíkovo-Nagymaros Project</i> , and seems useful.
	The provision should be couched in negative terms: “not disproportionate” etc. (Denmark, on behalf of the Nordic countries).	A negative formulation may allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.
	The reference to “gravity” should be dropped (Japan).	It does not seem unreasonable to take account of the gravity of a breach in determining the permissibility of countermeasures.
	The United States proposes a reformulation of article 52: “Countermeasures must be proportional to the injury suffered, taking into account both the gravity of the internationally wrongful act and the rights in question as well as the degree of response necessary to induce the State responsible for the internationally wrongful act to comply with its obligations.”	To be considered by the Drafting Committee.
Article 53	Article 53 needs to be redrafted so as to include references to States which are not injured, but which may nevertheless take countermeasures (Austria).	See main document, chapters II and IV, above.
	Paragraph 5 should also include a reference to situations in which the Security Council has taken a binding decision (Netherlands).	This is covered by article 59.
	The conditions set out in paragraphs 1, 2, 4 and 5 (b) are not recognized in present-day international law (United Kingdom). The United States agrees with this criticism with respect to paragraphs 2, 4 and 5 (b); Slovakia with respect to paragraphs 4 and 5 (b). Japan disagrees with the reference, in paragraph 2, to “offers of negotiation”.	See generally main document, chapter IV, above.
	Paragraph 3 should be formulated more restrictively, so as to prevent abuse (Republic of Korea). In the view of the United States, paragraph 3 should be expressly exempted from paragraph 5 (b).	See generally main document, chapter IV, above.

<i>Title/article</i>	<i>Suggestion</i>	<i>Comment</i>
Article 53 (continued)	Paragraph 5 should become a separate provision, possibly as article 50 <i>bis</i> . (Denmark, on behalf of the Nordic countries).	This could be considered by the Drafting Committee in the light of the general debate on countermeasures.
	Paragraph 5 (b) should be incorporated in paragraph 4; consequently urgent countermeasures could still be taken if a dispute was submitted to a binding dispute settlement procedure (France).	To be considered by the Drafting Committee; the comment also encompasses Japan's view that countermeasures should not apply to disputes concerning reparation as distinct from cessation.
	Paragraph 5 (a)–(b) should be disjunctive, not cumulative (Poland).	
Article 54, paragraph 1	Article 54, paragraph 1, does not have a basis in international law and should be deleted (Japan).	See generally main document, chapter IV, above.
	Countermeasures as an exceptional remedy may only be taken by "injured States"; hence paragraph 1 should be deleted. Article 54 generally does not do justice to the role of the United Nations as a guardian of international peace and security (Mexico).	
	States which are entitled to invoke the responsibility of a State responsible for a "serious breach" may resort to countermeasures irrespective of a request of an injured State, or of the conditions attaching to countermeasures by that injured State (France).	
Article 54, paragraph 2	Those Governments which reject articles 41–42 also favour the deletion of article 54, paragraph 2 (e.g. Japan; see also Mexico).	See main document, chapters III and IV, above.
	There should be an express cross-reference to article 49, paragraph 2; countermeasures may only be taken after requests have produced no result (Austria).	This is covered by the phrase "in accordance with the present chapter".
Article 54, paragraph 3	The procedure ought to be more precise; perhaps there should be (in article 54 or 53) an obligation to negotiate joint countermeasures (Austria).	See main document, chapter IV, above.
Part four generally	An additional article should elaborate on the "reflexive" nature of the draft articles, e.g. by clarifying that circumstances precluding wrongfulness equally apply to secondary obligations (Netherlands).	This can be made clear in the commentary.
	A new provision, along the lines of article 34, paragraph 2, should safeguard the rights of non-State entities (Netherlands).	This seems unnecessary given the scope of the draft articles as well as article 34, paragraph 2; the Drafting Committee may wish to consider whether article 34, paragraph 2, should be moved to part four.
	The irrelevance of internal law should be expressed in a general provision (France; see also France's comments on article 32).	See comment above, on France's suggestion relating to article 32.
Article 56	Preference for former article 37 (of the 1996 draft) (Italy, Spain).	This can be considered by the Drafting Committee.
	The provision should be kept within part two (Spain).	The principle has potential application to issues arising under other parts.

<i>Title/article</i>	<i>Suggestion</i>	<i>Comment</i>
Article 56 <i>(continued)</i>	It should contain an exception for peremptory norms (Spain).	The word “determined” means “validly determined”; see article 53 of the 1969 Vienna Convention.
	Article 56 as it currently stands seems to refer to part one and part two only. At least, no mention is made of “implementation”, and “legal consequences” only covers part two.	This should be considered by the Drafting Committee.
Article 57	In the French text, the words “pour le comportement d’une organisation internationale” should be replaced by “à raison du comportement d’une organisation internationale” (France).	This can be considered by the Drafting Committee.
Article 59	Article 59 is superfluous because of Article 103 of the Charter of the United Nations (Slovakia).	This may be considered by the Drafting Committee in the light of the debate as to the form of the articles. A possible solution is to merge articles 56 and 59.
	The phrase “without prejudice to the Charter of the United Nations” should be more precise (Austria, Spain): in particular the relation between Security Council action and article 54 is unclear (Austria).	This can be considered by the Drafting Committee.
	Article 59 has to cover part two <i>bis</i> as well; there should be a reference to peremptory norms (Spain).	This can be considered by the Drafting Committee.

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Comments and observations received from Governments

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Introduction

1. On 12 December 2000, the General Assembly adopted resolution 55/152, entitled “Report of the International Law Commission on the work of its fifty-second session”. In paragraph 2 of that resolution, the Assembly encouraged the Commission to complete its work on the topic “State responsibility” during its fifty-third session, taking into account the views expressed by Governments during the debates in the Sixth Committee at the fifty-fifth session of the General Assembly, and any written comments that might be submitted by 31 January 2001, as requested by the Commission.

2. In its report, the Commission had indicated that it would appreciate receiving from Governments comments and observations on the entire text of the draft articles provisionally adopted by the Drafting Committee on second reading in 2000,¹ in particular on any aspect which it might need to consider further with

¹ *Yearbook ... 2000*, vol. II (Part Two), p. 17, para. 23.

a view to its completion of the second reading in 2001.² By a note dated 21 August 2000, the Secretariat invited Governments to submit their written comments by 31 January 2001.

3. As at 16 March 2001, replies had been received from the following 10 States (dates of submission in parentheses): Austria (27 February 2001); China (17 January 2001); Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark) (5 February 2001); Japan (9 February 2001); Netherlands (12 February 2001); Republic of Korea (20 February 2001); Slovakia (14 February 2001); Spain (27 February 2001); United Kingdom of Great Britain and Northern Ireland (1 March 2001); and United States of America (2 March 2001). Replies have since been received by Argentina, France, Mexico and Poland. These replies are reproduced below, in an article-by-article manner.

² *Ibid.*, chap. IV, annex, text of the draft articles provisionally adopted by the Drafting Committee on second reading, p. 65.

Comments and observations received from Governments

General remarks

Argentina

1. Argentina warmly welcomes the considerable progress made on this important topic and hopes that the Commission will manage to complete the second reading at its fifty-third session.

2. Argentina is convinced that the draft articles submitted to the General Assembly for consideration at its fifty-fifth session are close to the final product, with only a few minor technical and streamlining adjustments to be made.

3. This is a balanced and realistic draft codifying the general rules governing responsibility for wrongful acts by States, and also containing elements of progressive development in directions which Argentina considers appropriate on the whole.

4. Specifically, the draft has made adequate progress on two of the most controversial and sensitive topics: the question of so-called “State crimes” and the rules governing countermeasures.

Austria

Austria welcomes the fact that the Commission gave absolute priority to the subject of State responsibility during its annual session in 2000 and expresses its confidence that it will be possible, on the basis of the most recent report of the Special Rapporteur and of the recent work of the Commission, to bring the long discussions about this difficult subject to a successful conclusion.

China

1. At its fifty-second session, the Commission completed a preliminary consideration of the draft articles on State responsibility adopted on first reading¹ and provisionally adopted a revised text of the draft articles. China commends the Commission for the progress achieved in its work.

2. The draft articles on State responsibility are nearing completion. China hopes that the Commission will concentrate its time and energy on the question of State responsibility as a matter of priority at the forthcoming session, striving to complete the second reading of the draft articles as planned in 2001 with a view to submitting a complete text of draft articles and commentaries to the General Assembly.

¹ *Yearbook ... 1996*, vol. II (Part Two), p. 58.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

1. The Nordic countries attach great importance to the successful conclusion of this monumental project, which constitutes the last major building block of the international legal order to be placed alongside the law of treaties and the law of the peaceful settlement of disputes.

2. Over the years the Nordic countries have urged the Commission to complete this topic by the end of the present term of office of its members, i.e. in 2001. The Nordic countries commend the Special Rapporteur, James Crawford, for having moved ahead at full speed since he took command of the subject matter in 1997.¹ As a result

¹ *Yearbook ... 1997*, vol. II (Part Two), p. 58, para. 161 (d).

of his energetic efforts and those of the Commission's Drafting Committee, we now have before us the outline of a full set of draft articles on second reading. And generally speaking, the Nordic countries are very satisfied with the result.

3. As to the present draft adopted by the Drafting Committee on second reading, the Nordic countries can agree to the new structure of the draft in four parts. The present draft is a considerable improvement compared to the draft adopted on first reading in 1996. The Special Rapporteur has made a much appreciated effort to streamline the draft articles in the light of comments made by Governments, development in State practice, judicial decisions and the literature.

4. The Nordic countries look forward to receiving the Commission's final draft together with its recommendation as to the further consideration of the articles. The Nordic countries are confident that the Commission will be able to finish the second and final reading of the draft articles during its forthcoming session and present a final draft on this monumental codification project. The Nordic countries urge the Commission to do its utmost to achieve this result.

Japan

1. In Japan's view, the draft articles should function in two ways. They should serve as a reference and guideline informing a State of its rights and obligations with regard to State responsibility. The draft should thus function to secure legal stability and predictability in international relations. But more importantly, this draft should also serve as a general standard for international courts to refer to in actual international disputes.

2. While the function of restoring the legality of the obligation breached has been recently emphasized, the traditional and still central function of State responsibility focuses on the conditions where injured States can invoke State responsibility and what they can seek for reparation. Even though part one of the draft articles reflects multilateral obligations in State responsibility, invocation of State responsibility is still in essence recognized in the context of bilateral relationships between the responsible State and the injured State.

Mexico

1. Mexico expresses its appreciation to the Commission, especially its special rapporteurs, for their work on the topic of State responsibility. It hopes that the codifying exercise in which the Commission is engaged will lead to the adoption of a set of provisions to regulate this important area of international relations.¹

2. Mexico considers that the Commission's work should take the form of an instrument that will codify the basic principles governing State responsibility and will help to resolve any conflicts that may arise in its implementation and interpretation. In this context, it is essential to avoid

¹ The text of the articles provisionally adopted by the Drafting Committee on second reading is contained in *Yearbook ... 2000*, vol. II (Part Two), pp. 65–71.

the inclusion of concepts that do not have sufficient support in international practice and tend to multiply or exacerbate differences instead of helping to resolve them.

3. In accordance with the agenda of its fifty-third session, the Commission will consider and adopt on second reading the draft articles referred to it by the Drafting Committee. Mexico is thus submitting the following comments and requests the Commission to take them into account in its decision-making process.

4. Mexico supports the general structure of the draft articles provisionally adopted by the Drafting Committee and congratulates the Commission on its revision of the proposed organization of the articles adopted on first reading. The new structure more clearly and systematically reflects the various components of State responsibility and the way they interact. It was a particularly wise decision to introduce a distinction between the secondary consequences of an internationally wrongful act and the means available for dealing with those consequences.

5. It is noteworthy, however, that no dispute settlement mechanisms have been included in the new structure of the draft articles. Mexico takes note of the Commission's intention to continue to examine this issue during the second reading of the draft articles and reaffirms the need for the adopted text to make reference to and expand upon dispute settlement mechanisms, to the extent possible. Regardless of the final form of the draft, the inclusion of provisions for resolving disputes is essential in the light of some of the concepts deriving therefrom, including countermeasures.

6. Lastly, Mexico would like to pay tribute to Mr. James Crawford, whose dedication and efforts have been crucial to the conclusion of the Commission's work on this topic.

Netherlands

At its fifty-second session, the Commission asked Governments for their observations on the draft articles on State responsibility. In addition to the said draft articles, the Netherlands' observations take account of the chapter on State responsibility in the Commission's report on its fifty-second session.¹

¹ *Yearbook ... 2000*, vol. II (Part Two), p. 18.

Poland

1. Poland expresses its highest satisfaction at the termination of the Commission's codification work on the topic of State responsibility. It wishes to congratulate the Commission, and in particular its Special Rapporteur, who delivered a highly mature and scholarly draft, and the Chairman of the Drafting Committee, who conducted the work leading to the elaboration of the final version of the draft.

2. Poland accepts the general structure of the draft divided into four general parts dealing with the origin of State responsibility, obligations arising out of internationally wrongful acts, procedures of implementation of State responsibility and general provisions, respectively. The draft therefore preserves its general structure, as proposed

at the very beginning of the Commission's work on the topic. At the same time, thanks to important changes, modifications, clarifications, and simplifications, the current version constitutes an important step towards the possible codification of the law on State responsibility.

Republic of Korea

1. The Republic of Korea wishes to express its appreciation to the Commission and, in particular, to the Special Rapporteur, James Crawford, for the excellent work they have done on the draft articles on State responsibility, one of the most complicated and pivotal topics of international law today.
2. The Republic of Korea considers that the draft articles provisionally adopted by the Drafting Committee on second reading represent a considerable improvement on those adopted on first reading in 1996. They have become more simplified in a logically consistent way and are better suited to the needs of the international community, thereby enhancing their applicability in the practice of international relations.
3. In general, the Commission has not only brought the draft articles more in line with existing customary law, but has also struck an appropriate balance between codification and progressive development in the field of State responsibility.
4. In the light of the progress made so far, the Republic of Korea hopes that all outstanding issues will be resolved at the forthcoming session of the Commission and that the efforts of several decades will be fully rewarded.

Slovakia

1. Slovakia acknowledges that the codification of international law in the field of State responsibility is of the utmost importance. It is a very difficult, challenging and, indeed, delicate task to identify and elaborate a set of rules determining internationally wrongful acts of States and providing for the consequences arising therefrom.
2. Slovakia would like to commend the Commission and in particular its Special Rapporteur, James Crawford, for their work on this topic.

Spain

1. Spain wishes to reaffirm its interest in the codification process concerning State responsibility, which the Commission undertook in the 1950s and which has thus far culminated in the provisional adoption of a set of draft articles with a total of 59 articles.¹ Spain is convinced that codifying the law of State responsibility can help to foster stability and peace in international relations through the regulation by means of a treaty of a group of provisions of unquestionable importance for the smooth functioning of the international order.

2. For these reasons, Spain values the work accomplished by the Commission and particularly by the Special Rapporteur, James Crawford, which has resulted in a clearer and better organized draft than the one submitted on first reading in 1996.

3. For the above reasons and with a view to facilitating the prompt conclusion of the work, Spain confines itself to reiterating some specific comments on the most important topics covered in the draft articles, omitting a detailed commentary on the draft as a whole.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom commends the Commission on the revised draft articles on State responsibility provisionally adopted by the Drafting Committee. In many respects the revised draft articles are a considerable improvement on those adopted in 1996 on first reading. The decision to provide for a single category of internationally wrongful acts has brought the draft articles closer to State practice; and the decision to omit part three (settlement of disputes) has removed one significant obstacle to the acceptability of the draft articles by States. However, it is clear that, while many parts of the text reflect well-established rules of international law, other parts concern areas where the law is still developing and where there is little, if any, settled State practice. There are always difficulties in identifying general principles in such areas but these are compounded in the case of State responsibility by the great breadth of the subject and the wide variety of situations in which such responsibility may be incurred. In these circumstances it is essential that the draft articles do not purport to identify rules where none exist or, where rules are developing, seek to fix definitively their parameters when it is clear that they have yet to crystallize.

2. The statement of the Chairman of the Drafting Committee¹ introducing the draft articles is a helpful explanation of the thinking behind the current draft. It is said in many places that questions arising from various draft articles will be dealt with in the commentary. These questions are numerous and important. A final view on the draft can be taken only when the commentary is available.

3. The United Kingdom has a number of detailed observations on particular draft articles. It retains, however, a number of fundamental concerns that relate to the structure of the draft articles and to the approach to certain topics. In addition, to the extent that its earlier written and oral observations remain relevant to the present draft they are maintained (but not necessarily repeated here).

¹ *Yearbook ... 2000*, vol. II (Part Two), pp. 65–71.

¹ *Yearbook ... 2000*, vol. I, 2662nd meeting, p. 386.

United States of America

1. The United States welcomes the opportunity to provide comments on the second reading text of the draft articles on State responsibility prepared by the Commission. The Commission has made substantial progress in revising the draft articles; however, certain provisions continue to deviate from customary international law and State practice. The comments of the United States first address those provisions that raise the most serious concerns:

(a) *Countermeasures*. The United States continues to believe that the second reading draft articles on countermeasures contain unsupported restrictions on the use of countermeasures;

(b) *Serious breaches of essential obligations to the international community*. While it welcomes the Commission's recognition that the concept of "international crime" has no place in the draft articles on State responsibility, the United States questions the wisdom of drawing a distinction between breaches and "serious breaches". It particularly opposes any interpretation of these articles that would allow punitive damages as a remedy for serious breaches;

(c) *Injured States*. The United States welcomes the Commission's decision to draw a distinction between States that are specifically injured by the acts of wrongdoing States and other States that do not directly sustain injury, but believe the Commission's definition of "injured State" should be narrowed even further to strengthen this distinction.

2. It is to be hoped that these comments will facilitate the Commission's continuing and important efforts to finalize the draft articles on State responsibility by aligning them more closely with customary international law and State practice.

3. The United States is pleased with the substantial progress the Commission has made in revising the draft articles to more accurately reflect existing customary international law. However, the United States believes that the particular provisions that have been discussed continue to deviate from customary international law and State practice. In order to enhance prospects for broadest support of the Commission's work in this important area, the United States believes it critical that the Commission better align the provisions with customary international law in the areas discussed above, as well as below.

Dispute settlement provisions

China

In the revised text of the draft articles provisionally adopted by the Drafting Committee, all the articles on dispute settlement have been deleted. China believes that in view of the provisions of Article 33 of the Charter of the United Nations, parties to a dispute should have the right to freely choose the means that they deem appropriate to settle the dispute peacefully. It is therefore necessary to make changes to the draft articles of the former part three. However, China does not agree with the simple deletion

of all the articles concerning dispute settlement. Since the question of State responsibility involves rights and obligations between States as well as their vital interests, it is a sensitive area of international law in which controversy arises easily. In order to deal with these questions properly, it is necessary to set out general provisions to serve as principles for the settlement of disputes arising from State responsibility, including in particular strict compliance with the obligation to settle disputes peacefully as stipulated in Article 2, paragraph 3, and Article 33 of the Charter of the United Nations. China suggests that the Commission continue its consideration of the articles on dispute settlement, and place those articles back into the draft articles for final adoption.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The Nordic countries wish to reiterate that the proposed new structure of the draft articles represents a considerable improvement and should be maintained as the basis for the final presentation of the draft to the General Assembly at its fifty-sixth session. Thus the Nordic countries can accept that for the time being there will be no specific part dealing with peaceful settlement of disputes related to the draft articles.

Japan

A dispute settlement clause is not necessary, whether or not the draft articles will be adopted as a convention, since if a new dispute settlement mechanism were created, it would become a *de facto* second International Court of Justice, considering that almost all international legal disputes entail State responsibility.

Mexico

1. As has been indicated throughout this document, Mexico is in favour of including references to dispute settlement mechanisms in the draft articles, deeming them fundamental to the effective implementation of its provisions. Even if the draft articles were adopted as a declaration, it would be necessary to include dispute settlement provisions so that, without prejudice to the principle of free choice of means, these rules could help States determine the most appropriate mechanisms for resolving any differences that might arise in their implementation and interpretation.

2. In view of the possibility that States will resort to countermeasures, Mexico feels that third-party dispute settlement methods are more suited to the nature of the draft articles.

Slovakia

Slovakia agrees with the approach to put aside the former part three (settlement of disputes). Slovakia also supports the decision of the Commission not to link the taking of countermeasures to the dispute settlement mechanism.

Spain

1. For the reasons stated above (see General remarks), Spain has been in favour of the Commission concluding its work with the adoption on second reading of a draft international convention, in which the provisions in part three concerning the settlement of disputes would occupy a special place.

2. Nevertheless, in submitting the draft articles adopted by the Drafting Committee on second reading and requesting comments from Governments, the Commission has deleted all references to the settlement of disputes and seems to lean towards adopting the draft as a declaration of the General Assembly (*Yearbook ... 2000*, vol. II (Part Two), pp. 53–54, para. 311, and p. 64, para. 401). Moreover, despite the substantial progress made, the Commission, in the interest of achieving consensus, does not appear to contemplate extending the work beyond 2001. All of this appears to have prejudged the debate on the form that the draft should take and to have disposed many Governments to abandon the attainment of an international convention for the time being. In view of the vagueness of many of the draft provisions and the serious consequences which their application would entail in the absence of a third body that arbitrates with regard to the interpretation and application of the articles, Spain believes that it would be appropriate to introduce some type of dispute settlement provision even if no agreement is reached to adopt a binding instrument. Such a provision would offer States valuable guidelines on conduct and guidance in this area, encouraging them to resort to judicial methods of settlement, while respecting the free choice of methods and the validity of special regimes.

United Kingdom of Great Britain and Northern Ireland

See General remarks, above.

Final form of the draft articles

Austria

1. Regarding the question of the legal form to be chosen for the result of the work of the Commission on the subject of State responsibility, there is the possibility to opt either for a binding legal instrument in the form of a multilateral convention or for a non-binding solution, like a General Assembly resolution. There appears to be a tendency in today's progressive development of international law against the traditional form of a binding legal instrument, and for a text to be adopted as an annex to an Assembly resolution. This could mean the Assembly adopting a resolution which would take note of the articles on State responsibility as a "restatement of international law". This procedure would have the advantage that the careful and delicate balance would not be disturbed by a drafting exercise in the Assembly. Austria is in favour of this solution.

2. As past experience in a number of specific conventions has shown, the general advantages of a binding legal

instrument, which consist in essence in legal security, can easily be turned into the opposite effect. A diplomatic conference finalizing and adopting the text would in all likelihood imply the renewal, not to say repetition, of a very complicated discussion, which could endanger the balance of the text attained by the Commission.

China

As to the final form to be taken by the draft articles, China favours that of a General Assembly resolution or declaration, rather than a convention.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The draft as it now presents itself may no doubt still undergo changes, but by and large it is a draft worthy of being considered and eventually adopted as a legally binding convention alongside such basic codifications as the law of treaties, diplomatic and consular law and the law of the sea. The recent adoption of the Rome Statute of the International Criminal Court setting out the *individual* responsibility of persons committing the most serious international crimes would also seem to suggest that the time has indeed come to adopt the basic instrument on *State* responsibility.

Japan

1. In the light of the functions expected of the draft articles, Japan believes that they should not be adopted as an "innovative" guideline that does not reflect State practice and established international law. Such an instrument would not gain the credibility necessary in the real exercise of international law. The task of the Commission is the codification and progressive development of international law. Japan considers that a non-binding declaration or guideline is a more suitable form for the topic. However, if the draft articles go beyond progressive development, they would entail a new political judgement and would need to be discussed and decided on by Governments.

2. Japan prefers a non-binding instrument (i.e. declaration, guideline) to a convention.

3. General principles of State responsibility that States can comfortably rely on should be produced. Whether or not the draft articles end up as a declaration or a convention, or even a study of authorities, the final product should be something on which States count and to which courts refer.

Mexico

1. In Mexico's view, the result of the work of the Commission on the topic of State responsibility should take the form of a binding instrument. After all, the signing of a convention would be the most suitable way to conclude an effort that has been going on for 50 years.

2. Moreover, a binding instrument is the only way of providing security to States and establishing concrete

mechanisms for resolving differences that may arise in practice.

3. Support for the adoption of the draft articles in the form of a declaration has grown in recent years. This trend is based on the fact that in view of the difficulties involved in the topic of State responsibility, there is a risk that no agreement will be reached on a diplomatic conference or that a convention will not receive enough ratifications to enter into force. It has also been said that the adoption of the draft articles in a non-binding form could have greater impact by providing a guide to States concerning their obligations and rights, and offering accepted guidelines, in the form of a declaration, to courts considering relevant cases.

4. There are evident advantages and disadvantages to the adoption of a convention or a declaration. In the light of the debate in the Sixth Committee, Mexico feels that the final decision can be taken only when the definitive content of the articles has been established. As can be seen from reading the various reports of the Commission and the debates in the Sixth Committee, the topic of State responsibility is a complex one. In its current form, the draft contains a series of elements that provide important definitions on the nature of State responsibility. Excessive caution should not be a justification for depriving the international community of an instrument that will provide certainty. Mexico is willing to analyse all possibilities that may lead to a universally acceptable instrument.

Netherlands

1. One question that arises in connection with the draft is whether the draft articles should eventually take the form of an international treaty or a General Assembly declaration (or rather an annex to such a declaration). The aim of the Commission is to complete its work on State responsibility at its forthcoming session in 2001. The Netherlands welcomes this aim in principle. But it must be remembered that there is a drawback to the desire to complete the text. The pressure to play safe will undoubtedly grow; in other words, the elements in the draft that could be regarded as *de lege ferenda* or progressive development (for example, countermeasures and serious breaches) will come under pressure.

2. Given the Commission's eagerness to complete its work, a declaration would be the most obvious course of action. If the Commission opts for a treaty, it would run the risk that much of the *acquis* in the text would once again be open to doubt. It must also be remembered that a declaration by the General Assembly should be seen both as a codification of existing customary international law and, to the extent that the articles are still no more than emerging rules of customary law, a form of State practice which will make a significant contribution to the development of customary law in this area. A declaration would therefore hardly be less binding on States than a treaty. Moreover, with a treaty, there would be the danger of States being reluctant to ratify it and thus not being bound by the worldwide legal regime the treaty was intended to establish. Nor should the advantage associated with a treaty be overestimated, namely that it would automatically create a need to provide for a dispute settlement

mechanism. A complicating factor here would then be the question of whether such a mechanism should apply to every specific dispute concerning alleged breaches of the primary rules or should be concerned solely with the interpretation and application of the treaty itself.

3. The Netherlands therefore advocates embodying the results of the activities of the Commission in an annex to a declaration by the General Assembly. The Netherlands is not in favour of a weaker instrument.

Poland

Although Poland is fully aware of possible difficulties, it would welcome the convening of an international convention under the auspices of the United Nations General Assembly codifying the law of State responsibility.

Republic of Korea

The Republic of Korea prefers the draft articles to be adopted as a binding legal instrument in the form of a multilateral convention rather than as non-binding guidelines. We have come such a long way in the struggle for codified rules of State responsibility that it would be extremely unfortunate to let the work of almost half a century be cast in a non-binding instrument. The Republic of Korea believes that the rule of State responsibility plays such an important role in international law that its effectiveness cannot be achieved merely through non-binding guidelines or model laws which could place the legal status of the rules embodied in them on uncertain ground.

Slovakia

Bearing in mind the importance of the topic, the overall system of public international law and the work done on this topic over the last 46 years, Slovakia is of the view that a legally binding instrument, i.e. a convention, would be the most appropriate in this regard. The adoption of a convention would complement the system of primary rules of international law and provide for a very much needed set of secondary rules. The instrument on State responsibility should represent, side by side with the 1969 Vienna Convention on the Law of Treaties, one of the pillars of international law.

Spain

See Dispute settlement provisions, above.

United Kingdom of Great Britain and Northern Ireland

1. There appears to be widespread acknowledgement that the draft articles should not be the basis for a convention or other prescriptive document; one possible outcome would be to commend them to States in a General Assembly resolution.

2. The choice of form has implications for the content. In a convention it might have been appropriate to include both provisions declaratory of customary international law and provisions that develop the law or present entirely novel rules. Such a convention would derive much of its weight and authority from the number of parties it attracted. A text appended to a General Assembly resolution and commended to States, on the other hand, will derive its authority from the accuracy with which it is perceived to reflect customary international law. It is therefore important that the draft should be firmly based upon State practice.

United States of America

1. With regard to the question of what form the draft articles on State responsibility should ultimately assume, the United States believes it would be preferable to finalize the Commission's work in a form other than a convention, so as to enhance prospects for its acceptance by a broad group of States.

2. The United States believes that the draft articles on State responsibility should not be finalized in the form of a convention. Because the draft articles reflect secondary rules of international law, a convention is not necessary, as it might be with respect to an instrument establishing primary rules. Additionally, finalizing the draft articles in a form other than a convention would facilitate the Commission's efforts to complete its work and avoid contentious areas, such as the dispute settlement provisions currently omitted from the second reading text. Such an approach would make the draft articles amenable to wider agreement during negotiation.

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

Part one does not appear to present major difficulties.

Title

France¹

Part One

Act giving rise to the international responsibility of a State

In the view of France, the title selected by the Commission is too general. It would be preferable to give this part the title "Act giving rise to the international responsibility of a State", which would be more in keep-

ing with the content of chapters II–III concerning what constitutes an act giving rise to responsibility, namely, conduct attributable to a State which is wrongful under international law.

CHAPTER I. GENERAL PRINCIPLES

Article 2. Elements of an internationally wrongful act of a State

Poland

See comments on article 13, below.

CHAPTER II. THE ACT OF THE STATE UNDER INTERNATIONAL LAW

Article 4. Attribution to the State of the conduct of its organs

Poland

As the Commission has adopted the objective concept of an international delict, Poland endorses the opinion expressed by the Special Rapporteur that the definition of the State organ under article 4 of the draft is of crucial importance for the attribution of the wrongful act to the State. However, Poland does not share the position according to which the evaluation of the possible position of a specific agency within the State system should be subjected to control under international law. The issue should be governed exclusively by the domestic (constitutional) law of the State concerned.

United Kingdom of Great Britain and Northern Ireland

Draft article 4 provides that the conduct of State organs acting in that capacity shall be considered to be acts of the State; and that the category of State organs includes any person or body which has that status in accordance with the internal law of the State. The draft article does not indicate how it is to be determined whether an organ is acting "in that capacity". Nor does it indicate what, if any, persons or bodies *not* having the status of State organs under internal law are nonetheless to be regarded as State organs as a matter of international law (and on this question the classification of persons and bodies under internal law cannot be determinative). The problem is that there is no universally accepted conception of what the scope of governmental authority is.

Article 5. Attribution to the State of the conduct of entities exercising elements of the governmental authority

Japan

Japan suggests the deletion of the phrase "by the law of that State". To exercise elements of "governmental authority" is the determining factor whether the conduct of an entity is considered an act of the State. Article 5

¹ Proposed additions or amendments are indicated by italics and bold type. Proposed deletions are indicated by a strike mark and bold type.

only stipulates the case where an entity is empowered by the “law” of the State to exercise elements of the governmental authority. However, the internal “law” may be too narrow. For example, if a State privatizes an enforcement function with its non-legal internal guideline, such function should still be considered to be an act of State. It should be recalled that an internal law is only a presumptive factor in determining whether an act of an entity is attributed to the State. This should be made clear in the commentary.

Netherlands

The phrases “empowered by the law” and “governmental authority” leave room for uncertainty. The scope of the term “governmental authority” in particular is open to discussion in the light of the trend in many States, including the Netherlands, towards privatization or semi-privatization of government agencies. At the same time, the Netherlands notes that this obscurity seems unavoidable and that the current text meets more of the potential objections than any alternative.

United Kingdom of Great Britain and Northern Ireland

1. Draft article 5 gives rise to similar questions (see article 4). The absence of clear criteria for determining what “governmental authority” is will lead to difficulty in applying the draft article in borderline situations. The Special Rapporteur comments that “international law has to accept, by and large, the actual systems adopted by States”, and that this question must be answered by “a renvoi to the public institutions or organs in place in the different States” (see *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7, pp. 33–34, para. 154 (b)). This, however, brings in the same difficulty in a different way, when determining what is a “public institution or organ” acting as such.

2. There may be doubt as to whether a given function is a governmental function. For example, a State may establish an independent body—independent, that is, of the executive, legislature and judiciary—to perform a defined role in the administration or regulation of a particular activity: for example, a broadcasting commission with powers to lay down guidelines or impose decisions on acceptable programme content, or a body administering a national lottery. Those functions may not be fulfilled by any body in many other States. Another difficulty concerns bodies exercising what is indisputably a typical State function, but with their authority resting wholly or largely upon voluntary acceptance rather than upon legal compulsion: for example, a religious court, or a body concerned with the self-regulation of a particular industry. The requirement in draft article 5 that the body be empowered by law offers some assistance but cannot resolve the problem, because it too invites the question whether whatever is specifically empowered is an exercise of a governmental authority. The same difficulty also arises in the case of draft articles 7–9.

3. It would be helpful if further guidance could be provided in the commentaries on the approach that should be taken to the determination of the status of such bodies. The principles developed for the purpose of deciding whether bodies are entitled to State immunity are not necessarily applicable for the purpose of deciding whether the State is responsible for the acts and omissions of those bodies.

Article 6. Attribution to the State of conduct in fact carried out on its instructions or under its direction or control

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

In defining acts attributable to the State under international law, some further streamlining may be considered, for example, by merging articles 6–7 and placing articles 8–9 in the context of articles 4–5.

Netherlands

The Netherlands is pleased to note that the words “direction or control” allow for the application of both a strict standard of “effective control”, as used by the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case,¹ and a more flexible standard as applied by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case.² This inbuilt ambiguity is a positive element and offers scope for progressive development of the legal rules on State responsibility.

¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, I.C.J. Reports 1986, p. 14.

² *Prosecutor v. Duško Tadić*, International Tribunal for the Former Yugoslavia, case No. IT-94-1-A, judgement of 15 July 1999, ILR, vol. 112, p. 369.

Poland

See comments on article 17, below.

Article 7. Attribution to the State of certain conduct carried out in the absence of the official authorities

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

See comments on article 6, above.

Netherlands

1. The Netherlands considers this to be a useful article. Situations occasionally arise, for example in Somalia, to which this article could be applicable.

2. See also comments on article 10, below.

**United Kingdom of Great Britain
and Northern Ireland**

See comments on article 5, above.

United States of America

Article 7 allows the conduct of private parties to be attributed to a State when private parties exercise “elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority”. The commentary to first reading article 8 (b) (the predecessor to article 7) noted that international practice in this area is very limited and thus acknowledged that there is little authority to support this article.¹ Moreover, the commentary noted that this article would apply only in exceptional circumstances, such as when organs of administration are lacking as a result of war or natural disaster. Because the persons to whom this article would apply “have no prior link to the machinery of the State or to any of the other entities entrusted under internal law with the exercise of elements of the governmental authority, the attribution of their conduct to the State is admissible only in genuinely exceptional cases.”² The United States believes article 7 should be redrafted to more explicitly convey this exceptional nature.

¹ *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, p. 285, para. (11) of the commentary to article 8.

² *Ibid.*

Title

Republic of Korea

The title of this article would better reflect its contents if the words “or default” were added after the words “in the absence”.

*Article 8. Attribution to the State of the conduct of
organs placed at its disposal by another State*

Argentina

This article presents no major problems as it stands. Some doubts could arise, however, concerning the position of a State that places one of its organs at the disposal of the offending State. It might therefore be useful to stipulate at the beginning of the article that its provisions are without prejudice to the application of chapter IV (Responsibility of a State in respect of the act of another State). That would make it clear that the State “lending” one of its organs would be responsible for the wrongful act only to the extent that the requirements of that chapter are met.

**Denmark, on behalf of the Nordic countries
(Finland, Iceland, Norway, Sweden and Denmark)**

See comments on article 6, above.

Netherlands

The Netherlands believes that the current wording is too limited. Situations of joint responsibility can arise at any time. There are two possible solutions to this problem. First, the scope of the savings clause in article 19 which relates to part one, chapter IV, could be extended to cover chapter II as well. Secondly, the words “without prejudice to the other State’s international responsibility” could be added to article 8. The Netherlands is in favour of the second solution.

**United Kingdom of Great Britain
and Northern Ireland**

See comments on article 5, above.

*Article 9. Attribution to the State of the conduct of
organs acting outside their authority
or contrary to instructions*

**Denmark, on behalf of the Nordic countries
(Finland, Iceland, Norway, Sweden and Denmark)**

See comments on article 6, above.

**United Kingdom of Great Britain
and Northern Ireland**

See comments on article 5, above.

*Article 10. Conduct of an insurrectional
or other movement*

Netherlands

This article, taken in conjunction with article 7, leads to the conclusion that every internationally wrongful act of an insurrectional movement which does not succeed in becoming the new government will immediately be directly attributed in full to the State. This is in contrast to article 14, paragraph 1, of the previous draft.¹ The Netherlands doubts whether support for this can be found in case law.

¹ “The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.” (*Yearbook ... 1996*, vol. II (Part Two), p. 59)

*Article 11. Conduct which is acknowledged and
adopted by the State as its own*

Netherlands

This article uses the words “act of (that) State under international law” whereas the words “act of (that) State” appear elsewhere in the draft. The wording should be harmonized.

CHAPTER III. BREACH OF AN INTERNATIONAL OBLIGATION

*Article 12. Existence of a breach of an international obligation**Article 13. International obligation in force for the State***Poland**

Poland understands that article 13 of the draft is of intertemporal nature and that its aim is to exclude the retroactive application of the law of State responsibility. Otherwise this provision in connection with the definition of the internationally wrongful act as formulated in article 2 (b) of the draft, as well as with article 12, would be superfluous.

*Article 14. Extension in time of the breach of an international obligation**Title***Republic of Korea**

As to the title of this article, the phrase “the moment and duration of the breach of an international obligation” is preferred to the phrase “[e]xtension in time of the breach of an international obligation”.

*Paragraph 2***Netherlands**

Although paragraph 2 discusses the duration of the breach, it does not consider at what point responsibility is triggered. The intention of the text is clear, but the wording leaves something to be desired. However, the Netherlands has no alternative wording to propose.

*Article 15. Breach consisting of a composite act**Paragraph 1***United States of America**

The United States commends the Commission for substantially revising and streamlining the articles concerning the moment and duration of breach. In particular, the United States notes that article 15, paragraph 1, defines breach of an international obligation as occurring in the context of “a series of actions or omissions defined in aggregate as wrongful” only when an action or omission taken with all other actions or omissions is sufficient to constitute the wrongful act. This is, for example, inherently so with regard to judicial actions. A lower court decision may be the first action in a series of actions that will ultimately be determined in the aggregate to be internationally wrongful. The lower court decision, in and of itself, may be attributable to the State pursuant to article 4; whether it constitutes, in and of itself, an internationally wrongful act is a separate question, as recognized in article 2. Except in extraordinary circumstances, there is no question of breach of an in-

ternational obligation until the lower court decision becomes the final expression of the court system as a whole, i.e. until there has been a decision of the court of last resort available in the case. The United States also wishes to note its understanding that, consistent with article 13, the series of actions or omissions defined in aggregate as wrongful cannot include actions or omissions that occur before the existence of the obligation in question.

*Paragraph 2***United States of America**

While the United States approves of article 15, paragraph 1, it believes that article 15, paragraph 2, requires further consideration. The current draft does not differentiate between categories of action which clearly lend themselves to consideration as composite acts, such as genocide, and other categories of action where such characterization is not so clearly appropriate under customary international law. This could result in inappropriately extending liability in certain situations.

CHAPTER IV. RESPONSIBILITY OF A STATE IN RESPECT OF THE ACT OF ANOTHER STATE

Argentina

Articles 16 (a), 17 (a) and 18 (b), stipulate that in order for a State to be responsible in respect of the act of another State, the State aiding, assisting, directing, controlling or coercing another State in the commission of the wrongful act must do so with knowledge of the circumstances of the act. This introduces a “subjective element” that seems *prima facie* to be incompatible with the general rules in the preceding chapters. There is, however, clearly some merit in the idea behind this “subjective” requirement: to limit the number of potential author States “participating” in the wrongful act, which otherwise could increase indefinitely.

Mexico

Mexico pays tribute to the Commission for its work on the formulation, on second reading, of part one, chapter IV. Despite the difficulties arising from the primary origin of the rules contained therein, the Commission has managed to express them skilfully in the draft. Mexico endorses the general approach taken to articles 16–19 and will merely make some observations on a specific issue.

*Title***France****Chapter IV. Responsibility of a State as a result of the act of another State**

It would be preferable to modify the title of chapter IV, at least in the French version, so as to refer to the responsibility of a State “as a result of” and not “in respect of” the act of another State.

Article 16. Aid or assistance in the commission of an internationally wrongful act

Argentina

See general comments on chapter IV above, and article 18, below.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

In chapter IV, on the responsibility of a State in respect of the act of another State, one may question the wisdom of introducing the qualification of “knowledge of the circumstances” in articles 16–18 as this requirement does not figure—and rightly so—in article 2 stating the essential elements of an internationally wrongful act.

Mexico

The situation is different in article 16, which refers to aid or assistance. The provision of aid or assistance in itself is not an indication that the State providing it does so with knowledge of the circumstances of the internationally wrongful act and that the act committed by that other State would have been internationally wrongful if it had been committed by the State providing the aid or assistance.

Poland

The wording of article 16 is unclear. Should it be interpreted as imposing the international responsibility upon the exclusively assisting State if that State is bound by the specific international obligation infringed by the assisted State, or does the provision in question refer to the rules of attribution of the internationally wrongful act?

Republic of Korea

The meaning of the phrase “with knowledge of the circumstances of the internationally wrongful act” is rather vague and it does not seem to provide any practical guidance to determine the “responsibility of a State in respect of the act of another State”.

United Kingdom of Great Britain and Northern Ireland

While the drafting of this article has been improved, further clarity, both in the article and in the commentary, is necessary. The expressions “in the commission” and “knowledge of the circumstances of” should be clarified so as to ensure that the aid or assistance must be clearly and unequivocally connected to the subsequent internationally wrongful act. As regards intention, it should be made clear that the “assisting” State must be aware that the act in question is planned and must further intend to facilitate the commission of that act by its assistance. It is not clear that there is a distinction between “aiding” and “assisting”.

United States of America

1. Article 16 allows a State which aids or assists another State in committing an internationally wrongful act to be

held responsible for the latter State’s wrongful act if the assisting State does so “with knowledge of the circumstances of the internationally wrongful act” and if the act would be internationally wrongful had it been committed by the assisting State itself. The United States welcomes the improvements in article 16 over its first reading predecessor (art. 27),¹ particularly the incorporation of an intent requirement in the language of article 16 (a) which requires “knowledge of the circumstances of the internationally wrongful act”. The United States is also pleased to note that article 16 is “limited to aid or assistance in the breach of obligations by which the assisting State is itself bound” (*Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4, p. 51, para. 188).

2. The United States believes that article 16 can be further improved by providing additional clarification in the commentary to article 16 as to what “knowledge of the circumstances” means and what constitutes the threshold of actual participation required by the phrase “aids or assists”. The United States notes that in both the commentary to the first reading article 27² and in the Special Rapporteur’s discussion of this article in his second report (*Yearbook ... 1999* (see paragraph 1 above)), it has been stressed that the intent requirement must be narrowly construed. An assisting State must be both aware that its assistance will be used for an unlawful purpose and so intend its assistance to be used. The United States believes that article 16 should cover only those cases where “the assistance is clearly and unequivocally connected to the subsequent wrongful act” (*ibid.*, para. 180). The inclusion of the phrase “of the circumstances” as a qualifier to the term “knowledge” should not undercut this narrow interpretation of the intent requirement, and the commentary to article 16 should make this clear.

3. As to the threshold of participation required by the phrase “aids or assists”, the commentary to first reading article 27 drew a distinction between “incitement or encouragement” which article 27 did not cover, and noted that aid or assistance must make it “*materially* easier for the State receiving the aid or assistance in question to commit an internationally wrongful act” (see footnote 2 above). The United States urges the Commission to fully develop the issue of what threshold of participation is required by the phrase “aids or assists” in the commentary to article 16, as the current draft of article 16 provides little guidance on this issue.

¹ *Yearbook ... 1996*, vol. II (Part Two), p. 61.

² *Yearbook ... 1978*, vol. II (Part Two), p. 104, para. (17) of the commentary to article 27.

Subparagraph (a)

Netherlands

The Netherlands suggests that article 16 (a) should read: “That State does so when it knows or should have known the circumstances of the internationally wrongful act.”

Article 17. Direction and control exercised over the commission of an internationally wrongful act

Argentina

See general comments on chapter IV above, and article 18, below.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

See comments on article 16, above.

Mexico

1. Articles 17 and 18 establish as one of the two conditions under which a State may be responsible in respect of the act of another that the former must have knowledge of the circumstances of the internationally wrongful act. In Mexico's view, this condition is unnecessary because it is implicit in the coercion or direction and control exercised.

2. Coercion or direction and control are deliberate actions, the commission of which would assume previous knowledge of the action in question. This situation, compounded by the fact that the articles require the action in question to have been committed by the State that coerced or directed and controlled it, seems sufficient to justify an invocation of responsibility.

3. In the light of the foregoing, it would be preferable to delete articles 17 (a) and 18 (b). Otherwise these paragraphs might be interpreted as meaning that it is necessary to invoke a special type of knowledge, in addition to that implied in the coercion or direction and control exercised, which would be excessive.

Netherlands

The Netherlands observes that the progressive development implied in article 6 by the ambiguity of the control standard is missing here. The phrase "[a] State which directs and controls" is cumulative and should be replaced by "directs or controls".

Poland

Poland is not convinced that the criteria formulated in draft article 17 for the responsibility of the State directing or coercing another State to commit the internationally wrongful act should be directly applied to situations covered by article 6, as the former cases seem to be extremely rare under international law, and should be interpreted extremely restrictively. Article 6 should therefore be read as an alternative, in accordance with its wording, while the conditions of responsibility under article 17 should be fulfilled jointly.

Republic of Korea

See comments on article 16, above.

Article 18. Coercion of another State

Argentina

1. This article, covering the situation of a State which coerces another State to commit an internationally wrongful act, calls for two comments. First, the Commission seems to have in mind cases where the coerced State is in a situation of force majeure (art. 24) as a result of that coercion.¹ However, a more realistic scenario would be one in which coercion creates a situation of distress—if the object of the coercion is an individual (art. 25)—or a state of necessity (art. 26). In fact, domestic legal provisions usually distinguish between force majeure (absolute force, created exclusively by acts of nature) and coercion (relative or coercive force, resulting from human action).

2. Secondly, there is a difference with regard to articles 16 and 17, dealing respectively with aid or assistance and direction and control in the commission of a wrongful act by another State. The difference derives from the fact that, under articles 16–17, the State participating in the wrongful act must be bound by the primary norm violated by the State directly committing the wrongful act. In the case of coercion, on the other hand, the coercing State would be internationally responsible even where the act, had it been committed by the coercing State itself, was not wrongful.

3. On the basis of the premise that a State may exert "lawful coercion",² there could be a situation where a State exerting "lawful coercion" on a State caused it to violate a norm by which the coercing State was not bound. In such a situation, the coercing State, while exerting "lawful coercion"—in other words, engaging in conduct not prohibited *per se* by international law—and while not being bound by the violated norm, would be internationally responsible under article 18.

4. There is no justification for the difference in treatment between articles 16 and 17 on the one hand, and article 18 on the other, except for the intuitive notion that coercion is more "serious" than assistance or direct control. But if, as was stated earlier, coercion may be "lawful", it is unclear why it should be subject to a stricter regime.

5. There is a practical reason:³ namely that the State that becomes an offending State as a result of the coercion could probably invoke coercion as a circumstance precluding wrongfulness. The affected State should therefore be given an opportunity to obtain reparation from the coercing State. Argentina supports that position, inasmuch as the coercing State would not be able to seek refuge in an abuse of the law.

¹ See *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4, p. 54, para. 204, and *Yearbook ... 1999*, vol. II (Part Two), p. 72, para. 268.

² *Ibid.*, vol. II (Part One), p. 55, para. 207.

³ *Ibid.*, p. 54, para. 204, and *Yearbook ... 1999*, vol. II (Part Two), pp. 72–73, para. 273.

**Denmark, on behalf of the Nordic countries
(Finland, Iceland, Norway, Sweden and Denmark)**

See comments on article 16, above.

Mexico

See comments on article 17, above.

Subparagraph (b)

Argentina

See general comments on chapter IV, above.

Article 19. Effect of this chapter

Argentina

See general comments on part four, below.

Netherlands

See comments on article 8, above.

Poland

Article 19 concerns the issue of the responsibility of the State committing a violation of international law under coercion. Although this problem should be evaluated from the point of view of the draft as a whole, it might be useful to introduce the exception of coercion into chapter V as an additional circumstance excluding wrongfulness. Any consequence of such acts would nevertheless be covered by draft article 27.

CHAPTER V. CIRCUMSTANCES PRECLUDING
WRONGFULNESS

France

1. It would be more satisfactory, given the general purpose of the draft articles, for this chapter to address “circumstances precluding responsibility” rather than “circumstances precluding wrongfulness”, a question whose scope appears to go far beyond the topic of the law of responsibility.
2. If the absence of wrongfulness by definition precludes responsibility as conceived in article 1, it is not impossible to maintain that, on the contrary, there are circumstances in which responsibility is precluded even in the case of a wrongful act.
3. From this standpoint, there would be no reason to include in this chapter “consent”, “compliance with peremptory norms”, “self-defence” and “countermeasures in respect of an internationally wrongful act”. On the other hand, it would be possible to retain the articles on “force majeure”, “distress” and “state of necessity”, considering that they have to do with circumstances precluding responsibility even in the case of a wrongful act.
4. However, the distinction between these two categories of circumstances is open to controversy with regard

to both its principle and its precise content. France, mindful of the difficulties which this question raises, does not, therefore, propose to modify chapter V with the exception of deleting its final article (see below).

Japan

Since there is a risk that circumstances precluding wrongfulness may be abused as an excuse to commit internationally wrongful acts, the list of circumstances under chapter V should be exhaustive. This should be made clear in the commentary.

Netherlands

In connection with this chapter, which deals with circumstances precluding wrongfulness, the Netherlands would draw attention to the debate currently under way, for example, in the Security Council about the concept of humanitarian intervention. This is because humanitarian intervention, without prior authorization by the Security Council and without permission from the legitimate Government of the State on whose territory the intervention takes place, can be seen—in exceptional situations, because of large-scale violations of fundamental human rights or the immediate threat of such violations—as a potential justification for an internationally wrongful act, namely the actual or threatened use of force if this is required for humanitarian ends and satisfies a series of conditions. The Netherlands takes the view that an article containing such a ground for justification should be included.

Article 20. Consent

Slovakia

In part one, chapter V, Slovakia supports the inclusion in article 20 (Consent) of an exception for peremptory norms of international law, as was stipulated in article 29 of the 1996 draft articles.¹

¹ *Yearbook ... 1996*, vol. II (Part Two), p. 61.

Spain

Spain considers that the current wording unquestionably improves the 1996 draft. All that is missing is paragraph 2 of former article 29 of the 1996 draft¹ (current article 20), which linked consent to the obligations arising under peremptory norms of international law. The deletion of this important principle of international law does not appear to be fully justified.

¹ *Yearbook ... 1996*, vol. II (Part Two), p. 61.

Article 21. Compliance with peremptory norms

Slovakia

Slovakia is of the view that article 21 (Compliance with peremptory rules) is superfluous since conduct (an act) required by law is by definition allowed by law and cannot be wrongful.

*Article 22. Self-defence***Japan**

1. Japan suggests the deletion of the words “taken in conformity with the Charter of the United Nations”.
2. Reference to the Charter of the United Nations may be confusing and unnecessary. In the commentary to the first reading text (*Yearbook ... 1980*, vol. II (Part Two), art. 34 (Self-defence), p. 60, para. (25)), the Commission explained that it inserted the words “in conformity with the Charter of the United Nations” in order to avoid the problem of the content of “lawful” self-defence because such a question was a matter of the primary law on self-defence, not a matter of a secondary rule of State responsibility. Japan fully shares such view of the Commission. However, if the article refers to the Charter as it is, contrary to the Commission’s intention, there is a risk that the Commission will be wrongly accused of taking a certain position on the relationship between self-defence under the Charter and that under international law. Therefore it would be better to avoid any reference to the content of lawfulness.
3. In any event, article 59¹ makes it clear that the draft articles are without prejudice to the Charter of the United Nations. Thus, there is no concern that self-defence under article 22 with the suggested deletion would affect the primary rules on self-defence.

¹ *Yearbook ... 2000*, vol. II (Part Two), p. 71.

*Article 23. Countermeasures in respect of an internationally wrongful act***United Kingdom of Great Britain and Northern Ireland**

1. The basic provision in draft article 23 might be expanded so as to make clear that countermeasures must be proportionate to the injury suffered, limited in their aim to inducing the responsible State to comply with its obligations, and not aimed at third States. The draft article, or its commentary, could also make clear that no State may impose countermeasures that violate peremptory norms of international law or other obligations essential for the protection of the fundamental interests of the international community of States as a whole, or that violate its obligations concerning the protection of fundamental human rights or humanitarian law.
2. For the reasons given below (see part two *bis*, chapter II, and articles 51, 53 and 54, paragraph 2), it would be helpful to increase the detail with which draft article 23 deals with countermeasures, to bring this provision more closely in line with the approach adopted in the other draft articles in this chapter.

United States of America

Countermeasures are acts of a State that would otherwise be considered wrongful under international law, but are permitted and considered lawful to allow an injured State to bring about the compliance of a wrongdoing State with its international obligations. Article 23 defines countermeasures as those acts whose wrongfulness is precluded to the extent that the act constitutes a countermeasure under the conditions set forth in articles 50 to 55. The United States prefaces its remarks by noting that any actions by a State that are not otherwise prohibited under international law are outside the scope of articles 23 and 50 to 55 as these actions would not, by definition, constitute countermeasures.

*Article 24. Force majeure***Argentina**

See comments on article 18, above.

United Kingdom of Great Britain and Northern Ireland

The Special Rapporteur rightly states (*Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4, p. 67, para. 263) that “article 31 should provide that force majeure is only excluded if the State has produced or contributed to producing the situation through its *wrongful** conduct”. The wording of paragraph 2 (a) is, furthermore, awkward: it is the conduct of the State, rather than the force majeure, to which the phrase “either alone or in combination with other factors” should relate. The paragraph might accordingly read as follows:

“Wrongful conduct of the State invoking force majeure, either alone or in combination with other factors, has caused the irresistible force or unforeseen event.”

*Article 25. Distress***United Kingdom of Great Britain and Northern Ireland**

The point made in relation to draft article 24 is applicable also to draft article 25, paragraph 2 (a), which would be better phrased as follows:

“Wrongful conduct of the State invoking the situation of distress, either alone or in combination with other factors, has caused that situation.”

*Article 26. State of necessity**Paragraph 1***France**

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community of States as a whole.

In its written and oral comments France has several times had occasion to express its reservations about the phrase “the international community as a whole”. Each time this expression is used in the draft articles, it would be preferable to replace it by the one contained in article 53 of the 1969 Vienna Convention, i.e. “the international community of States as a whole”.

Poland

The notion of an “essential interest” as formulated in article 26 is not precise and should be clarified in the commentary of the Commission.

United Kingdom of Great Britain and Northern Ireland

1. A defence of necessity is open to very serious abuse. It is unlike the other circumstances precluding wrongfulness set out in the draft articles, both because of the extreme—indeed, practically unlimited—breadth of the circumstances in which the defence might be invoked, and because of the wide range of interests that might be said to be protectable. The defence of necessity stands at the very edge of the rule of law; it should not be included in a set of draft articles that describe the routine framework of legal responsibility between States. Without prejudice to that position, however, if a provision on the defence of necessity were to be retained in the draft articles, the current text has to be substantially revised.

2. A provision on the defence of necessity could be accepted (though it is highly undesirable) if it were made absolutely clear that the defence could operate only to protect interests so essential that a breach of them threatens the economic or social stability of the State, or serious personal injury or environmental damage on a massive scale. In particular, it should be emphasized that the interests protected are those of the State, and not those of the Government or any other group within the State. It should also be emphasized that it is a matter for international law, and not for each State, to determine whether any given circumstances justify the invocation of the defence of necessity.

3. A clear indication of the nature of the “essential” interests must be given, in draft article 26 and/or in the commentary. In particular, it would be helpful to indicate specifically whether a State may invoke the defence of necessity in order to exculpate conduct intended to safeguard global interests, such as high seas fisheries or the environment, in which the State may have a particular interest but no particular rights; and if so, within what limits. The previous commentary avoids a definition of “essential interest”, stating merely that “[t]he extent to which a given interest is ‘essential’ naturally depends on all the circumstances in which the State is placed in different specific situations; the extent must therefore be judged in the light of the particular case into which the interest enters, rather than be predetermined in the abstract”.¹ That

¹ *Yearbook ... 1980*, vol. II (Part Two), p. 34, para. (32) of the commentary to article 33.

is nowhere near being an adequate safeguard against the risk of an excessively wide interpretation of the defence.

4. It would be helpful to indicate in the commentary the relationship between the concepts of an essential interest (draft art. 26), a fundamental interest (draft art. 41) and a collective interest (draft art. 49).

5. Certain other drafting changes would be desirable if a provision is retained as discussed below.

6. The reference in draft article 26, paragraph 1 (*b*), to “the international community as a whole” is wholly unclear. Another term is needed. One possibility would be to refer, here and elsewhere, to “the international community of States as a whole”, the terminology used in the 1969 Vienna Convention. It is highly undesirable that a distinction of uncertain scope or purpose be drawn between “the international community as a whole” and “the international community of States as a whole”.

7. Draft article 26, paragraph 2 (*b*), states expressly that the defence of necessity is not available in relation to obligations that exclude the possibility of invoking necessity. If that provision were to be retained, it should be made clear at the appropriate points that the same exception may apply in relation to other circumstances precluding wrongfulness, notably force majeure.

8. Draft article 26, paragraph 2 (*c*), would need to be reformulated to bring it into line with draft articles 24, paragraph 2 (*a*), and 25, paragraph 2 (*a*). It might read:

“Wrongful conduct of the State, either alone or in combination with other factors, has caused the situation of necessity.”

Article 27. Consequences of invoking a circumstance precluding wrongfulness

Argentina

See comments on article 33 and on part four, below.

France

1. Delete the article.
2. Subparagraph (*a*) of this article states an obvious truth that does not need to be repeated. Subparagraph (*b*) is ambiguous: it could imply that the State to which the act giving rise to responsibility is attributable has an obligation to provide compensation for damage *even if* the act is not wrongful. The statement is unacceptable when set forth in such a general and imprecise way; for that reason, it is proposed that the article as a whole be deleted.

Japan

1. As pointed out in the first reading commentary, the articles on circumstances precluding wrongfulness “should be understood as not affecting the possibility that the State committing the act may, on grounds other than that of responsibility for a wrongful act, incur certain

obligations, such as an obligation to make reparation for damage caused by the act in question”.¹ Unlike previous article 35, the current article 27 does not specify in which circumstances precluding wrongfulness a State may incur an obligation to make compensation. Japan supports this approach. However, since the work for international liability is not likely to develop soon, the commentary should explain in what cases of circumstances precluding wrongfulness compensation is not expected. In particular, article 21 on preemptory norms is a new category and needs certain explanation in this regard.

2. Also, it should be made clear in the commentary that self-defence and countermeasures do not preclude any wrongfulness of, so to speak, indirect injury that might be suffered by a third State in connection with a measure of self-defence or countermeasures taken against a State.

¹*Yearbook ... 1980*, vol. II (Part Two), p. 61, para. (1) of the commentary to article 35.

Subparagraph (a)

United Kingdom of Great Britain and Northern Ireland

Subparagraph (a) would be more accurate if it read “the duty to comply with the obligation”.

Subparagraph (b)

Netherlands

The Netherlands is of the opinion that article 27 (b) should relate not to chapter V in its entirety but solely (as proposed by the Special Rapporteur) to articles 24–26 (see *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4, art. 35, p. 89, para. 358).

PART TWO

CONTENT OF INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I. GENERAL PRINCIPLES

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

In part two on the content of international responsibility of a State, chapters I–II, concerning general principles and the various forms of reparation, are particularly clear, concise and well structured.

Slovakia

Slovakia is generally satisfied with the structural changes in part two of the draft articles. Slovakia welcomes and supports the inclusion of new part two *bis* (implementation of State responsibility).

Article 29. Duty of continued performance

Netherlands

In response to paragraph 76 on article 36 *bis* (corresponding to the present articles 29–30) in *Yearbook ... 2000*, vol. II (Part Two), p. 24, the Netherlands would draw attention to the sentence: “In terms of its placement, the general principle of cessation should logically come before reparation since there would be cases in which a breach was drawn to the attention of the responsible State, which would immediately cease the conduct and the matter would go no further.” The Netherlands takes the view that the clause “and the matter would go no further” is not correct, for the other legal consequences of an internationally wrongful act would stand, even if the responsible State immediately ceased its wrongful conduct.

Article 30. Cessation and non-repetition

Netherlands

1. Paragraph 91 of *Yearbook ... 2000*, vol. II (Part Two), p. 26, makes a connection between the “assurances and guarantees of non-repetition” and, *inter alia*, the “seriousness of the breach”. In the Netherlands’ view, reference should also be made in article 30 to the “gravity of the breach” as referred to in article 42. Conversely, article 42, paragraph 3, should contain a cross-reference to chapter I, and not only to chapter II as is currently the case.

2. See also comments on article 29, above.

Subparagraph (b)

United Kingdom of Great Britain and Northern Ireland

Subparagraph (b) would be more accurate if it read “to give appropriate assurances and guarantees”.

United States of America

1. In addition to these areas (see General remarks above), the United States would like to draw the attention of the Commission to other provisions, including article 30 (b) on assurances and guarantees of non-repetition, which it believes should be deleted as it reflects neither customary international law nor State practice.

2. Article 30 (b) requires the State responsible for an internationally wrongful act “[t]o offer appropriate assurances and guarantees of non-repetition, if circumstances so require”. The United States urges the deletion of this provision because it does not codify customary international law, and there is fundamental scepticism, even amongst the Commission itself, as to whether there can be any legal obligation to provide assurances and guarantees of non-repetition.¹ There are no examples of cases in which courts have ordered that a State give assurances

¹*Yearbook ... 2000*, vol. II (Part Two), p. 26, para. 88.

and guarantees of non-repetition (*ibid.*). With regard to State practice, assurances and guarantees of non-repetition appear to be “directly inherited from nineteenth-century diplomacy”, and while Governments may provide such assurances in diplomatic practice, it is questionable whether such political commitments can be regarded as legal requirements (*ibid.*). In fact, use of the term “appropriate” to modify “assurances and guarantees” is a further indication that article 30 (*b*) does not reflect a legal rule, but rather a diplomatic practice. Finally, even the third report of the current Special Rapporteur raises the question as to whether assurances and guarantees can properly be formulated as obligations (*Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, p. 24, para. 58). The United States submits that assurances and guarantees of non-repetition cannot be formulated as legal obligations, have no place in the draft articles on State responsibility and should remain as an aspect of diplomatic practice.

Article 31. Reparation

Argentina

1. In part two of the draft articles there is a conspicuous lack of regulation on the question of the causal link between the wrongful act and the damage subject to reparation. Only article 37, paragraph 2, in making a brief mention of loss of profits, offers any criterion regarding the extent of the damage subject to reparation. However, the problem, although usually addressed in connection with the obligation to compensate, is one that arises from the obligation to make reparation in general.

2. Any regime of responsibility should offer criteria for determining the causal link between the wrongful act and the consequences subject to reparation. Otherwise, there would be no way of setting a time limit or a logical limit on the consequences of the wrongful act.

3. Article 31 seems too broad, since no distinction is drawn between direct or proximate consequences and indirect or remote consequences. Since such a distinction is firmly rooted in international practice, there is no reason not to include a reference to it in article 31, paragraph 2, or at least in the commentary to the article.

Japan

1. See comments on article 43, below.

Netherlands

Paragraph 93 of *Yearbook ... 2000*, vol. II (Part Two), p. 26, (commentary on article 37 *bis*: the current article 31 combined with article 35) examines the factors of “intention” and “negligence”, stating that the distinction between them should come into play in the question of reparation. This is not reflected in the text of either article 31 or article 35 (or in part two, chapter II, in general). The Netherlands proposes that chapter II focus on the role of intention and negligence, for example by adding the following words to article 35:

“The determination of the reparation shall take into account the nature (and gravity) of the internationally wrongful act.”

Poland

Article 31 should be amended (perhaps by way of a reference to other provisions of the draft dealing with the presenting of international claims by directly and/or indirectly injured States) in order to limit a possibility of bringing financial claims in cases of moral injuries. Poland is not convinced that a possibility of claiming compensation for moral injury, as envisaged in article 31, paragraph 2, read jointly with articles 37–38, reflects the current state of international law. In the opinion of Poland, the moral damage gives right to satisfaction only and excludes compensation, even though under certain circumstances moral damages can also be materially assessable. The provision is connected with article 40 which states that the reparation should be established by taking into account the contribution to damage by the injured State. Should this be understood as indicating that the damage constitutes an element of the internationally wrongful act?

Spain

Spain is in favour of maintaining the restriction contained in article 42, paragraph 3, of the 1996 draft, whereby “[i]n no case shall reparation result in depriving the population of a State of its own means of subsistence”.¹

¹ *Yearbook ... 1996*, vol. II (Part Two), p. 63.

United Kingdom of Great Britain and Northern Ireland

1. Paragraph 1 is concerned with the injury “caused” by the wrongful act; and paragraph 2 with the damage “arising in consequence of” the wrongful act. The Chairman of the Drafting Committee has suggested that “the need for a causal link was usually stated in primary rules”.¹ Whether or not that is so, it is desirable that the complex question of causation not be addressed in these draft articles, and that the commentary make this clear.

2. Paragraph 2, while not defining either of the terms “injury” or “damage”, does state that injury includes non-material damage. The Chairman of the Drafting Committee has stated that “[m]oral’ damage could be taken to include not only pain and suffering, but also the broader notion of injury, which some might call ‘legal injury’ ... to States”.² It is not clear what is meant by “legal injury”, but it is possible that the term may be understood to include that type of legal injury which is suffered by each party to a treaty by virtue only of the fact that the treaty is violated by another party. Such an interpretation would entail a conflation of the categories of “injured State” (draft art. 43) and “interested State” (draft art. 49). Indeed, it would be more in conformity with State practice, and more desirable, not to base the draft articles upon a distinction between “injured” States and “interested” States, but to

¹ *Yearbook ... 2000*, vol. I, 2662nd meeting, p. 388, para. 17.

² *Ibid.*, para. 16.

proceed instead on the basis of the distinction between the remedies available in different circumstances to the various States to whom the obligation that has been breached is owed. Nonetheless, if the distinction between injured and interested States is to be retained, draft article 31 will need to be re-examined in the light of the definition of the “injured State” in draft article 43, and in the light of the definition of damage implicit in draft article 37.

Paragraph 2

Austria

1. It is generally said in textbooks that in international law there is no material reparation for moral damage suffered by States and that reparation for such damage is granted in the specific form of “satisfaction”. Looking at the draft, and in particular at articles 31, paragraph 2, 37 and 38, paragraph 1, it could possibly be interpreted in a different way. Article 37, paragraph 2, refers to “financially assessable damage” which any compensation shall cover. The problem is, however, whether the definition of moral damage only depends on the financial assessability, or on other criteria. The answer to this question depends on the legal tradition and the existing laws of each legal system, and it has to be said that in many municipal legal systems moral damages are also regarded as financially assessable. It is therefore possible that lawyers from such States will interpret the draft as meaning exactly that, i.e. as stipulating the obligation to compensate also for moral damage. Such interpretation seems to find support in article 38, paragraph 1, which envisages satisfaction insofar as the injury “cannot be made good by restitution or compensation”.

2. That would be a change to existing international law; Austria has its doubts that such a change would be warranted or practical.

United States of America

The United States notes that moral damages are encompassed by a responsible State’s duty to make full reparation under article 31, paragraph 2, which provides that “[i]njury consists of any damage, whether material or moral”.

Article 32. Irrelevance of internal law

France

Article 57 ~~32~~ [42]. Irrelevance of internal law

The responsible State may not avail itself of the provisions of its internal law to justify a breach of its international obligations

1. It is not essential to recall the customary principle codified in article 27 of the 1969 Vienna Convention, which has a general impact on international law. Nevertheless, the scope of application of this principle should not be limited to part two of the draft articles. If this article is retained, it should be moved, possibly to part four (General provisions), so that it concerns the draft articles as a whole.

2. A better place for former article 32 would be in part four, for the reasons given above.

Mexico

1. Mexico feels that the inclusion of this article in the draft is useful and agrees with the Commission that its content differs in scope from the principle expressed in article 3.

2. Since the proposed rule is applicable to the whole of part two, chapter I, however, it seems more appropriate to insert it immediately after article 28 (Legal consequences of an internationally wrongful act).

Poland

Article 32 dealing with the irrelevance of internal law is of great importance not only for the implementation of responsibility but also with respect to other aspects of the law on State responsibility, including, e.g. the origin of State responsibility (see article 4). Poland understands this provision as relying upon domestic provisions in order to exclude the possibility of making claims under the domestic legal system. Poland would suggest including this provision in part four of the draft. Probably the same may be true with regard to article 33, which covers in fact the same question as the general clause of article 56 (as it allows the reference to other rules of international law applicable to the specific situation). Reference may be made to the example of article 60 of the 1969 Vienna Convention, as well as some other multilateral international conventions or so-called self-contained regimes.

Article 33. Other consequences of an internationally wrongful act

Argentina

1. It is not clear why former article 37 on *lex specialis* was moved to part four, while former article 38, now article 33, was left in part two (see general comments on part four above).

2. The wording of article 33 refers to the content of part two, but the problem addressed by the article is broader in scope. In effect, article 33 allows for the existence of rules of general international law that may be applicable even though they are not expressly mentioned in the draft articles. Such rules may exist in relation to aspects of international responsibility other than the question of the legal consequences of the wrongful act (for instance, it is conceivable that there may be grounds for precluding wrongfulness other than those stipulated in part one, as article 27 now indicates). Therefore, if it is thought necessary to include this provision, it should be placed in part four (perhaps as article 56, paragraph 2).

3. It should be noted that former articles 37 and 38, despite their similarity, refer to different situations. Whereas former article 37 provided that the draft articles would not apply where special rules of international law existed, former article 38 provided for just the opposite situation by preserving the applicability of general rules not set out

in the articles, or perhaps developed subsequent to their adoption.

4. It is true that in its current wording article 33 does not appear to go beyond what is stated in the current article 56. For that reason, it might be preferable to retain the wording of former article 38, which makes explicit reference to customary law.

Mexico

1. Mexico believes that the scope of this provision should be made more specific to prevent it from prejudicing or affecting in any way the consequences of an internationally wrongful act arising out of other rules of international law.

2. According to the Drafting Committee, article 33 has two functions:

[F]irst, to preserve the application of rules of customary international law of State responsibility that might not be entirely reflected in the draft articles; and secondly, to attempt to preserve some effects of a breach of an international obligation which did not flow from the rules of State responsibility proper, but stemmed from the law of treaties or other areas of international law.

(*Yearbook ... 2000*, vol. I, 2662nd meeting, p. 389, para. 19).

The two functions will be considered separately.

3. As for the first function, it should be recalled that the Commission is engaged in codifying the customary rules applicable to State responsibility. It is therefore unfortunate, if this is truly the goal being pursued, that the draft indicates that there may be other consequences arising out of customary law that affect responsibility as such and are not expressly included in part two, chapter I. Far from providing legal certainty, the retention of the article in its present form could be controversial.

4. As for the second function, Mexico agrees with the Commission that the other effects of an internationally wrongful act that do not flow from the responsibility regime as such but from other areas of international law are independent of the draft articles and should not be affected by them. This savings clause could be useful in preventing conflicts of interpretation.

Netherlands

The Netherlands accepts the suggestion made in paragraph 108 of *Yearbook ... 2000*, vol. II (Part Two), p. 28, that article 38 (current article 33) should be incorporated in the general provisions in part four. This would mean making the wording more general so as to apply not only to the consequences of internationally wrongful acts but also to the entire legal regime governing State responsibility.

Poland

See comments on article 32, above.

United Kingdom of Great Britain and Northern Ireland

It will be widely presumed that the draft articles are intended to set out a comprehensive framework, cover-

ing all aspects of State responsibility in greater or lesser detail. It may therefore be assumed that any legal consequences of wrongful acts (other than those resulting from a *lex specialis* such as the law of treaties) that are not set out in the draft articles were intended to be excluded. It would therefore be helpful to make clear in the commentary what kinds of additional rules of the customary international law of State responsibility are intended to be preserved by draft article 33. If there are none, this provision should be deleted. If retained, it is not obvious that it should be placed where it is and limited to the legal consequences of an internationally wrongful act. It could be retained as a general provision.

Article 34. Scope of international obligations covered by this part

Paragraph 1

France

The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community *of States* 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.

Mexico

1. Article 34 is an especially important draft article because it determines which subjects are covered by the obligations set forth in articles 28–33. It is therefore essential that its wording be as exact as possible. It is recognized that an internationally wrongful act incurs obligations that are owed to one or more States, depending on the circumstances of the case; in view of the ambiguity of the term “international community as a whole” as used in this article, however, doubts arise as to the obligations owed to this still imprecise entity, the international community as a whole. What is the international community as a whole, and who are its members? To avoid problems of interpretation, Mexico would prefer to see the term “international community as a whole” replaced by “community of States as a whole”, which is a more specific term and is derived from the 1969 Vienna Convention.

2. The fact that the obligations may be owed to a State, to several States or to the community of States as a whole does not mean that the obligations of the responsible State are the same to each one of these States. As the Commission noted in article 34, paragraph 1, the scope of these obligations depends on the character and content of the obligation breached and on the circumstances of the breach. The paragraph fails to include, however, any reference to the effects of the internationally wrongful act on the State to which the obligation is owed, a basic element in defining the scope of responsibility. Mexico suggests including in the criteria for determining the scope of the obligations covered by part two the effects of the breach on the subject to whom these obligations are owed. An affected State could, on the basis of these effects, demand the consequences set out in articles 30–31.

*Paragraph 2***Argentina**

See general comments on part four, below.

Poland

Although Poland is ready to accept the draft provisions referring to the position of individuals under the law of State responsibility, it is not fully convinced that they do not exceed the current state of international law. In particular, the meaning of article 34, paragraph 2, is unclear as to the relationship between the law on State responsibility and claims based upon private law presented by the municipal law of the perpetrator.

CHAPTER II. THE FORMS OF REPARATION

**Denmark, on behalf of the Nordic countries
(Finland, Iceland, Norway, Sweden and Denmark)**

See comments on part two, chapter I, above.

Mexico

The Commission has done excellent work and has achieved the right balance in determining the forms of reparation and how they interact. Mexico's comments on this chapter of the draft articles are intended to clarify some of its positions.

Netherlands

The Netherlands approves of the fact that the articles in this chapter take the form of obligations on the responsible State and not, as in the previous draft, of rights of the injured State.

*Article 35. Forms of reparation***Argentina**

Some have criticized chapter II as being too restrictive in its wording, which appears to favour the automatic application of the rules of reparation. For the sake of greater flexibility, it might be helpful to insert the phrase "without prejudice to the right of the parties to agree on other modalities of reparation" at the beginning of the article.

Japan

See comments on article 43, below.

Netherlands

See comments on article 31, above.

*Article 36. Restitution***France****(c) *Would not necessarily cause that State to violate another international obligation***

It is necessary to add a third item to article 36 (or 35 in the text proposed by France; see comments on article 32 above), setting forth the principle that the State responsible for the internationally wrongful act must make restitution only if doing so does not require it to violate any of its other international obligations, and thus to commit another internationally wrongful act. Otherwise, the situation of a State bound (even if by its own act) by two obligations whose simultaneous performance is impossible because they are mutually incompatible would be legally irresolvable. It is not possible to establish a rule whose application would result in there being no concrete solution to one or more disputes.

Netherlands

1. It is clear from paragraph 172 of *Yearbook ... 2000*, vol. II (Part Two), p. 37, that the Special Rapporteur was of the opinion that there was no requirement that all attempts to secure restitution should be first exhausted and that any election by the injured State to seek compensation rather than restitution should be legally effective. This opinion is not reflected in the wording of article 36. While the Netherlands does not object to the current wording of article 36 or to incorporating the Special Rapporteur's opinion, it does feel that if the responsible State opts for restitution, it should be entitled to do so, and that the injured State cannot deprive the responsible State of this right.

2. Paragraphs 182 and 184 of *Yearbook ... 2000*, vol. II (Part Two), p. 38, show that the Commission discussed whether "'legal' impossibility" was included in the phrase "material impossibility" and whether a "legal impossibility" could therefore impede the fulfilment of a responsible State's obligation to make restitution. It is the view of the Netherlands that, just as a State cannot, under article 3 of the draft articles, evade its responsibility by describing its internationally wrongful acts as lawful under national law, so too it cannot hide behind national law to avoid making restitution. The only way in which "material impossibility" could be regarded as including "legal impossibility" would be if restitution were to entail a breach of an obligation under international law.

Poland

As to restitution, Poland suggests amending article 36 by inserting in the *chapeau* the expression "to re-establish the situation which would have existed if the internationally wrongful act would have not been committed" in place of the current corresponding expression. In the opinion of Poland, such a formula does not necessarily imply full reparation. Poland is of the opinion that full

reparation might be excluded in case of material [financial] reparation if such a reparation would lead to an excessive burden for the responsible State. It seems to Poland therefore that the provision of article 36 (b) should be extended to cover also reparation within the meaning of article 37 (e.g. in the form of a general provision for the chapter concerned).

Spain

Spain views as positive the deletion from the draft adopted in 1996 of some vaguely worded provisions, such as former article 43, subparagraph (d), which contained an exception to restitution in kind whose verification in practice would be highly problematic (“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”).¹ The regulation contained in new article 36 is much better suited to contemporary international practice.

¹ *Yearbook ... 1996*, vol. II (Part Two), p. 63.

Subparagraph (b)

United Kingdom of Great Britain and Northern Ireland

The principle set out in draft article 36 (b) is accepted. There is, however, doubt as to the factors that may be weighed in deciding whether restitution is disproportionately onerous. There is a question of practical importance that may arise, for instance, where responsibility results from the defective exercise of a power by a State, in contexts such as the adoption of measures expropriating or regulating foreign property rights. For example, if property is taken by a State as part of a nationalization programme that is legally defective only because of the lateness or inadequacy of compensation, re-establishment of the *status quo ante* might be possible, and the burden upon the State of doing so may not be great. Restitution may appear to be the appropriate remedy. On the other hand, it might be said that there is little practical point in demanding restitution, because the State could immediately issue a new expropriation measure or regulation, accompanied this time by proper provisions for the payment of compensation. The position might be complicated by the acquisition of rights in respect of the property by third parties. It would be helpful if these points, of considerable practical importance, were fully addressed in the commentary.

Article 37. Compensation

Argentina

See comments on article 31, above.

Mexico

1. Article 37 establishes the obligation of the responsible State to compensate for the damage caused by the

internationally wrongful act and, immediately thereafter, provides that the compensation will cover any financially assessable damage. Does this statement mean that moral damage is subject to compensation? The doubt arises from the provision in article 31, paragraph 2, stating that injury consists of any damage, whether material or moral, and from the fact that in some systems moral damage may be financially compensated. The Drafting Committee's comment implies that the Commission itself considers that moral damages are not financially assessable; this understanding is not, however, clearly expressed in the draft articles. If a clarification is not added to the effect that compensation covers any material damage that is financially assessable, the text could be interpreted as meaning that moral damage is also subject to compensation.

2. In accordance with relevant decisions in international jurisprudence, Mexico considers that satisfaction is generally an appropriate form of reparation for moral damage suffered by a State as a result of an internationally wrongful act.¹

¹ *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 35.

Netherlands

1. The Netherlands concurs with the wording of article 37, which regulates “compensation” in general rather than detailed terms.

2. The commentary should clarify the respective scope of, and the distinction between, articles 37 and 38 as regards material vis-à-vis immaterial damage and as regards damage caused to an individual or to the State.

3. In response to paragraph 212 of *Yearbook ... 2000*, vol. II (Part Two), p. 41, on the Special Rapporteur's proposed text for articles 44–45 (corresponding to current articles 37–38), the Netherlands would observe that the phrase “gravity of the injury” can apply equally to the gravity of the wrongful act and the gravity of the damage incurred.

Republic of Korea

The Republic of Korea considers that this article has achieved an appropriate balance between an attempt to elaborate the detailed criteria for the amount of compensation and a flexible approach intended to allow such criteria to develop over time.

United Kingdom of Great Britain and Northern Ireland

The question whether any particular form of damage is financially assessable is not answered in the same way in all legal systems. While the position in international law is best worked out through decisions on concrete cases, the commentary might usefully indicate that assessability is a matter for international, and not for national law.

*Paragraph 1***Republic of Korea**

In paragraph 1, the Republic of Korea prefers the phrase “if and to the extent that” to the phrase “insofar as”, without wishing to alter the substance of the provision.

*Paragraph 2***Austria**

See comments on article 31, paragraph 2, above.

United States of America

1. The United States would urge the Commission to clarify that moral damages are included as financially assessable damages under article 37, paragraph 2, on compensation.

2. The United States urges the Commission to make explicit that moral damages are likewise included in a responsible State’s duty to provide compensation for damage to injured States by clarifying in article 37, paragraph 2, that moral damages are “financially assessable damage[s]”. The United States also believes it would be important to clarify in this article that moral damages are limited to damages for mental pain and anguish and do not include “punitive damages”.

*Article 38. Satisfaction***Japan**

See comments on article 43, below.

Netherlands

See comments on article 37, above.

Spain

With regard to satisfaction, as regulated in new article 38, it was a wise decision to delete the reference to punishment of those responsible for a wrongful act as one of the forms of satisfaction, a measure which certainly does not appear to have been confirmed in State practice thus far. The same can be said of damages, as regulated in article 45 of the 1996 draft.¹ This provision, which has not been confirmed in practice either, does not appear to be necessary, since article 35 sets forth the principle of full reparation and article 37 provides that compensation shall cover “the damage caused [by an internationally wrongful act], insofar as such damage is not made good by restitution”. Only the reference in article 42, paragraph 1, to the obligation to pay “damages reflecting the gravity of the breach”, in the context of the regime of aggravated responsibility for breaches of obligations to the international community as a whole, is acceptable.

¹ *Yearbook ... 1996*, vol. II (Part Two), p. 63.

United States of America

The United States welcomes the Commission’s removal of moral damages from article 38 concerning satisfaction.

*Paragraph 1***Austria**

See comments on article 31, paragraph 2, above.

Republic of Korea

In paragraph 1, the phrase “insofar as” should be replaced by the phrase “if and to the extent”, as noted above under article 37.

*Paragraph 2***Mexico**

Article 38, paragraph 2, describes in an illustrative manner the forms that satisfaction may take. The examples listed reflect general practice and are the expressions par excellence of satisfaction. The last phrase of the paragraph, “or another appropriate modality”, appears to be too broad, however, and to cover endless possibilities. Despite the savings clause in paragraph 3, it would be preferable to limit the scope of paragraph 2 by adding the words “of a similar nature” to the phrase “or another appropriate modality”. Such a step would place more precise limits on this form of reparation.

*Paragraph 3***Republic of Korea**

In paragraph 3, the drafting of this article could be improved by replacing the phrase “humiliating to the responsible State” with the phrase “impairing the dignity of the responsible State”, since the former phrase does not appear to fit within current legal terminology.

Spain

The wording of article 38, paragraph 3, also raises concerns for Spain in that it refers to measures of satisfaction which take “a form humiliating to the responsible State”. This concept is undefined, as was the notion of “the dignity of the State” provided for in article 45 of the 1996 draft,¹ which has found no application in more recent international practice. In this regard, the restriction contained in article 38, paragraph 3, of the 2000 proposal, whereby “[s]atisfaction shall not be out of proportion to the injury”, appears to be sufficient.

¹ *Yearbook ... 1996*, vol. II (Part Two), p. 63.

*Article 39. Interest***Republic of Korea**

This article would be better placed under the rubric of compensation, preferably as article 37, paragraphs 3–4, since interest is not an automatic form of reparation.

Rather interest is primarily concerned with compensation, although the question of interest might arise in the other forms of reparation.

Article 40. Contribution to the damage

Poland

See comments on article 31, above.

Republic of Korea

Although the Republic of Korea fully acknowledges its importance, this article applies to all forms of reparation and should therefore be included under article 31, which concerns the general principle of reparation.

Slovakia

Slovakia proposes to move current article 40 (Contribution to the damage) from chapter II to chapter I. The principle of “contribution to the damage” does not belong to “forms of reparation”, rather it may be subsumed under chapter I, general principles. The most suitable place for article 40 would perhaps be in current article 31 (Reparation), as its paragraph 3. The notion of “contribution to the damage” was similarly part of article 42 on reparation in the 1996 draft articles.¹

¹ *Yearbook ... 1996*, vol. II (Part Two), p. 63.

CHAPTER III. SERIOUS BREACHES OF ESSENTIAL OBLIGATIONS TO THE INTERNATIONAL COMMUNITY

Argentina

1. Argentina has supported the need to recognize the existence of a category of particularly serious breaches by a State of its essential obligations to the international community as a whole, over and beyond the terminology adopted. In this connection, the omission of the term “crime” from the current wording of article 41 appears to be a positive sign, since the term lent itself to conceptual confusion, as stated by Argentina in 1998.¹

2. The threefold distinction between *erga omnes* norms, *jus cogens* norms and serious breaches represents an acceptable vision of the international legal system in its current state of development. From that standpoint, the draft articles accurately reflect that distinction.

3. As was stated at the fifty-fifth session of the General Assembly,² just as important as or even more important than the inclusion of a differentiated regime of responsibility in accordance with the seriousness of the wrongful act would be adequate implementation and reflection of such a regime in the articles. In the opinion of Argentina, the system envisaged in part two, chapter III, is, on the whole, appropriate and precise.

¹ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/488 and Add.1–3, p. 113.

² Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session (A/CN.4/513), paras. 89–94.

Austria

Austria approves of the change of direction introduced by the Special Rapporteur, away from any reference to “international crimes” in the draft and towards a more restricted category of *erga omnes* obligations. This avoids the difficult discussion as to the precise meaning of “international crimes”. It has consistently been Austria’s position that such a reference should not be made in the text. Austria is therefore in favour of the new solution proposed in the current text.

**Denmark, on behalf of the Nordic countries
(Finland, Iceland, Norway, Sweden and Denmark)**

Chapter III, concerning serious breaches of essential obligations to the international community, is an acceptable compromise to settle the earlier distinction between “delicts” and “crimes”. The essential point is not the terminology, though the word “crime” in the context of State responsibility may give rise to false implications. The essential point is that some violations such as aggression and genocide are such an affront to the international community as a whole that they need to be distinguished from other violations, in the same way as they are known from the laws of war, with the distinction drawn between “breaches” and “grave breaches” of those rules. The Nordic countries therefore also continue to support the distinction in the context of State responsibility and agree with the solution now presented in part two, chapter III.

France

1. In the view of France, chapter III could be deleted. Article 41 is not essential. It seems to constitute no more than an introduction to some provisions of part two *bis* (which France proposes to convert to part three). Nevertheless, the qualification in paragraph 1 concerning an internationally wrongful act could be restated in article 49 (or article 46 in the text proposed by France). Here, too, the expression “international community as a whole” should be replaced by “international community of States as a whole”.

2. As France explained in its statement to the Sixth Committee on 24 October 2000,¹ article 42 raises a number of difficulties. Paragraph 1 introduces the concept of “punitive” damages linked to a “retaliatory” approach which is not, on the whole, the one taken in the draft articles as provisionally adopted on second reading, and which does not, in France’s view, appear to rest on solid legal foundations, for reasons which France has already had occasion to explain.

3. As to paragraphs 2–3, they do not appear to be essential, for they add nothing of substance.

4. In sum, nothing seems to justify retaining chapter III, especially in this location.

¹ *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 15th meeting (A/C.6/55/SR.15), para. 9.

Mexico

1. Mexico concurs with the elimination of the concept of “State crimes” from the draft articles. This action is a significant step in the process of ending a long-standing debate.
2. Article 41, however, changes the concept of State crimes, characterizing them now as serious breaches of essential obligations to the international community as a whole, a step that does not prevent additional problems and a series of misinterpretations from arising.
3. The terminology itself is unclear. What are serious breaches? How are they determined? How does this concept differ from the breach of *erga omnes* obligations? What are essential obligations? How are fundamental interests defined?
4. On various occasions, Mexico has noted that the nature and consequences of an internationally wrongful act are essential factors in determining the specific content of the responsibility of the State that has committed such an act, but that it is neither advisable nor necessary to make distinctions in the draft articles based on the hierarchy of the norm violated. The establishment of hierarchies tends to create a different responsibility regime depending on the norm violated and leads to a series of complex interrelations that go beyond the objective and purpose of the draft articles.
5. Part two, chapter III, of the draft articles illustrates the problems that arise from the setting up of a special regime in cases of breaches of essential obligations to the international community as a whole. As the debate in the Sixth Committee has shown, there is no consensus among States as to how to identify the norms that would fall into this category or on their specific consequences. There is still no clarity in international law on these points; Mexico therefore invites the Commission to consider this issue seriously in the light of the General Assembly debate.

Netherlands

1. The Netherlands is in agreement with the deletion of article 19 as included in the draft adopted by the Commission on first reading. Article 19 introduced the term “international crime” of a State, defining it as “[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole”.¹ Retaining the term “international crime of a State” is controversial within both the Commission and the Sixth Committee of the General Assembly, and does not therefore appear feasible. It would be inadvisable to risk jeopardizing what the Commission has now achieved in relation to the codification and progressive development of the doctrine of State responsibility by insisting on clinging to the term “international crime of a State”. In the view of the Netherlands, the provisions on the legal consequences of “serious breaches by a State

of obligations to the international community as a whole” (art. 41 in conjunction with art. 42), proposed by the Special Rapporteur and adopted by the Drafting Committee, are a good compromise, with the added advantage that this wording does not put what has been agreed at risk. However, the Netherlands does take the view that further consideration should be given to the definition of “serious breaches” in articles 41 and 42, in their *chapeaux* and in the heading of part two, chapter III, in which the relevant articles are grouped. The Commission should harmonize the various definitions. The Netherlands also notes that the examples given in the previous article 19 to illustrate what was meant by an international crime have not been used to illustrate the corresponding concept of “serious breaches”. This is regrettable because the examples clearly illustrated the term “international crime”, which has now been abandoned. All that is left now, therefore, is a framework, thus leaving a great deal to be filled in by case law and development of the law in general. At the same time, the Netherlands understands the Special Rapporteur’s wish to delete all the elements of the text that have no connection with secondary rules and to transfer them to the commentary.

2. See also comments on article 41 below.

Poland

Poland accepts the inclusion of the provisions on serious breaches of essential obligations owed to the international community as a whole. Article 41, paragraph 1, combines the institutions of *jus cogens* and obligations *erga omnes*, the former being of substantive, and the latter of procedural nature. Poland must emphasize, however, that the criteria for the evaluation of whether the breach in question is really serious are not objective and can create important difficulties in practice. Furthermore, the provision referred to is not correctly reflected in part two *bis* of the draft articles. In particular, it is unclear whether reparation claims in case of obligations *erga omnes* can be presented by every State, all States acting together, or by the international community as a whole. In the opinion of Poland, it should be stated clearly (either in article 49 or in chapter II of the draft) what kind of claims could be presented by the States not individually affected by the violation of international law, as the legal interest affected by such violation is of a different nature and focuses on the observance of international law by all the parties to the specific international legal relationship. Poland agrees that it would be difficult to achieve a general consensus on this point, but the Commission should clarify the issue in its commentary.

Slovakia

1. With regard to part two, chapter III (Consequences of serious breaches of obligations to the international community as a whole), Slovakia welcomes the abandonment of the dichotomy of international crimes and delicts. The distinction between crimes and delicts, and in particular the concept of an international crime, has received a controversial response from Member States and international scholars. In the view of Slovakia, the deletion of article 19 also appropriately reflects new

¹ *Yearbook ... 1996*, vol. II (Part Two), p. 60.

developments in international law in the past decade, namely the concept of international individual criminal responsibility laid down in the Rome Statute of the International Criminal Court, as well as in the respective statutes of international criminal tribunals established by the Security Council. The previous concept of “State crimes” went beyond the scope of the draft articles with respect to the content of “State responsibility”. While a responsible State was under an obligation to cease its internationally wrongful act and provide full reparation, the notion of “international crime of States” could have led to the conclusion that it provided for some punitive measures or sanctions against a responsible State, which apparently was not the intention of the Commission.

2. Though Slovakia considers new chapter III to be a promising step in the right direction, there are still some issues giving rise to concern. First of all, it is the notion of “international community as a whole” which is creating a certain degree of ambiguity and confusion. It is not clear how broad a range of subjects it does cover (except for States). It is not clear whether it includes international organizations, private entities or individuals. Slovakia believes that this issue should be clarified. One of the remedies could be the use of the notion of “international community of States as a whole”, as in article 53 of the 1969 Vienna Convention.

Spain

1. As the Spanish delegation to the Sixth Committee has stated on several occasions, Spain supports the regulation in the draft articles of an aggravated regime of international State responsibility. International practice shows that the legal consequences of, for example, breaches of a customs treaty differ quantitatively and qualitatively from those that arise where aggression is committed by one State against another State or where acts of genocide are committed.

2. The name of this more aggravated regime of international State responsibility is not as important as its legal content. Spain has no difficulty with the use of the expression “serious breaches of essential obligations to the international community as a whole”, as proposed by the Drafting Committee in the heading of part two, chapter III, of the draft.

United Kingdom of Great Britain and Northern Ireland

1. Draft articles 41–42 represent an attempt to find a compromise acceptable both to those within the Commission who supported and to those who opposed the concept of international crimes as that concept appeared in the draft articles adopted on a first reading. Compromise solutions in this context are, however, problematic. To the extent that the authority of draft articles annexed to a General Assembly resolution depends upon recognition of the “weight” of the articles as a codification of State practice, an innovative compromise, not rooted in such practice, would necessarily weaken the authority of the entire draft. The provisions relating to serious breaches of fundamental obligations go far beyond codification of

customary international law. There are, moreover, practical difficulties with the provisions as drafted.

2. The first difficulty lies in knowing what would constitute a “serious breach”. Accepting that international law recognizes a category of obligations *erga omnes*, owed to all States and in the performance of which all States have a legal interest (*Barcelona Traction case*)¹, the content of that category is far from settled. Given the significance of this category of *erga omnes* obligations in the context of countermeasures, this point has very considerable practical importance.

3. This uncertainty is not resolved by the addition of further criteria in draft article 41. The requirement that the breach must be “serious” (i.e. involve “gross or systematic failure”) is understandable; but quite rightly not all serious breaches fall within the category. The serious breach must also risk “substantial harm to the fundamental interests” protected by the *erga omnes* obligation, which must be fundamental interests of the “international community as a whole”; and the obligation must be “essential” for the protection of that interest. Every one of those conditions introduces a further element of uncertainty into the operation of the provisions. While every definition gives rise to doubts over borderline cases, the doubts here are so extensive as to render draft article 41 of little practical value as a definition of the category of breaches in relation to which the important consequences set out elsewhere in the draft articles attach. The uncertainty puts in doubt the viability of this innovative mechanism as a practical instrument.

4. Under the draft articles, the consequences of finding that a particular breach is a “serious breach” within the meaning of draft article 41 would be: (a) that any damages awarded may reflect the gravity of the breach (draft art. 42); (b) that obligations of non-recognition and non-assistance are imposed on third States (draft art. 41); and (c) that any State may impose countermeasures in response “in the interest of the beneficiaries of the obligation breached” (draft art. 54, para. 2).

5. As to the first consequence, it is questionable whether punitive damages are appropriate except in rare cases. Generally speaking it is not for an individual State or group of States, or a tribunal, to punish a State as such. State responsibility is concerned with the redress of wrongs, not the punishment of misdeeds. A provision permitting non-punitive damages that reflect the gravity of the breach would be acceptable; but any such provision clearly ought to permit the gravity of the breach to be taken into account in all cases, whether or not the breach falls within a special subcategory of serious breaches of certain *erga omnes* obligations defined by the cumulative criteria in draft article 41. There is no reason why damages in respect of a breach of an obligation owed to a single State or group of States (or to the international community of States as a whole, but not essential for the protection of its fundamental interests) should be governed by principles different from those that govern damages in respect of

¹ *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 3.*

“serious breaches” under draft article 41. It is, moreover, noted that even as the draft articles stand, it is possible to award damages for moral injury in addition to compensation for material injury. That introduces a limited and principled means for taking into account particularly flagrant breaches of international obligations. If a revised provision concerning the award of damages reflecting the gravity of the breach were to be retained, it would be more appropriately located in part two, chapter I, or part two, chapter II.

6. As to the second consequence, it is clear in certain circumstances that States should not recognize as lawful situations created by breaches of international law, or assist the responsible State in maintaining the situation, and that States should cooperate to bring certain breaches to an end. Draft article 42, paragraph 2, however, gives rise to difficulties. Contrary to the impression created by draft article 42, the obligations there set out may attach equally to breaches other than those falling within the narrow range encompassed by draft article 41. Moreover, the circumstances in which breaches occur vary widely; and States are by no means always all affected in the same way. Furthermore, the temporal element cannot be ignored. Yet draft article 42, paragraph 2, prescribes a single rule with which every State must comply, without any limit in time, in every case of serious breach. The resilience and practical utility of the draft would be greatly increased if draft article 42, paragraph 2, were amended so as to provide that the draft articles are without prejudice to any further obligations that might arise under international law in respect of serious breaches. The particular obligations set out in draft article 42, paragraph 2, might be added as examples. This would preserve the substance of draft article 42, paragraph 2, but without the creation of an inflexible rule mandating the application of the same approach in every conceivable case that might arise, and without implying that similar obligations may not apply to breaches other than those falling within draft article 41.

7. The third consequence, concerning countermeasures, is considered below (see article 54, paragraph 2).

Article 41. Application of this chapter

Argentina

See general comments on chapter III, above.

Austria

This new solution suffers from one deficiency: it builds upon the notion of a “serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests”, as defined in article 41, paragraph 1. Paragraph 2 of the same article defines “serious breaches” as such involving a “gross or systematic failure” to fulfil the obligation concerned. In certain exceptional cases there will be no doubt as to whether a breach of an obligation is “gross or systematic” and therefore “serious”, but there is no objective way of determining the borderline between “gross or systematic” and therefore “serious” and “other” breaches of obligations. Drawing the

line in particular in the two areas where this concept is of the most important practical significance, in the areas of human rights and environmental protection, will certainly not be easy. As all States will have the right to invoke “serious breaches”, one would have to expect that the notion of “serious breaches” will be applied by different States differently unless a mandatory third-party dispute settlement procedure is envisaged.

China

1. China, believing that it is inappropriate to introduce the concept of “State crimes” into international law, supported the proposal that the formulation of “State crimes” in draft article 19 adopted on first reading, as well as the provisions in part two relating to their legal consequences, should be appropriately amended.

2. The revised text reflects major changes to the former article 19. The new text replaces “State crimes” with “serious breaches of essential obligations to the international community”, thus circumventing the controversial concept of “State crimes”. It also differentiates between varying degrees of gravity of an internationally wrongful act. China appreciates this effort. However, some fundamental questions still remain in the current text. For example, what is “an obligation owed to the international community as a whole and essential for the protection of its fundamental interests”? To talk about consequences without a clear definition of the concept would very easily lead to controversy in practice.

France

Delete the article.

Japan

1. Japan suggests the deletion of articles 41, 42 and 54, paragraph 2.

2. Japan has consistently objected to the introduction of the ambiguous notion of “international crime”, which is not established under international law. Therefore, it is appreciated that the term “international crime” has been deleted from the text.

3. However, a careful examination of the text shows that it is still haunted by the ghost of “international crime”. In article 41, the new text creates a new category of “serious breaches of essential obligations to the international community”. If an obligation falls within this category, then such a breach of obligation entails special consequences under article 42. Such a breach may involve, for the responsible States, damages reflecting the “gravity” of the breach. Any State has an obligation not to recognize as lawful the situation created by the breach, not to render aid or assistance to the responsible State in maintaining the situation so created, and to cooperate as far as possible to bring the breach to an end. And any State may take countermeasures “in the interest of the beneficiaries” of the obligation breached under article 54, paragraph 2, regardless of the existence or intent of an injured State, or even the intent of beneficiaries.

4. Thus, “serious breaches” under article 41 is only the equivalent of “international crime” barely disguised. It seems that an article 41 obligation is considered to be somehow of a higher value than the other obligations. The core question appears to be whether there exists a hierarchy among international obligations, and if so, whether a different regime of State responsibility may be applied to more serious breaches than are applied to less serious ones. This question relates to the concepts of *jus cogens* and *obligations erga omnes*; however, neither of their concrete contents has yet been sufficiently clarified. The relationship between these concepts and “serious breaches” under article 41 is not clear, either.

5. Accordingly, it might be too optimistic to assume that current international law has developed sufficiently to specify what kind of obligations fall within this category of “serious breaches of essential obligations to the international community”.

6. From the viewpoint of the structure of the text, the actual significance in placing an article on “serious breaches” is to allow for the provision on consequences of serious breaches in article 42. In other words, if the consequences specially ascribed for serious breaches are not appropriate or necessary, there is no point in stipulating such a special category of obligation superior to the usual obligation. If what may be called the “special consequences” in article 42 are looked at, it can be said, at least, that the obligation not to recognize as lawful the situation created by the breach, the obligation not to render assistance to maintain such situation, and the obligation to cooperate to bring the breach to an end, do not result exclusively from the “serious breaches”. It is a matter of course that all internationally wrongful acts should not be recognized as lawful or assisted. Also, the obligation to cooperate is not logically limited to the case of serious breaches, but can be derived from breaches of multilateral obligations or obligations to the international community as a whole.

7. Damages reflecting the gravity of the breach seem scarcely different from “punitive damages”, which is not a notion established under recognized international law. The draft provision apparently tries to avoid this problem by inserting the word “may” in article 42, paragraph 1, which reads: “A serious breach within the meaning of article 41 may involve, for the responsible State, damages reflecting the gravity of the breach”. However, it is not clear who will decide whether a certain obligation “may” involve damages reflecting the gravity.

8. By examining each item of the special consequences under article 42, which offer the *raison d’être* of creating a category of “serious breaches” under article 41, it should be concluded that they are neither special nor appropriate.

9. Japan does not deny the possibility of the existence of a more serious breach of obligation than the usual breach of obligation as a general matter. However, as a matter of law, it cannot be said that there is a consensus about what obligations fall into the category of “serious breaches” and, if such “serious breaches” ever exist, whether some special measures are allowed to be taken, and if so, what the content of the special measures would be. In short, there is no consensus about setting a prior norm of obligation and its contents, even as a matter of primary law.

10. Under such a status quo, we should strictly refrain from creating a norm of higher obligation and special consequences in this draft that is expected to serve as a general secondary rule of general international law. To create such a special obligation and corresponding special consequences is not the task of general secondary rules, but is the task of primary rules. Japan believes that articles 41–42 have not succeeded in departing from the notion of “international crime”, and have no place in this text.

11. As a possible solution, as the United Kingdom suggested in the Sixth Committee,¹ it may be a good idea to create a saving clause for the existence of a category of obligation that has special consequences of State responsibility.

¹ *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 14th meeting (A/C.6/55/SR.14), para. 32.

Netherlands

1. First, reference is made here to the observations on deleting the term “international crimes” and substituting “serious breaches” in part two (see part two, chapter III).

2. The Netherlands thinks it right for the definition of “serious breaches” to be included in part two. That would make clear the distinction between “internationally wrongful acts” and “serious breaches”. Part one contains general provisions which also apply to this category of “serious breaches”.

3. The Netherlands is aware that support exists for replacing the term “international community as a whole” by “international community of States as a whole”, following the example of the 1969 Vienna Convention. The Netherlands recognizes the analogy with the Convention, but fears that extending this analogy might create a restrictive interpretation of the term “international community”. The Netherlands therefore favours retaining the existing wording.

4. Although the list of examples that appeared in article 19, paragraph 3,¹ of the previous version has been omitted, the adjective “serious” now appears in the definition itself and not simply in the examples (see also part two, chapter III). The word “serious” is a constituent part of the definition and presents an extra obstacle

¹ “Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) A serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) A serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) A serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) A serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.”

(*Yearbook ... 1996*, vol. II (Part Two), p. 60)

to the application of article 42. However, it is doubtful whether such an obstacle is always necessary. For example, aggression in any form constitutes a “serious breach” in itself. The Netherlands also thinks that the additional obstacle to responsibility for a “serious breach” that is represented by the words “a gross or systematic failure ... risking substantial harm” (in contrast to “causing significant harm”) is appropriate.

Republic of Korea

1. The Republic of Korea fully supports the Commission’s decision to abandon the distinction between international crimes and international delicts. The controversy with regard to the existence and the possible regime of international crimes has been a stumbling block to the progress of the work of the Commission in the field of State responsibility.
2. The Republic of Korea considers that the notion of international crimes has not yet sufficiently developed to be codified at the current stage. A better solution would be to codify the law of State responsibility as a general rule and to allow the notion of international crimes to evolve. However, the Republic of Korea is convinced that the obligations *erga omnes* and the peremptory norms of general international law deserve special treatment in international law, and breaches of these norms should receive treatment more severe than breaches of less serious obligations. The Republic of Korea is therefore pleased to note that the Commission has embodied this view in the draft articles by referring to “serious breaches of essential obligations to the international community”.
3. Notwithstanding the Republic of Korea’s appreciation of this article, its specific meaning is not clear owing to the frequent use of qualifiers, such as “serious”, “essential”, “gross or systematic”, “substantial” and “fundamental”. In addition, there is a need for further clarification on how the term “essential obligations to the international community as a whole” differs from the ordinary obligations *erga omnes* or from the peremptory norms of general international law.

Spain

The definition of such wrongful acts should be based on an agreement among States, as reflected in international practice. Such a definition, as regulated definitively in article 41 proposed by the Drafting Committee, can only consist of a reference to the consensus established within the international community. The latter expression should, however, be clarified by a reference to the States which constitute the international community, as envisaged in article 53 of the 1969 Vienna Convention. While such a definition is no doubt tautological, no other alternative seems possible at the current stage of evolution of the international order. It seems preferable, therefore, to delete the list of examples of international crimes, as contained in article 19, paragraph 3, of the 1996 draft.¹ Nevertheless, international practice recognizes some breaches of international norms that are unquestionably covered by the definition contained in

article 41, such as aggression or genocide, on which the Commission could take a position in its commentary on that provision.

United Kingdom of Great Britain and Northern Ireland

1. The main points of principle that are of concern have been set out above (see part two, chapter III). There remain some matters of detail that are of concern.
2. The commentary needs to explain clearly how it is to be determined whether an obligation is owed *erga omnes* or to “the international community of States as a whole” (which formula is preferable to that in draft article 41—see article 26); whether the obligation protects the “fundamental interests” of the international community of States as a whole; and whether it is “essential” for that protection. The formula in draft article 41 differs from that in draft article 49, paragraph 1 (a), which requires that obligations be “*established for the protection*”^{*} of certain interests. It is not clear whether it is intended that “purposive establishment” should be required under draft article 49 but not be required here. The relationship between these fundamental interests and an “essential interest” (draft art. 26) and a “collective interest” (draft art. 49) also needs to be explained.
3. The commentary should also explain how the risk of substantial harm to the fundamental interests, referred to in draft article 41, paragraph 2, should be assessed. It is presumably not intended that the mere fact of the violation of an obligation should suffice to demonstrate the existence of the risk of substantial harm.

United States of America

1. The United States welcomes the removal of the concept of “international crimes” from the draft articles. Articles 41–42 dealing with “serious breaches of essential obligations to the international community” have replaced the first reading text article 19, which dealt with “international crimes”. Though the replacement of “international crimes” with the category of “serious breaches” is undoubtedly an important improvement, the United States questions the merit of drawing a distinction between “serious” and other breaches.
2. There are no qualitative distinctions among wrongful acts, and there are already existing international institutions and regimes to respond to violations of international obligations that the Commission would consider “serious breaches”. For example, the efforts under way to establish a permanent International Criminal Court, and the Security Council’s creation of the international tribunals for the former Yugoslavia and Rwanda, are examples of special regimes of law better suited than the law of State responsibility to address serious violations of humanitarian law. Indeed, responsibility for dealing with violations of international obligations that the Commission interprets as rising to the level of “serious breaches” is better left to the Security Council rather than to the law of State responsibility. Furthermore, the description of some breaches as “serious” derogates from the status and importance of

¹ *Yearbook ... 1996*, vol. II (Part Two), p. 60.

other obligations breached. The articles on State responsibility are an inappropriate vehicle for making such distinctions. Finally, the draft articles are intended to deal only with secondary rules. Articles 41–42 in attempting to define “serious breaches” infringe on this distinction between primary and secondary rules, as primary rules must be referenced in order to determine what constitutes a “serious breach”.

3. The United States also notes that the definition of what constitutes a “serious breach” in article 41, paragraph 2, uses such broad language that any purpose of drawing a distinction between “serious” breaches and other breaches is essentially negated. Almost any breach of an international obligation could be described by an injured State as meeting the criteria for “serious breach”, and given the additional remedies the draft articles provide for “serious breaches”, injured States might have an incentive to argue that an ordinary breach is in fact a “serious breach”. There is little consensus under international law as to the meaning of the key phrases used to define “serious breach”, such as “fundamental interests” and “substantial harm”. This lack of consensus makes it nearly impossible for the Commission to draft a definition of “serious breach” that would be widely acceptable. This difficulty in arriving at an acceptable definition of “serious breach” provides additional strong grounds for the deletion of these articles.

4. The United States strongly urges the Commission to delete articles 41–42.

Article 42. Consequences of serious breaches of obligations to the international community as a whole

France

Delete the article.

Japan

1. Japan suggests the deletion of articles 41, 42 and 54, paragraph 2.
2. See also comments on article 41, above.

Netherlands

The specific legal consequences of an “international crime” (i.e. legal consequences for the responsible State, which were not subject to the restrictions applying to the consequences of internationally wrongful acts), which were contained in article 52 of the previous draft, have disappeared along with the term “international crime”. The phrase “damages reflecting the gravity of the breach” is all that remains of specific consequences of a serious breach for the responsible State in article 42, the corresponding article of the current draft. The Netherlands believes that the draft should be more specific on this point; in other words it should state (perhaps in the commentary) that in the event of serious breaches damages are payable over and above compensation for the material damage incurred. Strictly speaking, punitive damages should be an appropriate form of reparation for serious breaches. However, the Netherlands is

aware that one of the consequences of deleting the term “international crime” is that punitive damages have become impossible. Nevertheless, the draft articles should indicate that in the event of serious breaches the legal consequences for the responsible State should be correspondingly serious. Apart from *restitutio in integrum* and satisfaction, options might include financial consequences exceeding the costs of compensation for material damage, or institutional measures such as being placed under control or restriction of the rights attached to membership of an international organization.

Spain

1. The definition of the more aggravated regime of international responsibility which comes into play where “serious breaches of essential obligations to the international community” are committed is extremely difficult. As correctly envisaged in general in article 59 of the draft adopted by the Drafting Committee, this regime will be complementary to action taken by the Security Council, although the inclusion of this provision may not be necessary in the light of Article 103 of the Charter of the United Nations.

2. For Spain, this aggravated regime of international responsibility can be based on the following points: first, an express reference to the international provisions on individual criminal responsibility (Rome Statute of the International Criminal Court, the ad hoc tribunals and so on) should be included; the Commission should not concern itself with this matter in its draft articles on State responsibility. It is true that draft article 58 makes a general reference to the individual responsibility of any person acting in the capacity of an organ or agent of a State, but it would also be appropriate to make an express reference to this in part two, chapter III, of the draft.

3. Secondly, the proposal contained in article 54, whereby “[i]n the cases referred to in article 41, any State may take countermeasures, in accordance with the present chapter in the interest of the beneficiaries of the obligation breached”, is correct. Where one of the obligations referred to in article 41 is breached, all States may take countermeasures, in accordance with the circumstances affecting the violation of the primary norm and provided that the restrictions set out in the draft are complied with.

4. With regard to the substantive consequences of the serious breaches regulated in article 41, they are, in accordance with the proposal made in article 42, largely undefined. The Commission should enlarge upon and clarify to the extent possible the obligations of all States provided for in article 42, either in the text of the article or in the commentaries. In particular, the Commission should streamline the content of the obligation not to recognize as lawful the situation created by the breach and the obligation not to render aid or assistance to the responsible State in maintaining the situation so created. The reference in paragraph 2 (c) to cooperation among States “to bring the breach to an end” is also problematic, as it is unclear whether a separate obligation is involved or whether it is related to the taking of countermeasures under article 54. In the latter case it would be necessary to

mention expressly the restrictions applying to the taking of countermeasures.

5. All of this should be understood as being without prejudice to the reference made in article 42, paragraph 3; thus, it is the evolution of the international order itself that is developing the legal regime of “serious breaches of essential obligations to the international community”.

United States of America

1. The most troubling aspect of the articles on “serious breaches” is that these articles provide additional remedies against States found to have committed “serious breaches”, above and beyond those provided for ordinary breaches. The United States is most concerned with article 42, paragraph 1, which includes language (“damages reflecting the gravity of the breach”) that can be interpreted to allow punitive damages for serious breaches. There is scant support under customary international law (in contrast to domestic law) for the imposition of punitive damages in response to a “serious breach”, and the United States believes it is crucial that this paragraph be deleted. The Special Rapporteur has acknowledged the lack of a basis under customary international law for the imposition of punitive damages, stating that “[t]here is no authority and very little justification for the award of punitive damages properly so-called, in cases of States responsibility, in the absence of some special regime for their imposition”.¹ See also *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7, p. 17, para. 63, listing cases that have rejected claims for punitive damages under international law.

2. The United States notes that detailed proposals for the consequences that should attach to responsible States committing international crimes were rejected both in 1995 and in 1996 by the Commission.² The Commission should likewise reject any attempt at this late date to introduce what appears to be a special regime for the imposition of punitive damages into the draft articles as a potential remedy for “serious breaches”. The United States strongly urges the Commission to delete articles 41–42.

3. See also comments on article 41, above.

¹ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, p. 56, para. 190 and footnote 380.

² *Ibid.* See also *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7, p. 17, para. 63.

Paragraph 1

Argentina

To avoid confusion, the phrase “in addition to the consequences set out in part two of these articles” could be inserted at the beginning of the paragraph.

Netherlands

1. The specific consequences contained in article 52 of the previous draft¹ disappeared with the deletion of the term “international crime”. The phrase “damages reflecting the gravity of the breach” is all that remains in the corresponding article 42 of the current draft to indicate specific legal consequences of “serious breaches”. The Netherlands considers it doubtful whether this can be regarded as a sufficiently effective form of reparation. Although there is no question of introducing the concept of punitive damages at the current stage, the text (or the commentary) should perhaps be more specific on this point. The draft articles should reflect the notion that in cases of serious breaches, damages are necessary over and above compensation for the material damage incurred (see part two, chapter III).

2. The Netherlands has reservations about the use of the word “may”. The relatively open-ended nature of this word can only be explained if the serious breach in question inflicted no damage in itself, or if this paragraph anticipates legal consequences defined in the rest of article 42. Another explanation for the use of the word “may” would be that the injured State has a discretionary power to seek damages. However, the Netherlands believes that this interpretation contradicts the express obligation on the responsible State to make restitution or to compensate for the damage caused, as stated in articles 36–37, although what is involved in these articles is only “internationally wrongful acts”. Lastly, the use of “may” could be explained by the Drafting Committee’s consideration that “there might be situations in which the gravity of the breach called for heavy financial consequences”.² Nonetheless, the Netherlands suggests that the words “may involve” should be replaced by the word “involves”.

¹ “Where an internationally wrongful act of a State is an international crime:

(a) An injured State’s entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of article 43;

(b) An injured State’s entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of article 45.”

(*Yearbook ... 1996*, vol. II (Part Two), p. 64)

Article 43, subparagraphs (c) and (d), read:

“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:

...

(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.”

Article 45, paragraph 3, read:

“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.”

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

² *Yearbook ... 2000*, vol. I, 2662nd meeting, p. 393, para. 44.

Republic of Korea

It is not clear what the phrase “damages reflecting the gravity of the breach” implies. If the phrase is construed to mean punitive damages, the Republic of Korea is opposed to its inclusion in the draft articles.

Spain

See comments on article 38, above.

Paragraph 2

Austria

“Serious breaches” entail obligations not only for the States which have committed a wrongful act, but also for all other States (see article 42, paragraph 2), among which is the obligation “[t]o cooperate as far as possible to bring the breach to an end” (art. 42, para. 2 (c)). However, the relationship between article 54, paragraph 2, and article 42, paragraph 2 (c), is unclear. Probably it is possible to regard the obligation to bring the breach to an end (art. 42, para. 2 (c)) as being “in the interest of the beneficiaries of the obligation breached” (art. 54, para. 2); relevant action could then be regarded as falling under article 54, paragraph 2. But there is some doubt as to whether this is the intention of the drafters and whether actions “to bring the breach to an end” are only permitted within the limits of countermeasures. If not, the difficult problem of what has been called “humanitarian interventions” might have to be faced in this context. The practical implications of this question are evident and it is therefore important that no ambiguities are left in the text.

China

A question arises regarding the relationship of article 42, paragraph 2, with Security Council resolutions. For example, for an act that threatens international peace and security, would the obligations set out in article 42, paragraph 2, arise automatically, or only after a decision has been made by the Security Council? The current text is not clear on this. China suggests that the Commission provide the necessary definition and clarification in the commentary to this article.

Netherlands

1. Placing subparagraph (a) (the obligation for all States “[n]ot to recognize as lawful the situation created by the breach”) in article 42 might create the impression that the obligation laid down in this subparagraph did not apply to breaches that were not serious. However, the Netherlands realizes that it would not be possible to transfer this obligation to the legal consequences of internationally wrongful acts, since part two, chapter I, is concerned with the legal consequences for the responsible State.

2. The Netherlands assumes that the emphasis in subparagraph (c) (the obligation for all States “[t]o cooperate as far as possible to bring the breach to an end”) is on cooperation, i.e. maximizing the collective response, for example, through the collective security system of the United Nations, and preventing States from going it alone.

The Netherlands proposes that, since “serious breaches” are involved, the restriction “as far as possible” should be deleted.

United Kingdom of Great Britain and Northern Ireland

As explained above (see part two, chapter III), draft article 42, paragraph 2, seeks to introduce an undesirable rigidity into international law. The draft articles would be of greater practical value if the paragraph were omitted. If any provision is retained, it would be better if it were less prescriptive, allowing a greater flexibility of response in the light of the nature of the breach and the circumstances of each State concerned.

Paragraph 3

Netherlands

Options could include institutional consequences, such as being placed under control, or restriction of the rights attached to membership of an international organization (see also article 30 and part two, chapter III).

United Kingdom of Great Britain and Northern Ireland

Paragraph 3 preserves the effect of articles 35–40, and of provisions of customary international law that may attach further consequences to serious breaches. The Special Rapporteur, finding examples of further consequences only in the field of treaty law (which is covered by draft article 56 on *lex specialis*), doubts the usefulness of this provision (*Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, para. 65). He is clearly right. Unless concrete examples of further consequences, not covered by other draft articles, can be given, this paragraph should be deleted.

PART TWO *BIS*

THE IMPLEMENTATION OF STATE RESPONSIBILITY

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The new part two *bis*, actually part three, on the implementation of State responsibility, also represents a clear improvement compared to the 1996 draft.

Slovakia

The new part two *bis* represents a logical continuation of the text after part one (The internationally wrongful act of State) and part two (Content of international responsibility of a State).

Title

France

~~Part Two~~ *bis* Part Three

The implementation of *international* State responsibility

France suggests that this part become part three of the draft articles and that the inclusion of a part dealing with the settlement of disputes be abandoned.

CHAPTER I. INVOCATION OF THE RESPONSIBILITY OF A STATE

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

Chapter I, setting out the conditions for invoking the responsibility of a State, reads well.

Mexico

1. Under the framework provided in articles 43 and 49, certain States have an interest in the performance of an obligation breached, even though they are not directly injured by the internationally wrongful act, and they should therefore be entitled to invoke their right under article 43. Mexico supports this position, since obligations unquestionably exist whose breach has effects on States other than those directly involved in the act in question. What is important is that the responsibility of the State committing the wrongful act should take different forms, depending on its impact on the State that invokes the responsibility. Not all States having an interest in a specific case have the right to compensation, nor may they demand all the consequences covered by articles 28–34. This is clearly regulated in draft article 49.

2. The distinction made in articles 43 and 49 is sensible. The concept of injured State expressed in article 43 is too broad, however. Since the definition of injured State determines a State's right to demand reparation and resort to countermeasures for an internationally wrongful act, it is essential to clarify and delimit its scope.

3. Mexico considers that the specific and objective injury suffered by a State should be the main factor in determining whether the State may be regarded as an injured State. Article 43 (a) and (b) (i) appear to reflect this need for a concrete and objective injury, whereas subparagraph (b) (ii) does not meet this criterion and allows for any State to be included in the concept of injured State, provided it argues that the breach of the obligation is of such a character as to affect the enjoyment of its rights or the performance of the obligations of all the States concerned. Mexico feels that the language of this subparagraph is vague and imprecise, and it recommends that the Commission should consider deleting it from the draft articles.

4. In fact, the concept expressed in subparagraph (b) (ii) is covered by the supposition in subparagraph (b) that establishes the hypothesis of invoking a State's responsibility

to the community as a whole, which cannot be anything other than the community of States as embodied in organs such as the Security Council or the General Assembly.

5. Given the broad range of entitlements attributed to a State other than the injured State, this reference should be eliminated from subparagraph (b) (ii).

6. Moreover, as indicated in the comments on article 34, it is suggested that the term "international community as a whole" should be replaced by "community of States as a whole".

United Kingdom of Great Britain and Northern Ireland

1. The draft refers at many points to the right to invoke responsibility. It is not clear in every context what is understood by "invocation of responsibility". Under the draft, in certain circumstances non-injured States that are parties to multilateral treaties or members of groups towards which an obligation is owed do not have the right to invoke responsibility. This is the case, in particular, regarding multilateral treaties that do not fall within the uncertain scope of the category of treaties established for the protection of a collective interest. While such States will in any event, by virtue of the principles of international law governing remedies, be unable to obtain certain remedies, such as damages, it is not desirable that they should be precluded from taking any formal action whatever in relation to breaches of the obligations in question. The provisions on injured and interested States, and on the invocation of responsibility and on damages, seem to have this result.

2. Given the pivotal significance of the concept of invocation of responsibility, it should be defined in the draft or at least in the commentary. The definition should make clear that for the purposes of the draft the invocation of responsibility means the making of a formal diplomatic claim or the initiation of judicial proceedings against the responsible State in order to obtain reparation from it.

3. It should be clear that informally calling upon a State to abide by its obligations does not count as an invocation of responsibility. It should also be clear that the initiation of actions such as the scrutiny of a State's actions in an international organization, or a proposal that a situation should be investigated by an international body, or the invocation of a dispute settlement mechanism that does not entail a binding decision (for instance, a fact-finding mission, or a conciliation commission) do not amount to an invocation of responsibility, and that the right to take such actions is not subject to the limitations set out in the draft.

Article 43. *The injured State*

Austria

1. As far as the notion of "injured States" is concerned, the draft contains different solutions depending on the character of the breach of the obligation: If it is "of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned" (art. 43 (b) (ii)), all States concerned have the

rights of “injured States”. However, the definition of “the State concerned” may pose certain difficulties.

2. It is therefore suggested that the relation between this provision and the provisions concerning States other than the “injured States” should be clarified.

France

Article 40 ~~43~~ [40] *The injured State*

Under the present draft articles, a State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) That State individually; or

(b) A group of States including that State, ~~or the international community as a whole~~, and the breach of the obligation:

(i) Specifically affects that State: or

(ii) Is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned;
or

(c) *A group of States including that State or the international community of States as a whole, and if the obligation is established for the protection of a collective interest.*

In the view of France, and as its representative stated to the Sixth Committee on 24 October 2000,¹ it would be useful to make a clearer distinction between the injured State and the State which only has a legal interest. To that end, it would be preferable to place article 49, paragraph 1 (a), after article 43 (a) and (b) (or article 40 (a) and (b) in the text proposed by France). It would indeed seem that the breach of an obligation which protects a collective interest injures each of the States included in the group of States for whose benefit the obligation was established, so that each of them has more than a mere legal interest in ensuring that the obligation is carried out.

¹ *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee, 15th meeting (A/C.6/55/SR.15), para. 4.*

Japan

1. Japan supports the approach of the draft articles to narrow the meaning of “injured States”.

2. The relationship between “injury”, “(being) affected” and “damage” is unclear and confused.

3. The current draft articles on the entitlement to invoke State responsibility (art. 43) stipulate “injured States” without defining the notion of “injury”. From this provision, it is unclear whether “injured” States can be identified only by the types of obligation breached, as distinguished from “interested States” in article 49, or whether “injured States” are assumed to suffer from “injury” when a certain type of obligation is breached

and such obligation is owed to another State, as the word “injured States” is used.

4. However, if article 43 assumes the existence of “injury” as defining an injured State, then it is again unclear whether “injury” assumed under article 43 and “injury” under article 31 are different notions or not. Japan believes that article 43 should more explicitly explain what is meant by an injured State: whether material or moral damage is necessary for a State to become an “injured State” entitled to invoke State responsibility, or rather, whether the breach of an obligation is enough.

5. From the structure of part two and part two *bis*, it seems that injury in article 43 is considered to be the legal concept that establishes the relationship of the responsible State and the injured State in State responsibility (or qualification to invoke State responsibility), whereas the latter means “damage”, the legal concept that defines the extent to which the injured State is entitled to claim reparation. Article 31, paragraph 1, reads: “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act”. Thus, the “injury” in article 31, paragraph 1, intends to determine the scope of the reparation that States can claim. If “injury” assumed under article 43 and “injury” under article 31 are different, it would be better to use the term “damage” instead of “injury” to avoid confusion.

6. On the other hand, the report of the Drafting Committee says: “In the view of the Drafting Committee, the identification of an injured State in any particular case depended, to some extent, on the primary rules concerned and on the circumstances of the case; in the context of the secondary rules, what could be done was to identify the categories of affected States and their entitlement to invoke responsibility and specific remedies.” (*Yearbook ... 2000*, vol. I, 2662nd meeting, pp. 393–394, para. 50); and: “The words ‘affects’ and ‘affect’ in subparagraphs (b) (i) and (b) (ii) indicated that there were adverse and negative effects, as would be explained in the commentary.” (*Ibid.*, p. 394, para. 52.)

7. This shows at least that the Drafting Committee drafted article 43 with the understanding that the term “injured States” is meant to mean States that were affected, not injured. In this case, it is not clear whether “affect” under article 43 and “injury” for the purpose of implementing reparations are the same. If so, article 43 should use the term “injure” instead of “(being) affected”.

8. If “injury” is different from “being affected”, as pointed out above, this means that States entitled to invoke State responsibility are identified without the notion of “injury”. However, from an examination of articles 31–40, which stipulate that the responsible States have an obligation to make reparation for “damage”, not for “being affected”, it would be concluded that States that can seek reparation are limited to those that actually suffer “damage”. Then what is the relationship in the draft articles between States that are entitled to invoke State responsibility and States that are entitled to seek reparation? Article 31, paragraph 1, does not specify to which State the responsible State is under an obligation to make full reparation.

9. Article 43 is heavily influenced by article 60 of the 1969 Vienna Convention. However, the qualification to terminate or suspend treaties under article 60 is a matter of primary law, and it might be different from the qualification to invoke State responsibility. If article 43 uses the same terminology of “affect”, the commentary should make clear the difference between the texts.

Netherlands

1. The Netherlands notes that in the previous draft the term “injured State” was not confined to the State directly injured, but included all other States in cases of international crimes. Article 43 of the current draft limits the definition to the State directly injured or to a group of States or the international community as a whole, if the responsible State has breached obligations owed to all the States concerned, e.g. a disarmament treaty. A reading of article 43 of the current draft in conjunction with article 49 reveals that a distinction is now being made between two categories of State, namely, on the one hand, the directly injured State or group of States, which can all invoke the responsibility of a particular State, and on the other hand, States which, if the responsible State is in breach of *erga omnes* obligations, are affected to a degree in a more theoretical or “legal” way and can therefore invoke legal consequences only to a limited extent. The Netherlands has reservations about the desirability of this distinction, and wonders whether the price for deleting the term “international crime” is not too high. In the current draft, in cases of serious breaches of *erga omnes* obligations, not only is the category of injured States very limited, but the array of forms of reparation available under article 49 to States that are “legally” affected is more restricted than that available to the directly injured State and is also much more restricted than those permitted to all States by the previous draft in cases of international crimes. The Netherlands sees these changes to the previous draft as a retrograde step and advises the Commission to reconsider.

2. In addition, the Netherlands takes the view that the drafters have here lost sight of the connection with article 31, paragraph 2, which defines “injury”. Article 31, paragraph 2, also expressly acknowledges “moral damage” as an element of “injury”. If this is incorporated in the term “injured State” in article 43, this concept should also embrace “any State other than an injured State” as referred to in article 49. The Netherlands therefore proposes incorporating a new subparagraph (c) in article 43, to cover the category of States currently referred to in article 49. A distinction would then have to be made between “directly injured States”—the category mentioned in subparagraphs (a)–(b)—and “injured States other than the directly injured States” in the new subparagraph (c).

3. Articles 44–48 would then have to apply to injured States in general. Article 49 would have to be amended in line with new article 43 (c).

Republic of Korea

The Republic of Korea essentially agrees with the distinction between “the injured States” as defined in article 43 and “States other than the injured State” referred to in article 49, which is one of the improvements on the draft

articles adopted on first reading. It seems natural to make the right of invocation of States depend on the extent to which they are affected by the breach of the obligation concerned. However, in the view of the Republic of Korea, it is important to make the distinction even clearer. This is particularly so because, in the context of the draft articles, the invocation of the responsibility of the State and the right to remedies or countermeasures are predicated upon this distinction.

Slovakia

Slovakia supports the distinction made in the draft between “injured States” (art. 43) and those States that may have a legal interest in invoking responsibility even though they are not themselves specifically affected by the breach (art. 49). The Commission abandoned its endeavour to define the term “injured State” for a good reason: a very complicated broad definition in article 40 of the 1996 draft articles created broad room for too many States to claim to be injured. This distinction is in the view of Slovakia legitimately justified: a situation may arise when States other than the “State victim” have a legitimate interest in the primary obligation at stake. The other reason for this distinction is that while recognizing the rights of those States to invoke responsibility, the “State victim” should always have a broader range of remedies, in particular the right to full reparation, than the States which do not suffer the actual injury. The weakness of previous article 40 was that it provided the same remedies and rights equally for all States which fell within the scope of the definition of “injured State”, whether it was a directly injured State or a State with a legal interest.

United Kingdom of Great Britain and Northern Ireland

1. It is necessary to draw a distinction between injured and interested States in order to determine what remedies might be available to each. It is not helpful to apply that distinction more generally in other contexts relating to the invocation of responsibility and the imposition of countermeasures. According to draft article 2, harm or injury is not a necessary element of a wrongful act. It would be inappropriate and inconsistent with this approach, which conforms with State practice, to prescribe injury as a necessary prerequisite of the right to invoke responsibility.

2. In the case of bilateral treaties, a State may invoke the responsibility of another State whether or not it sustains any material injury as a result of the alleged breach (draft art. 43 (a)). The implication is that the mere fact of the alleged breach is sufficient to justify the invocation of responsibility: proof of injury is not necessary. If that is so in respect of bilateral obligations, it is difficult to see why it should not also be true in respect of multilateral obligations. The draft articles, however, appear not to adopt this view. They require proof either that the breach caused the applicant State to be an “injured” State, or alternatively that the obligation breached was owed to a group of States including the “interested State” and was established for the protection of a collective interest, or that the obligation was owed to the international community (of States) as a whole (although in the case of a breach of an

obligation owed to the international community (of States) as a whole any State may invoke responsibility, regardless of whether it was injured and regardless of whether the obligation was established for the protection of a collective interest (draft art. 49, para. 1 (b)). The logic of this system makes sense in the context of distinguishing between entitlements to remedies; but it is neither necessary nor helpful in the context of establishing *locus standi*. The following comments are made without prejudice to this view.

3. First, if draft article 43 in fact defines the concept of injured State, so that only a State that falls within draft article 43 (a) or (b) is an injured State, it would be preferable that it say so, first by defining the concept, and then setting out its consequences.

4. Secondly, it is not clear how it is to be determined whether an obligation is owed to a State “individually”. The case of a bilateral treaty is clear; but the Chairman of the Drafting Committee, in his remarks on draft article 43, referred to the case of a “multilateral treaty that gave rise to a number of bilateral relations”.¹ Practically all multilateral treaties, and customary law obligations, could be analysed in terms of bilateral obligations. That is reflected in the operation of concepts such as consent, waiver and persistent objection. It is therefore of crucial importance to the utility of this draft article that a clear and workable test for distinguishing individual obligations from “group” obligations should be set out in the commentary.

5. A similar point might be made in relation to the difficulty of determining which obligations are owed to what is better phrased as “the international community of States as a whole”, in subparagraph (b).

¹ *Yearbook ... 2000*, vol. I, 2662nd meeting, p. 394, para. 51.

United States of America

1. The United States welcomes the important distinction that the Commission has drawn between States that are specifically injured by the acts of the responsible State and other States that do not directly sustain injury. The United States believes that this distinction is a sound one. It also supports the Commission’s decision to structure article 43 in terms of bilateral obligations dealt with in subparagraph (a) and multilateral obligations dealt with in subparagraph (b). The United States shares the view noted in the Special Rapporteur’s third report that article 43 (b) pertaining to multilateral obligations would not apply “in legal contexts (e.g. diplomatic protection) recognized as pertaining specifically to the relations of two States *inter se*” (*Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, p. 35, para. 107, table 1). Thus, there is nothing in article 43 that would change the doctrine of espousal.

2. The definition of “injured State” was narrowed in the revised draft articles, and the United States welcomes this improvement. It believes, however, that the draft articles would benefit from an even further focusing of this definition. Article 43 (b) (ii) provides that if an obligation breached is owed to a group of States of the international community as a whole and “[i]s of such a character as to affect the enjoyment of the rights or the performance of

the obligations of all the States concerned”, then a State may claim injured status. The broad language of this provision allows almost any State to claim status as an injured State, and thereby undermines the important distinction being drawn between States specifically injured and those States not directly sustaining an injury. Further, it inappropriately allows States to invoke the principles of State responsibility even when they have not been specially affected by the breach. Article 43 (b) (i) provides an adequate standard for invoking State responsibility for a breach owed to a group of States that is more in keeping with established international law and practice. The United States urges that article 43 (b) (ii) be deleted.

Subparagraph (b)

Japan

1. Japan suggests the deletion of article 43 (b) (ii).

2. To distinguish between “an injured State” and “an interested State” is very important since it determines whether a State can seek reparation or not. In the new text, this distinction is made automatically based on the category of obligation breached. In other words, under article 43, “injury” is not required for a State to be defined as “an injured State”. As a result, from the wording of articles 43 and 49, it is difficult in reality to make a distinction between an “integral obligation” as defined in article 43 and an “obligation to establish collective interest” in article 49. Almost all multilateral treaties usually establish certain collective interests. Also, it seems possible in many cases to formulate obligations for collective interests under article 49 as integral obligations under article 43.

3. It is very doubtful whether such a distinction is in reality possible without the notion of “injury” (infringement of rights). It is assumed that one of the reasons why the notion of “injury” has been dropped is that a breach of the integral obligation defined in article 43 (b) (ii) can hardly be explained by the traditional notion of “injury”. Also, it may be because the draft faithfully pursues the systematic construction of the law of State responsibility based on the types of obligation breached. However, the cost and benefit involved in pursuing this highly theoretical approach have to be carefully examined. Has the notion of “integral obligation” become an accepted notion of international law to such an extent that the deletion of the notion of “injury” is justified? Can it be specified what falls in the category of an integral obligation as such? It appears that an integral obligation shares only a small part of international law that is difficult to specify. Also, because of the inclusion of “integral obligations”, article 43 seems to contain two fundamentally different types of obligations. If we totally rely on the types of obligation breached to determine a State’s status either as an injured State or as an interested State, it would be better to have obligations of a similar nature defined in one article. Thus, it appears that there is more to lose than to gain.

4. Also, considering what a State, which is a party to an integral obligation, can seek for reparation, the significance of stipulating integral obligations becomes all the more doubtful. Almost by definition, a breach of an integral obligation (i.e. disarmament treaties) entails

only legal injury; therefore, restitution and compensation would be irrelevant. Also, it is unlikely that a State would ask for satisfaction only to itself in the case of an integral obligation. Thus, in reality, a State would be able to seek only cessation and non-repetition. Then, there would be no substantial difference between the case of article 43 (b) (ii) and article 49. Rather, an interested State in the meaning of article 49 can seek compliance with the obligation for the reparation to the injured State. Thus, it appears that article 49 offers greater consequences than article 43 (b) (ii). In this sense, article 43 (b) (ii) is not realistically meaningful.

5. If article 43 (b) (ii) remains, the distinction between an integral obligation and an obligation to establish collective rights should be clarified in the commentary.

6. Considering the views expressed on articles 43 and 49, and on the understanding that the term “injury” is used in a different sense in articles 31 and 43 (though the word “injury” does not appear in article 43), Japan would like to suggest some options, as follows:

Option 1

(Arts. 31 and 35–40)

- Replace “injury” in article 31, paragraph 1, by “damage, whether material or moral”. Replace “injury” in articles 35 and 38 by “damage”.
- Delete article 31, paragraph 2.

(Arts. 43 and 49)

- Delete article 43 (b) (ii) and article 49, paragraph 2 (b).
- Replace “affects” by “injures” in article 43.

The revised article 43 will now read:

“Article 43

“A State is entitled as an injured State to invoke the responsibility of another State as provided in part two if the obligation breached is owed:

“(a) To that State individually; or

“(b) Collectively to a group of States including that State, or to the international community as a whole, and the breach of the obligation specifically injures that State.”

Option 2

The commentary should make clear that “injury” in articles 31 and 35–40 means “injury for the purposes of reparation”, which is different from the “injury” assumed under article 43 “for the purposes of implementation of responsibility”.

Republic of Korea

Article 43 (b) (ii) is so loosely formulated that it would in practice be difficult to distinguish it from article 49, paragraph 1. “The obligation ... established for the protection of a collective interest” or the “obligation ... owed to the international community as a whole” under article 49, paragraph 1, may, by definition, affect the enjoyment of the rights or the performance of the obligations of all States concerned under article 43 (b) (ii).

*Article 44. Invocation of responsibility
by an injured State*

Netherlands

The Netherlands agrees with the Special Rapporteur (see *Yearbook ... 2000*, vol. II (Part Two), p. 44, para. 244) that article 44 means that the injured State has the right to opt for compensation rather than restitution but, having regard to the Netherlands’ observations on article 36, the Netherlands believes that this right is subordinate to the responsible State’s right to elect to make restitution. This does not affect the injured State’s right to seek additional compensation.

United Kingdom of Great Britain and Northern Ireland

The title of this draft article suggests that it will define what the invocation of responsibility means, which it does not. If the distinction between injured and interested States were to be maintained, this draft article should list all the remedies that the State entitled to invoke responsibility may seek from the responsible State, so as to establish clearly the contrast with the list in draft article 49, paragraph 2.

Article 45. Admissibility of claims

France

The responsibility of a State may not be invoked if:

(a) The claim is not brought in accordance with any applicable rule relating to ~~the nationality of claims~~ ***nationality in the context of the exercise of diplomatic protection;***

In the French version, this correction is essential for the clarity of the text, since the expression “*nationalité des réclamations*” (nationality of claims) has no precise meaning. The rules relating to nationality that are referred to here are those which are applicable in the context of the exercise of diplomatic protection.

Mexico

1. The Commission decided to eliminate chapter III, article 22, adopted on first reading and intended to regulate the exhaustion of local remedies, because it believed that article 45 dealt with the issue sufficiently. Mexico

endorses this position and the procedural treatment now being given to this rule. It feels, however, that article 45 in its present form weakens the importance of the obligation to exhaust local remedies in cases concerning the treatment of non-nationals.

2. Article 22, adopted on first reading, categorically recognized the existence of the principle of the exhaustion of local remedies as “the logical consequence of the nature of international obligations whose purpose and specific object is the protection of individuals”.¹ Despite this recognition, article 45, now provisionally adopted on second reading by the Drafting Committee, eliminates the references to cases concerning the treatment of individuals and merely indicates in a general way that the responsibility of a State may not be invoked if the claim is one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted.²

3. By this method, the Commission is trying not to pre-judge its own future work in respect of diplomatic protection and recognizes the existence of a debate on the enforcement of the rule of exhaustion of local remedies outside the field of diplomatic protection.

4. Mexico feels that the draft articles should not weaken a principle that is firmly rooted in international law, i.e. the exhaustion of local remedies in cases concerning the treatment of non-nationals, simply in pursuit of a neutrality that does not appear to be justified. In this context, Mexico believes it to be more appropriate to distinguish these cases from others that may arise in the different areas of diplomatic protection to which this rule could apply, and suggests that an additional paragraph should be added to article 45, to be inserted between the present subparagraphs (a) and (b), recognizing that responsibility may not be invoked in cases concerning the treatment of non-nationals if they have not previously exhausted the effective and available local remedies. The present subparagraph (b) could be reformulated to refer to situations other than the treatment of non-nationals.

¹ *Yearbook ... 1977*, vol. II (Part Two), p. 31, para. (6) of the commentary to article 22, adopted on first reading by the Commission at its forty-eighth session, cited in *Yearbook ... 1996*, vol. II (Part Two), p. 60, footnote 181.

² *Yearbook ... 2000*, vol. II (Part Two), art. 45 (b), p. 69.

Republic of Korea

For reasons of precision, the words “by an injured State” should be inserted between the words “may not be invoked” and “if”.

Spain

Spain considers that the exhaustion of local remedies is a rule of fundamental importance to the regime of international State responsibility. It is true that the current wording of subparagraph (b) leaves open the question of the legal character of this rule, which will be substantive or procedural depending on the primary norm or norms breached. By the same token, however, the advisability of including the rule of exhaustion of local remedies in

article 45 as one of the conditions for the admissibility of claims is doubtful, as that would seem to imply that a purely procedural character has been attributed to it. It would be preferable to include the prior exhaustion rule among the provisions in part one, as in the 1996 draft, or in the general provisions.

United States of America

Article 45 addresses the admissibility of claims and provides that State responsibility may not be invoked if (a) a claim is not brought in accordance with applicable rules relating to nationality of claims and (b) the claim is “one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted”. The Special Rapporteur’s comments to this provision make clear that exhaustion of local remedies is “a standard procedural condition to the admissibility of the claim” rather than a substantive requirement (*Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4, p. 40, para. 145). The United States welcomes this clarification by the Special Rapporteur, and further notes that the precise parameters of this procedural rule should be dealt with in detail under the topic of diplomatic protection (see *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, para. 241, p. 66).

Article 46. Loss of the right to invoke responsibility

Netherlands

The Netherlands would point to a certain discrepancy between articles 46 and 49. Article 46 is based on the idea that responsibility may not be invoked if the injured State has validly waived its claim. However, article 49 allows a third State to invoke responsibility, for example, in cases where the responsible State has violated an obligation owed to the international community as a whole (*erga omnes*) and, in the interests of the directly injured State, to seek compliance with the obligation of reparation. The Netherlands believes that in cases of breaches of *erga omnes* obligations the directly injured State does not have the right to waive its claim. It can only do so for itself; it cannot set aside the rights of third States and/or of the international community as a whole to invoke the responsibility of the State which committed the breach of an *erga omnes* obligation.

Republic of Korea

1. A question arises as to whether “States other than the injured State” within the meaning of article 49 may seek from the responsible State the cessation of a wrongful act and assurances of non-repetition, where “the injured State” has validly waived its claim pursuant to article 46.

2. In the view of the Republic of Korea, where a peremptory norm has been breached, States with a legal interest should retain the right to seek cessation and assurances of non-repetition, even if the injured State has waived its claim. In this case, it would be more appropriate to state that the injured State cannot validly waive the

right to seek cessation and assurances of non-repetition. However, the draft articles do not explicitly deal with the question of what happens when a breach of obligations falling short of the preemptory norms occurs. The Commission may wish to consider whether the actual text of the draft articles can be further clarified in this respect.

United Kingdom of Great Britain and Northern Ireland

The requirement in subparagraph (a) that a waiver must be “valid” is unnecessary, being plainly implicit in the term “waiver”. The requirement that waiver must be “unequivocal” either sets out a condition implicit in a waiver, in which case it is unnecessary, or qualifies the term “waiver” and limits the application of draft article 46 to a subcategory of waiver, in which case it is undesirable.

Article 48. Invocation of responsibility against several States

United States of America

The United States is concerned that article 48, which deals with invocation of responsibility against several States, could be interpreted to allow joint and several liability. Under common law, persons who are jointly and severally liable may each be held responsible for the entire amount of damage caused to third parties. As noted by the Special Rapporteur in his third report, States should be free to incorporate joint and several liability into their specific agreements, but apart from such agreements, which are *lex specialis*, States should only be held liable to the extent the degree of injury suffered by a wronged State can be attributed to the conduct of the breaching State (*Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4, p. 75, para. 277). To clarify that article 48 does not impose joint and several liability on States, the United States proposes that article 48, paragraph 1, be redrafted to read as follows:

“Where several States are responsible for the same internationally wrongful act, the responsibility of each State may only be invoked to the extent that injuries are properly attributable to that State’s conduct.”

Paragraph 1

Republic of Korea

It is not clear whether article 48, paragraph 1, also applies to situations where there are several wrongful acts by several States, each causing the same damage. If so, the words “the same internationally wrongful act” should be amended accordingly to reflect such a meaning.

Article 49. Invocation of responsibility by States other than the injured State

Argentina

Argentina welcomes the establishment of a distinction between the State or States directly injured by an

internationally wrongful act and other States that may have an interest in enforcing the obligation breached. Article 49 defines cases in which a State other than the State directly affected may invoke the international responsibility of another State, as well as the conditions governing such invocation (specifically, the right of the State to seek cessation of the wrongful act, and guarantees of non-repetition). This is a reasonable solution.

Austria

From a doctrinal as well as from a practical, political point of view, the issue of *erga omnes* obligations has played an important role for a long time in the Commission’s work on State responsibility, not in the least because this doctrine has evolved in the last few years such that nobody could have foreseen. The Special Rapporteur has reduced the concept of *erga omnes* obligations to a viable, realistic level. States invoking responsibility with regard to such obligations are no longer only referred to as “injured States”. Article 49 dealing with “States other than the injured State” entitles such States to invoke responsibility if the obligation breached is owed to a group of States or to the international community as a whole. While a “group of States” may be the parties to a multilateral treaty concerning human rights or the environment provided that this can be viewed as a collective interest, only *jus cogens*, some rules of customary international law and very few treaties of a nearly universal character will obviously qualify as obligations owed to the international community as a whole.

China

Article 49 would allow any State other than the injured State to invoke the responsibility of another State, while article 54 would further allow such States to take countermeasures at the request and on behalf of an injured State. These provisions would obviously introduce elements akin to “collective sanctions” or “collective intervention” into the regime of State responsibility, broadening the category of States entitled to take countermeasures, and establishing so-called “collective countermeasures”. This would run counter to the basic principle that countermeasures should and can only be taken by States injured by an internationally wrongful act. More seriously, “collective countermeasures” could become one more pretext for power politics in international relations, for only powerful States and blocs of States are in a position to take countermeasures against weaker States. Furthermore, “collective countermeasures” are inconsistent with the principle of proportionality enunciated in article 52. The same countermeasures would become tougher when non-injured States join in, leading to undesirable consequences greatly exceeding the injury. Finally, as “collective countermeasures” further complicates the already complex question of countermeasures, and taking into account the objection to “collective countermeasures” expressed by many States, China suggests that draft articles 49 and 54 in the revised text be deleted entirely.

**Denmark, on behalf of the Nordic countries
(Finland, Iceland, Norway, Sweden and Denmark)**

The somewhat controversial article 49 providing for the invocation of responsibility by States other than the injured State is acceptable to the Nordic countries and indeed necessary, seen in the context of the provisions concerning serious breaches of obligations to the international community as a whole.

France¹

1. Subject to paragraph 2, any State other than an injured State is entitled to invoke the responsibility of another State *if that State has committed an internationally wrongful act which constitutes a serious breach of an obligation owed to the international community of States as a whole and which is essential for the protection of its fundamental interests:*

~~(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest;~~

~~(b) The obligation breached is owed to the international community as a whole.~~

2. A State entitled to invoke responsibility under paragraph 1 may seek from the responsible State:

~~(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 29 30 [41, 46];~~

~~(b) Compliance with the obligation of reparation under chapter II of Part Two, in the interest of the injured State or of the beneficiaries of the obligation breached.~~

3. The requirements for the invocation of responsibility by an injured State under articles 41 44, 42 45 [22] and 43 46 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

¹ Paragraph 1, chapeau: France proposes that the description of an internationally wrongful act contained in current article 41 be used here and that article 41 be deleted, as suggested.

Paragraph 1 (a): As explained above, this provision could become article 43 (c) (or article 40 (c) in the text proposed by France).

Paragraph 2 (b): On several occasions, France has defended the idea that what should distinguish the injured State from the State having a legal interest is the fulfilment of the obligation of reparation. The State which has only a legal interest can only demand the cessation of the breach committed by another State. It cannot seek reparation for the damage caused by an internationally wrongful act which has not directly affected it, nor is there any reason for it to substitute itself for the injured State in demanding the reparations owed to that State. Unlike the injured State which can, by invoking the responsibility of the State which has committed the internationally wrongful act, seek reparation for the damage it has suffered, a State which has a legal interest, can only demand the cessation of the internationally wrongful act when invoking the responsibility of the State which has violated the obligation. For this reason, in the view of France, article 49, paragraph 2 (b) (or article 46, paragraph 2 (b), in the text proposed by France), should be deleted. Only subparagraph (a), which establishes the principle that a State having a legal interest can demand the cessation of an internationally wrongful act, should be retained.

Japan

1. It should be recalled that in essence, the law of State responsibility is the secondary rule to regulate the relationship between wrongful States and injured States. This draft has now turned out to be the law regulating the relationship among wrongful States, injured States and affected States other than injured States (hereinafter referred to as "interested States"). Accepting that there exists a category of "interested States", it is doubtful whether such category of States should be dealt with in the law of State responsibility.

2. In fact, setting aside countermeasures, interested States can seek only "cessation" and "assurances and guarantees of non-repetition". Cessation is, in other words, to reaffirm the continued observance of the primary obligation. It is only natural that all the States that have agreed on the primary obligation should abide by that obligation. The relations between the State that breached the obligation and the State requesting its compliance can be recognized in the context of the relationship in the primary rule, not necessarily in the context of the secondary rule.

3. The inclusion of provisions on interested States may be legitimized by the objective of enhancing the function of restoring legality by State responsibility; however, it is not desirable to bestow too much power on the law of State responsibility. Rather, this might blur the importance of its core function, which is to define the relationship between injured States and responsible States.

4. See also comments on article 43, above.

Netherlands

1. The Netherlands has also noted the observation by the Special Rapporteur in paragraph 127 of *Yearbook ... 2000*, vol. II (Part Two), that a savings clause should be inserted to indicate that entities other than States may also invoke responsibility in cases involving breaches of obligations owed to the international community as a whole (*erga omnes*). He gives the example of persons who are victims of human rights abuses, who have certain procedures available to them in international law. Although there is a savings clause in article 34, paragraph 2, it applies to part two only. A similar savings clause should also be included in part two *bis*.

2. The Netherlands agrees with the three scenarios regarding the invocation of State responsibility for breaches of *erga omnes* obligations described in paragraph 352 of *Yearbook ... 2000*, vol. II (Part Two).

3. The Netherlands notes that in its current form article 49, paragraph 2 (b), applies solely to part two, chapter II, and not to reparation for serious breaches.

4. See also comments on articles 43 and 46, above.

Republic of Korea

See comments on articles 43 and 46, above.

Slovakia

See comments on article 43, above.

United Kingdom of Great Britain and Northern Ireland

Observations of a general nature on the concept of the “interested” State have been made above (see article 43). The following comments relate to matters of detail (see article 49, paragraphs 1–2, below).

Paragraph 1

Argentina

Paragraph 1 (a) of the article entitles a State other than the injured State to invoke the responsibility of another State if “[t]he obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest”. Since any multilateral treaty can establish, to one degree or another, a “collective interest”, Argentina believes it would be helpful for the Commission to offer additional clarification regarding this concept, in order to facilitate the interpretation and application of the article in practice.

Republic of Korea

See comments on article 43 (b) above.

United Kingdom of Great Britain and Northern Ireland

1. It is not clear what is meant, in paragraph 1 (a), by “the protection of a collective interest”. It is presumably intended to establish a subcategory of multilateral treaties; but it is not apparent what the criterion is or how it should be applied. It is neither necessary nor desirable to establish such a subcategory of multilateral treaties. The words “and is established for the protection of a collective interest” should be omitted, thus allowing all parties to all multilateral treaties and other multilateral obligations to have the status of “interested States”, although in the absence of injury a State would not, of course, be entitled to the full range of remedies available to an injured State.

2. The term “may seek” in paragraph 2 is wrong. It implies that, for example, some parties to multilateral treaties not established for the protection of collective interests may not even request that another party cease its violation of the treaty.

Paragraph 2

Austria

1. States other than the injured State may request the cessation of the internationally wrongful act and guarantees of non-repetition (see article 49, paragraph 2 (a)). Of special interest is the fact that the draft introduces a new right to request compliance with the obligation of reparation in the interest of the injured State or of the benefi-

ciaries of the obligation breached (art. 49, para. 2 (b)). This would refer to victims of human rights violations or of violations of the environment. Whereas in the case of the environment this could concern nationals of the State invoking the responsibility, the first case—victims of human rights violations—will mainly concern nationals of other States, most importantly nationals of the State which has committed the wrongful act.

2. This concept is very interesting and worth pursuing, but probably has not yet been fully explored. In most cases of human rights violations, States will act in favour of victims who are nationals of the State which has committed the wrongful act. Each party to the multilateral human rights treaty concerned would be entitled to invoke this right, so that there could be a multitude of claimants. In this case, the draft does not envisage an obligation to cooperate between the States invoking responsibility, as article 54, paragraph 3, with its—relatively weak—obligation to cooperate applies only to countermeasures. It must be borne in mind that the problem of many States entitled to invoke State responsibility with regard to one single wrongful act seems to raise more problems than are solved by the draft articles. Further reflection and the introduction of a more precise regime is therefore required.

United Kingdom of Great Britain and Northern Ireland

1. The comments on paragraph 2 made in the debate in the Sixth Committee suggest that paragraph 2 (b) is highly ambiguous. It might be seen as entitling an interested State to demand reparation, to be made to itself, thereby advancing the interest “of the injured State or of the beneficiaries of the obligation breached”. The State might subsequently make over all or part of the fruits of reparation to the injured State or to the “beneficiaries”. This would be a wholly novel form of action in international law. Alternatively, paragraph 2 (b) might be seen as entitling an interested State to demand that the responsible State make reparation directly to the injured State or to the beneficiaries of the obligation. It is not clear how it is envisaged that paragraph 2 (b) would operate in practice.

2. A further difficulty concerns the relevance of the wishes of the injured State. If there is an injured State, it can make the claim itself. If it chooses not to claim, the position should be treated as analogous to a waiver under draft article 46 and, just as the injured State loses thereby the right to invoke the responsibility of the claim, so should the possibility of the claim being made by others on its behalf be extinguished. Exceptional circumstances, such as the invasion of a State and the destruction of the capacity of its Government to invoke responsibility or otherwise act on behalf of the State, might be dealt with in the commentary.

3. A similar point might be made concerning the wishes of the beneficiaries of the obligation; but there is a more fundamental concern in relation to that provision. The proposed right to invoke responsibility “in the interest ... of the beneficiaries of the obligation breached” is novel. The United Kingdom is sympathetic to the aim of ensuring that there are States entitled to claim in all cases of injury to common interests, such as the high seas and its

resources and the atmosphere. There are, on the other hand, concerns that the current formula would have unintended and undesirable effects.

4. In the context of human rights obligations falling within draft article 49, paragraph 1, for example, draft article 49, paragraph 2 (b), appears to entitle all States not merely to call for cessation and assurances and guarantees of non-repetition, but also to demand compliance with obligations concerning reparation “in the interest” of the abused nationals or residents of the responsible State. It may involve decisions on the form of repatriation that intrude deeply into the internal affairs of other States. That provision goes further than is warranted by customary international law. It also goes further than is necessary for the safeguarding of human rights: for that purpose, cessation of the wrongdoing is the crucial step. There is a serious risk that this provision may disrupt the established frameworks for the enforcement of human rights obligations, with the consequence that States will become less willing to develop instruments setting out primary norms of human rights law. Paragraph 2 (b) goes further than is warranted in the current state of international law, and is unnecessary. It is hoped that the Commission will reconsider draft article 49, paragraph 2 (b), with a view to omitting it or at least narrowing its scope.

United States of America

The United States notes that under article 49, paragraph 2 (a), States other than injured States may seek from the responsible State assurances and guarantees of non-repetition in addition to cessation of the internationally wrongful act. For the reasons expressed above with respect to article 30 (b), the United States believes that the “assurances and guarantees of non-repetition” provision of article 49, paragraph 2 (a) should likewise be deleted.

Paragraph 3

Austria

Owing to the lack of an obligation to cooperate in the context of article 49, it is possible to imagine that various States formulate various, even contradictory, requests, or, in the case of requests for compensation, that they demand compensation at very different financial levels. It must be asked how the State which has committed the wrongful act is to deal with such a situation, and what would be the effects of the compliance with one of these requests and not with the others. If it is not possible to solve this problem in a clear way, at least article 49, paragraph 3, should be revised so as to comprise also a provision about cooperation similar to the provision contained in article 54, paragraph 3. It would be an even better solution to envisage an obligation to negotiate a joint request of all States interested in exercising their rights under article 49, paragraph 3.

Republic of Korea

This paragraph would be more straightforward if the words “*mutatis mutandis*” were inserted between the words “under articles 44, 45 and 46 apply” and “to an

invocation of responsibility”, since some modification might be needed in the process of the application of articles 44–46 to the invocation of responsibility by States other than the injured State.

CHAPTER II. COUNTERMEASURES

Argentina

1. In 1998 Argentina stated that “[t]he taking of countermeasures should not be codified as a *right* normally protected by the international legal order, but as an act merely *tolerated* by the contemporary law of nations” in exceptional cases.¹ In this connection, the treatment of the topic in part two *bis*, chapter II, sets limits and conditions on this concept that are in principle acceptable, inasmuch as it makes clear the exceptional nature of countermeasures and specifies the procedural and substantive conditions relating to resort to countermeasures.

2. As for the logical place for rules on this topic, some have even suggested excluding the question of countermeasures. While from a purely theoretical standpoint there may be some merit in not including this question, there is no doubt that, in the current state of international law, countermeasures represent one of the means of giving effect to international responsibility. Against that background, Argentina thinks it would be useful to include precise rules within the draft articles, as contained in part two *bis*, chapter II, so as to minimize the possibility of abuses.

¹ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/488 and Add.1–3, p. 151, para. 9.

China

China believes that in the context of respect for international law and the basic principles of international relations, countermeasures can be one of the legitimate means available to a State injured by an internationally wrongful act to redress the injury and protect its interests. However, in view of past and possible future abuses of countermeasures, recognition of the right of an injured State to take countermeasures must be accompanied by appropriate restrictions on their use, in order to strike a balance between the recognition of the legitimacy of countermeasures and the need to prevent their abuse. China has noted that the relevant provisions in the revised text have been improved in this regard. For example, the new text has added a number of qualifying conditions, clearly setting out the purposes of and limitations on the use of countermeasures. In addition, the reference to “interim measures of protection” has been deleted. China welcomes these improvements, but the text on countermeasures still needs further refinement and improvement. In particular, the desirability of the newly added article 54 on “collective countermeasures” and the related article 49 needs further consideration.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

Chapter II on countermeasures contains all the essential elements for regulating this most sensitive issue and it is placed in the right context of implementing State responsibility instead of in the chapter on circumstances precluding wrongfulness.

Japan

1. Provisions regarding countermeasures have the most important actual significance in international disputes related to State responsibility. Also, they necessarily entail risk of abuse. Therefore, provisions on countermeasures require the most careful and strict examination.

2. Japan is sceptical as to whether countermeasures are part of the law of State responsibility. Countermeasures and self-defence have one thing in common; both are preceded by an internationally wrongful act and both can only target the wrongdoing State. Unlike reparation, a countermeasure is not an automatic logical legal consequence of State responsibility. Countermeasures are taken as wilful acts by an injured State. There is no provision of self-defence in part two *bis* because the contents and the conditions to resort to self-defence are determined by the primary rule on self-defence itself and are outside the scope of State responsibility. The same applies to countermeasures. The contents and the conditions to take countermeasures are a matter of the primary rule and are outside the scope of this draft. Japan fully shares the concern expressed by quite a few States in the Sixth Committee on the risk of the abuse of countermeasures and believes that they need certain substantial and procedural restrictions. However, in a world where there is no central supreme government over States, States are entitled to protect their interests by themselves and countermeasures are permitted under international law. It is not necessary or appropriate to place countermeasures in the section on the invocation of State responsibility in part two *bis*. Considering the debate over the necessity of part two *bis*, chapter II, as shown in the Sixth Committee, it may be a good idea to delete the entire chapter II and insert in article 23 only the elements on which there was consensus among States.

3. However, if chapter II were to remain in part two *bis*, Japan would like to make several points.

4. See comments on article 50, paragraph 1; article 52; article 53; and article 54, paragraph 1, below.

Mexico

1. Despite opposition from many States, the Commission has chosen to include the concept of countermeasures in the draft articles and confer general international recognition on them. Mexico regrets this decision. Although precedents can be found in international law authorizing the resort to countermeasures, their practical application is subject to very specific parameters, depending on the type of obligation breached. Attempting to regulate them in a general way and to authorize their application in response to the commission of any internationally wrongful act would virtually grant them acceptance in international

law, which would open the way to abuse and could aggravate an existing conflict.

2. If this situation is compounded by the absence of dispute settlement mechanisms, the unilateral nature of countermeasures and the many evident interrelationships among the draft articles—which, for example, authorize States other than the injured State to take countermeasures—the result may be extremely risky, especially for the weakest States.

3. It has not escaped Mexico's attention that the Commission has been doing its utmost to regulate the resort to countermeasures. Articles 50–55 of the draft have been worded more clearly, specifying the object and limits of such measures and reducing the possibility that they will be used for punitive purposes. Difficulties still exist, however, which the Commission should take into account in order to minimize the risks of including countermeasures in the draft articles.

4. Mexico considers that, if the Commission decides to retain countermeasures in the draft, the following adjustments will be necessary (see comments on articles 50, 51 and 54, below).

Netherlands

The statements made in the Sixth Committee show that a number of permanent members of the Security Council, in particular, are concerned that the legal regime of countermeasures now being proposed (as a way of convincing the responsible State to respect the secondary rules contained in the draft) is too severely restricted. The members in question allege that the draft articles differ on this point from the customary international law currently applicable in this area. The Netherlands takes the view that countermeasures are a useful instrument with which to implement State responsibility. However, they are an instrument which must be used with appropriate safeguards. The Netherlands feels that the draft has, on the whole, struck the right balance between the use of this instrument and the provision of the necessary guarantees against its misuse. This matter is examined further in the article-by-article discussion (see articles 50, 52, 53 and 54).

Poland

1. Poland welcomes the inclusion of provisions on countermeasures in the draft articles. However, Poland would like to propose two minor amendments.

2. See also comments on articles 53–54, below.

Slovakia

1. Part two *bis* is, in the view of Slovakia, an appropriate place for inclusion of the institution of countermeasures. Slovakia approves the transposition of countermeasures from part two, since they bore no relation to the content or forms of international responsibility of States.

2. The institution of countermeasures was confirmed as a part of international law by ICJ in the *Gabčíkovo-Nagymaros Project* case.¹ The Court laid down conditions upon which countermeasures may be imposed. According to the ICJ ruling, countermeasures must be, first of all, taken only in response to a previous internationally wrongful act of another State and must be directed against that State.² The purpose of countermeasures must be to induce the wrongdoing State to comply with its obligations. These principles laid down by the Court are correctly reflected in article 50. Similarly, the principle of proportionality confirmed by ICJ was embodied in article 52 (“Countermeasures must be commensurate with the injury suffered”), although the Court refers to *the effects* of a countermeasure³ which from the drafting point of view, is more precise.

¹*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 7.*

²*Ibid.*, p. 52.

³*Ibid.*, p. 56.

Spain

1. With regard to part two *bis*, chapter II, in general, Spain considers that an effort should be made in the rules on countermeasures—a topic that undoubtedly should be included in the draft—to strike a balance between the rights and interests of the injured State and those of the responsible State. Excessively rigid regulation of the conditions and restrictions relating to the use of countermeasures can favour the responsible State, while overly permissive regulation means opening the door to possible abuses. Spain welcomes the fact that this matter has been placed in the context of “the implementation of State responsibility” and not in the chapter on circumstances precluding wrongfulness. This emphasizes that the only object of countermeasures is to induce States to comply with their international obligations.

2. The regime of countermeasures contained in the draft is properly restrictive, although what is lacking is a specific provision on the consequences for third States of countermeasures taken against the responsible State.

United Kingdom of Great Britain and Northern Ireland

1. The provisions concerning countermeasures are a striking anomaly in the draft articles. Alone among the circumstances precluding wrongfulness in part one, chapter V, they are singled out for lengthy elaboration, in part two *bis*, chapter II. There is no good reason why countermeasures should be treated in this way, while self-defence, force majeure and necessity are not.

2. It is clearly necessary to refer in general terms to the right to take countermeasures, and in this connection reference may be made to the constraints that are necessary to protect States against possible abuses of the right to take countermeasures. The manner in which the draft articles

approach this task is, however, unsatisfactory. The United Kingdom has concerns relating to several aspects of these provisions, including the role of the injured State in deciding whether or not countermeasures are to be taken “on its behalf”, and certain other matters (see articles 25, 51, 53 and 54, paragraph 2).

United States of America

1. The United States continues to believe that the restrictions in articles 50–55 that have been placed on the use of countermeasures do not reflect customary international law or State practice, and could undermine efforts by States to settle disputes peacefully. The United States therefore strongly believes that these articles should be deleted. However, should the Commission nonetheless decide to retain them, the United States believes that, at a minimum, the following revisions must be made: (a) delete article 51, which lists five obligations that are not subject to countermeasures, because this article is unnecessary given the constraints already imposed on States by the Charter of the United Nations, and because the article suffers from considerable vagueness; (b) recast article 52 on proportionality to reflect the important purpose of inducement in countermeasures; (c) revise article 53, which sets forth conditions governing a State’s resort to countermeasures, to (i) either delete the requirement for suspension of countermeasures or clarify that “provisional and urgent” countermeasures need not be suspended when a dispute is submitted to a tribunal and (ii) reflect that under customary international law a State may take countermeasures both prior to and during negotiations with a wrongdoing State.

2. See also comments on article 23, above.

Article 50. Object and limits of countermeasures

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The Nordic countries are satisfied to see the opening paragraph (art. 50, para. 1) stating that the only purpose of any countermeasure must be that of inducing the wrongdoing State to comply with its international obligations; in other words, punitive actions are outlawed. It is nevertheless essential that strong safeguards be established against possible abuses of countermeasures. It has to be kept in mind that this legal institution favours powerful States which in most instances are the only ones having the means to avail themselves of the use of countermeasures to protect their interests.

Mexico

1. The purpose of the wording of article 50 is to point out that countermeasures are exceptional in nature and that their sole object is to induce the responsible State to comply with its obligations. Mexico considers that the

text is not emphatic enough to achieve this objective. In view of the flexibility of the conditions set forth in article 53, it might be concluded that a State could take a countermeasure, after notifying the responsible State, without their being any objective means to measure whether that State was willing to comply with its obligations or implement some mechanism for the peaceful settlement of disputes.

2. It is suggested, therefore, that the wording of article 50, paragraph 1, be strengthened to indicate expressly that:

“Countermeasures are an exceptional remedy. An injured State may take countermeasures against a State which is responsible for an internationally wrongful act only to the extent strictly necessary to induce that State to comply with its obligations under part two. In any case, the injured State shall inform the United Nations Security Council of the countermeasures taken.”

Netherlands

1. In response to paragraph 295 of *Yearbook ... 2000*, vol. II (Part Two), which states that the Special Rapporteur drew a distinction between the suspension of an obligation and the suspension of its performance, the Netherlands would point out that in the *Gabčíkovo-Nagymaros Project* case¹ ICJ dismissed the distinction that Hungary made between “suspension of the application of the treaty” (i.e. a treaty obligation) and “suspension of activities” (i.e. performance of the obligation).

2. The Netherlands endorses the view expressed in paragraph 302 of *Yearbook ... 2000*, vol. II (Part Two), viz., that countermeasures must not impair the rights of third parties, and suggests that this view should be reflected in the draft articles.

¹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7.

Slovakia

See comments on part two *bis*, chapter II, above.

Paragraph 1

Japan

As to the purpose of countermeasures under article 50, paragraph 1, countermeasures are usually taken to induce compliance with the primary obligation, not the obligation of reparation. Thus, the purpose of countermeasures defined in article 50, paragraph 1, does not really conform to State practice. For example, if a State restricts trade in violation of a bilateral trade agreement, the other State would request cessation. However, if it is not successful and decides to take countermeasures, they are often not intended to induce compensation for the trade loss caused by the wrongful act, but to induce compliance with the agreement.

Article 51. Obligations not subject to countermeasures

Mexico

See comments on article 54, below.

Poland

It is not quite clear whether in the light of article 51, paragraph 2, and article 53, paragraph 3, the injured State can refer to countermeasures without exhausting any measures of peaceful settlement of disputes. Poland suggests that countermeasures can be used after a prior reference to the procedures in force in accordance with all the relevant rules of international law in force between the States concerned (and not only to negotiations, as mentioned in article 53, paragraph 2).

Spain

The regulation of obligations not subject to countermeasures, as contained in article 51, should be assessed in a positive light. Nevertheless, Spain wishes to note, with regard to subparagraphs (b) and (c) of article 51 proposed by the Drafting Committee, that for Spain the fundamental rights and humanitarian obligations referred to in these two provisions are those designed to protect the lives and physical integrity of human beings. This is in accordance with article 60, paragraph 5, of the 1969 Vienna Convention and with a good number of international treaties on human rights and humanitarian law, which envisage a number of human rights that States parties may not derogate from under any circumstances. Spain believes that these provisions should be accompanied by the commentary that the Commission made on this provision in 1995,¹ where it notes that the exceptions of a humanitarian character that should be envisaged when measures of an economic character are taken should be included under this assumption. Such exceptions consist of the supply of food and medicines to the population of the State that is the target of countermeasures.

¹ *Yearbook ... 1995*, vol. II (Part Two), pp. 71–74, paras. (17)–(24) of the commentary to article 14.

United Kingdom of Great Britain and Northern Ireland

Draft article 51 forbids the imposition of countermeasures involving derogation from obligations falling within certain categories, some of which are generic while others (notably para. 1 (e)) are so specific that the list may appear to be exhaustive. A simple generic formula describing the kind of obligations from which countermeasures may not derogate would be preferable. It would keep open the possibility of the content of the category developing through State practice. Examples, such as obligations concerning the threat or use of force and fundamental human rights, might usefully be given in the commentary.

United States of America

Article 51, paragraph 1, lists five obligations that are not subject to countermeasures. This article is not necessary. First, the Charter of the United Nations already establishes overriding constraints on behaviour by States. Secondly, by exempting certain measures from countermeasures, article 51, paragraph 1, implies that there is a distinction between various classes of obligations, where no such distinction is reflected under customary international law. Thirdly, the remaining articles on countermeasures already impose constraints on the use of countermeasures. It would be anomalous to prevent a State from using a countermeasure, consistent with the other parameters provided in these articles, and in response to another State's breach, particularly where that breach involved graver consequences than those in the proposed countermeasure. Finally, article 51, paragraph 1, has the potential to complicate rather than facilitate the resolution of disputes. There is no accepted definition of the terms the article uses, inviting disagreements and conflicting expectations among States. There is no consensus, for example, as to what constitutes "fundamental human rights". In fact, no international legal instrument defines the phrase "fundamental human rights", and the concept underlying this phrase is usually referred to as "human rights and fundamental freedoms". Likewise, the content of peremptory norms in areas other than genocide, slavery and torture is not well defined or accepted. Moreover, article 51, paragraph 1, would inhibit the ability of States, through countermeasures, to peacefully induce a State to remedy breaches of fundamental obligations. The United States recommends the deletion of this article.

Paragraph 1

Republic of Korea

It is clear from the draft articles that States are not allowed to take countermeasures of a non-reversible nature, or in breach of obligations under peremptory norms of general international law. However, in the light of the growing importance of the environment, the Republic of Korea would like to see the inclusion of "obligations to protect the natural environment against widespread, long-term and severe damage" between subparagraphs (d) and (e) as one of the obligations not subject to countermeasures.

Article 52. Proportionality

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

In article 52 on proportionality, the Nordic countries would prefer a more negative approach to the taking of countermeasures by substituting the words "be commensurate with" by "not be disproportionate to" and leaving out the last qualifying part of this provision.

Japan

1. If the object of countermeasures is defined as inducing a responsible State to comply with its obligations

under part two (art. 50), then countermeasures should be allowed to the extent necessary to induce such compliance. "Countermeasures ... commensurate with the injury suffered" (art. 52) are not necessarily strong enough to induce compliance. For example, a weak State would not be able to take effective countermeasures against a strong State, since a strong State is not likely to be induced by the countermeasures in proportion to the injury when the injury was not serious for the strong State.

2. Also, the essence of the "gravity" of the wrongfulness is another element reminiscent of "international crime". "Gravity" is irrelevant for the purpose of inducing compliance.

Netherlands

The Netherlands concurs with this article which, in its opinion, reflects one of the conclusions of ICJ in *the Gabčíkovo-Nagymaros Project* case.¹

¹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7.

Republic of Korea

The term "the rights in question" is not readily comprehensible. If the rights in question involve the rights of the injured State, the rights of other States which may be affected by the wrongful act and the rights of the responsible State, this should be more clearly reflected in this article. Considering countermeasures taken only towards the responsible State, the words "the effects of the internationally wrongful act on the injured State" would be more preferable to the words "the rights in question".

Slovakia

See comments on part two *bis*, chapter II, above.

Spain

1. For the same reason (see article 53), the concept of "proportionality" contained in article 52 requires clarification in each specific case by the party applying the law. For this reason, Spain considers that other criteria should be added to the two envisaged in this provision—gravity of the wrongful act and the rights in question—in order to evaluate the requirement of proportionality, such as, for example, the effects of countermeasures on the responsible State.

2. More specifically, Spain welcomes the deletion, in the provision regulating prohibited countermeasures, of what was referred to in the 1996 draft as measures of "[e]xtreme economic or political coercion designed to endanger the ... political independence of the State which has committed the internationally wrongful act".¹ On the other hand, a prohibition on such measures where they are designed to endanger the territorial integrity of the State does appear to be justified and is, for that matter, already included in the principle of proportionality contained in article 52. It would undoubtedly be wholly

¹ *Yearbook ... 1996*, vol. II (Part Two), art. 50 (b), p. 64.

disproportionate to apply countermeasures aimed at cutting off part of the territory of the responsible State.

United States of America

1. The United States agrees that under customary international law a rule of proportionality applies to the exercise of countermeasures, but customary international law also includes an inducement element in the contours of the rule of proportionality. As stated in our 1997 comments on the first reading text, proportionality may require, under certain circumstances, that countermeasures be related to the initial wrongdoing by the responsible State (*Yearbook ... 1998*, vol. II (Part One), document A/CN.4/488 and Add.1–3, pp. 159–160, paras. 1–3). Likewise, proportionality may also require that countermeasures be “tailored to induce the wrongdoer to meet its obligations” (*ibid.*, para. 2). In his third report, the Special Rapporteur addresses the question of whether it would be useful to introduce a “notion of purpose” or the inducement prong into the proportionality article (*Yearbook ... 2000*, vol. II (Part One) document A/CN.4/507 and Add.1–4, p. 91, para. 346). He concludes that while it is indeed a requirement for countermeasures to be “tailored to induce the wrongdoer to meet its obligations”, this requirement is an aspect of necessity (formulated in the first reading text draft article 47 and second reading text draft article 50), and not of proportionality (*ibid.*). The United States respectfully disagrees. The requirement of necessity deals with the initial decision to resort to countermeasures by asking whether countermeasures are necessary (*Yearbook ... 1998* (see above), footnote 7). In contrast, whether the countermeasure chosen by the injured State “is necessary to induce the wrongdoing State to meet its obligations” is an aspect of proportionality (*ibid.*). The United States continues to believe that this aspect of proportionality should be included in article 52.

2. Article 52, as revised, incorporates language from the case concerning the *Gabčíkovo-Nagymaros Project*.¹ In that case, ICJ noted that “the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question”.² In his third report, the Special Rapporteur notes that, in response to the proposals of several Governments that “the requirement of proportionality be more strictly formulated”, the double negative formulation of the first reading text (“Countermeasures ... shall not be out of proportion” to the internationally wrongful act) should be replaced by the positive formulation of the *Gabčíkovo-Nagymaros Project* case (countermeasures should be “commensurate with the injury suffered”) (*Yearbook ... 2000* (see above)).

3. The ICJ analysis does not clearly indicate what is meant by the term “commensurate”, and this term likewise is not defined in article 52. A useful discussion of the term “commensurate” in the context of the rule of proportionality can be found in Judge Schwebel’s dissenting

opinion in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.³ Judge Schwebel (citing Judge Ago) notes that “[i]n the case of conduct adopted for punitive purposes ... it is self-evident that the punitive action and the wrong should be commensurate with each other. But in the case of action taken for the specific purpose of halting and repelling an armed attack, this does not mean that the action should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result”.⁴ Although Judge Schwebel’s analysis of proportionality arose in the context of collective self-defence, his reasoning is equally applicable to countermeasures.

4. The United States is concerned that the term “commensurate” may be interpreted incorrectly to have a narrower meaning than the term “proportional”. Under such a view, a countermeasure might need to be the exact equivalent of the breaching act by the responsible State. The United States does not believe such an interpretation is in accord with international law and practice. It believes that the rule of proportionality permits acts that are tailored to induce the wrongdoing State’s compliance with its international obligations, and that therefore a countermeasure need not be the exact equivalent of the breaching act. To avoid any ambiguity, the United States recommends that the phrase “commensurate with” in article 52 be replaced with the traditional phrase “proportional to”.

5. The United States also notes that the phrase “rights in question”, taken from the *Gabčíkovo-Nagymaros Project* case, is not defined by the case itself nor by article 52. While the phrase “rights in question” generally refers to the rights alleged to have been violated by the parties to a particular dispute brought before ICJ, in the *Gabčíkovo-Nagymaros Project* case, the phrase is not used to refer to the rights of Hungary or Slovakia but rather is used as part of the Court’s general definition of countermeasures. The United States understands the phrase “rights in question” to preserve the notion that customary international law recognizes that a degree of response greater than the precipitating wrong may sometimes be required to bring a wrongdoing State into compliance with its obligations if the principles implicated by the antecedent breach so warrant (*Yearbook ... 1998* (see paragraph 1 above), para. 3; see also *the Air Service Agreement* case.⁵

6. Accordingly, with the changes the United States proposes, article 52 would read:

“Countermeasures must be proportional to the injury suffered, taking into account both the gravity of the internationally wrongful act and the rights in question as well as the degree of response necessary to induce the State responsible for the internationally wrongful act to comply with its obligations.”

³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 259.

⁴ *Ibid.*, p. 368.

⁵ *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 417 and 443–444.

¹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7.

² *Ibid.*, p. 56, para. 85.

Article 53. Conditions relating to resort to countermeasures

Austria

1. Article 53 concerning the conditions for countermeasures has to be redrafted in any event, as it refers only to the “injured State”, whereas the duty to cooperate according to article 54, paragraph 3, is only applicable if several States “other than the injured State” take countermeasures. Strictly speaking, a single such State is under no duty to negotiate under article 53 or under article 54, paragraph 3.

2. See also comments on article 54, paragraph 3, below.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The present draft appears to have a certain leaning in favour of resorting to countermeasures. In particular, the Nordic countries would like to see the provision in article 53, paragraph 5, about the effect of binding dispute settlement procedures on the taking of countermeasures, be moved into a separate article following directly after the opening article 50. The Nordic countries firmly believe that there should be no room for countermeasures where a mandatory system of dispute settlement exists. The only exceptions would be if the procedure is obstructed by the other party and if countermeasures are urgent and necessary to protect that party’s interest and the dispute has not yet been submitted to an institution with the authority to make decisions which can protect such interests. Following this line of reasoning, article 51, paragraph 2, may become redundant.

Japan

Japan has concerns with regard to the procedural requirements in taking countermeasures under article 53, according to which injured States shall “offer” to negotiate with responsible States and cannot take countermeasures while negotiations are being pursued in good faith. Since responsible States are likely to accept the offer to negotiate, it seems quite difficult in fact to resort to countermeasures. As a result, if a State is in need of taking countermeasures, it can easily resort to provisional measures avoiding formal countermeasures, thus making formal countermeasures a hollow procedure. In one way, the procedural requirement for countermeasures looks too strict, but in another way, there seems to be a loophole. This point needs careful examination.

Netherlands

Criticism has been voiced in various quarters of the prohibition on the taking or continuing of countermeasures by the injured State during negotiations with the responsible State, since such a prohibition does not reflect State practice. The Netherlands cannot support this criticism, and would regard the deletion or amendment of article 53, paragraphs 2–6, as a retrograde step.

Slovakia

Slovakia has some doubts with regard to article 53, paragraphs 4–5. A proposed prohibition or suspension of countermeasures while negotiations are being pursued in good faith would put too much pressure on a State invoking countermeasures; and it should not be forgotten that a State invoking countermeasures is an “injured State”, injured by a wrongful act of a State towards which countermeasures are aiming. In view of the treatment of countermeasures by ICJ in the *Gabčíkovo-Nagymaros Project* case,¹ paragraph 5 (b) does not correspond to the customary law in the field of countermeasures.

¹ *Gabčíkovo-Nagymaros Project (Hungary-Slovakia), Judgment, I.C.J. Reports 1997, p.7.*

Spain

1. From this standpoint, draft article 53, which regulates the conditions relating to resort to countermeasures, as the latter are correctly defined in article 50, seeks to achieve a certain balance between the rights of the injured State and the State in breach of an international obligation, and therefore should be assessed in an overall positive light. It is true that the rights of the injured State can be adversely affected while it is complying with the obligation to notify the responsible State of its decision to take countermeasures and offering to negotiate with that State, as provided for in article 53, paragraph 2, or if the dispute is resolved through the settlement mechanisms provided for in article 53, paragraph 5. In order for that not to occur, however, the injured State may take “such provisional and urgent countermeasures as may be necessary to preserve its rights” (art. 53, para. 3).

2. There can be no doubt that “provisional and urgent countermeasures” is an indeterminate legal concept; however, it is no less so than many of the other concepts included in the draft, a problem that only a dispute settlement regime can resolve in a satisfactory manner.

United Kingdom of Great Britain and Northern Ireland

1. The main concern relates to draft article 53. The conditions set out in draft article 53, paragraphs 1, 2, 4 and 5 (b), do not reflect international law and are formulated in a manner that will in many cases render the objectives of part two *bis*, chapter II, unattainable. Draft article 53 is so fundamentally flawed as to render the provisions on countermeasures, as currently drafted, wholly unacceptable.

2. While it is necessary to guard against the abuse of the right to take countermeasures, this has to be done in a way that does not impede the imposition of countermeasures in cases where their imposition is justified. For example, it is clearly not acceptable that the taking of countermeasures in the face of genocide should have to be postponed while the “injured” or “interested” State makes an offer (which a wrongdoing State would no doubt accept with alacrity) to negotiate, or while States engage in negotiations despite the continuation

of the killing. Similarly, the duty to postpone countermeasures whenever a dispute has been submitted to a court or tribunal (or any other form of dispute settlement process) is open to the most serious abuse. It would discourage acceptance of or reference to dispute settlement mechanisms. The requirements set out in draft article 53 that negotiations and dispute settlement procedures be pursued in good faith by the responsible State are wholly inadequate as safeguards. It may take a good deal of time to establish bad faith; and it cannot be right to insist that the imposition of countermeasures must be suspended while that time elapses. The provision entitling an injured State to take provisional and urgent countermeasures does not resolve this difficulty, as such countermeasures are limited to those “necessary to preserve its rights”.

3. For these reasons, draft article 53 needs to be replaced by a provision setting out the main points of principle concerning the existence of and limits upon the right to take countermeasures, at a level of detail consistent with the treatment that is given, for example, to necessity in draft article 26.

United States of America

(a) *Negotiation*

1. Article 53, paragraph 2, requires that an injured State offer to negotiate with the breaching State prior to taking countermeasures, and article 53, paragraph 4, requires that countermeasures not be undertaken while negotiations are being pursued in good faith. These articles contravene customary international law, which permits an injured State to take countermeasures prior to seeking negotiations with the responsible State, and also permits countermeasures during negotiations (see the *Air Service Agreement* case,¹ pp. 444–446). The *Air Service Agreement* tribunal noted that it “does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of counter-measures during negotiations” (*ibid.*, p. 445, para. 91). The reason for the *Air Service Agreement* rule is clear: it prevents the breaching State from controlling the duration and impact caused by its breach by deciding when and for how long to engage in “good-faith negotiations”. The United States believes it is essential that the Commission delete the negotiation clause from article 53, paragraphs 2 and 4, in its entirety, in order to bring the draft articles into conformity with customary international law.

(b) *Provisional and urgent countermeasures*

2. Article 53, paragraph 3, creates an exception to articles 53, paragraphs 2 and 4, for “such provisional and urgent countermeasures as may be necessary to preserve” the injured State’s rights. The United States com-

mends the Commission’s decision to replace the language of the first reading text, which referred to “interim measures of protection”, with the reference in article 53, paragraph 3, to “provisional and urgent countermeasures”. Nonetheless, several problems with this provision still remain. First, there is nothing under customary international law to support limiting the countermeasures that may be taken prior to and during negotiations only to those countermeasures that would qualify as “provisional and urgent”. The United States maintains that the negotiation clause in article 53, paragraphs 2 and 4, in its entirety should be deleted. The inclusion of article 53, paragraph 3, does not satisfy these objections.

3. Secondly, it would appear that even “provisional and urgent” countermeasures would be required to be suspended under article 53, paragraph 5 (b) if the dispute “is submitted to a court or tribunal which has the authority to make decisions binding on the parties”. As discussed below, the United States strongly believes that article 53, paragraph 5 (b), should be deleted, but, at a minimum, if article 53, paragraph 5 (b) is retained, article 53, paragraph 3, needs to be exempt from the suspension requirement of article 53, paragraph 5 (b). The purpose of article 53, paragraph 3, is to enable an injured State to preserve its rights during negotiations with the responsible State. The injured State’s need for preservation of these rights does not disappear when the responsible State submits the dispute to a court or tribunal with the authority to make binding decisions on the parties. Otherwise a breaching State could control the duration and impact of the injury it is causing through its breach.

4. That provisional and urgent countermeasures appear to be subject to article 53, paragraph 5 (b)’s suspension requirement may well be a drafting error. Under the first reading text, in article 48, paragraph 1, “interim measures of protection” could be taken to preserve an injured State’s rights, but these “interim measures of protection” were not subject to the suspension requirement of first reading text article 48, paragraph 3. Article 48, paragraph 3, required only “countermeasures” but not “interim measures of protection” to be suspended when the relevant dispute was submitted to a tribunal. Because the language “interim measures of protection” has been replaced in the second reading text with the language “provisional and urgent countermeasures”, these countermeasures, as all other countermeasures, now appear to have been made subject to article 53, paragraph 5 (b)’s suspension requirement. The Commission at a minimum needs to make explicit that article 53, paragraph 3, is exempt from article 53, paragraph 5 (b).

(c) *Suspension of countermeasures*

5. Under article 53, paragraph 5 (b), once a dispute is submitted to a court or tribunal with the authority to make binding decisions, no new countermeasures may be taken and countermeasures already taken must be suspended within a reasonable time. The United States believes that this provision needs to be deleted, as there is no basis for such an absolute rule. The *Air Service Agreement* tribunal

¹ *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).*

noted that, once a dispute is submitted to a tribunal that has the “means to achieve the objectives justifying the counter-measures”, the right to initiate countermeasures disappears, and countermeasures already initiated “*may*” be “eliminated” but only to the extent the tribunal provides equivalent “interim measures of protection” (see footnote 1 above, pp. 445–446). Furthermore, the *Air Service Agreement* tribunal noted that “[a]s the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the Parties to initiate or maintain counter-measures, too, may not disappear completely” (*ibid.*, p. 446). This approach appropriately reflects the need to ensure that an injured party is able to respond to a continuing injury caused by another State’s breach. The United States submits that the requirement to suspend countermeasures is not so much related to a tribunal’s authority to make binding decisions on the parties, as it is to whether a tribunal actually orders equivalent “interim measures of protection” to replace the suspended countermeasures in protecting the injured State’s rights. Likewise, the right to initiate countermeasures does not disappear completely if a tribunal’s ability to impose interim measures of protection is insufficient to address the injury to the State caused by the breach. As these determinations can only be made on a case-by-case basis, the United States urges the Commission to delete article 53, paragraph 5 (b).

Paragraph 3

Argentina

Paragraph 2 provides that “[t]he injured State shall notify the responsible State of any decision to take countermeasures, and offer to negotiate with that State”. However, paragraph 3 states that, notwithstanding, “the injured State may take such provisional and urgent countermeasures as may be necessary to preserve its rights”. Since such provisional countermeasures are subject to fewer procedural requirements than other countermeasures, there is a risk that they will be used as a subterfuge to elude those requirements. Therefore it would be advisable for the Commission to try to restrict the circumstances that would entitle a State to take provisional countermeasures, and in particular to set some sort of time limit, which is lacking in the current wording of the article.

Republic of Korea

The Republic of Korea is concerned about the possible abuses of the provisional and urgent countermeasures. The genuine necessity of the urgent countermeasures is not likely to be high. Furthermore, the conditions for such countermeasures in this article are couched broadly enough to enable States to rely on them whenever they find it necessary, therefore leaving it open to abuse.

Paragraph 4

France

See comments on paragraph 5, below.

Paragraph 5

France

4. Countermeasures other than those in paragraph 3 may not be taken:

(a) While the negotiations are being pursued in good faith and have not been unduly delayed;

(b) *When the dispute is submitted to a court or tribunal which has the authority to make decisions binding on the parties.*

5. Countermeasures may not be taken, and if already taken must be suspended within a reasonable time *if the internationally wrongful act has ceased*:

~~(a) The internationally wrongful act has ceased; and~~

~~(b) The dispute is submitted to a court or tribunal which has the authority to make decisions binding on the parties.~~

It is proposed here to move paragraph 5 (b) to paragraph 4. It is unwarranted for the initiation of a court settlement procedure to have the effect, in and of itself, of preventing the parties from taking or maintaining any countermeasures. Even in such an eventuality, it is appropriate to reserve for a State the right to take or maintain the provisional countermeasures referred to in paragraph 3.

Netherlands

In the interests of being systematic, it would be advisable to add a subparagraph to paragraph 5 indicating that countermeasures are not permitted or should be suspended “if the Security Council has taken a binding decision with regard to the dispute”.

Poland

1. Poland does not think that both premises excluding the use of countermeasures provided for in article 53, paragraph 5, should be fulfilled jointly; the word “and” should be replaced by the word “or”. Such a provision would logically amend paragraph 4 of the same provision.

2. See also article 51, above.

Article 54. Countermeasures by States other than the injured State

Argentina

It should be pointed out that rules on collective countermeasures should be even stricter than those on bilateral countermeasures. Inclusion of the former in the draft articles may be regarded as progressive development and would call for further attention and consideration.

China

See comments on article 49, above.

France

“1. Any State entitled under article ~~46~~ 49, paragraph 1, to invoke the responsibility of a State may take countermeasures ~~at the request and on behalf of any State injured by the breach, to the extent that that State may itself take countermeasures under this chapter.~~

“~~2. In the cases referred to in article 41, any State may take countermeasures,~~ in accordance with the present chapter, in the interest of the beneficiaries of the obligation breached.

“~~23.~~ Where more than one State takes countermeasures under the present article, the States concerned shall cooperate in order to ensure that the conditions laid down by this chapter for the taking of countermeasures are fulfilled.”

It seems neither appropriate nor logical to subordinate the right of a State having a legal interest as defined in article 46, paragraph 1, to take countermeasures at the request of an injured State, since the legal interest should be defined more strictly than is the case in article 49 of the current draft.

Mexico

1. In view of their implications, countermeasures may normally be taken only by the State that is directly affected by the internationally wrongful act. The draft articles provide for the possibility that States other than the injured State may take countermeasures in two cases:

(a) Where such measures are taken at the request and on behalf of any State injured by the breach; and

(b) Where the point at issue is a serious breach of essential obligations to the international community as a whole.

2. Mexico believes that the position expressed in article 54 is not supported by international law and raises serious difficulties, since it encourages States to take unilateral countermeasures where they have not suffered any specific and objective injury as a result of an internationally wrongful act. The many countermeasures that could be taken under this article would have disruptive effects and would give rise to a series of complex relationships. Mexico considers that article 49 and article 42, paragraph 2 (c), are sufficient to determine the rights of States other than the injured State and that article 54 should be deleted. As a result of this deletion, the references to “State taking the measures” in article 50, paragraph 2, and “State taking countermeasures” in article 51, paragraph 2, should be replaced by a reference to the “injured State”.

3. The structure of article 51 would appear to indicate that the obligation to respect the inviolability

of diplomatic or consular agents, premises, archives and documents is not a peremptory norm of international law. The Commission concluded on first reading that although steps may be taken that affect diplomatic or consular rights or privileges, by way of countermeasures, inviolability is an absolute right that is not subject to derogation.¹ How can it now be affirmed that it is not a peremptory norm? For these reasons, it is suggested that article 51, paragraph 1 (d) and (e), should be reversed.

4. Article 53, paragraph 5, sets out the obligation not to take or to suspend countermeasures if the wrongful act has ceased and the dispute is submitted to binding dispute settlement procedures. Mexico accepts this position, but wonders whether it might not be necessary to incorporate other third-party dispute settlement mechanisms, even if they are not binding.

5. An extremely delicate issue is that relating to the provisions of the new article 54, providing for countermeasures by States other than the injured State. The non-injured State, as defined in article 49, is authorized to take countermeasures “at the request and on behalf of any State injured”. This same provision makes it possible for collective countermeasures to be taken in the case of serious violations of essential obligations to the international community as a whole. In these circumstances, any State would be authorized to take countermeasures “in the interest of the beneficiaries of the obligation breached” with the understanding that more than one State could take these same countermeasures; in other words, they would take on a collective character.

6. The consequences of the existence of a serious breach by a State of an obligation owed to the international community as a whole and essential to the protection of its fundamental interests would seem, in principle, to be a matter covered by Chapter VII of the Charter of the United Nations. The response to a serious violation of this type has already been clearly defined in the legal order established by the Charter itself. In a regime of State responsibility, it would be unacceptable to introduce a mechanism that would change the collective security system enshrined in the Charter and allow for the taking of collective countermeasures, unilaterally decided, without the intervention of the central organ of the international community, and leaving it up to each State, if a grave violation has occurred, to determine the nature of the countermeasure to be taken and how that countermeasure will be terminated. The latitude provided by a system of this kind is incompatible with the institutional system created in 1945, whose norms and procedures are binding; it is therefore inadmissible to establish savings clauses such as those being proposed through collective countermeasures.

7. From the beginning, countermeasures have been controversial because of their close link with concepts that were considered outside the scope of law, such as

¹ *Yearbook ... 1995*, vol. II (Part Two), pp. 70–71, paras. (13)–(16) of the commentary to article 14.

self-help. Although it is true that the new text sets strict criteria for the use of countermeasures by defining their object and limits, specifying the obligations that are not subject to derogation, providing for proportionality and setting the conditions relating to their implementation, there is still considerable room for caprice and arbitrariness.

8. By applying the principle of *ubi lex non distinguit nec nos distinguere debemus*, it seems clear, according to Gómez Robledo,² that Article 41 of the Charter of the United Nations provides for some type of action; such action, however, like the action referred to in Article 42, is within the exclusive competence of the Security Council. Only by its delegation or authorization is such action within the competence of a regional body or arrangement (Article 53); this competence is itself not original but rather derived and subordinate. The term “action” in Chapter VII of the Charter—action which is reserved for the Security Council—includes both military and paramilitary action and economic, diplomatic and political sanctions. This understanding may be fairly inferred from the *obiter dictum* of ICJ in the *Certain Expenses of the United Nations case*.³

9. In his well-known interpretation of Article 41 of the Charter of the United Nations, Kelsen maintains that, in his view, the measures provided for in both Article 41 and Article 42 are coercive. The purpose of these measures, he says, is to *enforce* the decisions of the Security Council, in other words to impose its decisions on a recalcitrant State.⁴

10. The matter must be examined more closely—as is done by Gómez Robledo—and it must be asked whether, in the passage from singular to collective, something similar might occur to that described by the principle of physics which states that a quantitative variation in the cause produces a qualitative variation in the effect. There are good reasons, he notes, to think that it is one thing for an individual State to conduct its diplomatic or trade relations as it sees fit and another very different thing for a group of States, even if from the same region, to impose a situation of complete diplomatic ostracism or economic blockade on the target State with no chance for mitigation or exceptions—a situation, in brief, that is comparable to the *interdictio aquae et ignis* of Roman law. A financial and trade embargo may have a much more coercive effect on a State, its economy or even the very existence of its population than the use of armed force, which may not go beyond a few border incidents.⁵

11. If such measures are taken by the collective decision of a number of States, they clearly become equivalent to sanctions. As Bowett states, it is unrealistic to claim that measures that do not involve the use of armed force may never constitute coercion; on the contrary, the list of such

measures in Article 41 is a clear indication that the collective use of such measures must be seen as a coercive action.⁶

12. According to Paolillo, coercive action is aimed at enforcing Security Council decisions and is therefore binding in nature. Accordingly, measures under Article 41 differ from those under Article 42 in the means involved in their implementation, but their nature is the same. Both are coercive in the sense that they are applied obligatorily, even against the will of the target State.⁷

13. ICJ, in its decision in the *Certain Expenses of the United Nations case*, after recognizing the concurrent competence of the Security Council and the General Assembly as to the “recommendations” that either body may make for the maintenance of international peace and security, categorically states that, on the contrary, the type of action which is solely within the competence of the Security Council is expressly stated in Chapter VII of the Charter of the United Nations, namely, action with respect to threats to the peace, breaches of the peace and acts of aggression.⁸

14. Besides the practical difficulties arising from the taking of countermeasures, the act of separating them from dispute settlement mechanisms has converted them into an even more subjective and arbitrary means of inducing a responsible State to perform its obligations. In Mexico’s view, the rules of State responsibility should be limited to establishing the consequences of an internationally wrongful act from the standpoint of reparation and cessation.

15. Still, it is surprising that countermeasures are considered to be comparable, on an equal basis, with circumstances excluding wrongfulness, in other juridical categories, such as compliance with peremptory norms, self-defence, force majeure, distress, state of necessity or the consent of the State. To grant countermeasures an acceptance that would legitimize actions deemed wrongful because they are not in compliance with a State’s international obligations, and thus subject to the fulfilment of certain conditions—would mean providing considerable elasticity to a legal regime that by nature ought to be extremely rigorous. If a good deal of discretion is also granted in the taking of countermeasures, this could upset the balances required in order for the draft articles to be generally accepted.

16. Moreover, substantive consequences arise from this distinction, in that it authorizes all States other than the responsible State to take measures to terminate the breach. If it is a question of a serious breach of essential obligations to the international community as a whole, the articles would clearly be legitimizing the taking of countermeasures by States other than the directly injured State, either individually or collectively.

² Gómez Robledo, “Naciones Unidas y sistema interamericano (conflictos jurisdiccionales)”, p. 496.

³ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, p. 165.

⁴ Kelsen, *The Law of the United Nations: a Critical Analysis of its Fundamental Problems*, p. 724.

⁵ Gómez Robledo, loc. cit., pp. 498–499.

⁶ Bowett, “The interrelationship of the Organization of American States and the United Nations within the context of collective security”, p. 872.

⁷ Paolillo, “Regionalismo y acción coercitiva regional en la Carta de las Naciones Unidas”, pp. 234–235.

⁸ See footnote 3 above.

Netherlands

1. The Netherlands respects the innovative nature of this article's provisions. The same problem occurs here, *mutatis mutandis*, as was identified in connection with the relationship between articles 46 and 49: what is the legal situation if the directly injured State has waived its claim against the responsible State? The Netherlands is of the opinion that if the responsible State has breached *erga omnes* obligations, the directly injured State cannot frustrate the right of third States and/or of the international community as a whole to take countermeasures.

2. The Netherlands raises the question of whether the three scenarios which the Special Rapporteur suggested for the invocation of responsibility for breaches of *erga omnes* obligations (see article 49) also apply here *mutatis mutandis* to the taking of countermeasures against such a breach.

Spain

See comments on article 42, above.

Paragraph 1

Austria

The draft provisions on countermeasures as a means of obtaining respect for *erga omnes* obligations deal with a difficult problem, as they represent a specific justification for an intervention. The draft has evolved considerably since its first reading, and simple breaches of *erga omnes* obligations no longer entitle States to take countermeasures unless one of them is an injured State, such as the State of which the victim is a national. As far as the States other than the injured State are concerned, they are not entitled to take countermeasures except if requested to do so by the injured State (see article 54, paragraph 1). They normally have only the right contained in article 49, paragraph 2 (a), to seek cessation of the internationally wrongful act and guarantees of non-repetition. Hence these rights become a mere exhortation, with no specific consequences attached to it. Austria has doubts whether this is the result that should be achieved.

Japan

Article 54, paragraph 1, allows "States other than the injured State" (referred to in this document as "interested States") to take countermeasures "at the request and on behalf of any State injured ... to the extent that that State may itself take countermeasures" in the case of a multilateral obligation "established for the protection of a collective interest" and of an "obligation ... to the international community as a whole" (art. 49). This is, in essence, to entitle an "interested State" to surrogate a right of an injured State to take countermeasures. This may have a certain meaning, in that unlawful situations will not be left unresolved, in case an injured State is not able to take countermeasures by itself. However, such a subrogation system of countermeasures does not have a

basis established in international law. Such a development is a matter of primary rules. Introducing such a new system as a secondary rule may negatively affect the development of the primary rules. Also, it may involve more risk of abuse than the benefit.

Paragraph 2

Austria

1. In the case of "serious breaches" according to article 41, not only the directly injured States may take countermeasures, but any State may do so in the interest of the beneficiaries of the obligation breached (art. 54, para. 2). This rule is rather confusing, because it comprises two different situations: if the "serious breach" also fulfils the conditions set out in article 43 (b), i.e. if it is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned, any State is injured and therefore entitled to take countermeasures; but nothing in the present draft entitles such a State to make requests in the interest of the beneficiaries of the obligation breached. Depending on the clarification of the relation between the entitlement of States under article 43 and article 49 (see article 43), it may be necessary to add the wording "in the interest ... of the beneficiaries of the obligation breached" to article 44, paragraph 2, concerning the possible requests of an injured State.

2. In view of all this, the mentioning of article 41 in article 54, paragraph 2, must be understood as referring only to such breaches of *erga omnes* violations which do not fulfil the conditions of article 43 (b) and, therefore, fall under article 49. But also with this understanding the current wording of the draft is not without problems: "countermeasures" are defined as measures which should induce a State to comply with its secondary obligations arising from its responsibility (see article 50, paragraph 1); countermeasures are no sanctions. Therefore, in the case of a breach of an *erga omnes* obligation, only if a State has availed itself of its right under article 49, paragraph 2 (b), to demand reparation "in the interest of the beneficiaries of the obligation breached" and if such request was contested or simply not complied with, only then there would be a breach of secondary obligations which could be responded to with countermeasures.

3. In article 54, paragraph 2, as currently drafted, there is no clear connection with article 49, paragraph 2 (b), and this could create the impression that a State could take countermeasures without previously having made requests in accordance with article 49, paragraph 2 (b). It is probably arguable that such an interpretation is excluded indirectly in view of article 53, paragraph 1, but in Austria's view the connection should be made more evident through an explicit reference.

4. See also comments under article 42, paragraph 2, above.

Japan

1. Japan suggests the deletion of articles 41, 42 and 54, paragraph 2.

2. Article 54, paragraph 2, is another element reminiscent of “international crime”. Under article 54, paragraph 2, if “any State” considers that taking countermeasures contributes to the “interest” of beneficiaries, then it is entitled to take full countermeasures against the responsible State. It does not matter whether the State taking countermeasures has been injured, whether there exists an injured State or not, an injured State’s consent, or even whether the intention of beneficiaries exists.

3. Entitlement of any State to countermeasures in such a manner stipulated in article 54, paragraph 2, goes far beyond the progressive development of international law. Rather, it should be called “innovative” or “revolutionary” development of international law.

4. See also comments on article 41, above.

Poland

Poland has important doubts as to the formula used in article 54, paragraph 2. According to article 59, the obligations arising out of the (draft) articles on State responsibility are without prejudice to the Charter of the United Nations (i.e. primarily Article 2, paragraph 4, and Chapter VII of the Charter). This means that the Security Council should enjoy the monopoly of deciding on possible countermeasures (sanctions). However, the situation is less clear when the Council is unable to decide upon taking any action in case of danger to or violation of international peace and security, to say nothing of the situations in which any permanent member of the Council uses the right of veto with respect to proposed action by the Council. Finally, Poland can imagine cases of serious breaches of international law governed by article 41 of the draft which are outside the competence of the Council. Article 54, paragraph 2, suggests that in such cases every State individually could have recourse to countermeasures in order to force the perpetrator to comply with the alleged obligations deriving from the responsibility of States and the only duty would be to consult the decision to take countermeasures with other States applying countermeasures (including consultation within international organizations). Although there is a certain trend in contemporary international law in this direction (e.g. the reaction by certain States in respect of violations of the conditions of the settlement of the conflict between Iraq and Kuwait), it seems that this practice has met important opposition within the international community. It should nevertheless be subjected to some form of control by the international community, as different opinions may arise as to the legality of action under specific circumstances (Poland may cite here the example of the right to self-determination, the implementation of which depends upon the recognition of the people so entitled by the international community). Finally, Poland understands that countermeasures by third (indirectly injured) States should be directed mostly at the cessation of the wrongful act rather than at obtaining reparation by the directly injured State, which reflects existing customary law in this field.

Republic of Korea

As to collective countermeasures in paragraph 2, further efforts should be made to find a way to reduce arbitrariness in the process of their implementation, and to alleviate the influence of the more powerful States.

United Kingdom of Great Britain and Northern Ireland

A further substantial difficulty concerns the provision in draft article 54, paragraph 2, which would permit any State, in the case of “serious breach”, to take countermeasures “in the interests of the beneficiaries of the obligation breached”. Even where, on the basis of the *Barcelona Traction*¹ dictum, there may be a legal interest of States at large in respect of violations of certain obligations, it does not necessarily follow that all States can vindicate those interests in the same way as directly injured States. Moreover, the current proposal would enable any State to take countermeasures even when an injured State itself chose not to do so. This is potentially highly destabilizing for treaty relations.

¹ *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 3.*

Paragraph 3

Austria

1. There are problems relating to article 54, paragraph 3, concerning cooperation between several States in taking countermeasures. Such countermeasures must also comply with the rule of proportionality, laid down in article 52. The application of this rule is difficult enough if one State takes countermeasures and it is unclear how it should be applied if several States do so, let alone if they are applying different countermeasures. A possible solution could be to redraft article 53, envisaging an obligation of all States intending to take countermeasures to negotiate joint countermeasures prior to taking them.

2. See also comments on article 53, above.

Netherlands

Article 54, paragraph 3, can, in the opinion of the Netherlands, also be held to be relevant to cooperation on measures in the framework of the collective security system of the United Nations. This would include measures decided upon by the Security Council itself pursuant to Chapter VII of the Charter of the United Nations and measures by States that are authorized by the Council, also pursuant to Chapter VII. Such measures are deemed to be subject to the conditions laid down in the chapter on countermeasures, in particular article 51. The view that Council collective sanctions should be subject to restrictions is gaining ground. Like States, the Council is bound by peremptory norms of international law, and it cannot empower States to breach such norms. This problem cannot be dismissed by saying that article 59 of the draft articles serves as a savings clause for the applicability and precedence accorded to the Charter.

PART FOUR

GENERAL PROVISIONS

Argentina

1. See comments on article 33, above.
2. Part four contains, among other things, some “savings clauses” regarding the relationship between the draft articles and other legal regimes.
3. However, other savings clauses can also be found in other parts of the draft articles (for example, in article 19, article 27, paragraphs 1 and 2, article 33 and article 34, paragraph 2). Although some of these clauses are directly related to the part in which they are found, many of them could be formulated in such a way as to apply to the draft articles as a whole, in which case they would be better placed in part four.

**Denmark, on behalf of the Nordic countries
(Finland, Iceland, Norway, Sweden and Denmark)**

The Nordic countries can accept the four savings clauses contained in the final part four of the draft articles.

Netherlands

1. The Netherlands is in agreement with the general provisions contained in part four. However, it believes that an article should be added to the existing provisions to make clear the reflexive nature of the legal rules on State responsibility. This means that the various elements of the Commission’s draft also apply to the operationalization of State responsibility. For example, if a responsible State does not fulfil the obligations flowing from the secondary rules, it can also invoke “circumstances precluding wrongfulness”.
2. The question also arises of whether an article similar to article 34, paragraph 2, should be added to this part, to ensure that the entire text is without prejudice to any right, arising from the international responsibility of a State, which accrues to any person or any entity other than a State.
3. See also comments on article 33, above.

Article 56. Lex specialis

Argentina

1. See comments on article 33, above.
2. The article appears to be too restrictive in its wording. As it stands, it might exclude the possibility that the articles would apply as a residual regime if a special regime exists. In the opinion of Argentina, the draft articles should have residual application in all special legal regimes, unless the latter expressly state the contrary. Oth-

erwise, much of the practical impact of the draft articles would be lost. It would therefore be desirable to come up with a more flexible wording for the article.

Netherlands

The Netherlands believes that the option of taking collective countermeasures in cases of serious breaches of *erga omnes* obligations (art. 50 B as originally proposed by the Special Rapporteur; see paragraphs 357 and 369 of *Yearbook ... 2000*, vol. II (Part Two) is adequately expressed by the *lex specialis* rule in article 56. An example would be multilateral sanctions in the framework of the United Nations.

Spain

The wording of draft article 56, entitled “*Lex specialis*”, does not seem to be the most appropriate, in that it implies that the draft articles as a whole have a subsidiary or subordinate character in relation to any other norms of international law which deal with the conditions for the existence of a wrongful act or its legal consequences. The wording of article 37 of the 1996 draft is preferable, in that it was based on the principle of the application of the draft “without prejudice” to other special regimes that might spell out in greater detail the conditions for the existence and the consequences of a wrongful act. It would also be preferable to keep the provision in part two or at least to make it clear that specific regimes do not take precedence over peremptory norms of international law.

Article 57. Responsibility of or for the conduct of an international organization

France

“These articles are without prejudice to any question that may arise in regard to the responsibility under international law of an international organization, or of any State *as a result of* the conduct of an international organization.”

The expression “as a result of” better renders causality.

Article 58. Individual responsibility

Poland

Poland welcomes article 58 of the draft dealing with the possible criminal responsibility of individuals and expresses its intention and readiness to bear all responsibilities arising out of the Rome Statute of the International Criminal Court.

*Article 59. Relation to the Charter
of the United Nations*

Austria

1. The drafting of article 59 on the relation of the draft articles to the Charter of the United Nations seems rather ambiguous. It is not clear what it means that the legal consequences of an internationally wrongful act of a State are “without prejudice to the Charter of the United Nations”.

2. This wording lends itself to such a variety of interpretations, some of which are even contradictory: does it refer to the obligation to refrain from a threat or use of force; but this obligation is already contained in article 51, paragraph 1 (a), of the draft. Does it refer to the competence of the organs of the United Nations to deal with breaches of an obligation, even if States are applying the provisions of the draft outside any United Nations procedures? Does article 59 aim at establishing priority for the United Nations or does it only try to ensure the possibility of parallel action? And what happens if the Security Council decides that measures of States according to article 54, paragraphs 2–3—and possibly also under article 42, paragraph 2 (c)—are a threat to the peace and takes action accordingly? Would this affect application of the rules contained in the draft? Furthermore, it has to be made clear that countermeasures taken outside the United Nations system and those taken within the system must also be subject to the rule of proportionality.

3. If it is not possible to express the precise meaning of the phrase “without prejudice to the Charter of the United Nations”, it would be advisable to delete the provision.

Slovakia

Taking into account Article 103 of the Charter of the United Nations, Slovakia finds article 59 superfluous, and is thus proposing its deletion.

Spain

1. The relationship between the regime of responsibility laid down in the draft and in the Charter of the United Nations should be formulated with greater precision, for while the Security Council is authorized to take “enforcement measures” under Chapter VII, such measures are not subordinated to the general regime of countermeasures, since they do not necessarily respond to the commission of internationally wrongful acts. In any event, while the Council is not a judicial body, but a political body which takes action with respect to “any threat to the peace, breach of the peace, or act of aggression” (Chapter VII, Article 39, of the Charter), it must act in accordance with *jus cogens* norms.

2. See also comments on article 42, above.

DIPLOMATIC PROTECTION

[Agenda item 3]

DOCUMENT A/CN.4/514*

Second report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur

[Original: English]
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A. Exhaustion of local remedies¹

1. The exhaustion of local remedies rule is a rule of customary international law. In the *Interhandel* case ICJ stated that:

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.²

In the *ELSI* case ICJ described it not merely as a rule, but as “an important principle of customary international law”.³

2. Many reasons have been given for this rule. Borchard advances the following reasons:

[F]irst, the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs; secondly, the right of sovereignty and independence warrants the local state in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice; thirdly, the home government of the complaining citizen must give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussion; fourthly, if the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain that the wrongful act or denial of justice is the deliberate act of the state; and fifthly, if it is a deliberate act of the state, that the state is willing to leave the wrong unrighted. It is a logical principle that where there is a judicial remedy, it must be sought. Only if sought in vain and a denial of justice established, does diplomatic interposition become proper.⁴

The foundation of the rule, according to Jiménez de Aréchaga, is “the respect for the sovereignty and jurisdiction of the state competent to deal with the question through its judicial organs”.⁵

3. An exhaustion of local remedies rule was included in article 22 in the draft articles on State responsibility adopted by the Commission on first reading.⁶ The commentary to that article⁷ described the requirement of the exhaustion of local remedies as “a principle of general international law”. The draft articles on State responsibility provisionally adopted by the Drafting Committee on second reading in 2000⁸ provide that the “responsibility of a State may not be invoked if ... [t]he claim is

one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted”,⁹ but leave the drafting of a comprehensive rule on this subject to the present study.

4. Mr. Roberto Ago, the Special Rapporteur responsible for the drafting of article 22, succeeded in including many of the principles comprising the exhaustion of local remedies in a single article uninterrupted by a single full-stop. It reads:

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.¹⁰

No attempt is made to emulate this feat in the present report, first, because the components of the exhaustion of local remedies rule considered in this report go beyond those addressed by Mr. Ago,¹¹ and secondly, because the goal of clarity is better achieved by a number of draft articles. Consequently Mr. Ago’s single article is replaced by several articles.

B. The general principle that local remedies must be exhausted

Article 10

1. A State may not bring an international claim arising out of an injury to a national, whether a natural or legal person, before the injured national has, subject to Article 14, exhausted all available local legal remedies in the State alleged to be responsible for the injury.

2. “Local legal remedies” means the remedies which are as of right open to natural or legal persons before judicial or administrative courts or authorities whether ordinary or special.

C. The exhaustion of local remedies rule is a customary rule

5. That the exhaustion of local remedies is a well-established rule of customary international law is not disputed. It has been affirmed by the decisions of international¹² and national courts, bilateral and multilateral treaties, State practice, codification attempts by governmental and non-governmental bodies and the writings of jurists. The fact that treaties, particularly investment treaties, may on occasion exclude the operation of the

¹ The Special Rapporteur wishes to acknowledge the invaluable contribution made to the preparation of the report by Ms. Zsuzsanna Deen-Racsmany of the University of Leiden.

² *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 27.

³ *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 42, para. 50.

⁴ *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, pp. 817–818. For further reasons, see Doehring, “Local remedies, exhaustion of”, p. 238; and Sepúlveda Amor, “International law and national sovereignty: the NAFTA and the claims of Mexican jurisdiction”, p. 586.

⁵ “International responsibility”, p. 584.

⁶ *Yearbook ... 1996*, vol. II (Part Two), p. 60.

⁷ *Yearbook ... 1977*, vol. II (Part Two), p. 31.

⁸ *Yearbook ... 2000*, vol. II (Part Two), annex, p. 65.

⁹ *Ibid.*, p. 69, art. 45.

¹⁰ *Yearbook ... 1977* (see footnote 7 above), p. 30.

¹¹ Mr. Ago acknowledged that article 22 did not pretend to cover all aspects of the exhaustion of local remedies rule, particularly those that went beyond the purpose of the draft articles, namely the codification of the general rules governing State responsibility (*ibid.*, pp. 48 and 50, paras. (52) and (61) of the commentary to article 22).

¹² See paragraph 1 above.

rule in no way detracts from the generality of the rule or the universality of its acceptance.¹³ The commentary to article 22 of the draft articles on State responsibility adopted by the Commission on first reading¹⁴ contains a litany of sources proclaiming its validity. There is no reason to rehearse those sources.

D. Persons required to exhaust local remedies

6. Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies where it engages in *acta jure gestionis*.¹⁵ Diplomats or State enterprises engaged in *acta jure imperii*, on the other hand, are not required to exhaust local remedies, as an injury to them is a direct injury to the State to which the exhaustion of local remedies rule is inapplicable.¹⁶

E. Primary and secondary rules

7. No attempt is made to define or describe the great range of internationally wrongful acts that give rise to State responsibility when an alien is injured to which the exhaustion of local remedies rule applies. To do so would be to trespass on the field of “primary rules” of international law which the Commission has studiously avoided in its draft articles on State responsibility, and which it has suggested should likewise be avoided in the study on diplomatic protection.¹⁷ This policy has served the Commission well in its approach to State responsibility. However, it should be stressed, first, that there is no clear distinction between primary and secondary rules; secondly, that the distinction rests on unclear jurisprudential grounds; and thirdly, that it is a distinction of dubious value in a study on the exhaustion of local remedies.

8. That a clear distinction between primary and secondary rules is unattainable is evidenced by the many occasions on which members of the Commission have disagreed over the classification of a rule as primary

or secondary.¹⁸ Scholars have likewise had difficulty in drawing a clear distinction.¹⁹

9. The distinction between primary and secondary rules was invoked by Special Rapporteur Mr. Ago as a tool for rescuing the Commission from the difficulties caused by Special Rapporteur Mr. García Amador’s proposals to codify the international minimum standard in his draft articles on State responsibility.²⁰ Little attention was paid to the jurisprudential basis of the distinction by Mr. Ago when he first introduced the distinction in his second report on State responsibility, in which he stated:

Responsibility differs widely, in its aspects, from the other subjects which the Commission has previously set out to codify. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed ‘primary’, as opposed to the other rules—precisely those covering the field of responsibility—which may be termed ‘secondary’, inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules.²¹

Common-law lawyers familiar with the distinction between primary and secondary rules expounded by Hart in 1961 in *The Concept of Law*, which views secondary rules largely as rules of recognition designed to identify the primary rules of obligation,²² will immediately realize that Mr. Ago had some other jurisprudential explanation in mind. It is more likely that Mr. Ago was influenced by the writings of a jurist such as Ross,²³ who sees a legal rule as completed only when the “secondary norms” of effectiveness (or sanctions) are added to the “primary norms” of obligation.²⁴ Whatever the inspiration for the distinction between primary and secondary rules as employed by the Commission may be, it does not rest on a clear jurisprudential foundation.

10. While the distinction between primary and secondary rules has served its purpose in the field of State responsibility, it is a distinction that cannot be

¹³ *Yearbook ... 1977* (see footnote 7 above), p. 49, para. (55). See also Amerasinghe, “Whither the local remedies rule?”.

¹⁴ *Yearbook ... 1977* (see footnote 7 above), pp. 30–50.

¹⁵ *Ibid.*, p. 46, para. 45; sixth report on State responsibility by Mr. Ago, *Yearbook ... 1977*, vol. II (Part One), document A/CN.4/302 and Add. 1–3, p. 40, para. 103; see also International Law Association, *Report of the Sixty-Ninth Conference* (London, 2000), pp. 615–616; Herdegen, “Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen”, p. 65; and Law, *The Local Remedies Rule in International Law*, pp. 116–121.

¹⁶ See paragraph 27 below.

¹⁷ At its forty-ninth session a working group of the Commission recommended that the study of diplomatic protection “will be limited to codification of secondary rules: while addressing the requirement of an internationally wrongful act of the State as a requisite, it will not address the specific content of the international legal obligation which has been violated, whether under customary or treaty law” (*Yearbook ... 1997*, vol. II (Part Two), p. 61, para. 181).

¹⁸ The controversial article 19 in the draft articles on State responsibility adopted by the Commission on first reading (see footnote 6 above), dealing with international State crimes, has been frequently classified as a primary rule in a code of secondary rules. See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7, p. 7, para. 18.

¹⁹ See Lillich, “Duties of States regarding the civil rights of aliens”, p. 373. See also Combacau and Allard, “‘Primary’ and ‘secondary’ rules in the law of State responsibility: categorizing international obligations”. This highly sophisticated article hardly produces clarity on the distinction between primary and secondary rules. Rather, it provides evidence of the difficulties inherent in drawing such a distinction.

²⁰ See Mr. Ago’s first report on State responsibility, *Yearbook ... 1969*, vol. II, document A/CN.4/217 and Add.1, pp. 125–141; and his second report, *Yearbook ... 1970*, vol. II, document A/CN.4/233, pp. 177–197.

²¹ *Yearbook ... 1970* (see footnote 20 above), p. 179, para. 11.

²² Wellens, “Diversity in secondary rules and the unity of international law: some reflections on current trends”, addresses the question of international law from the perspective of Hart’s distinction between primary and secondary rules. It does not, however, suggest that it was this distinction that inspired Mr. Ago’s approach to State responsibility.

²³ *On Law and Justice*, pp. 209–210.

²⁴ For an examination of this matter, see Goldie, “State responsibility and the expropriation of property”.

too strictly maintained in a study on the exhaustion of local remedies in the context of diplomatic protection, as the concept of denial of justice is intimately connected with the exhaustion of local remedies rule. Writers on the exhaustion of local remedies rule often include an examination of denial of justice as an integral component of the exhaustion of local remedies rule, or at least find it necessary to discuss the connection between denial of justice and the exhaustion of local remedies.²⁵ Moreover, attempts at codification of the local remedies rule often seek to give some definition to denial of justice.²⁶ Circumstances of this kind, coupled with the fact that denial of justice may be seen both as a secondary rule excusing recourse to further remedies (associated with the “futility rule”, discussed in article 15) or as a primary rule giving rise to international responsibility, suggest that the attempt at maintaining a rigid distinction between primary and secondary rules followed in the study on State responsibility should not be pursued with the same degree of rigidity in the present study. The commentary on article 22 of the draft articles on State responsibility adopted by the Commission on first reading warns that consideration of the topic of exhaustion of local remedies “must at all costs stop short of an examination of the content of ‘primary’ rules of international law”.²⁷ This warning was, however, in the context of the codification of State responsibility and does not preclude the Commission from adopting a different approach in a study on diplomatic protection.

F. Remedies to be exhausted

11. The remedies available to an alien that must be exhausted before an international claim is brought will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule govern-

²⁵ Amerasinghe, *Local Remedies in International Law*, chap. III, p. 31; Borchard, *op. cit.*, part I, chap. VIII, p. 330; Cançado Trindade, “Denial of justice and its relationship to exhaustion of local remedies in international law”; Eagleton, *The Responsibility of States in International Law*, p. 113, and “Denial of justice in international law”, p. 542; O’Connell, *International Law*, pp. 945–950; Jennings and Watts, eds., *Oppenheim’s International Law*, pp. 525 and 544; Head, “A fresh look at the local remedies rule”, p. 149; Adede, “A survey of treaty provisions on the rule of exhaustion of local remedies”, and “A fresh look at the meaning of the doctrine of denial of justice under international law”, p. 76 (“the doctrine of denial of justice and the local remedies rule are two sides of the same coin”); and Dunn, *The Protection of Nationals: A Study in the Application of International Law*, pp. 146–159.

²⁶ Arts. 4 and 9 of *Articles adopted in first reading by the Third Committee of the Conference for the Codification of International Law* (The Hague, 1930) (League of Nations publication, *V. Legal, 1930.V.17*, document C.351(c)M.145(c).1930.V) (text in *Yearbook ... 1956*, vol. II, document A/CN.4/96, pp. 225–226); art. IV, Project No. 16 on diplomatic protection prepared by the American Institute of International Law (1925) (*ibid.*, p. 227); arts. V–VI of the Draft on “international responsibility of States for injuries on their territory to the person or property of foreigners”, prepared by the Institute of International Law (1927) (*ibid.*, p. 228); draft Convention on responsibility of States for damage done in their territory to the person or property of foreigners (particularly art. 9), prepared by Harvard Law School (1929) (*ibid.*, p. 229); Principles of international law that govern the responsibility of the State in the opinion of Latin American countries (art. VIII), prepared by the Inter-American Juridical Committee in 1962 (text in *Yearbook ... 1969* (see footnote 20 above), p. 153); third report on State responsibility by Mr. García Amador, *Yearbook ... 1958*, vol. II, document A/CN.4/111, pp. 55–61.

²⁷ *Yearbook ... 1977* (see footnote 7 above), p. 48, para. (52).

ing all situations. The words “all”, “available” and the limitation of local remedies to remedies before “judicial or administrative courts or authorities whether ordinary or special” offer some guidance but cannot hope to cover all circumstances. This article must, moreover, be read with article 15, which provides for exceptions to the rule that all available local remedies must be exhausted.

12. There is strong support for the view that all *legal* remedies that offer the injured individual a prospect of success must be exhausted. In *Nielsen v. Denmark*²⁸ the European Commission of Human Rights stated that the exhaustion of local remedies rule requires “that recourse should be had to all *legal** remedies available under the local law”; while in the *Ambatielos Claim*²⁹ the arbitral tribunal declared that “[i]t is the whole system of *legal** protection, as provided by municipal law, which must have been put to the test”. Writers too formulate the rule as requiring the exhaustion of *legal* remedies.³⁰ There is, however, some uncertainty as to the meaning of the term “legal” in the context of local remedies.

13. “Legal” remedies clearly include judicial remedies. The foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Courts in this connection include both ordinary and special courts since “the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress”.³¹

14. Legal remedies also include remedies before administrative bodies—provided the foreign national has a right to obtain redress from the tribunal. Some authorities have formulated the recourse to administrative authorities too broadly. The Draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School, 1961³² states that local remedies shall be considered to be exhausted “if the claimant has employed all administrative, arbitral, or judicial remedies which were made available to him by the respondent State”.³³ Moreover, the explanatory commentary on the Draft declares that:

By administrative remedies are meant all those remedies which are available through the executive branch of the government, as well

²⁸ *B. Schouw Nielsen v. Government of Denmark*, European Commission and European Court of Human Rights, application No. 343/57, decision of 2 September 1959 (*Yearbook of the European Convention on Human Rights 1958–1959*, p. 412).

²⁹ *The Ambatielos Claim*, award of 6 March 1956 (UNRIAA, vol. XII (Sales No. 63.V.3), p. 120).

³⁰ See, for example, Jennings and Watts, eds., *op. cit.*, p. 523; Amerasinghe, *Local Remedies ...*, p. 157; and Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: its Rationale in the International Protection of Individual Rights*, p. 58.

³¹ *Nielsen v. Denmark* case (see footnote 28 above), p. 438. See also the *Lawless* case, application No. 332/57, decision of 30 August 1958 (*Yearbook of the European Convention on Human Rights 1958–1959*, pp. 318–322).

³² For the text, see *Yearbook ... 1969* (footnote 20 above), p. 142.

³³ *Ibid.*, art. 19, p. 146.

as special remedies which may be provided by legislative action if claims are routinely handled through private bills for relief.³⁴

This formula, supported by some writers,³⁵ suggests that the claimant is required to exhaust not only those remedies which lie as of right, in accordance with the maxim *ubi jus ibi remedium*, but may also be required to approach the executive (or legislature?) for relief in the exercise of its discretionary powers. Clearly, the exhaustion of attempts to obtain such relief does not fall within the scope of the exhaustion of local remedies rule. The local remedies which must be exhausted include remedies of a legal nature “but not extra-legal remedies or remedies as of grace”³⁶ or those whose “purpose is to obtain a favour and not to vindicate a right”.³⁷ Administrative or other remedies which are not judicial or quasi-judicial in character and are of a discretionary character therefore fall outside the application of the local remedies rule.³⁸

15. The *Ambatielos Claim*,³⁹ in which an arbitration commission, in finding that a foreign national had failed in his endeavour to exhaust local remedies by not calling a crucial witness, held that “‘local remedies’ include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals”, has been rightly criticized as imposing too heavy a burden on the foreign national.⁴⁰ It seems both impossible and unwise to draft a rule that accurately reflects the complexities of the *Ambatielos* case. It seems better simply to draw this case to the attention of litigants as a reminder that litigants cannot have a “second try” at the international level if, because of faulty preparation and presentation of the claim at the municipal level, they fail in their action in the course of exhausting local remedies.⁴¹

³⁴ Amerasinghe, *Local remedies* ..., p. 158.

³⁵ Adede, “A survey ...”, pp. 4–7.

³⁶ Briery, *The Law of Nations*, p. 281; Brownlie, *Principles of Public International Law*, p. 499; Amerasinghe, “The local remedies rule in an appropriate perspective”, p. 747; Aronovitz, “Notes on the current status of the rule of exhaustion of local remedies in the European Convention of Human Rights”; *Greece v. United Kingdom*, application No. 299/57 (*Yearbook of the European Convention on Human Rights 1958–1959*), p. 192; Claim of Finnish Shipowners against Great Britain in respect of the Use of certain Finnish Vessels during the War, decision of 9 May 1934 (UNRIAA, vol. III (Sales No. 1949.V.2), p. 1479).

³⁷ *De Becker v. Belgium*, application No. 214/56, decision of 9 June 1958 (*Yearbook of the European Convention on Human Rights 1958–1959*), p. 238; and Jiménez de Aréchaga, “International law in the past third of a century”, p. 293.

³⁸ Cançado Trindade, *op. cit.*, p. 62; Amerasinghe, *Local Remedies* ..., p. 161; Fawcett, *The Application of the European Convention on Human Rights*, p. 295. In the *Velásquez Rodríguez v. Honduras Case*, Inter-American Court of Human Rights, Merits, judgement of 29 July 1988, Series C No. 4, the Court defined remedies as those “which are suitable to address an infringement of a legal right” (para. 64).

³⁹ See footnote 29 above.

⁴⁰ *Ibid.* See the dissenting opinion of Commissioner John Spiropoulos, *ibid.*, p. 128; Amerasinghe, *Local Remedies* ..., pp. 215–249; Jiménez de Aréchaga, “International responsibility”, pp. 586–587; and Verzijl, “La règle de l’épuisement des recours internes”, pp. 306–307. But on the contrary, Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals*, pp. 81–92; Law, *op. cit.*, pp. 83–91; and Jennings and Watts, eds., *op. cit.*, p. 524.

⁴¹ See O’Connell, *op. cit.*, p. 1059.

16. In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise in the municipal proceedings all the arguments he intends to raise in international proceedings. In the *Finnish Ships Arbitration* the arbitrator stated that

all the contentions of fact and propositions of law which are brought forward by the claimant Government ... must have been investigated and adjudicated upon by the municipal Courts.⁴²

This principle has been confirmed by ICJ in the *ELSI* case.⁴³ Like the “rule” in *Ambatielos*, this principle seems to belong in the commentary as an admonition to prospective litigants rather than as a component of an article on the exhaustion of local remedies.

17. Article 10 makes it clear that the local remedies must be “available”. This means that the local remedies must be available both in theory and in practice. There is, however, some disagreement as to how far the foreign national must test or exhaust local remedies that on the face of it are available more in theory than in practice. In the *Forests of Central Rhodopia* claim,⁴⁴ the tribunal held that there was no remedy to exhaust where the sovereign was immune from suit under municipal law, while in the *Panevezys-Saldutiskis Railway* case⁴⁵ PCIJ refused to accept that there was no local remedy in respect of a challenge to the validity of an act of seizure *jure imperii* on the part of the Government. The Court held that:

The question whether or not the Lithuanian courts have jurisdiction to entertain a particular suit depends on Lithuanian law and is one on which the Lithuanian courts alone can pronounce a final decision ... Until it has been clearly shown that [they] have no jurisdiction ... the Court cannot accept the contention ... that the rule as to the exhaustion of local remedies does not apply.

It will be for the Court to decide on the facts of each case whether under the legal system of the State in question there is no available remedy. While counsel’s advice on the availability of a remedy should be given serious attention, it cannot be conclusive.⁴⁶ Issues related to availability of a remedy are further considered in article 15.

G. Local remedies must be exhausted where the claim is preponderantly based on injury to a national

Article 11

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly

⁴² UNRIAA (see footnote 36 above), p. 1502. See also the *Ambatielos Claim* (footnote 29 above), p. 123.

⁴³ *I.C.J. Reports 1989* (see footnote 3 above), pp. 45–46. See also the commentary to article 22 of the draft articles on State responsibility adopted by the Commission on first reading, *Yearbook ... 1977* (footnote 7 above), p. 47, para. (49), which asserts the demonstration of an intent to win to be decisive.

⁴⁴ *Affaire des Forêts du Rhodope Central (fond)*, decision of 29 March 1933 (UNRIAA, vol. III (Sales No. 1949.V.2), p. 1420).

⁴⁵ *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 19. See also Amerasinghe, “The local remedies rule ...”, pp. 752–754; International Law Association (footnote 15 above), p. 620; and Aronovitz, *loc. cit.*, pp. 78–79.

⁴⁶ Amerasinghe, *Local Remedies* ..., pp. 191–192.

on the basis of an injury to a national and where the legal proceedings in question would not have been brought but for the injury to the national. [In deciding on this matter, regard shall be had to such factors as the remedy claimed, the nature of the claim and the subject of the dispute.]

18. The exhaustion of local remedies rule properly belongs to a study on diplomatic protection, as the rule applies only to cases in which the claimant State has been injured “indirectly”, that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State,⁴⁷ as here the State has a distinct reason of its own for bringing an international claim. Moreover, it could not be expected of a State to exhaust local remedies in such a case, as this would violate the principle of *par in parem non habet imperium non habet jurisdictionem*.⁴⁸

19. In practice it is difficult to decide whether the claim is “direct” or “indirect” where it is “mixed”, in the sense that it contains elements of both injury to the State and injury to the nationals of the State.⁴⁹ Many disputes before international courts have presented the phenomenon of the mixed claim. In *Aerial Incident of 27 July 1955*,⁵⁰ in which Bulgaria shot down an El Al flight, there was injury to both the State of Israel and to its nationals on the flight; in the *United States Diplomatic and Consular Staff in Tehran* case,⁵¹ there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the *Interhandel* case,⁵² there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the *Aerial Incident of 27 July 1955* it was not necessary for ICJ to make a decision; in the *United States Diplomatic and Consular Staff in Tehran* case the Court treated the claim as a direct violation of international law; and in the *Interhandel* case the Court found that the claim was preponderantly indirect and that Switzerland had failed to exhaust local remedies.

20. Writers have suggested various tests that may be employed in deciding whether the claim is direct or indirect. However, the same decision is often employed

⁴⁷ Jennings and Watts, eds., *op. cit.*, p. 523; Amerasinghe, *Local Remedies ...*, pp. 107 *et seq.*; Freeman, *The International Responsibility of States for Denial of Justice*, p. 404; Jessup, *A Modern Law of Nations: an Introduction*, pp. 118–120; Cançado Trindade, *op. cit.*, p. 172 (with special reference to human rights cases); Meron, “The incidence of the rule of exhaustion of local remedies”, p. 85; Verdross and Simma, *Universelles Völkerrecht: Theorie und Praxis*, p. 886; Herdegen, *loc. cit.*, p. 68; Adede, “A survey ...”, p. 1, footnote 1; and *Restatement of the Law Third, The Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute Publishers, 1987), vol. 2, p. 348, para. 902 *k*. Cf. Brownlie, *op. cit.*, p. 498.

⁴⁸ Meron, *loc. cit.*, pp. 83 and 85. Cf. Brownlie, *op. cit.*, p. 498.

⁴⁹ Fitzmaurice, “Hersch Lauterpacht—the scholar as judge: part I”, p. 54.

⁵⁰ *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Judgment, *I.C.J. Reports 1959*, p. 127.

⁵¹ *United States Diplomatic and Consular Staff in Tehran*, Judgment, *I.C.J. Reports 1980*, p. 3.

⁵² See footnote 2 above.

to support different tests and there is, moreover, some overlap in respect of the different tests. The following tests or factors are most commonly advanced to explain the distinction between direct and indirect claims: preponderance, subject of the dispute, nature of the claim, nature of the remedies and the *sine qua non* test.

21. In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant.⁵³ Support for this test is to be found in both the *Interhandel* case and the *ELSI* case. In *Interhandel* the Court stated that, although the dispute might contain elements of a direct injury,

such arguments do not deprive the dispute ... of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national.⁵⁴

In *ELSI* a Chamber of ICJ rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that

the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations].⁵⁵

22. Closely related to the preponderance test is the *sine qua non* or “but for” test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered affirmatively, the claim is an indirect one and local remedies must be exhausted.⁵⁶ Reliance for this test is placed on the *ELSI* case, but as shown above, the *ELSI* case may also be invoked in support of the preponderance test.

23. There is little to distinguish the preponderance test from the “but for” test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. Conversely, if there is evidence to show that the claim would not have been brought but for the injury to the national, this evidence will usually demonstrate that the claim is preponderantly indirect. Article 11 adopts both tests, as together they emphasize

⁵³ According to the *Restatement of the Law Second, The Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute Publishers, 1965), the exhaustion of local remedies rule is inapplicable if “the state of the alien’s nationality, which has espoused his claim, is asserting on its own behalf a separate and preponderant claim for direct injury to it arising out of the same wrongful conduct” (part IV, p. 618, para. 208 (c)). The *Restatement of the Law Third* (see footnote 47 above) contains the same principle:

“Under international law, before a state can make a formal claim on behalf of a private person ... that person must ordinarily exhaust domestic remedies available in the responding state ... Local remedies need not be exhausted for violations of international law not involving private persons; a state is not required to seek a remedy for violations of its rights in the courts of the responsible state, even where the state suffered injury to its own interests as a result of a violation of international law that also caused injury to its nationals.”

See also Meron, *loc. cit.*, p. 86; and Whiteman, *Digest of International Law*, p. 779.

⁵⁴ *I.C.J. Reports 1959* (see footnote 2 above), p. 28.

⁵⁵ *I.C.J. Reports 1989* (see footnote 3 above), p. 43, para. 52.

⁵⁶ Adler, “The exhaustion of the local remedies rule after the International Court of Justice’s decision in *ELSI*”.

the need for the injury to the national to be the dominant factor in the initiation of the claim if local remedies are required to be exhausted.

24. The other “tests” invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed.

25. The *subject of the dispute* is clearly a factor to be considered in the classification of a claim as direct or indirect. Where the injury is to a diplomatic or consular official (as in the *United States Diplomatic and Consular Staff in Tehran* case)⁵⁷ or to State property (as in *Aerial Incident of 27 July 1955*⁵⁸ or *Corfu Channel*⁵⁹), the claim will normally be direct.⁶⁰ In most circumstances the breach of a treaty will give rise to a direct claim unless the treaty violation is incidental and subordinate to an injury to the national, as in *Interhandel* and *ELSI*.

26. Meron, in considering the *nature of the claim* as a factor to be taken into account suggests that “the true test is to be found in the real interests and objects pursued by the claimant State”.⁶¹ This determining factor has been elaborated upon by other authors. Thirlway states:

It appears therefore that, in the Court’s jurisprudence, what counts for the applicability or otherwise of the local remedies rule is the nature of the principal element of the claim. Obviously if the claim is such that it does not involve injury of a kind which could be remedied by recourse to the local courts, the rule is totally excluded; not however because purely inter-State rights are involved, but because the claim is of such a kind that redress *could* not be obtained in local courts. But if the essence of the matter is injury to nationals, whose claim is being espoused by their State, and redress by the local courts will effectively put an end to the dispute, then the rule will apply to render inadmissible also any subsidiary aspects of the claim which might be regarded as strictly matters of direct inter-State relations.⁶²

Amerasinghe, while approving the “nature of the claim” test, argues that:

The rule of exhaustion relates to the right violated or the injury committed and not to the claim based on it as such, which reflects a secondary or remedial right. It is also the essence of the substantive right violated, as determined by the objects and interests promoted therein, that is of importance.⁶³

Support for this approach is to be found in the *Interhandel* case, in which ICJ stated:

⁵⁷ See footnote 51 above.

⁵⁸ See footnote 50 above.

⁵⁹ *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4.

⁶⁰ Meron, *loc. cit.*, p. 87; and García Amador, *The Changing Law of International Claims*, pp. 467–468. See also 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, and the commentary thereto, supplement to the *American Journal of International Law* (Washington, D.C.), vol. 23, special number (April 1929), pp. 156–157.

⁶¹ *Loc. cit.*, p. 87.

⁶² “The law and procedure of the International Court of Justice 1960–1989”, pp. 89–90.

⁶³ *Local Remedies ...*, p. 129.

The Court considers that one interest, and one alone, that of *Interhandel*, which has led the latter to institute and to resume proceedings before the United States courts, has induced the Swiss Government to institute international proceedings.⁶⁴

Clearly “the real interests and objects” of the claimant State in bringing the claim (Meron, *loc. cit.*, p. 87), “the nature of the principal element of the claim” (Thirlway, *loc. cit.*, p. 89) and “the essence of the substantive right violated” (Amerasinghe, *Local Remedies ...*, p. 129) are factors to be considered in the classification of the claim. None, however, is conclusive. Ultimately the question to be answered is whether the claim is preponderantly based on injury to a national and whether the claim would have been brought but for this injury.

27. The *nature of the remedy* sought by the claimant State will also assist in the classification of the claim. Where a State seeks purely declaratory relief the claim will be direct; while where a State seeks monetary relief or restitution for its national, the claim will be indirect. There is certainly support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted. In the *Air Service Agreement*⁶⁵ arbitration between the United States and France, the United States objected to decisions of the French Government causing damage to United States carriers that the United States alleged were in breach of a bilateral air services agreement. France contended that Pan American Airlines, the United States carrier most affected by France’s conduct, was required to exhaust local remedies before an international claim might be brought; while the United States argued that it was clear from the remedy it sought—an authoritative interpretation of the Air Services Agreement—that its interest in the arbitration extended beyond the problems experienced by Pan American Airlines to other United States-designated carriers. In upholding the United States’ argument the arbitration panel held that there was no need for local remedies to be exhausted, as the dispute involved “a right granted by one government to the other government”.⁶⁶ Further support may be found for this approach in the ICJ opinion in the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* in which the Court stated that the alleged dispute arising out of the United States legislation directed to closing the PLO Mission to the United Nations

relates solely to what the United Nations considers to be its rights under the Headquarters Agreement. The purpose of the arbitration procedure envisaged by that Agreement is precisely the settlement of such disputes as may arise between the Organization and the host country without any prior recourse to municipal courts, and it would be against both the letter and the spirit of the Agreement for

⁶⁴ *I.C.J. Reports 1959* (see footnote 2 above), p. 29.

⁶⁵ *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978 (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 415); and ILR, vol. 54, p. 304.

⁶⁶ ILR, vol. 54, p. 324. See also *Swiss Confederation v. German Federal Republic*, ILR, vol. 25 (1958–I), p. 47, noted in *The British Year Book of International Law, 1958*, vol. 34, p. 363. Relying on these decisions, Adler has contended that “[a]uthorities prior to *ELSI* suggested that the nature of the remedy sought should determine whether the exhaustion rule applied to mixed claims” (*loc. cit.*, p. 643).

the implementation of that procedure to be subjected to such prior recourse. It is evident that a provision of the nature of section 21 of the Headquarters Agreement cannot require the exhaustion of local remedies as a condition of its implementation.⁶⁷

28. Not infrequently States seek “mixed” remedies in international claims. In both *Interhandel* and *ELSI* the claimant State sought a declaratory judgement relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national. In neither case did the claimant State succeed in its bid to avoid the local remedies rule. In *Interhandel* ICJ held that the Swiss claim was primarily designed “for the purpose of securing the restitution to that company of assets vested by the Government of the United States”⁶⁸; while in *ELSI* the Court held that the United States claim for monetary damages on behalf of its nationals “colours and pervades the United States claim as a whole”.⁶⁹

29. *Interhandel* and *ELSI* indicate that local remedies must be exhausted where the request for a declaratory judgement is linked to other relief arising out of injury to a national. It seems, however, that a State may seek a declaratory judgement on the interpretation of a treaty relating to the treatment of nationals without exhausting local remedies provided it does not couple this request with a claim for compensation or restitution on behalf of its national.⁷⁰ This is an undesirable situation as it would allow a State “to circumvent the local remedies rule by promoting declaratory judgments which would acquire force of *res judicata* with respect to subsequent international proceedings seeking reparation”.⁷¹

30. It is impossible to draft a rule that subjects the claimant State to compliance with the local remedies rule in the above case without imposing an obligation on States to comply with exhaustion of local remedies in cases involving the interpretation of a treaty where this would be unwarranted.⁷² Article 11 does, however, make it clear that a request for a declaratory judgement *per se* is not exempt from the exhaustion of local remedies rule. Where the request for a declaratory judgement is incidental to or related to a claim involving injury to a national—*whether linked to a claim for compensation or restitution on behalf of the injured national or not*—it is still possible for a tribunal to hold that in all the circumstances of the case the request for a declaratory judgement is preponderantly brought on the basis of an injury to the national. Such a decision would be fair and reasonable where there is evidence that the claimant State has deliberately requested a declaratory judgement in order to avoid compliance with the local remedies rule.

31. Article 11 includes in parenthesis a number of factors to be taken into consideration in the classification

of a claim as direct or indirect. The Commission may, understandably, take the view that such factors are best left to the commentary for, as a rule, codification should avoid the inclusion of examples of this kind in a legislative text.

Article 12

The requirement that local remedies must be exhausted is a procedural precondition that must be complied with before a State may bring an international claim based on injury to a national arising out of an internationally wrongful act committed against the national where the act complained of is a breach of both local law and international law.

Article 13

Where a foreign national brings legal proceedings before the domestic courts of a State in order to obtain redress for a violation of the domestic law of that State not amounting to an international wrong, the State in which such proceedings are brought may incur international responsibility if there is a denial of justice to the foreign national. Subject to article 14, the injured foreign national must exhaust any further local remedies that may be available before an international claim is brought on his behalf.

32. In the *Encyclopedia of Public International Law* Doehring states that:

As long as the local remedies rule exists, controversy will remain as to the question of its conceptual nature, i.e. the question of whether the rule forms a part of procedural law or whether it operates as a part of substantive law.⁷³

This controversy, which has not left the Commission untouched, has produced three positions.⁷⁴ The first maintains that the internationally wrongful act of the wrongdoing State is not complete until local remedies have been exhausted without success; that the exhaustion of local remedies is a substantive condition on which the very existence of international responsibility depends. According to the second position, the exhaustion of local remedies rule is simply a procedural condition which must be met before an international claim may be brought. The third⁷⁵ distinguishes between an injury to an alien under domestic law and under international law. If the injury is caused by a violation of domestic law not constituting a violation of international law, international responsibility arises only from an act or omission constituting a denial of justice committed against the alien by the judicial organs of the respondent State in the course of his attempt to secure redress for the violation of domestic law. Here the exhaustion of local remedies rule is a substantive condition for the existence of international responsibility. In contrast, where the injury

⁶⁷ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 29, para. 41.

⁶⁸ *I.C.J. Reports 1959* (see footnote 2 above), pp. 28–29.

⁶⁹ *I.C.J. Reports 1989* (see footnote 3 above), p. 43.

⁷⁰ Adler, *loc. cit.*, p. 652; and Meron, *loc. cit.*, p. 86.

⁷¹ Jiménez de Aréchaga, “International law ...”, p. 293.

⁷² As in the cases described in paragraph 29 above.

⁷³ *Loc. cit.*, p. 240.

⁷⁴ Another position which has not received much support maintains that where the international responsibility of the State is established by the original injury, the exhaustion of local remedies is no longer required (see Verzijl, quoted in Briggs, “The local remedies rule: a drafting suggestion”, p. 923).

⁷⁵ Fawcett, “The exhaustion of local remedies: substance or procedure?”; and Brownlie, *op. cit.*, p. 497.

to the alien arises from a violation of international law, international responsibility occurs at the moment of injury and the requirement that local remedies must still be exhausted before an international claim is brought is merely a procedural precondition. There is no need to establish a denial of justice on the part of the judicial organs of the respondent State. Moreover, if the act or omission violates international law and not domestic law, the absence of local remedies obviates the need to exhaust such remedies.

33. Some jurists have suggested that the debate over the question whether the exhaustion of local remedies rule is one of substance or procedure is purely theoretical.⁷⁶ This is manifestly incorrect as the critical time at which international responsibility arises will differ according to the approach adopted. If the rule is substantive, international responsibility will arise only after all local remedies have been exhausted, whereas international responsibility is incurred immediately on the commission of an internationally wrongful act if the rule is procedural. This difference has serious consequences for the principle of nationality of claims, which generally requires the injured alien to be a national of the claimant State at the time the international wrong is committed.⁷⁷ It may also affect the jurisdiction of a tribunal if a State party to a dispute has attached a time limit to its acceptance of jurisdiction, as occurred in *Phosphates in Morocco*.⁷⁸ Furthermore the position adopted on the nature of the rule has decisive implications for the rendering of a declaratory judgement in the absence of the exhaustion of local remedies, and for the waiver of the need for recourse to local remedies by the respondent State as, logically, neither would be possible if the rule is characterized as substantive.⁷⁹ Whether the rule is characterized as substantive or procedural may also affect the question whether it is to be treated as a preliminary objection (if it is procedural) or considered as part of the merits (if it is substantive) in proceedings before an international tribunal.⁸⁰

34. The debate over the nature of the exhaustion of local remedies rule has surfaced in codification attempts, judicial decisions, separate judicial opinions and the practice of States. Furthermore no serious academic work on the exhaustion of local remedies rule is complete without an expression of views on the question whether the rule is substantive or procedural.

⁷⁶ According to Schwarzenberger,

“On the level of unorganised international society, it would be as pointless as in the case of the nationality test to attempt to classify the local remedies rule by reference to irrelevant distinctions between substance and procedure.” (*International Law*, p. 611)

See also Dunn, *op. cit.*, p. 156; and *Yearbook ... 1977* (footnote 7 above), p. 35, para. (14) of the commentary to article 22.

⁷⁷ Doehring, *loc. cit.*, p. 240.

⁷⁸ *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10.

⁷⁹ Amerasinghe, *State Responsibility for Injuries to Aliens*, pp. 201–208; “The formal character of the rule of local remedies”, pp. 447–455; and *Local Remedies ...*, pp. 330–337.

⁸⁰ Amerasinghe, *Local Remedies ...*, pp. 333–335. But on the contrary, see *Yearbook ... 1977* (footnote 7 above), p. 42, para. (33).

H. Codification

35. Attempted codifications of the exhaustion of local remedies rule have generally avoided a clear commitment to either the procedural or the substantive approach. There was, however, a discernible trend in favour of the procedural view before the endorsement of the substantive position by the Commission in 1977.

36. In 1927, the Institute of International Law resolved that:

No demand for reparation can be brought through diplomatic channels of a State so long as the wronged individual has at his disposal effective and sufficient means to obtain for him the treatment due him.

Nor can any demand for reparation take place if the responsible State places at the disposal of the wronged individual an effective means of obtaining the corresponding damages.⁸¹

Although hardly a model of clarity, this provision has been interpreted as a reflection of the view that the exhaustion of local remedies rule is concerned with the admissibility of the claim rather than the origin of responsibility. It does, moreover, suggest support for the view that responsibility arises at the time of the injury.⁸²

37. Two years later, in 1929, the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930) drew up a provision which read:

Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision. This rule does not exclude application of the provisions [on State responsibility for denial of justice].⁸³

The text adopted in first reading by the Third Committee of the Conference for the Codification of International Law provided:

The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State.⁸⁴

Both these formulations may be seen as examples of deliberate ambiguity.⁸⁵ On the one hand they suggest that international responsibility does not arise until local remedies have been exhausted, while on the other hand they suggest that responsibility is simply suspended pending the exhaustion of local remedies.⁸⁶

38. The provisions of the draft Convention on responsibility of States for damage done in their territory to the person or property of foreigners prepared by

⁸¹ *Yearbook ... 1956* (see footnote 26 above), annex 8, art. XII, p. 228.

⁸² Borchard, “Theoretical aspects of the international responsibility of States”, p. 235; and De Visscher, “Notes sur la responsabilité internationale des États et la protection diplomatique d’après quelques documents récents”, p. 245.

⁸³ *Yearbook ... 1956* (see footnote 26 above), basis of discussion No. 27, p. 225.

⁸⁴ *Ibid.*, annex 3, art. 4, p. 225.

⁸⁵ *Yearbook ... 1977* (see footnote 7 above), pp. 36–37, para. (19) of the commentary to article 22.

⁸⁶ See Caçado Trindade, “The birth of State responsibility ...”, pp. 157–158.

the Harvard Law School in 1929 lend support to the substantive position. They provide as follows:

Article 6

A state is not ordinarily responsible (under duty to make reparation to another state) until the local remedies available to the injured alien have been exhausted.

Article 7

(a) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.

(b) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the state has failed to discipline the officer or employee.

Article 8

(a) A state is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.

(b) A state is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice.

Article 9

A state is responsible if an injury to an alien results from a denial of justice ...⁸⁷

The resolution adopted at the Seventh International Conference of American States (Montevideo, 1933), in stating that “diplomatic protection cannot be initiated”⁸⁸ unless local remedies have been exhausted, gave further support to the substantive view.

39. In 1956, the Institute of International Law, after rejecting a radical proposal of Verzijl⁸⁹ to abandon the local remedies rule, adopted a resolution endorsing the view that the exhaustion of local remedies rule is procedural in nature:

When a State claims that an injury to the person or property of one of its nationals has been committed in violation of international law, any diplomatic claim or claim before a judicial body vested in the State making the claim by reason of such injury to one of its nationals is irreceivable if the internal legal order of the

⁸⁷ *Yearbook ... 1956* (see footnote 26 above), annex 9, p. 229.

⁸⁸ *Ibid.*, annex 6, p. 226.

⁸⁹ In his preliminary report to the Institute Verzijl proposed:

“(I) Where the injury to the person or property of an alien does not in itself involve the international responsibility of the State on whose territory the injury was committed, no diplomatic claim may be brought before international responsibility exists as a result of a denial of justice ...

“(II) Where the injury to the person or property of an alien involves in itself the international responsibility of the State on whose territory the injury was committed, there is no valid motive for subordinating a diplomatic claim to the previous exhaustion of local remedies.”

(*Annuaire de l'Institut de Droit international*, vol. 45 (Aix-en-Provence session, 1954), p. 24). See further on this proposal Briggs, *loc. cit.*

State against which the claim is made provides means of redress available to the injured person which appear to be effective and sufficient so long as the normal use of these means of redress has not been exhausted.⁹⁰

40. In 1956, the Commission commenced its study of the subject. Mr. García Amador, Special Rapporteur, presented his first report on State responsibility, in which he proposed the following basis of discussion:

The following, among others, may be considered as exonerating circumstances [for international responsibility]:

(a) *Failure to resort to local remedies*, in the sense that, so long as these remedies have not been exhausted, an international claim will not lie and the duty to make reparation will not be enforceable.⁹¹

The commentary explains that

the rule implies a suspensive condition, which may be procedural or substantive, but to which the right to bring international claims is subordinated. Responsibility may or may not exist, as the case may be, but unless and until the said condition is fulfilled, the claiming State has only a potential right. Responsibility as such may be imputable, but the duty to make reparation cannot be claimed. Consequently, in pure legal theory, failure to exhaust local remedies may or may not be grounds for exonerating from international responsibility, according to the circumstances, but it will always constitute a complete bar to the bringing of an international claim.⁹²

In his third report he modified this provision to read:

An international claim brought for the purpose of obtaining reparation for injuries alleged by an alien ... shall not be admissible until all the remedies established by municipal law have been exhausted.⁹³

At about the same time, in 1960, the Harvard Law School proposed the following rule, which inclined more clearly in favour of the procedural position:

(a) An alien is entitled to present an international claim under this Convention only after he has exhausted the local remedies provided by the State against which the claim is made.

(b) A State is entitled to present a claim under this Convention only on behalf of a person who is its national, and only if the local remedies and any special international remedies provided by the State against which the claim is made have been exhausted.⁹⁴

41. In 1977, at the strong urging of the Special Rapporteur, Mr. Ago, the Commission adopted article 22 of the draft articles on State responsibility on first reading, which adopts the substantive view:

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned

⁹⁰ *Annuaire de l'Institut de Droit International*, vol. 46 (Granada session, 1956), p. 364.

⁹¹ *Yearbook ... 1956* (see footnote 26 above), p. 220, basis of discussion No. V, para. (2).

⁹² *Ibid.*, p. 206, para. 173. The author expressed the same view in García Amador, “State responsibility: some new problems”, p. 449; and his third report, *Yearbook ... 1958* (see footnote 26 above), p. 56, para. 3 of the commentary to article 18.

⁹³ *Yearbook ... 1958* (see footnote 26 above), p. 55, art. 15, para. 1. The same provision is to be found in each subsequent draft submitted by the Special Rapporteur. For the last formulation, see *Yearbook ... 1961*, vol. II, document A/CN.4/134 and Add.1, p. 48, art. 18, para. 1.

⁹⁴ Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 1, para. 2, reproduced in Sohn and Baxter, “Responsibility of States for injuries to the economic interests of aliens”, p. 548.

have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.⁹⁵

This provision is premised on the distinction between obligations of conduct and result contained in articles 20–21 of the draft articles on State responsibility adopted on first reading.

42. The draft articles provisionally adopted by the Drafting Committee of the Commission on second reading⁹⁶ make only passing reference to the exhaustion of local remedies rule in article 45 and leave it to the present report on diplomatic protection to deal fully with the rule. Moreover, these draft articles abandon the distinction between obligations of conduct and of result upon which article 22 of the draft articles adopted on first reading is premised.

43. In 2000, the Committee on Diplomatic Protection of Persons and Property of the International Law Association submitted its first report to the plenary meeting of the Association in London. In an interim report to the Committee it was recommended that a draft article should be adopted to read:

According to the general principles of international law the exhaustion of local remedies is a procedural precondition for the exercise of diplomatic protection.⁹⁷

I. Judicial decisions

44. Judicial decisions do not provide a clear answer to the question under consideration. Courts, like codification bodies, have often preferred to leave their reasoning on the nature of the local remedies rule deliberately vague. This explains why proponents of both the substantive and the procedural positions often rely on the same decision for support.⁹⁸

45. The *Mexican Union Railway* case gives clear support to the substantive position as it held that:

the responsibility of a State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question.⁹⁹

On the other hand, implied support for the procedural approach is to be found in the *Certain German Interests in Polish Upper Silesia* case,¹⁰⁰ which held that a

⁹⁵ *Yearbook ... 1977* (see footnote 7 above), p. 30. For the debate on this provision in the Commission, see *Yearbook ... 1977*, vol. I, 1463rd meeting, pp. 250–255, and 1465th–1469th meetings, pp. 258–282.

⁹⁶ See footnote 8 above.

⁹⁷ Kokott, “The exhaustion of local remedies”, p. 629.

⁹⁸ Here it is interesting to compare the reasoning of the principal proponents of the two schools, Amerasinghe and Ago. See Amerasinghe, *State Responsibility ...*, pp. 216–235; “The formal character ...”, pp. 462–476; and *Local Remedies ...*, pp. 337–356; and *Yearbook ... 1977* (footnote 15 above), pp. 27–32, paras. 62–79. See also *Yearbook ... 1977* (footnote 7 above), pp. 37–41, paras. 20–31.

⁹⁹ *Mexican Union Railway (Limited) (Great Britain) v. United Mexican States*, decision No. 21 of February 1930 (UNRIAA, vol. V (Sales No. 1952.V.3), p. 122).

¹⁰⁰ *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6.*

declaratory judgement could be given before local remedies had been exhausted, and in cases such as *Chorzów Factory*¹⁰¹ and *Electricity Company of Sofia and Bulgaria*,¹⁰² in which the local remedies rule was considered as a preliminary objection.

46. The *Phosphates in Morocco* case,¹⁰³ in which Mr. Ago appeared as counsel for Italy to argue the substantive position, has given rise to conflicting opinions:

In its preliminary application of 30 March 1932 to the Permanent Court of International Justice, the Italian Government asked the Court to judge and declare that the decision of the Mines Department dated 8 January 1925 and the denial of justice which had followed it were inconsistent with the international obligation incumbent upon France to respect the rights acquired by the Italian company *Minière e Fosfati*. The French Government had accepted the compulsory jurisdiction of the Court by a declaration dated 25 April 1931, for “any disputes which may arise after the ratification of the present declaration with regard to *situations or facts subsequent to such ratification*”. The question thus arose whether the internationally wrongful act of which the Italian Government was complaining could or could not be regarded as a “fact subsequent” to the critical date. The Italian Government contended that the breach of an international obligation initiated by the decision of 1925 only became a completed breach following certain acts subsequent to 1931, in particular a note of 28 January 1933 from the French Ministry for Foreign Affairs to the Italian Embassy and a letter of the same date sent by the same Ministry to the Italian individual concerned. The Italian Government saw that note and that letter as an official interpretation of the acquired rights of Italian nationals which was inconsistent with the international obligations of France. It saw in them a confirmation of the denial of justice to the Italian nationals concerned, constituted by the refusal of the French Resident-General to permit them to submit to him a petition for redress ... The new denial of justice now consisted in the final refusal of the French Government to make available to the claimants an extraordinary means of recourse, whether administrative or other, in view of the lack of ordinary means. On the basis of these facts, the Italian Government opted for the thesis that an internationally wrongful act, though begun by initial State conduct contrary to the result required by an international obligation, is completed only when the injured individuals have resorted without success to all existing appropriate and effective remedies. It was thus from that moment that, in its view, the responsibility came into being.

In opposition to the Italian Government, the French Government maintained that, if, as the former affirmed, the decision of 1925 by the Mines Department really merited the criticisms made against it—breach of treaties, breach of international law in general—it was at that date that the breach by France of its international obligations had been committed and completed, and at that date that the alleged internationally wrongful act had taken place. The French representative affirmed:

“Here, therefore, the rule of the exhaustion of local remedies is *no more* than a rule of procedure. The international responsibility is already in being; but it cannot be enforced through the diplomatic channel or by recourse to an international tribunal or appeal to the Permanent Court of International Justice unless local remedies have first been exhausted.”¹⁰⁴

In its judgment of 14 June 1938, the Court indicated that it did not discern in the action of the French Government subsequent to the decision of 1925 any new factor giving rise to the dispute in question, and that the refusal by the French Government to accede to the request to submit the dispute to extraordinary judges did not constitute an unlawful international act giving rise to a new dispute. The Court went on to say:

¹⁰¹ *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9.*

¹⁰² *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77, p. 64.*

¹⁰³ See footnote 78 above.

¹⁰⁴ This account of the case is taken from *Yearbook ... 1977* (see footnote 7 above), pp. 38–39, paras. (25)–(27) of the commentary to article 22 in the draft articles on State responsibility adopted by the Commission on first reading.

“The Court cannot regard the denial of justice alleged by the Italian Government as a factor giving rise to the present dispute. In its Application, the Italian Government has represented the decision of the Department of Mines as an unlawful international act, because that decision was inspired by the will to get rid of the foreign holding and because it therefore constituted a violation of the vested rights placed under the protection of the international conventions. That being so, it is in this decision that we should look for the violation of international law—a definitive act which would, by itself, directly involve international responsibility. *This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States.*” In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it.¹⁰⁵

Mr. Ago maintains that although PCIJ rejected Italy’s application it did not reject Italy’s argument that the local remedies rule was substantive in nature.¹⁰⁶ This argument is difficult to accept, particularly in the light of the Court’s finding that international responsibility was established “immediately as between the two States” following the decision of the Department of Mines and not after the exhaustion of local remedies.¹⁰⁷ For this reason the assessment of Amerasinghe on the finding of this case is to be preferred:

The PCIJ clearly held that the initial act, which was a violation of international law, gave rise to international ... responsibility, and that such responsibility did not arise solely after the later actions, relating to the exhaustion of local redress, alleged by the claimant State to have taken place. The time at which international responsibility arose was critical for this case and therefore the decision in the case is based on the understanding that international responsibility arose before any resort to local remedies might have taken place. This is clearly based on a procedural view of the rule of local remedies.¹⁰⁸

47. Although of limited value, the *Panevezys-Saldutiskis Railway* case provides some support for the procedural position in referring to the local remedies rule as one which “in principle subordinates the *presentation** of an international claim to such an exhaustion”.¹⁰⁹ Moreover, in that case, as in the *Prince von Pless Administration*¹¹⁰ and the *Losinger*¹¹¹ cases, although the objection concerning the exhaustion of local remedies was joined to the merits owing to the complexity of the issue, it was treated as a preliminary objection rather than a defence to the merits of the case.

48. The *Finnish Ships Arbitration*¹¹² is another case on which opinions are divided. According to the Commission commentary, Arbitrator Bagge “maintained a sort of neutrality between the two approaches to the re-

quirement of the exhaustion of local remedies”¹¹³ while other writers have seen in the award support for the procedural view.¹¹⁴ Arbitrator Bagge’s reasoning undoubtedly lends some support to Mr. Ago’s interpretation¹¹⁵ that the award is inconclusive on the nature of the local remedies rule. In an article published¹¹⁶ more than 20 years later, Bagge again failed to state his position on the question whether the local remedies rule is procedural or substantive but there is suggested support for the former view.

49. No ICJ decision gives support to the view that the local remedies rule is substantive in nature. While clear judicial support for the procedural view is not forthcoming either, there are some signs that this approach is preferred. In several decisions the local remedies rule has been treated as a preliminary objection¹¹⁷ or joined to the merits as a preliminary objection,¹¹⁸ which some writers see as signs of support for the procedural view¹¹⁹—although this is denied in the Commission commentary.¹²⁰ More important perhaps is the *obiter dictum* of the Court in the *ELSI* case that parties might agree in a treaty “that the local remedies rule shall not apply to claims based on alleged breaches of that treaty”.¹²¹ If the rule is procedural such a waiver presents no difficulty. If however the rule is substantive the question may legitimately be asked whether parties to a treaty can “decide to agree that action which would ordinarily not be a breach of international law unless and until it had given rise to a subsequent denial of justice, should, as between those parties, be treated *ab initio* as a breach of the treaty”.¹²²

50. The division of views on the nature of the local remedies rule is reflected in separate and dissenting judicial opinions. Support for the substantive position is to be found in the opinions of Judges Hudson,¹²³

¹¹³ *Yearbook ... 1977* (see footnote 7 above), p. 38, para. (24).

¹¹⁴ Amerasinghe, *Local Remedies ...*, pp. 344–347; and Fachiri, “The local remedies rule in the light of the Finnish Ships Arbitration”, p. 19.

¹¹⁵ See in particular the award (footnote 36 above), pp. 1502–1503.

¹¹⁶ “Intervention on the ground of damage caused to nationals, with particular reference to exhaustion of local remedies and the rights of shareholders”, p. 162.

¹¹⁷ *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, pp. 18 and 22–23.

¹¹⁸ *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, pp. 41–44.

¹¹⁹ Amerasinghe, *Local Remedies ...*, pp. 347 and 350–352.

¹²⁰ *Yearbook ... 1977* (see footnote 7 above), p. 42, para. (33).

¹²¹ *I.C.J. Reports 1989* (see footnote 3 above), p. 42, para. 50.

¹²² Thirlway, *loc. cit.*, p. 84.

¹²³ In his dissenting opinion in the *Panevezys-Saldutiskis Railway* case (p. 47), Judge Hudson stated:

“It is a very important rule of international law that local remedies must have been exhausted without redress before a State may successfully espouse a claim of its national against another State. This is not a rule of procedure. It is not merely a matter of orderly conduct. It is part of the substantive law as to international, i.e. State-to-State, responsibility. If adequate redress for the injury is available to the person who suffered it, if such person has only to reach out to avail himself of such redress, there is no basis for a claim to be espoused by the State of which such person is a national. Until the available means of local redress have been exhausted, no international responsibility can arise.”

(See footnote 45 above)

¹⁰⁵ *Phosphates in Morocco* (see footnote 78 above), p. 28.

¹⁰⁶ *Yearbook ... 1977* (see footnote 7 above), pp. 39–40, para. (28).

¹⁰⁷ The sentence in italics in the passage in the Court’s judgment cited above, which seems to provide the key to the Court’s decision, is omitted from the account of the case in the Commission’s commentary, *ibid.*, p. 39, para. (27).

¹⁰⁸ *Local Remedies ...*, pp. 349–350.

¹⁰⁹ *Panevezys-Saldutiskis Railway* (see footnote 45 above), p. 18.

¹¹⁰ *Prince von Pless Administration, Order of 11 May 1933, P.C.I.J., Series A/B, No. 54*, p. 150.

¹¹¹ *Losinger, Order of 27 June 1936, P.C.I.J., Series A/B, No. 67*, p. 15.

¹¹² See footnote 36 above.

Córdova,¹²⁴ Morelli¹²⁵ and Schwebel.¹²⁶ On the other hand, Judges Lauterpacht,¹²⁷ Armand-Ugon¹²⁸ and Tanaka¹²⁹ have expressed opinions in favour of the procedural view.

J. State practice

51. State practice in respect of the nature of the local remedies rule is mainly to be found in arguments presented by States in legal proceedings before international tribunals. The value of such practice, if it can properly be so called, is highly questionable as inevitably States (or more accurately their counsel) have chosen to advance the procedural or substantive position for functional reasons and not out of conviction. Thus Italy in the Phosphates in Morocco case relied strongly on the substantive approach,¹³⁰ while 50 years later in *ELSI*¹³¹ it argued that the local remedies rule was procedural in nature! In these circumstances it is pointless to attempt to extract evidence of *usus* or *opinio juris* for a particular position from counsel's arguments.

52. On rare occasions States have taken positions on the nature of the local remedies rule outside the context of legal proceedings. In response to Mr. García Amador's first report on State responsibility, the United States Department of State prepared a memorandum which expressed strong support for the "third position" described in paragraph 32 above:

Under existing international law where the initial act or wrong of which complaint is made is *not imputable* to the State, the exhaustion of local remedies is required with a resultant denial of justice on the part of the State ... In this view, the exhaustion of remedies rule is a substantive rule, i.e., it is required from a substantive standpoint under international law in order to impute responsibility to a State.

On the other hand, where the initial act or wrong of which complaint is made *is imputable* to the State, substantively it is unnecessary to exhaust local remedies in order to impute responsibility to the State. If the draft ultimately prepared by the International Law Commission requires the exhaustion of local remedies in the latter situation, the rule of exhaustion of local remedies in such circumstance is procedural, i.e., a condition precedent to the presentation of a formal claim.

Accordingly, the rule of exhaustion of local remedies may be substantive in certain types of cases and procedural in others.¹³²

In 1985 the British Government issued a set of rules relating to international claims in which it stated:

Rule VII

HMG [Her Majesty's Government] will not normally take over and formally espouse a claim of a UK national against another State

¹²⁴ *Interhandel* case (see footnote 2 above), pp. 45–46.

¹²⁵ *Barcelona Traction* case (see footnote 118 above), p. 114.

¹²⁶ *ELSI* case (see footnote 3 above), p. 116.

¹²⁷ *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 41.

¹²⁸ *Interhandel* case (see footnote 2 above), pp. 88–89.

¹²⁹ *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 143.

¹³⁰ See paragraph 46.

¹³¹ *I.C.J. Pleadings, Elettronica Sicula S.p.A. (ELSI)*, Vol. III, pp. 156–165; and *I.C.J. Reports 1989* (see footnote 3 above), p. 21.

¹³² Reproduced in Whiteman, *op. cit.*, pp. 789–790.

until all the legal remedies, if any, available to him in the State concerned have been exhausted.

Comment. Failure to exhaust any local remedies will not constitute a bar to a claim if it is clearly established that in the circumstances of the case an appeal to a higher municipal tribunal would have had no effect. Nor is a claimant against another State required to exhaust justice in that State if there is no justice to exhaust.

Rule VIII

If, in exhausting any municipal remedies, the claimant has met with prejudice or obstruction, which are a denial of justice, HMG may intervene on his behalf to secure redress of injustice.¹³³

Although not expressed in unequivocal terms, the formulation of rule VII and the implication of rule VIII that a denial of justice is not required in every case suggests that, like the United States, the British Government prefers the third position, which views the local remedies rule as procedural where an international wrong has been committed against an alien, but as substantive where, in the course of exhausting local remedies, a denial of justice has occurred.

K. Opinions of writers

53. Academic opinion is divided on the nature of the local remedies rule, but there is, in the words of the Commission commentary, "no clearly dominant opinion"¹³⁴ among authors. Moreover, it is difficult to speak of clear schools of thought "since the arguments advanced for or against a particular thesis vary so greatly from one author to another that writers sometimes arrive at similar conclusions from virtually opposite directions".¹³⁵ Subject to this admonition, Mr. Ago has produced a bibliography of the three different schools.¹³⁶ The present study makes no attempt to provide a comprehensive account of the different opinions of writers. Instead, it will draw attention to the views expressed by the main proponents of the three different schools.

54. The most ardent supporters of the substantive school are Borchard and Ago.

In 1929, Borchard wrote:

[I]t [is] very questionable whether the prevailing view regards the alien State as automatically injured whenever an officer of the State injures an alien. The alien is not regarded as the living embodiment of his State, by virtue of which the State is to be deemed simultaneously injured whenever the national is injured.

...
However logical [the procedural] view may seem, it is apparently rejected in international practice, doubtless because in the majority of countries the local law has not yet advanced to the stage of regarding the state as immediately responsible for torts of its officers. But even apart from this fact, the view above set forth fails to perceive the vital distinction between *municipal* responsibility to the alien and *international* responsibility to his State. The majority view, to the effect that there is no *international injury* to the claimant state—and it seems proper to regard the international claim or injury as arising simultaneously with the right of diplomatic interposition and not before then—until the alien has exhausted his local remedies if available

¹³³ Rules applying to international claims, published in 1985, reproduced in Warbrick, "Protection of nationals abroad", p. 1008.

¹³⁴ *Yearbook ... 1977* (see footnote 7 above), p. 34, para. (13).

¹³⁵ *Ibid.*, pp. 35–36, para (13).

¹³⁶ *Ibid.*, p. 34, footnotes 135–137.

and effective, is strongly influenced by the fact that the alien must ordinarily accept the same treatment from the law that nationals enjoy, and that if nationals have recourse only against the wrong-doing officer, that is all that aliens can demand, and the state assumes no greater responsibility toward aliens than it does toward nationals. The view seems entirely sound.¹³⁷

Frequent reference has been made above to the views of Mr. Ago expressed in his 1977 report to the Commission. The present study would, however, be incomplete without a more complete expression of Mr. Ago's views on the nature of the local remedies rule. The following statement, it is hoped, provides an accurate account of Mr. Ago's views:

It should be recalled that the fact of establishing that a State has committed, for example, a breach of an obligation laid on it by a treaty to accord a certain treatment to a national of another State, and has thus infringed the right of the other State that its national shall be accorded the treatment provided for in the treaty, is tantamount to saying that the first State has incurred, if all conditions for this are satisfied, an international responsibility towards the second State. And generation of an international responsibility is equivalent, in the example we have taken, to the creation of a new right of the injured State: the right to reparation for infringement of the right accorded to it by the treaty. But it would be difficult to conceive that this new right, attributed to the injured State by the international legal order, should depend on the result of proceedings instituted by a private individual at the internal level, which may lead to the restoration of the right of that individual, but not to the restoration of a right which belongs to the State at the international level and has been infringed at that level. If, so long as the condition of exhaustion of local remedies has not been satisfied, the injured State has no faculty to claim reparation for an internationally wrongful act allegedly committed to its detriment in the person or property of its national, it is because for the time being its new right to reparation of an injury suffered by it has not yet been created. In other words, a breach of the obligation imposed by the treaty has not yet occurred or, at least, has not yet definitively occurred. At this moment, therefore, the international responsibility, which in our case is reflected precisely in the right of the State to reparation of the injury suffered by it, has not yet arisen. In other words, the finding that the right of the State to demand reparation exists only after the final rejection of the claims of the private individuals concerned inevitably leads to the conclusion that the breach of the international obligation has not been completed before those remedies are exhausted, that is to say, before the negative effects of the new conduct of the State in regard to those remedies have been added to those of the initial conduct adopted by the State in the case in point, thereby rendering the result required by the international obligation definitively impossible of achievement.¹³⁸

Although his name is clearly associated with the substantive view, it should be pointed out that Mr. Ago's arguments concern only what he called "obligations of result",¹³⁹ i.e. obligations not concerned with the way the specified result was reached. In cases of violations of an "obligation of conduct", in other words where the mere conduct of the State violates an international obligation irrespective of the legality of the result reached, the international responsibility of the State is not conditional upon the exhaustion of local remedies. Indeed, although not spelled out in the report, it appears that the rule is not applicable at all in these cases in Mr. Ago's scheme.

55. Writers in favour of the substantive school include Gaja,¹⁴⁰ who argues that the exhaustion of local rem-

edies rule is a "presupposition" for unlawfulness, and O'Connell,¹⁴¹ who emphasizes the right of the State to attempt to redress the wrong within its own legal system.

56. The substantive view has drawn heavy criticism from legal scholars, particularly Amerasinghe who has published profusely in support of the procedural position.¹⁴² In his view there is something intrinsically incorrect about the substantive view's insistence that international responsibility is dependent upon local action and that the violation of international law—and international responsibility—is only completed once local courts have so pronounced.

In the case of international law, an international court is the proper organ finally to make the decision that a rule of international law has been broken. Municipal courts may pronounce on the issue, but it is clear that for the international legal system this cannot be final.¹⁴³

Amerasinghe challenges the substantive view's reasoning that an international wrong is not committed until local remedies have been exhausted:

What international law prohibits is the initial injury to the alien. To say that international law merely prohibits the perpetuation of the injury after resort to local remedies, and therefore does not take particular note of the initial injury as a violation of international norms, provided the result is brought about that satisfaction is given to the injured alien, seems to twist the truth to suit the theory. In short, it seems difficult to accept an interpretation of the situation which requires the State merely to fulfil its secondary obligation, of making reparation through whichever means it chooses, as the result to be achieved by the obligation imposed by international law, and therefore characterizes this secondary obligation as the only one that has not been fulfilled, while not attaching special importance to the primary obligation not to cause injury to the alien in the first place. The local remedies rule really pertains only to secondary obligation, leaving the fact of the violation of the primary obligation substantially unaltered.¹⁴⁴

57. Doehring maintains that in certain cases it is impossible to argue that the original act is not a violation of international law.¹⁴⁵ Even though his example, the killing of an individual, may be more closely linked with the protection of human rights, it is also highly relevant from the perspective of treatment of aliens and is therefore of broader applicability.¹⁴⁶ Moreover, it is claimed that the exceptions to the local remedies rule—for instance, waiver by the State in an arbitration

¹⁴¹ *Op. cit.*, p. 1053:

"A State is only internationally responsible to foreign nationals when the injuries they have suffered at its hands are irremediable at their own instance through the agency of the State's own law. If an avenue of redress is available under that law, either through appeal to the highest courts or through executive instrumentalities, the injury is not complete until the avenue has been explored in vain."

See also Head, *loc. cit.*, p. 150; Daillier and Pellet, *Droit international public*, pp. 774–775, para. 490; and Combacau and Sur, *Droit international public*, p. 546.

¹⁴² *State Responsibility ...*, pp. 169–270; *Local Remedies ...*; and "The local remedies rule ...", p. 727.

¹⁴³ *State Responsibility ...*, p. 215.

¹⁴⁴ *Local Remedies ...*, p. 328.

¹⁴⁵ *Loc. cit.*, p. 240. Support for Doehring's views has been expressed by other German authors: Herdegen, *loc. cit.*, p. 65; Kokott, *loc. cit.*, p. 612; and Geck, "Diplomatic protection", p. 1056.

¹⁴⁶ In the context of human rights protection, the procedural nature of the rule of exhaustion of local remedies is more broadly accepted than with regard to diplomatic protection. See, for example, Amerasinghe, *Local Remedies ...*, pp. 354 *et seq.*

¹³⁷ Borchard, *loc. cit.*, pp. 236–237.

¹³⁸ *Yearbook ... 1977* (see footnote 7 above), pp. 35–36, para. (15).

¹³⁹ *Ibid.*, p. 9, para. 27.

¹⁴⁰ *L'Esaurimento dei ricorsi interni nel diritto internazionale*, pp. 12 and 33.

agreement—are incompatible with the idea that international responsibility arises only after the exhaustion of local remedies.¹⁴⁷ Also, the continuous nationality rule is illogical if the international wrong is committed only after the exhaustion of local remedies.¹⁴⁸

58. An important argument against perceiving the rule in substantive terms is stated by Verzijl in the following terms:

If it be assumed that no international delinquency exists at all until the local remedies have been exhausted, the rule is necessarily much more rigid than in the other construction, since in that case the international claim itself is provisionally devoid of any juridical foundation. If, on the contrary, its merely procedural nature is recognized, much greater freedom is left to mitigate and qualify the rule with a view to obviating the evident abuses which can be, and regrettably often are, made of the rule.¹⁴⁹

59. Although the American Law Institute's *Restatement of the Law Third* does not take a position on the nature of the local remedies rule, the *Restatement of the Law Second* provides:

Procedural nature of requirement of exhaustion. As indicated in §168, there are some types of conduct causing injury to aliens that are in themselves wrongful under international law and others that merely give rise to a duty to make reparation, in which case a violation of international law does not occur until and unless there is a failure to make such payment. However, once an international wrong has been committed, whether in causing the original injury or in failure to pay compensation, the international responsibility of the state is engaged and the exhaustion of available remedies is primarily a procedural requirement.¹⁵⁰

60. Reasons of the above kind have led many international lawyers to support the procedural position.¹⁵¹

61. The third school, which has its origins in the writings of Hyde and Eagleton, is not incompatible with the procedural position. The main difference is that its proponents consider that

in the examination of claims, it becomes important to distinguish events which tend to show internationally illegal conduct on the part of a territorial sovereign, from those which tend to show a failure on its part to afford a means of redress in consequence of such conduct.

¹⁴⁷ Verdross and Simma, *op. cit.*, pp. 882–883, footnote 42. Other German authors have also adopted this view. See, for example, Kokott, *loc. cit.*, p. 612; Herdegen, *loc. cit.*, p. 65; and Schwarze, "Rechtsschutz Privater bei völkerrechtswidrigem Handeln fremder Staaten", pp. 428–429. See further Adede, "A survey ...", p. 15.

¹⁴⁸ Schwarze, *loc. cit.*, p. 429.

¹⁴⁹ Verzijl, *International Law in Historical Perspective*, p. 629.

¹⁵⁰ *Restatement of the Law Second* (see footnote 53 above), pp. 612–613, para. 206 d.

¹⁵¹ See De Visscher, "Le déni de justice en droit international", p. 421; Freeman, *op. cit.*, pp. 407 *et seq.*; Shaw, *International Law*, pp. 567–569; Jessup, *op. cit.*, p. 104; Geck, *loc. cit.*, p. 1056; Herdegen, *loc. cit.*, p. 65; Kokott, *loc. cit.*, p. 612; and Schwarzenberger, *op. cit.*, pp. 603–604. Arguably this is also the position taken in Jennings and Watts, eds., *op. cit.*, pp. 522–524) in the following statement:

"[W]here a state has treated an alien in its territory inconsistently with its international obligations but could nevertheless by subsequent action still secure for the alien the treatment (or its equivalent) required by its obligations, an international tribunal will not entertain a claim put forward on behalf of that person unless he has exhausted the legal remedies available to him in the state concerned. So long as there has been no final pronouncement on the part of the highest competent authority within the state, it cannot be said that a valid international claim has arisen."

The former serves to establish national responsibility; the latter to justify interposition.¹⁵²

In other words, this school considers the rule as one representing a procedural condition when it concerns cases where the original act or omission by itself amounts to a violation of international—as well as municipal—law. In contrast, where the injury is caused by an act constituting a violation of municipal law but not of international law, international responsibility commences only after the exhaustion of local remedies resulting in a denial of justice.

62. The leading proponent of this school is Fawcett. In an article published in 1954¹⁵³ in which he seeks to distinguish clearly between the cause of action and the right of action, he set out three possible legal situations in which the operation of the local remedies rule must be considered:

Case I: The action complained of ... is a breach of international law but not of the local law.

Case II: The action complained of is a breach of the local law but not of international law.

Case III: The action complained of is a breach both of the local law and of international law.¹⁵⁴

...

In the first case, where the action complained of is a breach of international law but not of the local law, the local remedies rule does not ... come into play at all; for, since there has been nothing done contrary to the local law, there can be no local remedies to exhaust.¹⁵⁵

Examples that would fall under this case include an injurious act committed by the highest executive authority of the State for which there is no remedy in domestic law; or where a State official commits a crime against humanity (e.g. apartheid) which is condoned or promoted by local law.

In the second case, where the action complained of is a breach of the local law but not initially of international law, the international responsibility of the State is not engaged by the action complained of: it can only arise out of a *subsequent* act of the State constituting a denial of justice to the injured party seeking a remedy for the original action of which he complains.¹⁵⁶

Here the local remedies rule operates as a substantive bar to an international claim as no claim arises until a denial of justice can be shown. In the third case,

Where the act complained of is a breach both of the local law and of an international agreement or customary international law, the rule of the exhaustion of local remedies operates as a procedural bar to an international claim ...¹⁵⁷

¹⁵² Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, p. 493. See also Eagleton, *op. cit.*, pp. 97–100. Writers of this period who lean towards the third school include Dunn, *op. cit.*, p. 166 (this is implied in his interpretation and criticism of article 8 (a) of the draft Convention on responsibility of States for damage done in their territory to the person or property of foreigners prepared by the Harvard Law School in 1929); Fachiri, *loc. cit.*, p. 33; and Starke, "Imputability in international delinquencies", pp. 107–108.

¹⁵³ Fawcett, *loc. cit.*

¹⁵⁴ *Ibid.*, p. 454.

¹⁵⁵ *Ibid.*, p. 455.

¹⁵⁶ *Ibid.*, pp. 455–456.

¹⁵⁷ *Ibid.*, p. 458.

Fawcett's simple, but clear, analysis, which has won the support of Fitzmaurice¹⁵⁸ and Brownlie,¹⁵⁹ provides the answer to the debate over the nature of the local remedies rule. It is unfortunate that it received so little attention in Mr. Ago's study.¹⁶⁰ Amerasinghe has attempted to reconcile Fawcett's position with his own procedural view by arguing that Fawcett's second case, which adopts the substantive approach, has nothing to do with the local remedies rule.

What is called the substantive aspect of the rule is really not an aspect of the rule at all. It is misapplied terminology to an area of State responsibility for injuries to aliens which deals with breaches of international law committed in connexion with the administration of justice. That which has been called the substantive aspect of the rule really related to "denials of justice" and should be dealt with in those terms.¹⁶¹

Once this is understood, he continues, Fawcett's view can be reduced "to a basically procedural view of the rule".¹⁶²

L. Conclusion

63. The "third position" is, logically, the most satisfactory. If a State commits an internationally wrongful act—for example, by torturing an alien—it incurs international responsibility from that moment. The act of torture gives rise to a cause of action against the responsible State but the right of action, the right to bring an international claim, is suspended until the State has had the opportunity to remedy the situation, for example by means of reparation, through its own courts. In such a case the local remedies rule is procedural. This view enjoys the support of some codification attempts, several judicial decisions and the majority of writers, as it is a view supported by both those who favour the procedural position and those who belong to the "third school". Supporters of the substantive view are unable to accept this explanation of the local remedies rule largely because of their refusal to distinguish between injurious acts to the alien that violate international law and those that violate only local law.

64. There is an even clearer consensus that where the original injury is caused by an act or omission in violation of local law only, a denial of justice arising in the course of the domestic proceedings is required before an international claim can be brought. Substantivists accept this and so do proceduralists, but the latter school denies that this phenomenon falls within the purview of the local remedies rule. The refusal of the procedural school to consider this type of case as belonging to the subject of exhaustion of local remedies is of no practical relevance and does not warrant further consideration.

65. There remains one last issue to be considered: whether a denial of justice further necessitates the exhaustion of remaining local remedies, not only in the context of the situation described in paragraph 64 above, but also where denial of justice follows a violation of in-

ternational law. Authors who have expressed an opinion on this issue in the works reviewed¹⁶³ support the view that local remedies need to be exhausted in such cases. This is logical if one perceives a denial of justice as a violation of international law. This view is not contradicted by codification attempts, international decisions or State practice.

66. The above draft articles seek to give effect to the conclusions reached in the present report. The decision to depart from the substantive position advanced by Mr. Ago in draft article 22 of the draft articles on State responsibility adopted on first reading has not been taken lightly. That position was, however, premised on the distinction between obligations of conduct and result, which has not been retained in the draft articles on State responsibility provisionally adopted by the Drafting Committee in 2000. The substantive view does not have substantial support from codification attempts, judicial decisions and writers. Moreover, the trend among writers since 1977 has been in favour of the procedural view or the third school. In these circumstances it is suggested that the Commission should approve the philosophy contained in draft articles 12–13.

M. Future work

67. The commentary to draft article 14 is still in the course of preparation. It is likely that the article will take the following form:

Local remedies need not be exhausted where:

- (a) **There are no effective remedies;**
- (b) **The exhaustion of local remedies would be futile;**
- (c) **The respondent State has waived the requirement that local remedies be exhausted;**
- (d) **There is no voluntary link between the injured individual and the respondent State;**
- (e) **The internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State.**

Further articles on the exhaustion of local remedies will deal with the burden of proof and advance waiver of an international claim by the foreign national (Calvo clause). It will also be desirable to draft a provision on the meaning of "denial of justice" in the light of the reference to this term in draft article 13, despite the fact that this will possibly involve the formulation of a primary rule. However, as pointed out in the commentary to draft article 10, the distinction between primary and secondary rules is of uncertain value in the present codification exercise.

¹⁵⁸ *Loc. cit.*, p. 53.

¹⁵⁹ *Op. cit.*, p. 497.

¹⁶⁰ *Yearbook ... 1977* (see footnote 7 above), p. 34, para. 13, footnote 137.

¹⁶¹ Amerasinghe, *State Responsibility ...*, p. 214. A similar view is expressed by Law, *op. cit.*, p. 34.

¹⁶² *Local Remedies ...*, p. 326.

¹⁶³ Law, *op. cit.*, p. 34; Fitzmaurice, *loc. cit.*, p. 59; and Amerasinghe, "The local remedies rule ...", p. 732.

UNILATERAL ACTS OF STATES

[Agenda item 4]

DOCUMENT A/CN.4/519

Fourth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur

[Original: English/French/Spanish]
[30 May 2001]

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Introduction*

1. The International Law Commission considered the topic of unilateral acts of States at its 2624th, 2628th–2630th and 2633rd meetings during its fifty-second session from 19 May to 7 June 2000.¹

2. At this time, the Commission had before it the third report of the Special Rapporteur² in which he introduced draft articles and commentaries thereto on various aspects of the topic, concerned mainly with the elaboration or formulation of unilateral acts, aspects on which it has been felt that common rules may be drawn up for all such acts, regardless of their material content.

3. After considering that report, the Commission decided to refer to the Drafting Committee articles 1–4 concerning the definition of unilateral acts (art. 1); the capacity of States to formulate unilateral acts (art. 2); persons authorized to formulate unilateral acts on behalf of the State (art. 3) and subsequent confirmation of an act formulated by a person not authorized for that purpose (art. 4). The Drafting Committee, however, was not able to start its consideration of this topic.

4. The Commission also decided to refer to a Working Group, which was established during that session, article 5, concerning the causes of invalidity, a delicate matter which, in the view of some members of the Commission, warranted more extensive study, along with the consideration of the question of the conditions of validity of a unilateral act.

5. It should be recalled, in this respect, that some members of the Working Group stressed the relationship of this

article with “a necessary provision on the conditions of validity of the unilateral act” and added that:

A study on the conditions determining the validity of unilateral acts ... would call for an examination of the possible material content of the act, its lawfulness in terms of international law, the absence of flaws in the manifestation of will, the requirement that the expression of will be known and the production of effects at the international level. Once those conditions had been identified and decided in detail, it would be easier to lay down appropriate rules governing invalidity.³

6. Moreover, one member of the Commission drew attention to the link with a possible provision on revocation, since “if unilateral acts could be revoked, it was in the interests of the State to use that method rather than invoke a cause of invalidity. The causes of invalidity should therefore essentially concern unilateral acts that were not revocable”.⁴

7. At that session, the Commission established a Working Group, which held two preliminary meetings during the first part of the session and considered some aspects of the topic, as is reflected in the report which the Commission submitted to the General Assembly at its fifty-fifth session; however, the Working Group was unable to take up the topic relating to invalidity of unilateral acts as had been envisaged.⁵

8. In the Sixth Committee of the General Assembly, various representatives made general comments on the topic, stressing, in particular, that its codification and progressive development might promote the stability of international relations.⁶ It was also stressed that although

³ Working Group on unilateral acts of States, working paper ILC(LII)/WG/UA/WP.1 (31 July 2000).

⁴ *Yearbook ... 2000* (see footnote 1 above), 2630th meeting (Mr. Economides), p. 141, para. 16.

⁵ *Yearbook ... 2000*, vol. II (Part Two), pp. 99–100, paras. 620–622.

⁶ *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 22nd meeting (A/C.6/55/SR.22), the Netherlands, para. 25.

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¹ *Yearbook ... 2000*, vol. I, pp. 96–100, 125–145 and 167–171.

² *Ibid.*, vol. II (Part One), document A/CN.4/505, p. 247.

“State practice and jurisprudence ... were very poorly developed ... the topic was extremely important and the Commission must pay particular heed to it”.⁷ Similarly, it was observed that “despite the diversity and complexity of the topic”,⁸ the matter was “an eminently fit subject for study”.⁹ Other representatives, however, expressed doubts on the topic.¹⁰ Nevertheless, in the opinion of the Special Rapporteur, as Fiedler points out:

Unilateral acts give rise to the possibility of developing international law, particularly regional international law, or of preventing or limiting the formation of new customary international law (Protest). Through a corresponding State practice it is also possible for unilateral acts to change the interpretation of existing international treaties and in this way to influence and supplement international law. For these reasons unilateral acts have a considerable impact on the formation of new law.¹¹

9. In the present report the Special Rapporteur, taking into account the comments made by members of the Commission and by the representatives of States in the Sixth Committee, proposes to take up various issues, some of a general nature which follow on from the first report submitted on the topic, which, as will be recalled, offered an introduction and a delimitation of the topic;¹² and others which constitute a continuation of the third report,¹³ which introduced various draft articles and commentaries thereto on issues in respect of which, in the view of the Special Rapporteur, common rules may be formulated.

10. With regard to the general aspects of the topic, first, an issue will be taken up which is considered fundamental to the study and development of the topic: the classification of unilateral acts, an exercise which must precede the formulation of common rules for the various categories of unilateral acts, in view of the diversity of such acts; to this end, some of the doctrine, and the comments of the members of the Commission and some Governments, particularly in their replies to the questionnaire which the Commission drew up in 1999, had been taken into account.

11. The Special Rapporteur believes that it is essential to group material unilateral acts in categories to which common rules may be applied. There is no doubt, and it has been apparent, that from the material point of view, unilateral acts are diverse, particularly as regards their legal effects. Although excellent works may be found in the doctrine which facilitate the study of material unilateral acts, it is clear that not all authors consider them from the same point of view, or reach the same conclusions, and this does not facilitate the study undertaken by the Commission.

12. In considering the various material unilateral acts, it may be noted that there are similarities, particularly in respect of their formulation. On the other hand, it may also

be noted that there are significant differences, particularly in respect of their legal effects.

13. Furthermore, a unilateral act of a State, in the sense with which this study is concerned, may be defined in various ways, as will be seen later, and this further complicates the consideration of the topic and any work of codification and progressive development.

14. In chapter I of this report, the Special Rapporteur will attempt to establish an appropriate classification of unilateral acts in order to form the basis for grouping the rules applicable to the various categories. This exercise has to be preceded by the determination of valid criteria on which this classification would be based, and for this purpose, some consideration will have to be given to material unilateral acts in terms of both their content and their legal effects.

15. In chapter II, specific consideration will be given to an important aspect of legal acts in general: the interpretation of unilateral acts, an issue which needs to be analysed in depth in order to determine whether the rules of the 1969 Vienna Convention on the Law of Treaties are applicable *mutatis mutandis* to unilateral acts or whether they can serve only as an inspiration and a reference point for drawing up rules applicable to these acts; and, if this is the case, to what extent the Vienna rules may be taken into account, bearing in mind that unilateral acts differ in some respects from the conventional acts which are the subject of that Convention, mainly in respect of their formulation, their coming into being and the production of legal effects.

16. Furthermore, it must be determined whether the rules relating to interpretation are normally applicable to all unilateral acts regardless of their content and their legal effects or whether, instead, such rules should be drawn up on the basis of each category of these acts.

17. The Special Rapporteur will offer some draft articles concerning the interpretation of unilateral acts.

18. He will then take up the topic of the coming into being of the legal act, the production of legal effects, their materialization, and the enforceability and opposability of the act, on which some draft articles will also be offered for the Commission's consideration.

19. Lastly, the Special Rapporteur will take up in a very preliminary way a study of the causes of invalidity, an issue which was considered by the Commission and on which the Working Group referred to above was requested to carry out more detailed study and submit a new draft article.¹⁴ Some members, as noted above, felt that the consideration of this topic should be preceded by a study of the conditions of validity of such acts.

20. Although the topic of invalidity is to be taken up by the Working Group to be established this year in the Commission to consider this issue specifically, the Special Rapporteur felt that in this introductory part it would be worth making some reference to the regime of invalid-

⁷ *Ibid.*, the Libyan Arab Jamahiriya, para. 56.

⁸ *Ibid.*, 24th meeting (A/C.6/55/SR.24), Cuba, para. 72.

⁹ *Ibid.*, 19th meeting (A/C.6/55/SR.19), India, para. 45.

¹⁰ *Ibid.*, 23rd meeting (A/C.6/55/SR.23), Japan, para. 84; 19th meeting (A/C.6/55/SR.19), the United Kingdom, para. 24, and Germany, para. 67.

¹¹ Fiedler, “Unilateral acts in international law”, p. 522.

¹² *Yearbook ... 1998*, vol. II (Part One), p. 319, document A/CN.4/486.

¹³ See footnote 2 above.

¹⁴ At its 2633rd meeting, on 7 June 2000, the Commission decided that the Working Group on unilateral acts would continue the study of draft article 5 submitted by the Special Rapporteur (*Yearbook ... 2000* (see footnote 1 above), p. 168, paras. 46–47).

ity in international law and its application in the context of unilateral acts and also to the possibility of drawing up specific rules concerning the conditions of validity, which in his view may facilitate the work and deliberations of the Working Group.¹⁵

21. After that, consideration will be given to some acts and conduct of the State which, while they may be unilateral in a formal sense, merit closer study in order to determine whether or not they fall within the context of the unilateral acts which are of concern.

22. At the most recent session of the Commission some members¹⁶ stressed the importance of silence and the need for further study of that issue and its relationship to the unilateral acts with which the Commission is now concerned; this matter is of interest, so that a further brief reference is justified at this stage of the study of the topic.

23. Silence has very special relevance in the context of treaty law, not only because of the effects it may produce in this sphere or in the context of these relations, but also in relation to some particular issues, for example in relation to reservations, as observed in article 20, paragraph 5, of the 1969 Vienna Convention which includes, in principle, the criterion of acceptance of a reservation in the absence of any objection within a fixed time limit.

24. Silence also has a close relationship with unilateral acts, as in the case of recognition and protest, but it should be distinguished from the legal act as such, in the strict sense which is of interest to the Commission.

25. Unquestionably, silence is a mode of expression of the will of a State which may produce significant legal effects¹⁷ even though its meaning may be undetermined.¹⁸ It has been expressly and carefully considered in the doctrine and has been examined in case law, particularly by ICJ, in cases such as those concerning *Fisheries*,¹⁹ the *Right of Passage over Indian Territory*,²⁰ the *Temple of Preah Vihear*,²¹ *Military and Paramilitary Activities*

*in and against Nicaragua*²² and the *Land, Island and Maritime Frontier Dispute*,²³ among others.²⁴

26. As noted previously, silence cannot be considered an autonomous manifestation of will, since it is a reaction. Silence or inaction must be perceived in relation to a pre-existing or contemporaneous attitude on the part of another subject.²⁵ Furthermore, silence is not the mere fact of not expressing oneself, but rather the absence of a reaction to the conduct or position of the other party.²⁶

27. A legal act is a manifestation of will, and, although silence also is undoubtedly a form of manifestation of will linked to prior knowledge,²⁷ it is not a legal act in the sense being dealt with here. In some legal systems, silence is not considered a legal act, though it is considered a manifestation of will.²⁸

28. Silence and acquiescence are closely related. Acquiescence, as MacGibbon says, "takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection".²⁹ It is interesting to note, with respect to the legal effects of silence, that if, by protest, a State attempts to block the claims of another State, silence may give rise to an obligation to desist from claiming a right or from contesting the legality of an existing situation, especially if a pre-existing rule attaches such a meaning to silence.

29. Acquiescence may be manifested actively, tacitly or both actively and tacitly. In the case concerning the arbitral award made by the King of Spain in 1906, ICJ concluded that Nicaragua had no grounds for asserting the nullity of the award, not only because of its positive acts of acquiescence, but also because it had taken no objection before the King of Spain to his

¹⁵ *Yearbook ... 2000* (see footnote 5 above), p. 97, para. 586. Some members, speaking generally on draft article 5, "stressed its relationship with a necessary provision on the conditions of validity of the unilateral act, which had not yet been formulated. A study on the conditions determining the validity of unilateral acts, it was said, would call for an examination of the possible material content of the act, its lawfulness in terms of international law, the absence of flaws in the manifestation of will, the requirement that the expression of will be known and the production of effects at the international level. Once those conditions had been identified and decided in detail, it would be easier to lay down appropriate rules governing invalidity".

¹⁶ *Ibid.*, pp. 96–97, paras. 584–585.

¹⁷ Rodríguez Carrión, *Lecciones de derecho internacional público*, p. 172.

¹⁸ Statement by Spain at the United Nations Vienna Conference on the Law of Treaties, quoted in Kohen, *Possession contestée et souveraineté territoriale*, p. 293.

¹⁹ *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116.

²⁰ *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6.

²¹ *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6.

²² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14.

²³ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 351.

²⁴ Noteworthy among the cases considered by ICJ are *Fisheries* (see footnote 19 above), p. 138, and *Temple of Preah Vihear* (see footnote 21 above).

²⁵ Kohen, *op. cit.*, p. 293.

²⁶ *Ibid.*

²⁷ The case law of ICJ appears to consider silence on the basis of the voluntaristic approach; that is, considering the precondition of knowledge, as in the *Fisheries* case (see footnote 19 above), pp. 138–139; see Johnson, "Acquisitive prescription in international law", p. 347.

²⁸ For example, the legal formula *qui tacet, consentire videtur* in canon law is not reflected in French law, in which "silence says nothing, precisely because it is silence ... it is the absence of any declaration, even a rudimentary one; it renders impenetrable the will of the silent party and even raises doubts as to whether the latter harbours the will to take a decision" (Bentz, "Le silence comme manifestation de volonté en droit international public", p. 46). It should also be noted that the formula "he who says nothing consents" is not a legal principle applicable in all circumstances in which a subject refrains from reacting to the conduct of another. Moreover, it is not a complete translation of the adage "*qui tacet consentire videtur si loqui debuisset ac potuisset*", referred to by ICJ in the *Temple of Preah Vihear* case (see footnote 21 above), p. 23, quoted by Kohen, *op. cit.*, p. 293.

²⁹ MacGibbon, "The scope of acquiescence in international law", p. 143.

proceeding with the arbitration.³⁰ The conduct of the State was also considered in the *Temple of Preah Vihear* case, in which the Court considered the conduct of the Siamese authorities and concluded that their failure to react constituted acquiescence.³¹ In the *Minquiers and Ecrehos* case, the Court recognized the United Kingdom's sovereignty over the Minquiers, not only on the basis of acts which indicated a certain recognition of that sovereignty on the part of France, but also because France had not formulated reservations to a diplomatic note that included those islands.³² Lastly, there is the *Island of Palmas* case, in which the absence of protest, according to the sole arbitrator Max Huber, was tantamount to acquiescence,³³ as in the *Fisheries*³⁴ case.

30. Silence can be a means of accepting or recognizing a legal claim or an existing situation, but this form of inaction or reaction can hardly be a means of effecting a promise. Lack of protest—that is, silence—can be decisive in legitimizing a given situation or legal claim, although it is clear that silence in itself does not signify any recognition whatsoever; the formulation of a protest is necessary only when, depending on the situation in question, a State may be expected to take a position.³⁵

31. In conclusion, silence has an unquestionable legal relevance, as a form of conduct, in relations between subjects of international law, but this does not mean that it can be defined as a legal act in the sense being dealt with by the Commission; that is, as an express manifestation of independent will intended to produce legal effects in relation to third States which did not participate in its elaboration.

32. It has also been noted that continued consideration should be given to estoppel, which has already been commented upon in previous reports, and its relation to the study of unilateral acts. Comments on this relation will be made as appropriate because, while it is true that these are different matters, the acts which give rise to estoppel are unilateral in form and may sometimes be confused with the unilateral acts referred to in the study undertaken by the Commission, especially in view of

³⁰ *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 209.

³¹ *I.C.J. Reports 1962* (see footnote 21 above), pp. 25 and 27. In addition, the Court considered various positive acts in forming its opinion on acquiescence. See also the cases of *Lübeck v. Mecklenburg-Schwerin*, *Annual Digest of Public International Law Cases*, 1925–1926, p. 114; the border between Venezuela and Colombia, UNRIIAA, vol. I (Sales No. 1948.V.2), p. 280; *Island of Palmas* (Netherlands/United States of America), award of 4 April 1928, *ibid.*, vol. II (Sales No. 1949.V.1), p. 868; *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, *ibid.*, vol. XVIII (Sales No. E/F.80.V.7), p. 415; *Fisheries* (footnote 19 above), p. 139; *Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, pp. 47 *et seq.*; *Right of Passage over Indian Territory* (see footnote 20 above); and *Military and Paramilitary Activities in and against Nicaragua* (footnote 22 above), pp. 408–410.

³² *I.C.J. Reports 1953* (see footnote 31 above), p. 71.

³³ *Island of Palmas* (see footnote 31 above).

³⁴ *Fisheries* (see footnote 19 above), p. 139.

³⁵ Reference to the arbitral award by Max Huber of 4 April 1928 in the *Island of Palmas* case (see footnote 31 above). *American Journal of International Law*, vol. 22 (1928), p. 880. Quoted in Verdross, *Derecho internacional público*, p. 103.

the fact that the author State could be obligated, by such an act, to adopt a given conduct.

33. Lastly, it seems appropriate, in this introduction, to refer briefly to interpretative declarations and to unilateral acts related to international responsibility, particularly unilateral acts related to the adoption of countermeasures by an injured State or States, in accordance with the draft articles currently being finalized by the Commission.

34. From a formal standpoint, interpretative declarations are unquestionably unilateral acts, whereby the author State or States purport to specify or clarify the meaning or scope which they attribute to a treaty or to certain of its provisions, as reflected in draft guideline 1.2 considered by the Commission in 2000.³⁶ Unilateral interpretative declarations are generally made within the framework of treaty relations. An interpretative declaration “operates within a legal mechanism which is dominated by a structure of relations based on consensus. It is precisely because of all this that an interpretative declaration which is accepted can give rise to an actual legal agreement between the contracting party making the declaration and the contracting party accepting it”.³⁷

35. While interpretative declarations, in the broad sense, must be made in the framework of treaty relations, since they are linked to a pre-existing text or agreement, interpretative declarations whereby the author State, or States, undertake unilateral commitments “going beyond those imposed on it by the treaty” and which, according to the Commission's definition, are “outside the scope of the ... Guide to Practice”³⁸ may be categorized as unilateral acts within the meaning being dealt with by the Commission. If an interpretative declaration formulated by a State with respect to a treaty or one of its provisions includes commitments that go beyond those provided for in the treaty, then that declaration reflects a material independence which excludes it from the treaty relation, despite the relationship it may have to the text of the treaty, which clearly establishes a bilateral relation with another State or other States. In particular, such declarations, in the view of the Special Rapporteur, would be subject to a legal regime other than that of the 1969 Vienna Convention; that is, to the particular regime concerning unilateral acts. These are, in sum, non-dependent unilateral acts which produce effects by themselves in relation to one or more States which did not take part in their formulation.

36. Also in the context of the international responsibility of States, it is possible to observe acts and conduct of States, which are unilateral in form, and these will be considered below with a view to determining their relationship to the unilateral acts of States being dealt with here; this issue was raised previously by the Special Rapporteur in his third report.³⁹

³⁶ *Yearbook ... 2000* (see footnote 5 above), p. 107.

³⁷ Sapienza, “Les déclarations interprétatives unilatérales et l'interprétation des traités”, p. 621.

³⁸ Guideline 1.4.1 (see footnote 36 above).

³⁹ See footnote 2 above.

37. First, in this context, there are acts or conduct, which are not always active, whereby a State breaches an international obligation to another State or to the international community as a whole. Such acts, action or inaction are clearly unilateral acts from a formal standpoint, but are not necessarily legal acts according to the definition of such acts *sensu lato*, which is based on the manifestation of will expressed with the intention of producing specific legal effects.

38. Limiting the scope of the definition of the unilateral acts being dealt with here is, in the view of the Special Rapporteur, essential. The unilateral acts being discussed by the Commission must be considered in a restrictive way. The draft should be limited in scope to acts expressly formulated with the specific intention of producing legal effects in a non-dependent manner on the international plane; this largely reflects the definition of classic material unilateral acts, although the diversity of such acts and the difficulty of characterizing them cannot be ignored. This limitation will undoubtedly facilitate the consideration of the topic and will avoid confusion among the regimes which could at some point be applied to these acts. The concept of a unilateral legal act must be limited to the definition of a legal act in the general sense, although it may be agreed that this is not the only conduct of a State which has legal consequences on the international plane. An offence, a quasi-contract or a simple act may also have such consequences. There is no doubt that “[w]hile such conduct leads only to the *application of an existing norm*, a legal act gives rise to a *new norm*”.⁴⁰

39. In the context of the international responsibility of States, it may be observed that countermeasures, which are in themselves wrongful acts, are permitted under international law as a means of responding to the breach of an international obligation and bringing about the cessation or reparation of the breach. As reflected in the draft articles on State responsibility which the Commission is considering at the fifty-third session, particularly draft articles 23 and 50–55, a State may take countermeasures against another State which is allegedly responsible for an internationally wrongful act “in order to induce that State to comply with its obligations”.⁴¹ The overall logic of countermeasures, as noted by Combacau and Sur, “is part of the dialectic of unilateral acts and conduct”.⁴² Without attempting to provide a definitive answer, as the Commission is still considering the issue, it is interesting to try to determine whether such acts should be viewed in the context of treaty relations and should therefore be subject to the existing regime set forth in the 1969 and 1986 Vienna Conventions, or whether they may be deemed to take place outside that context and may therefore be subject to the rules relating to unilateral acts in the strict sense.

40. A State may take various types of countermeasures: acts, actions and conduct constituting unilateral measures which are not necessarily legal measures.

⁴⁰ Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public*, p. 8.

⁴¹ *Yearbook ... 2001*, vol. II (Part Two), p. 30, art. 49, para. 1.

⁴² Combacau and Sur, *Droit international public*, p. 213.

41. A unilateral act in the form of a countermeasure may be a conventional act despite its unquestionably unilateral character, as in the case of the denunciation or suspension of a treaty by a State which considers that another State has breached its international commitments thereunder. Likewise, the allegedly injured State may adopt a regime or a domestic law applicable to its relations with the State which allegedly has failed to meet its obligations towards the first-mentioned State, as in the case, for example, of Nicaragua's adoption of domestic regulations, in particular Law No. 325 of 7 December 1999, imposing taxes on goods and services proceeding or originating from Honduras or Colombia.⁴³ This, in effect, is a domestic legal act, unilateral in form, which, by itself, has produced legal effects on the international plane, and whose duration will depend on the subsequent attitude of Honduras in relation to the Treaty concerning maritime delimitation between the Republic of Colombia and the Republic of Honduras,⁴⁴ signed on 2 August 1986 and in force since 1999. This act, while it is unilateral and autonomous in the sense that it produces effects by itself on the international plane, would not be categorized as a unilateral act in the strict sense because, in the view of the Special Rapporteur, it does not constitute the express manifestation of will that must characterize unilateral acts in the sense being dealt with here, as has been noted on several occasions.

42. By their very nature, unilateral acts whereby a State applies countermeasures against another State must be excluded from the scope of the study of unilateral acts. Such acts, which are unilateral from a formal standpoint and are sometimes legal acts—when they are not actions or other conduct—are necessarily linked to a pre-existing commitment; in other words, to the prior agreement which the latter State is alleged to have breached. It should be emphasized that this is

a rule which arises as a result of the violation of a primary rule: when a State breaches an international obligation, it must know that it thereby empowers another State to react by taking a measure which would, in other circumstances, be prohibited under international law, but of which the wrongfulness is precluded by the fact that the measure has been taken in response to an act which is itself contrary to international law”.⁴⁵

⁴³ In November 1999, Nicaragua requested the Central American Court of Justice to

“(a) declare that the adoption and ratification of the Maritime Delimitation Treaty by Honduras and the State of Colombia would breach the legal instruments governing regional integration; (b) determine the international responsibility of the Republic of Honduras and the reparation which it would have to make to the Republic of Nicaragua and the Central American institutional system; (c) immediately take provisional measures against the State of Honduras, urging it to refrain from adopting and/or ratifying the aforesaid Maritime Delimitation Treaty ... until the sovereign interests of the State of Nicaragua in relation to its maritime areas, the patrimonial interests of Central America and the highest interests of Central America's regional institutions have been safeguarded”.

(*Memorial Doctrinario de la Corte Centroamericana de Justicia*)

The Court, for its part, found that Nicaragua's application was admissible and, to safeguard the rights of the parties, ordered as a provisional measure that “Honduras should suspend the ratification procedure and subsequent procedures for the entry into force of the Maritime Delimitation Treaty ... signed on 2 August 1986”.

⁴⁴ United Nations, *Treaty Series*, vol. 2093, No. 36360, p. 295.

⁴⁵ Weil, “Le droit international en quête de son identité: cours général de droit international public”, p. 359.

In conclusion, such acts cannot be considered as independent and, therefore, they must be placed outside the context of treaty relations.⁴⁶

⁴⁶ It is important to stress, however, that responsibility entails new legal relations, as indicated in the general commentary on responsibility of States for internationally wrongful acts (*Yearbook ... 2001* (see footnote 41 above), pp 31–32); this could make it appear that the acts in question are autonomous or independent acts.

43. While it may be considered that interpretative declarations which go beyond the terms of a treaty may be included among the unilateral acts being dealt with here, silence and unilateral acts involving countermeasures must be placed outside this context, first because they are reactions, which means that they do not have the necessary autonomy, and secondly because they are not acts expressly formulated with the intention of producing specific legal effects.

CHAPTER I

Classification of unilateral acts

44. Clearly, as has already been noted, it is possible to establish common rules for unilateral acts in the sense understood by the Commission, which is reflected in draft article 1 (para. 3 above). These common rules include those governing the formulation of such acts; formal aspects, such as their definition and the capacity of States and their representatives; and general conditions for validity and causes of invalidity, which are elements common to all legal acts, whatever their nature; in other words, both conventional and unilateral acts.

45. But it is also clear, and has been stressed in the Commission, that it is not always possible to establish common rules applicable to all unilateral acts if the conclusion is that there is, in fact, significant diversity among these acts. As is normally recognized in the doctrine,⁴⁷ while unilateral acts have or may have great similarities, particularly from the point of view of form, they also have significant differences in their content and legal effects, as may be deduced from a study of classic material unilateral acts such as promise, recognition and waiver.

46. In the Sixth Committee, some members were in agreement that the draft articles should be organized around the distinction between general rules applicable to all unilateral acts and specific rules applicable to individual categories of such acts,⁴⁸ as had been suggested in the Commission by some members and by the Special Rapporteur himself.

47. There is no doubt that the formal element is common to all acts: a single manifestation of will, express in nature, whether individual or collective in origin, which produces effects by itself. This is a category of acts of a legal nature which are formulated by one or various subjects, which come into being and may produce effects as from that moment, and which generate legal effects independently of the acceptance or subsequent action of another State; this is clearly reflected in draft article 1 on the definition of

such acts, which the Commission has considered and on which there appears to be general agreement.

48. The emphasis on the form of the act suggests that it is possible to develop common rules applicable to all of them, regardless of their material aspect; the draft articles on the formulation of acts represent an attempt to achieve that goal. However, given the variety of material unilateral acts and the impossibility of establishing rules common to all of them, an attempt must be made to classify them in order to group the rules applicable to each of these categories or groups of acts if the work is to move forward.

49. Before beginning this exercise, which, as will be seen, requires reference, however brief, to the various material unilateral acts, criteria must first be established on which to base any grouping of the unilateral acts which are of concern: unilateral legal acts in the strict sense of the term.⁴⁹ This excludes conduct and attitudes which, although of unquestionable relevance under international law, should be removed from consideration; among these are silence as a manifestation of will and attitudes and actions which, although they may produce legal effects, do not fall into the category of acts that are of concern—for example, implicit, conclusive acts of recognition or waiver or other *de facto* acts such as occupation, which is of historical importance.

50. As has been said, the doctrine on the various aspects of the topic of unilateral acts of States, and particularly the classification thereof, is not only rich and abundant, but also diverse. Some authors offer highly interesting points of view and group together both unilateral acts in general and material unilateral acts on the basis of various criteria, some of which may be useful in the effort to establish a valid system of classification and which deserve specific mention in this report in order to facilitate the study of the topic, particularly outside the Commission. As indicated below, some authors rightly point out that the doctrine generally mentions recognition, protest, waiver and notification, a list which confuses form with content or substance with procedure.⁵⁰

⁴⁷ In this respect, Combacau and Sur (*op. cit.*, p. 92) point out that although unilateral acts are not mentioned in Article 38 of the ICJ Statute, they are as numerous as they are varied and their importance is considerable.

⁴⁸ See *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 20th meeting, Argentina (A/C.6/55/SR.20), para. 58; *ibid.*, 24th meeting, Cuba (A/C.6/55/SR.24), para. 73; *ibid.*, 23rd meeting, Romania (A/C.6/55/SR.23), para. 75; and *ibid.*, 18th meeting, France (A/C.6/55/SR.18), para. 119.

⁴⁹ Pastor Ridruejo, speaking in reference to unilateral conduct by a State, rightly notes that “the generic term unilateral conduct by a State covers three distinct possibilities: the first is that of unilateral acts in the strictest sense” (*Curso de derecho internacional público y organizaciones internacionales*, p. 168).

⁵⁰ Combacau and Sur, *op. cit.*, p. 94.

51. Some of the classic authors have addressed this issue and have arrived at interesting and useful conclusions. Pflüger, Biscottini and Venturini offer general classifications which, while important from the point of view of doctrine, are not fully applicable to the Commission's work, with its focus on the codification and progressive development of norms that can regulate the functioning of a specific category of legal acts.

52. Pflüger distinguishes between formal and non-formal acts; it is the second group which is of interest because their completion does not require any specific form. Thus, if this classification is accepted, a purely unilateral act would be an informal act. Pflüger also refers to conditional, revocable, non-conditional and non-revocable unilateral acts and to autonomous and dependent unilateral acts, the first of which correspond to the so-called "purely unilateral" acts.⁵¹

53. Venturini's study of unilateral acts⁵² deals with attitudes and conduct of States which may produce legal effects at the international level. With respect to unilateral acts as such, he affirms there is no doubt that the varied nature and legal basis of unilateral acts calls for a classification and reconstruction of the various types of acts in order to describe their effects. In his analysis, he rejects classifications which, in his view, have no relevance in the context of his study and makes a distinction between *negozi giuridici* (legal transactions) and acts *sensu stricto*; he also maintains that the distinction between autonomous acts and those which are dependent on other acts should be considered on the basis of general principles, and that from the point of view of effects, it would seem possible to study the voluntary unilateral acts of States by dividing them into three groups: (a) manifestations of will (*negozi giuridici*); (b) declarations other than manifestations of will; and (c) voluntary actions.

54. In the context of acts involving a manifestation of will, Venturini refers to promise and waiver, revocation, denunciation and declaration of war⁵³—in other words, a classification based on the material criterion or on the content of the act. The reference to revocation is interesting and suggests the need to consider the act as such. As shall be seen below, a distinction must be made between the revocation of a unilateral act and the classification of such an act according to whether it constitutes a dependent unilateral act, in other words, whether it falls into the category of unilateral acts or the sphere of treaty relations, which will determine the applicable rules.

55. Biscottini offers a classification based on a very useful criterion, that of the legal effects under the international legal system: acts in which the will plays an independent role and acts which are linked to other factors and in which the will does not play an independent role.⁵⁴ This classification is based on a criterion similar to that used by Suy, who distinguishes between constituent, ex-

tinctive, transfer and declaratory acts⁵⁵ without reference to content or to the material element, although these are discussed at length in his work on the topic.

56. Other authors take different approaches to the issue, which reflects the difficulty of establishing valid criteria. For example, Rousseau makes a distinction between express and tacit acts; the former include acts which set a condition (notification), acts which create obligations (promise and recognition), acts which confirm rights (protest) and acts through which rights are surrendered (waiver). The second category of acts is exemplified by silence, which, in some cases, is equivalent to tacit acquiescence.⁵⁶ The most interesting aspect of this classification is the author's inclusion of acts through which obligations are assumed and those through which rights are acquired in a single category: that of express acts, including notification, which, as has been mentioned, is not a legal act as such. As Combacau and Sur have noted, notification is a written procedure, the formal aspect of an act, which ensures publicity to the third parties concerned of an instrument that may have any type of content, including recognition.⁵⁷

57. Other authors are in favour of similar criteria. Remiro Brotóns classifies acts on the basis of their purpose, such as recognition, waiver or promise;⁵⁸ Daillier and Pellet agree, observing that a material classification is the most useful and adding that, generally speaking, the main categories are: notification, recognition, protest, waiver and promise.⁵⁹

58. Verdross, relying on the material criterion or the content of the act rather than on its effects, classifies acts into independent unilateral legal transactions (notification, recognition, protest, waiver and promise); dependent international legal transactions (offer and acceptance, reservation and submission to the jurisdiction of ICJ); and, lastly, legal transactions associated with specific combined situations (occupation, dereliction and *negotiorum gestio*).⁶⁰

59. Some authors propose more general, but no less interesting, systems of classification. Skubiszewski, for example, distinguishes between the act as instrument (declaration and notification) and the act viewed from the point of view of its content and effects (recognition, protest, promise and waiver),⁶¹ although his actual focus is on material classification.

60. Dupuy, using the criterion of effects, observes that such acts, of which there are various types, are generally considered from the point of view of their effects, which are quite varied. In particular, they may be differentiated according to whether they involve the opposability of a

⁵⁵ Suy, *Les actes juridiques unilatéraux en droit international public*, p. 42.

⁵⁶ Rousseau, *Droit international public*, p. 420.

⁵⁷ *Op. cit.*, p. 94.

⁵⁸ Remiro Brotóns, *Derecho internacional*, p. 175.

⁵⁹ Daillier and Pellet, *Droit international public*, pp. 358–359.

⁶⁰ Verdross, *op. cit.*, pp. 103–104.

⁶¹ Skubiszewski, "Unilateral acts of States", p. 224.

⁵¹ Pflüger, *Die einseitigen Rechtsgeschäfte im Völkerrecht*, pp. 64–65.

⁵² Venturini, "La portée et les effets juridiques des attitudes et des actes unilatéraux des États", pp. 407 *et seq.*

⁵³ *Ibid.*, pp. 414 *et seq.*

⁵⁴ Biscottini, *Contributo alla teoria degli atti unilaterali nel diritto internazionale*, pp. 18–24.

legal situation, the exercise of sovereign rights or the creation of legal commitments.⁶²

61. Other authors also use legal effects as a criterion; for example, Jacqué distinguishes between acts which create obligations for their author, those through which a State waives a right and those through which a State confirms the existence of its rights.⁶³ In all three groups, he refers to two categories of acts: those through which obligations are assumed and those through which rights or legal positions are confirmed. Acts through which an author State renounces a right may fall into the first group if the criterion of legal effects is considered to be valid; thus Rigaldies distinguishes between unilateral legal acts which may create rights for third parties and obligations for their author and those which may create obligations for third parties. The first are “strictly” unilateral; their autonomy is not in dispute. The second are “dependent” on other acts (cited in Venturini, *loc. cit.*).⁶⁴

62. Valid criteria for a system of classification cannot be established on the basis of doctrine alone. The views of Governments are also of great importance in this regard. Their replies to the questionnaire prepared by the Commission in 1999 and their statements in the Sixth Committee also demonstrate the variety of criteria on which a classification of unilateral acts could be based.

63. Italy, replying to the questionnaire prepared by the Commission in 1999, stated that there are three categories of unilateral act:

(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).⁶⁵

64. Argentina stated that:

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.⁶⁶

65. El Salvador mentions, without attempting to classify them, the acts it considers most important: notification, recognition, protest, waiver, unilateral promise, declaration, appeal and resolution; Georgia, following the material criterion, considers declaration, proclama-

tion and notification to be the main types of unilateral acts.⁶⁷

66. The Netherlands, however, considers material classification unimportant and states that:

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.⁶⁸

67. While it may turn out to be strictly an academic exercise, classification of the unilateral acts which are of concern has a highly relevant practical importance in this case, since it would be the basis on which groups of rules applicable to the various categories would be established.

68. The doctrine and the views of Governments on classification that have been examined demonstrate that although the criteria may vary, for the most part agreement exists on the most important material unilateral acts which are considered classic. They will need to be referred to at least briefly in order to attempt to identify the similarities and differences among them for the purpose of grouping them into specific categories.

69. Various problems arise when basing a classification on material acts, in the first place because it cannot be stated that there are no unilateral acts in existence other than the so-called “classic” unilateral acts. In addition to the acts already mentioned in the proposed classifications, some authors speak of other acts they consider unilateral, for example, Fiedler, who says that “[a] special place is held among the various types of unilateral acts by those practices ... Included among these are, for example, recognition, protest, renunciation, notification and, at times, acquiescence and revocation”. He adds that “[o]n the other hand, it is considerably more difficult to classify those unilateral acts called declarations, assurances, promises, *promesses unilaterales de garantie* or *promesse-confirmer* or some other name. The great number of terms which have been used or suggested for use in this field have been a hindrance rather than a help towards finding a satisfactory typology”.⁶⁹

70. In effect, the possibility cannot be dismissed that there are other unilateral acts in existence which differ from the so-called “classic” acts which engage the attention of international doctrine, like those already mentioned: protest, waiver, recognition, and unilateral promise, among others. And, at the same time, it does not appear to be easy to define a unilateral act of a State and describe it as a specific type of material act since the same act can be defined in different ways, as shall be seen later.

71. The diversity referred to earlier makes it impossible to draw up a restrictive list of unilateral acts from a material point of view, and this greatly complicates the grouping of rules. In addition to the classic acts already mentioned, there are unilateral declarations of neutrality

⁶² Dupuy, *Droit international public*, p. 267.

⁶³ Jacqué, *op. cit.*, p. 336.

⁶⁴ Rigaldies, “Contribution à l’étude de l’acte juridique unilatéral en droit international public”, p. 425.

⁶⁵ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/511, p. 267, General comments, reply of Italy.

⁶⁶ *Ibid.*, p. 275, question 4, reply of Argentina.

⁶⁷ *Ibid.*, p. 275, replies of El Salvador and Georgia.

⁶⁸ *Ibid.*, p. 276, reply of the Netherlands.

⁶⁹ Fiedler, *op. cit.*, p. 518.

and of war and negative security guarantees in the context of nuclear disarmament, and although they are different, they may resemble such classic acts as promise or waiver in the first case, recognition or promise in the second, and promise or waiver in the third.

72. Definition is also an important question that must be considered in order to be able to make a classification on the basis of a criterion other than the material criterion. For example, international doctrine and case law generally define the Ihlen declaration as an international promise,⁷⁰ although it could also be considered a recognition or a waiver if the content is examined in the context of its definitions. Thus, for example, the Special Rapporteur notes a reference to an act containing a promise when the Government of Norway, in its counter-case, said that Mr. Ihlen clearly never wished to promise the agreement of the Norwegian Government to that policy of exclusion.⁷¹ PCIJ took the same view in noting that by the Ihlen declaration, the Government of Norway would not oppose the Danish claims, making a promise not to “make any difficulties”, even though the legal effects of the declaration arose within the treaty relationship. But this declaration can also be considered a recognition. Through the Ihlen declaration, Norway acknowledged the existence of a fact with legal effect and declared its willingness to consider the acknowledged legal situation as legitimate, which appears to be reflected in the PCIJ decision of 5 April 1933 where it states that:

If that was the view which the Danish Government held before, during and at the close of these applications to the Powers, its action in approaching them in the way it did must certainly have been intended to ensure that those Powers should accept the point of view maintained by the Danish Government, namely, that sovereignty already existed over all Greenland, and not to persuade them to agree that a part of Greenland not previously under Danish sovereignty should now be brought thereunder. Their object was to ensure that those Powers would not attempt themselves to take possession of any non-colonized part of Greenland. The method of achieving this object was to get the Powers to recognize an existing state of fact.⁷²

73. The Ihlen declaration has also been examined in the doctrine. Kohen, when he examines forms of State conduct, in particular unilateral declarations whereby the State expresses its formal consent to a situation or a legal thesis, says that the prime example of this type of unilateral formal consent was the Ihlen declaration. PCIJ did not follow the Danish interpretation, whereby Mr. Ihlen’s reply constituted a recognition of Danish sovereignty.⁷³ In a major part of the doctrine, the Ihlen declaration is seen as an act of recognition. Carreau, for example, says that the formal recognition by Norway of Danish claims on Greenland subsequently made it impossible to review this unilateral act and to deny its legal consequences.⁷⁴ But, in addition to being an act of recognition, through this unilateral declaration, Norway

committed itself not to make any difficulties or to make any future claims, which meets the definition of a promise as a classic material unilateral act.

74. Furthermore, a declaration of neutrality, which is undoubtedly a unilateral act from a formal point of view and may be a unilateral act in the sense which is of concern,⁷⁵ is similar to a promise, that is to say, an act by which the State formulating it assumes the obligation to adopt a certain conduct in the future.

75. In the case of the Austrian declaration of neutrality, which some regard as unilateral, others as conventional,⁷⁶ and which is contained in the Constitution of 1955, it may be noted that in the Memorandum on the Results of Negotiations between Government Delegations of Austria and the Soviet Union of 15 April 1955 signed by the delegations of Austria and the Soviet Union,⁷⁷ Austria undertook (a) to make a declaration in a form which would obligate Austria internationally to practise in perpetuity a neutrality of the type maintained by Switzerland; (b) to submit it to the Austrian Parliament for decision immediately after the ratification of the State Treaty with Austria; (c) to take all suitable steps to obtain international recognition of the declaration confirmed by the Austrian Parliament; (d) to welcome a guarantee by the four great Powers of the inviolability and integrity of the Austrian State territory; and (e) to seek to obtain such guarantee.

76. Regardless of the definition which might be given to the declaration, which is a matter of subjective interpretation, it is of interest to determine the legal effects of the unilateral act and here the Special Rapporteur shall refer in some measure to classic material unilateral acts so as to be able to identify the similarities and differences between them, once again for the purpose of attempting to develop groups of rules applicable to the two categories referred to.

⁷⁵ Not all authors agree that the declarations of neutrality which have been formulated are unilateral acts. Reuter, for example, considers that declarations of neutrality of Belgium (treaties of 1831 and 1839), Luxembourg (treaty of 1867), Switzerland (Act of 20 November 1815), Austria (1955) and Laos (1962) constitute declarations established in treaty form (*Droit international public*, p. 470).

⁷⁶ The declaration by Austria caused different reactions from States. Some accepted it by silence, others, for instance the four great Powers, did so through express acts of recognition. As for whether this declaration of neutrality constitutes a unilateral promise or a distinct legal act, the doctrine responds to this question in different ways. For Fiedler “[t]he proclamation of the perpetual neutrality of Austria by an Austrian Federal Constitutional Act of October 26, 1955 was also characterized as a unilateral promise” (*op. cit.*, p. 519). For Combacau and Sur (*op. cit.*, p. 305), some of these declarations have a unilateral character, like that of Austria, while others are conventional, like the declaration of neutrality formulated by Switzerland. The acceptance of a unilateral act is, according to Zemanek (“Unilateral legal acts revisited”, p. 212), necessary when it affects the interests of other States: “They then need acceptance or, at least, acknowledgment to achieve legal force”, referring to the note sent by the Government of Austria to the four signatories of the State Treaty for the re-establishment of an independent and democratic Austria: France, the United Kingdom, the United States and the Soviet Union, to which the Governments of those countries replied that they agreed with the position of Austria.

⁷⁷ Council on Foreign Relations, *Documents on American Foreign Relations, 1955*, P. E. Zinner, ed. (New York Harper, 1956), pp. 121–124. The question still arises as to whether this Memorandum constitutes or reflects an agreement among the parties, given the fact that it was signed by the heads of delegations.

⁷⁰ See *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 69–70. Garner considers the Ihlen declaration as a promise, although he adds that it should be considered as a constituent element of an agreement (“The international binding force of unilateral oral declarations, quoted in Suy, *op. cit.*, p. 109).

⁷¹ *Legal Status of Eastern Greenland, P.C.I.J., Series C, No. 62*, counter-case of the Government of Norway, p. 556.

⁷² *Ibid.*, *Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 61–62.

⁷³ Kohen, *op. cit.*, p. 280.

⁷⁴ Carreau, *Droit international*, p. 209.

77. Unilateral acts produce direct legal effects in relation to their addressee. However, such acts can also produce indirect legal effects, like those which contribute to the formation or confirmation of the existence of customary norms or to the formation of general principles of law.

78. All the acts mentioned, in the context which is of concern, are formulated⁷⁸ through unilateral declarations, whether of individual or collective origin, and these declarations are subject to definite forms as far as their conditions of validity are concerned; the rules apply to all of them regardless of their content or material classification. A promise, waiver, recognition, protest or any other act is formulated through a manifestation of will with the intention of producing legal effects, and it is those effects which vary. Of course, as has been stated several times, other manifestations of will separate from the legal act *sensu stricto* can produce legal effects, but they are outside the scope of the study of such acts which the Commission has undertaken.

79. Through a promise the author State assumes an obligation. The doctrine is clear in this respect, as are the references made by international courts. A promise is a unilateral declaration whereby a State undertakes to adopt certain conduct towards another State or States, without subjecting this conduct to any kind of *quid pro quo* by the beneficiary of the promise.⁷⁹ It is a unilateral legal act whereby a State commits itself to certain conduct towards others.⁸⁰

80. The study of promises in the doctrine, in contrast to other so-called “classic” material acts, is much more recent and perhaps, as Jacqu  says, quoting Quadri and Suy, it is impossible to cite cases of unilateral promises prior to the League of Nations; they were treated as conventional acts.⁸¹

81. International courts have examined the promise as a legal act in various cases, among which, in particular, since they are recent and the subject of an interesting doctrinal discussion, the Special Rapporteur may note the declarations formulated in the context of the *Nuclear Tests* case, concerning which ICJ indicated that a promise could bind its author on condition that it was given publicly and that its intention was clear; this was further developed by Judge de Castro in his dissenting opinion, when he said that “[t]here is a difference between a promise which gives rise to a moral obligation (even when reinforced by oath or word of honour) and a promise which legally binds the promiser”. The Court, moreover, specified that a promise that gave rise to a legal obligation would constitute a strictly unilateral act without any form of *quid pro quo*, acceptance, reply or reaction.⁸²

82. The legal effect of a promise is to create new rights in favour of a third party and of course, obligations for

the author State; unlike other unilateral acts, which relate to existing facts or actions, a promise (or assurance) gives rise to new rights to the benefit of third parties.⁸³

83. In the context of unilateral promises the Special Rapporteur observes unilateral declarations formulated by certain European States in relation to the protection of minorities and declarations of acceptance of the binding jurisdiction of ICJ,⁸⁴ although some consider that those declarations are not purely unilateral acts since they must take place in a treaty relationship, which seems acceptable; this matter will not be discussed now since it was examined in prior reports.

84. When speaking of acts by which the State assumes unilateral obligations, exclusive reference to promises cannot be made since the State can assume unilateral obligations through other equally unilateral acts in the sense being considered. More broadly, this category should encompass other acts whatever their material classification or content, for example waiver, recognition, declaration of neutrality or other acts by which States commit themselves unilaterally, which coincides with what was said by one representative in the Sixth Committee, who felt that while “there was merit in the suggestion that the study of specific categories of unilateral act should begin by concentrating on those acts which created obligations for the author State, ... it was questionable whether that category should be limited to promises”.⁸⁵

85. It is not only through a promise that an author State can assume unilateral obligations in relation to one or more States, in any case its addressees. A promise gives rise to unilateral obligations, although it is not the only unilateral act that creates obligations.⁸⁶ Other material acts, in fact, have a similar legal effect in the sense that through them the author State assumes such obligations as recognition or waiver.

86. By waiver, which produces the extinction of a right because it does not provide for its transfer to other subjects,⁸⁷ the State abandons a right or a claim, but at the same time assumes or undertakes an obligation. The legal effect that the unilateral act of waiver produces is expressed in the State’s obligation no longer to contest the rights that another State has acquired through the waiver.⁸⁸

87. In addition, at the risk of exceeding the scope of the topic, it should be recalled that waiver, as has been established in international case law,⁸⁹ must be express,

⁸³ Daillier and Pellet, *op. cit.*, p. 359.

⁸⁴ Ballardore Pallieri, *Diritto internazionale pubblico*, pp. 295–298, quoted in Suy, *op. cit.*, p. 110.

⁸⁵ Statement by Finland on behalf of the Nordic countries, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 19th meeting (A/C.6/55/SR.19), para. 36.

⁸⁶ Skubiszewski, *op. cit.*, p. 229.

⁸⁷ Venturini, *loc. cit.*, p. 414.

⁸⁸ Cahier, “Le comportement des États comme source de droits et d’obligations”, pp. 247–248.

⁸⁹ Cases of the “*Kronprins Gustav Adolf*” (UNRIAA, vol. II (Sales No. 1949.V.1), p. 1239) and *Certain Norwegian Loans (Judgment, I.C.J. Reports 1957, p. 9)*. Quoted in Skubiszewski, *op. cit.*, p. 229.

⁷⁸ Combacau and Sur, *op. cit.*, p. 96.

⁷⁹ Rodríguez Carrión, *op. cit.*, p. 172.

⁸⁰ Rigaldies, *op. cit.*, p. 426; and Verdross, *op. cit.*, p. 104.

⁸¹ Jacqu , *op. cit.*, p. 327.

⁸² *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 374. Cited in Rigaldies, *op. cit.*, pp. 427–428.

and consequently cannot be assumed.⁹⁰ While, as noted by the arbitral tribunal established for the Campbell case, if the possibility of a tacit waiver is allowed, it must be inferred from facts that allow no other interpretation.⁹¹ Judge Basdevant, at the PCIJ public hearing of 26 April 1932, during the consideration of the case of the *Free Zones of Upper Savoy and the District of Gex*,⁹² said that as for tacit waiver, it was a matter of principle that a right could not easily be assumed to have been renounced; in order for the idea of waiver to be accepted, unequivocal acts would have to be invoked to establish that at a time when it had the interest and practical ability effectively to claim its right of lapse, France voluntarily refrained from claiming it, and that this abstention implied an intention of waiver. Only then, in accordance with the principles of law, could waiver be established. Before 1919, however, France had never had the practical ability effectively to claim its right to lapse of the treaties of 1815 to 1816.⁹³

88. As is known, a waiver can also be embodied in a treaty; this, by its very nature, is separate from the consideration of this subject. Indeed,

If the waiver is stipulated in a treaty, it loses its unilateral character because the effect depends on the treaty's entry into force, i.e. on the will of the other contracting party or parties. Nor is waiver unilateral when it is linked to the transfer of the abandoned claim, right, competence or power to another State or States: in such case it again becomes a contractual transaction.⁹⁴

89. As for the effects of a waiver, which some authors compare with a promise or consider as a type of promise,⁹⁵ it must be borne in mind that it amounts to an act of disposal of a right, unlike a promise, which is simply the exercise of a prerogative. Consequently, it is incorrect to refer to a waiver of territorial sovereignty. The obligation to give up a territory to another sovereign State does not arise from a waiver but from a promise or the acceptance of a proposal.⁹⁶

90. Legal acts containing a waiver can be considered valid in international practice, as international courts have noted. This applies to the *Free Zones of Upper Savoy and the District of Gex* case between France and Switzerland,⁹⁷ in which France formally took the position that a waiver as a unilateral act in international law was binding on the waiving State.⁹⁸

91. A State may also undertake unilateral obligations through recognition, and such obligations may be considered autonomous or independent if that is the context in which they arise or are formulated. Recognition,

express or tacit, can also in terms of its legal effects be assimilated to acts for which the State undertakes a unilateral obligation; the Special Rapporteur is of course referring to express recognition formulated by means of a unilateral act in the strict sense being discussed. Through recognition,⁹⁹ a State accepts a *de facto* situation, a legal claim, a competence or a power¹⁰⁰ and thereby undertakes in some manner to conduct itself in a certain way. Through recognition, the author State takes note of the existence of certain facts or certain legal acts and acknowledges that they are available against it.¹⁰¹ Recognition is the procedure whereby a subject of international law, particularly a State, which was not involved in bringing about a situation or establishing a legal instrument, accepts that such situation or instrument is available against it, or in other words acknowledges the applicability to itself of the legal consequences of the situation or instrument. Recognition is a unilateral act.¹⁰²

92. As Oppenheim observes:

In a broad sense recognition involves the acceptance by a state of any fact or situation occurring in its relations with other states.

...

The grant of recognition is an act on the international plane, affecting the mutual rights and obligations of states, and their status or legal capacity in general.

...

The grant of recognition by a state is a unilateral act affecting essentially bilateral relations.¹⁰³

93. There are many examples of legal practice relating to recognition of States, Governments, State neutrality, insurgency and belligerency. Also noteworthy is the declaration made by Egypt in 1957 recognizing the validity of the 1888 Convention respecting the Free Navigation of the Suez Maritime Canal, which gave rise to diverse opinions on doctrine relating to its unilateral nature.¹⁰⁴ To focus on recent practice, the Special Rapporteur may note the guidelines issued by the European Community on 16 December 1991 relating to the recognition of new States in Eastern Europe and the former Soviet Union, in which a common position on the process of recognition of the new States was adopted. The European Community adopted a declaration concerning the former Yugoslavia, in which the Community and its member States recognized those former Yugoslav republics which satisfied certain conditions.¹⁰⁵ The recognition by Italy of Malta's

⁹⁰ "Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 17.

⁹¹ Arbitral award of 10 June 1931 (UNRIIAA, vol. II (Sales No. 1949.V.1), p. 1156; quoted in Kohen, *op. cit.*, p. 357).

⁹² *Free Zones of Upper Savoy and the District of Gex*, Judgment, 1932, P.C.I.J., Series A/B, No. 46, p. 96.

⁹³ Extract from Kiss, *Répertoire de la pratique française en matière de droit international public*, p. 644.

⁹⁴ Skubiszewski, *loc. cit.*, p. 229.

⁹⁵ Miaja de la Muela, "Los actos unilaterales en las relaciones internacionales", p. 461. Quoted in Quadri, *Diritto internazionale pubblico*, p. 575.

⁹⁶ Quadri, *op. cit.*, pp. 575–576.

⁹⁷ See footnote 92 above.

⁹⁸ Rubin, "The international legal effects of unilateral declarations", p. 14.

⁹⁹ Considered by most authors as the most important unilateral act: Skubiszewski, *op. cit.*, p. 227; Daillier and Pellet, *op. cit.*, p. 358; and Verdross and Simma, *Universelles Völkerrecht: Theorie und Praxis*, p. 427.

¹⁰⁰ Skubiszewski, *op. cit.*, p. 229.

¹⁰¹ Daillier and Pellet, *op. cit.*, p. 358.

¹⁰² *Ibid.*, p. 550.

¹⁰³ Jennings and Watts, eds., *Oppenheim's International Law*, pp. 127, 128 and 130.

¹⁰⁴ Declaration (with letter of transmittal to the Secretary-General of the United Nations) on the Suez Canal and the arrangements for its operation (Cairo, 24 April 1957), United Nations, *Treaty Series*, vol. 265, No. 3821, p. 299. It was registered with the Secretariat of the United Nations although it was not an international treaty.

¹⁰⁵ See *British Year Book of International Law*, 1991, vol. 62, pp. 559–560.

declaration of neutrality of 15 May 1981 should also be borne in mind.¹⁰⁶

94. In contrast to recognition, in the case of a protest the State does not unilaterally undertake obligations, but rather prevents the formation of a right, a title or a legal position. The author State in no way undertakes an obligation; on the contrary, it seeks to reaffirm a right by preventing another State from acquiring it.

95. A protest is a classic material act which can be effected either through a form of conduct or conclusive acts,¹⁰⁷ or through a legal act in the sense referred to by the definition contained in draft article 1 examined by the Commission during its past session. A protest is a unilateral act whereby a subject of law manifests its intention not to consider a given state of affairs as legal and intends thereby to safeguard its rights which have been violated or threatened.¹⁰⁸ The legal effect of the protest is that the contested state of affairs is no longer available against the protesting State, which can continue to enforce its own rights.¹⁰⁹ According to Oppenheim:

A protest is a formal communication from one state to another that it objects to an act performed or contemplated by the latter. A state can lodge a protest against acts which have been notified to it or which have otherwise become known. A protest principally serves the purpose of preserving rights, or of making it known that the protesting state does not acquiesce in, or does not recognise, certain acts: but it does not nullify the act complained of.¹¹⁰

96. Declarations which constitute protests are frequent in practice, and thus have been examined by interna-

¹⁰⁶ ILM, vol. 21, No. 1 (January 1982), p. 396.

¹⁰⁷ Pflüger, quoted by Suy (*op. cit.*, p. 51) mentions direct or indirect implicit conduct, express or tacit conduct and explicit or implicit conduct. Thus, he describes as implicit actions (of protest) an action before ICJ, breaking off diplomatic relations, or the declaration of war.

¹⁰⁸ Suy, *op. cit.*, p. 48.

¹⁰⁹ *Ibid.*, p. 80.

¹¹⁰ Jennings and Watts, eds., *op. cit.*, p. 1193–1194.

tional doctrine and case law. Among others, the Special Rapporteur may note the case of the *Chamizal* arbitration between the United States and Mexico,¹¹¹ that of the nationality decrees between Tunisia and Morocco,¹¹² and the *Minquiers and Ecrehos* case.¹¹³

97. Following this brief and referential consideration of certain unilateral legal acts, it may be concluded that they can be grouped into two major categories according to their legal effects; this will make it possible to structure the draft articles which are to be presented. The two categories are: acts whereby the State undertakes obligations, and acts whereby the State reaffirms a right. The first of these will be taken up in the first part of the draft articles, as a group for which common rules can be elaborated.

98. A general part relating to formulation can be common to all acts: it can be maintained, supplemented and improved; and the draft articles can be divided into three parts: a general section; a first part, relating to acts whereby the State undertakes obligations; and a second part, containing rules relating to acts whereby the State reaffirms a right or a legal position or claim.

99. The Special Rapporteur proposes, as suggested by the Commission itself and the members of the Sixth Committee, to concentrate on the first part and to deal at some future time with rules relating to the second category of acts.

100. In the case of interpretation, which is discussed below, the Special Rapporteur will provide an overview of the subject and its relevance to unilateral acts in general, and then present conclusions applicable to all acts.

¹¹¹ Decision of 15 June 1911, *American Journal of International Law* (Washington, D.C.), vol. 5, 1911, pp. 782–833.

¹¹² *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4.*

¹¹³ *I.C.J. Reports 1953* (see footnote 31 above).

CHAPTER II

Rules relating to the interpretation of unilateral acts

A. Observations of the Special Rapporteur

101. During the discussion held in the Commission at its fifty-second session in 2000, it was concluded that common rules could be elaborated relating to certain issues concerning unilateral acts, but not relating to all aspects, which led to the earlier exercise on the classification of unilateral acts on which the draft articles to be prepared by the Commission on this subject would be based. In this context the general issue of interpretation of legal acts will be reviewed, with particular reference to unilateral acts, in order to submit draft articles for consideration by the Commission. In State practice as reflected in the case law of international courts, it may often be observed that disputes arise in relation to the interpretation or application of the text of a treaty, either bilateral or multilateral, or the interpretation of a

unilateral act, whether an act that intervenes in a treaty relationship or an independent unilateral act.

102. Any attempt to elaborate specific rules of interpretation applicable to unilateral acts entails answering two questions which the Special Rapporteur sees as fundamental: first, whether the rules of interpretation of the 1969 Vienna Convention are applicable *mutatis mutandis* to unilateral acts or should be taken as a valid reference in elaborating rules in this area; and secondly, whether it is possible in any case to elaborate rules common to all unilateral acts or whether, on the contrary, there is a need for separate rules applicable to each category of unilateral act.

103. In their replies to the questionnaire prepared by the Commission, some Governments, such as those of Finland, Italy and the Netherlands, were in favour of ap-

plying by analogy to unilateral acts the rules on interpretation contained in articles 31–33 of the 1969 Vienna Convention.¹¹⁴

104. Other Governments were more cautious. Thus, Israel pointed out that:

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 on unilateral acts of States, 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.

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.¹¹⁵

105. For its part, Austria stressed that:

In the *Fisheries Jurisdiction* case,¹¹⁶ 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 remains unclear.¹¹⁷

106. In the view of Argentina:

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,¹¹⁸ when a State 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,¹¹⁹ 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 may determine its interpretation.¹²⁰

107. Through interpretation, the judge seeks to determine the intention of the State which is a party to a conventional act or the author State of a unilateral act; for that purpose, the text of the instrument or the terms of the declaration prevail over any other source. As is well known, interpretation is an effort to determine the sense of a legal rule, treaty, declaration, judicial decision, etc.¹²¹ It is a positive activity with a specific objective, which is "to ascertain the intention of the parties from a text";¹²² the latter term is not limited to conventional acts, but should be construed as also being applicable to oral and written declarations. Ultimately, it is an intellectual activity whose purpose is to determine the meaning of a legal act, define its scope and clarify any obscure or ambiguous points.¹²³

108. In order to address the question of interpretation and the applicable rules, a distinction must first be drawn between conventional acts and unilateral acts, from both the formal and material points of view,¹²⁴ since this will enable the Special Rapporteur to consider whether the Vienna rules can be transposed to the regime of unilateral acts, or to give proper consideration to these rules, based on a flexible parallel approach.

109. From the formal point of view, the fundamental difference resides in the fact that a conventional act is the result of the concerted wills of two or more subjects of international law, whereas a unilateral act is the manifestation of the will of one or more States in individual, collective or concerted form, in which other States, and in particular the addressee State, do not participate. Furthermore, from the material point of view, a unilateral act is an act which creates rules in relation to subjects of law other than its authors, whereas a conventional act—or agreement—gives rise to the creation of rules applicable to its authors.¹²⁵

110. The legal effects which a conventional act may produce reflect the will of the parties involved in its elaboration and it is in relation to this that its legal effects are produced. As Reuter points out, it can be easily understood that the nature of a conventional act is that it entails mutual undertakings between the two parties concerned,¹²⁶ whereas the nature of a unilateral act entails undertakings on the part of the author State and the acquisition of rights by the addressee State or obligations incumbent on the addressee State or States, in the

¹²⁰ *Yearbook ... 2000* (see footnote 65 above), p. 278, reply to question 7 by Argentina.

¹²¹ Basdevant, ed., *Dictionnaire de la terminologie du droit international*, pp. 346–347. Grotius writes (*De jure belli ac pacis, libri tres* (book II, chap. XVI), in *The Classics of International Law*, p. 409): "The measure of correct interpretation is the inference of intent from the most probable indications." Cf. Bernhardt, "Interpretation in international law", p. 1418.

¹²² Reuter, *Introduction to the Law of Treaties*, p. 96, para. 141.

¹²³ Rousseau, *op. cit.*, p. 241.

¹²⁴ See Charpentier, "Engagements unilatéraux et engagements conventionnels: différences et convergences".

¹²⁵ See Jacqué, *op. cit.*, p. 320.

¹²⁶ Reuter, "Principes de droit international public", p. 564.

¹¹⁴ *Yearbook ... 2000* (see footnote 65 above), p. 278, replies to question 7, Finland, Italy and the Netherlands.

¹¹⁵ *Ibid.*, p. 279, reply by Israel.

¹¹⁶ *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432.

¹¹⁷ *Yearbook ... 2000* (see footnote 65 above), p. 279, reply to question 7 by Austria.

¹¹⁸ *Nuclear Tests* (see footnote 82 above), p. 253; and *ibid.* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974*, p. 457.

¹¹⁹ See footnote 90 above.

case of acts by which the State is reaffirming a right or a legal claim.

111. The difference between the two can lead to differences of opinion over how an act should be interpreted, including aspects such as its duration, revocability and amendment, which will need to be addressed at a later stage, when attempting to draw up specific rules for each category of unilateral legal act, since here again the question will have to be examined in depth in order to ascertain whether rules common to both categories of unilateral act may be established.

112. In general, the effects of a legal act are based on the intention of the States taking part in its elaboration or formulation. With specific reference to unilateral acts, ICJ reiterated clearly in the *Nuclear Tests* case that: "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration."¹²⁷ It is important to point out at this juncture that conventional acts produce effects and impose obligations on the parties from the time of their entry into force, although prior obligations may exist as laid down in the 1969 Vienna Convention.¹²⁸ A unilateral act, however, produces effects at the time when it is formulated, in other words the act is opposable to the author State and enforceable by the addressee State from that time onward, which does not fully coincide with its coming into being, something which must be considered separately, as shall be seen below. As shall also be seen in due course, the bilateral nature of the relationship does not affect the unilateral character of an act formulated by a State with the intention of producing legal effects in relation to third States.

113. It is important to stress that, by formulating a unilateral legal act, the author State may assume a unilateral obligation, in the case of the first category of such acts. This is also possible in the case of conventional acts when a treaty, which is the product of the concerted or combined wills of the parties, contains obligations only incumbent on one State party, in other words unilateral obligations, even though from the formal point of view it remains a conventional act.

114. As a general rule, when interpreting legal acts, reference has always been made to the declared will and true will of the author State or States. International case law and doctrine have generally favoured the criterion of declared will, while also taking into consideration the true will expressed by the author State or States. The

¹²⁷ *I.C.J. Reports 1974* (see footnote 82 above), p. 267, para. 43.

¹²⁸ Article 18 of the Convention imposes obligations on a State signatory to a treaty. The article stipulates that:

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

1969 and 1986 Vienna Conventions refer to the principle of declared will, but also take into consideration the context, object and purpose of the act, any subsequent agreements and practices, and even any relevant rules of international law applicable between the author State and the addressee State; reference can also be made to supplementary means of interpretation, such as the preparatory work of the treaty and the circumstances of its conclusion, in accordance with articles 31–32 of the above-mentioned Conventions, which may be applicable to unilateral acts.

115. Interpreting the intention of the authors of a conventional act is less complex than in the case of a unilateral act. In fact, as Sicault says, when there is a difference in a treaty between the true will of the parties and the text of the treaty, this difference is due to negligence on the part of the authors, but, unless the aim was fraudulent, the parties know what their common intention was, even if it is reflected only imperfectly in the text; they have at their disposal the same means and the same facilities to express in more precise terms the matter on which they are agreed; this is not the case for unilateral undertakings. Only the subject which has expressed the undertaking knows its true intention.¹²⁹

116. As pointed out above, the aim of interpretation is to determine the intention of the parties to an act or of the State or States which formulate an act, giving priority to the terms of the agreement or declaration as appropriate. An interpretation of this kind, based first and foremost on the terms and their meaning, has been given by ICJ in various cases, notably the *Aegean Sea Continental Shelf* case, in which the Court scrupulously examined the terms of the reservations formulated when the parties acceded to the General Act of Arbitration (Pacific Settlement of Disputes) in 1928. In this decision, the Court considered the question of the grammatical interpretation of the words "*et notamment*" ("and in particular") which preceded the reference to "*différends ayant trait au statut territorial de la Grèce*" ("disputes relating to the territorial status of Greece"). The Government of Greece maintained that "the natural, ordinary and current meaning of this expression absolutely precludes the Greek reservation from being read as covering disputes regarding territorial status".¹³⁰ The Court even looked carefully at the commas placed before and after the word "*notamment*". It is important to stress that the Court felt that the grammatical arguments were compelling and decisive. In this connection, in the same judgment, the Court added that it "is not a matter simply of their preponderant linguistic usage" when "the meaning attributed to "*et, notamment*" ... is grammatically not the only, although it may be the most frequent, use of that expression ... the meaning attributed to it by Greece thus depends on the context in which those words were used".¹³¹

117. However, ICJ does not confine itself to grammatical analysis to interpret texts, as can be seen clearly from the *Anglo-Iranian Oil Co.* case. Here, the Court

¹²⁹ Sicault, "Du caractère obligatoire des engagements unilatéraux en droit international public", p. 648.

¹³⁰ *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 22, para. 51.

¹³¹ *Ibid.*, para. 54.

considered the declaration by Iran, in particular the words “*et postérieurs à la ratification de cette déclaration*”, which followed immediately after the expression “*traités ou conventions acceptés par la Perse*”. The Court noted that it “cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text”.¹³²

118. With specific reference to unilateral acts, international case law is important, especially the *Nuclear Tests*,¹³³ *Military and Paramilitary Activities in and against Nicaragua*¹³⁴ and *Frontier Dispute*¹³⁵ cases, among others, in which ICJ considered unilateral declarations formulated by the authorities of States parties to the dispute concerned.

119. In its judgment of 27 June 1986 in the *Military and Paramilitary Activities in and against Nicaragua* case, ICJ stipulated that it could not

take the view that Nicaragua actually undertook a commitment to organize free elections, and that this commitment was of a legal nature. The Nicaraguan Junta ... planned the holding of free elections as part of its political programme of government, following the recommendation ... of the Organization of American States. This was an essentially political pledge ... the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself.¹³⁶

120. When considering another unilateral act in the *Frontier Dispute* case between Burkina Faso and Mali, the Court noted that “[i]n order to assess the intentions of the author of a unilateral act [which may give rise to a legal obligation], account must be taken of all the factual circumstances in which the act occurred ... there are no grounds to interpret the declaration made by Mali’s head of State on 11 April 1975 as a unilateral act with legal implications in regard to the present case”.¹³⁷ If the States concerned can commit themselves by the normal means of a formal agreement, there is no reason to interpret the declaration made by one of them as a unilateral act giving rise to legal effects. It is a different matter when the States concerned are all the States of the world and any one of them can express consent to be bound only through unilateral declarations.

121. In other cases, ICJ has considered unilateral declarations by States, such as those regarding acceptance of the Court’s jurisdiction, which are of great value, regardless of whether they can be considered as formal unilateral declarations made in the context of a treaty relationship.

122. In the *Anglo-Iranian Oil Co.* case, in which ICJ considered the declaration by Iran, it should be recalled

that the United Kingdom maintained that the rules governing the interpretation of treaties did not apply to unilateral acts. The Court then pointed out that

It may be said that this principle should in general be applied when interpreting the text of a treaty. But the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran, which appears to have shown a particular degree of caution when drafting the text of the Declaration. It appears to have inserted, *ex abundantia cautela*, words which, strictly speaking, may seem to have been superfluous. This caution is explained by the special reasons which led the Government of Iran to draft the Declaration in a very restrictive manner.¹³⁸

123. It is interesting to note that the rules laid down in the 1969 and 1986 Vienna Conventions have also been applied when interpreting arbitral decisions, such as the *Arbitral Award of 31 July 1989*¹³⁹ in the case between Senegal and Guinea-Bissau and the delimitation award in the *Laguna del Desierto* case between Chile and Argentina. In the latter case, it was pointed out that under international law there are rules which are used for the interpretation of any legal instrument, be it a treaty, a unilateral act, an arbitral award or the resolution of an international organization. These are thus general rules of interpretation dictated by the natural and ordinary meaning of words, reference to context and effectiveness.¹⁴⁰

124. In the case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau, the Tribunal noted that although neither of the States was a party to the 1969 Vienna Convention, it was not disputed by the two States in question that articles 31–32 of this Convention were the relevant rules of international law governing the interpretation of the Franco-Portuguese Delimitation Agreement of 1886. In the light of that agreement between the parties and the practice of international courts as regards the applicability of the provisions of the 1969 Vienna Convention in line with international custom recognized among States (see in particular *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 46–47, para. 94; and *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, pp. 18 and 63, para. 36), the Tribunal could not base itself on the aforementioned articles 31–32.¹⁴¹

125. With regard to unilateral acts by which a State assumes obligations which determine future conduct, in the *Nuclear Tests* case, ICJ held that “not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act”.¹⁴² In the *Frontier*

¹³² *Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952*, p. 104. See also the case of *South-West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 336; and the *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, pp. 69–70, para. 48.

¹³³ See footnotes 82 and 112 above.

¹³⁴ *I.C.J. Reports 1986* (see footnote 22 above), p. 14.

¹³⁵ *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554.

¹³⁶ *I.C.J. Reports 1986* (see footnote 22 above), p. 132, para. 261.

¹³⁷ *Ibid.* (see footnote 135 above), p. 574, para. 40.

¹³⁸ *I.C.J. Reports 1952* (see footnote 132 above), p. 105.

¹³⁹ See footnote 132 above.

¹⁴⁰ *Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy*, decision of 21 October 1994, UNRIAA, vol. XXII (Sales No. E/F.00.V.7), p.3, para. 72.

¹⁴¹ Decision of 14 February 1985, UNRIAA, vol. XIX (Sales No. E/F.90.V.7), p. 165, para. 41.

¹⁴² *I.C.J. Reports 1974* (see footnote 82 above), p. 267, para. 44.

Dispute case between Burkina Faso and Mali, however, the Chamber of the Court examined a unilateral declaration and took the view that it was not a unilateral legal act. The Chamber concluded that “there are no grounds to interpret the declaration made by Mali’s head of State on 11 April 1975 as a unilateral act with legal implications in regard to the present case”.¹⁴³

126. Before attempting to establish rules of interpretation applicable to unilateral acts, reference should be made to the basic criterion distinguishing the way in which unilateral acts are interpreted from the way in which conventional acts are interpreted. As has been pointed out, the latter are acts elaborated for a specific purpose and this means that specific criteria are used. The interests of legal certainty require that the main criterion should be the will expressed in the text, particularly in the case of acts by which the State concerned assumes unilateral obligations and, furthermore, as ICJ itself pointed out in the *Nuclear Tests* case referred to above, such acts should be interpreted restrictively.

127. In accordance with the case law and the doctrine, there is no doubt whatever that the restrictive criterion predominates in this context. Indeed, as ICJ clearly stated in the above-mentioned *Anglo-Iranian Oil Co.* case, “the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text”.¹⁴⁴ More recently, in the *Fisheries Jurisdiction* case, the Court indicated that “since a declaration under Article 36, paragraph 2, of the Statute, is a unilaterally drafted instrument, the Court has not hesitated to place a certain emphasis on the intention of the depositing State”.¹⁴⁵ Turning from declarations of acceptance of the Court to another context—declarations that have been defined as a unilateral international promise—the Court, in its decision in the *Nuclear Tests* case, stated that “[w]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for”.¹⁴⁶

128. In the case of waivers, in particular, it should be noted that the rule of non-presumption would then be a rule of restrictive interpretation; in cases where there is a doubt as to the will to waive, it should be assumed that the subject of law did not wish to do so.¹⁴⁷

129. The rules of interpretation on unilateral acts must be based on the consolidated rules laid down in the 1969 and 1986 Vienna Conventions, adapted, of course, to the specific characteristics of unilateral acts. In the first place, there is no doubt that the general rule of interpretation set out in the above-mentioned article 31 of the Conventions, whereby treaties shall be interpreted in good faith, is entirely applicable to unilateral acts.

130. Article 31, which is common to the two Vienna Conventions, establishes that “[a] treaty shall be inter-

preted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty”. The principle of good faith is one of the fundamental principles of the operation of interpretation which requires an effort to determine what the parties really meant;¹⁴⁸ this is also pointed out by the Institute of International Law in its Granada resolution of 19 April 1956.¹⁴⁹

131. There is no reason why this basic principle applicable to treaty relations should not be considered in the relations established by the formulation of a unilateral act. An act which is unilaterally formulated by a State must be interpreted in good faith, that is, in accordance with what the author State really intended to say. The task of the interpreter is, precisely, to attempt to identify the intention of the parties or, in this context, of the State which unilaterally formulates the act. Good faith and the meaning of the terms as a starting point are the point of departure of the interpretation process.¹⁵⁰ And, if this is recognized, logic dictates that the ordinary meaning to be given to the terms of the declaration, either orally or in writing, in its context and in the light of its object and purpose, should be mentioned in the first place, which would not *per se* dispel doubts as to desired and expressed will.

132. International case law has been clear in this regard. Thus, in the *Nuclear Tests* case, the Court stated that “[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation ... Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration”.¹⁵¹

133. At the outset, the Special Rapporteur had pointed out that it was essential to define whether the rules that may be elaborated on interpretation could be common to all unilateral acts within the meaning that is of interest to the Commission, that is, acts whereby the State expressly assumes unilateral obligations, and acts whereby the State reaffirms a right or a legal claim. The rule of good faith is, without any doubt whatever, applicable to all categories of unilateral acts.

134. Within the scope of conventional acts, as is known and as was recalled earlier, the exercise of interpretation includes consideration of the context in the light of the treaty’s object and purpose, and it is understood that the context is comprised of the preamble and the annexes. Furthermore, consideration is given to “any subsequent agreement between the parties regarding interpretation of the treaty or the application of its provisions” and “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” and “any relevant rules of international law applicable in the relations between the parties” (art. 31 of the 1969 and 1986 Vienna Conventions),

¹⁴³ *I.C.J. Reports 1986* (see footnote 135 above), p. 574, para. 40.

¹⁴⁴ *I.C.J. Reports 1952* (see footnote 132 above), p. 104.

¹⁴⁵ *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 48.

¹⁴⁶ *I.C.J. Reports 1974* (see footnote 82 above), p. 267, para. 44.

¹⁴⁷ Cahier, *loc. cit.*, p. 255.

¹⁴⁸ Rousseau, *op. cit.*, p. 269.

¹⁴⁹ *Annuaire de l’Institut de Droit International* (Granada session, April 1956), vol. 46, part II, p. 365.

¹⁵⁰ *Ibid.* (Bath session, September 1950), vol. 43, part I, p. 433.

¹⁵¹ *I.C.J. Reports 1974* (see footnote 82 above), p. 268, para. 46.

which reflects what has already been said about the comprehensive system embodied in the Conventions.

135. In relation to the context, there does not seem to be any doubt that it must be considered at the time of attempting to determine the real will of the author of the unilateral act. In the above-mentioned *Anglo-Iranian Oil Co.* case, ICJ stated that: "This clause ... is ... a decisive confirmation of the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court."¹⁵²

136. In the *Fisheries Jurisdiction* case between Spain and Canada, ICJ also interpreted Canada's declaration of acceptance of the jurisdiction of the Court and indicated that:

A declaration of acceptance of the compulsory jurisdiction of the Court, whether there are specified limits set to that acceptance or not, is a unilateral act of State sovereignty.

...

The Court will thus interpret the relevant words of a declaration ... in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court [that] ... may 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.¹⁵³

137. The situation changes when the object and purpose used in the scope of the 1969 Vienna Convention are transposed to unilateral acts. In the Special Rapporteur's view, there is no place for including this in the context of the interpretation of unilateral acts, since it deals with terms that are specifically applicable to treaty relations. In this context, it is important to highlight the intention of the State which formulates the act; hence, the interpretation should be considered "in the light of the intention" of that State, as reflected in draft article (a) set out below.

138. Furthermore, there is the question of the preamble and the annexes, which, despite the difference between the conventional act and the unilateral act, could be considered as belonging to the context for the purposes of interpretation within the scope of unilateral acts.

139. The preamble is the preliminary part of the treaty which precedes its operative provisions and contains an explanatory introduction setting out the reason for the conclusion of the treaty, an indication of the object or purpose of the treaty and perhaps some additional provisions, an indication of the plenipotentiaries who have drafted and signed it, or some of these elements.¹⁵⁴ The preamble, on which little has been written,¹⁵⁵ is, with respect to treaties, an "internal source of reference ... The preamble is a principal and natural source from which indications can be gathered of a treaty's objects and purposes even though the preamble does not contain substantive provisions".¹⁵⁶

¹⁵² *I.C.J. Reports 1952* (see footnote 132 above), p. 107.

¹⁵³ *I.C.J. Reports 1998* (see footnote 145 above), pp. 453–454, paras. 46 and 49.

¹⁵⁴ Basdevant, *op. cit.*, p. 465.

¹⁵⁵ See Suy, "Le Préambule", pp. 255 *et seq.*

¹⁵⁶ Dissenting opinion of Judge Weeramantry in the case of the *Arbitral Award of 31 July 1989* (see footnote 132 above), p. 142.

140. A unilateral declaration, whether oral or in writing, may contain a preambular part, although it would have some particularities depending on how the act is elaborated, even if there is no reference to this in practice, particularly that examined through the case law. In the *Nuclear Tests* case, it is to be noted that ICJ examines the declarations of the French authorities, which do not contain a formal preambular part, as can be seen in the communiqué issued by the Government of France in the *Official Journal* of 8 June 1974, as follows:

The Office of the President of the Republic takes this opportunity of stating that in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed.¹⁵⁷

Similarly, it will be noted that the President of the Republic issued the following statement to the press on 25 July 1974:

[O]n this question of nuclear tests, you know that the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government's programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect.¹⁵⁸

It is also useful to include the statement made by the Minister for Foreign Affairs of France to the General Assembly of the United Nations on 25 September 1974, which was considered by the Court in this same case, in which he indicated:

We have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year.¹⁵⁹

The parts of the declarations that do not specifically describe the action that will be taken, that is, the part in which the obligation is assumed, could be considered their preambular parts for the purposes of interpretation.

141. While it is true that, in such declarations, there is no specific preambular part, the possibility that some part thereof could be considered preambular for the purposes of interpretation should not be ruled out; similarly, the letter of transmittal of the Declaration on the Suez Canal and the arrangements for its operation, sent by the Minister for Foreign Affairs of Egypt to the Secretary-General of the United Nations on 24 April 1957, could be viewed in this light. In this Declaration, there is no formal preambular part; however, some of the language in the accompanying letter could be considered preambular, in particular, the statement that:

The Government of Egypt are pleased to announce that the Suez Canal is now open for formal traffic and will thus once again serve as a link between the nations of the world in the cause of peace and prosperity.¹⁶⁰

Furthermore, the content of the next paragraph of the letter could be considered a preambular part of the Declaration. It states:

¹⁵⁷ *I.C.J. Reports 1974* (see footnote 82 above), p. 265, para. 34.

¹⁵⁸ *Ibid.*, p. 266, para. 37.

¹⁵⁹ *Ibid.*, para. 39.

¹⁶⁰ United Nations, *Treaty Series*, vol. 265, No. 3821, p. 306.

The Government of Egypt wish to acknowledge with appreciation and gratitude the efforts of the States and peoples of the world who contributed to the restoration of the Canal for normal traffic, and of the United Nations whose exertions made it possible that the clearance of the Canal be accomplished peacefully and in a short time.¹⁶¹

142. The annexes are also a vital part of a unilateral declaration, although this does not happen frequently, particularly in orally expressed unilateral acts. An example of the inclusion of annexes in unilateral declarations is the case of the joint communiqué signed by the Governments of Venezuela and Mexico,¹⁶² which is a unilateral act from the formal point of view and contains an equally unilateral commitment to the countries of Central America and the Caribbean with regard to the supply of oil, a commitment which has been fulfilled and renewed by both Governments. The act contains an annex specifying the conditions for this. Subsequent practice is equally important in interpretation in general, whether of conventional acts¹⁶³ or unilateral acts. Article 31, paragraph 3 (a)–(b), of the 1969 and 1986 Vienna Conventions establishes two types of legal facts subsequent to the conclusion of the treaty: agreements regarding interpretation and subsequent practice which can demonstrate agreement on the meaning of the treaty. The Court has considered subsequent practice, as can be seen in the case of the *Land, Island and Maritime Frontier Dispute*.¹⁶⁴

143. The State may take some sort of action after formulating a unilateral act, which could result in a more exact determination of the content and of the meaning it ascribes to its unilateral declaration. This happened in the case of Venezuela and Mexico (para. 142), which appear to have developed a subsequent practice, the examination of which could help specify or clarify the content and scope of the unilateral commitment assumed by those countries in relation to the Central American countries, through a joint communiqué which could be considered a unilateral act of collective origin.

144. An interpretation agreement between the author State of the unilateral act and the addressees regarding interpretation does not seem relevant in a provision of this nature in the context of such acts; it is possible, however, to include in a provision on this question a State's practice after formulating the act.

145. The supplementary means of interpretation established by article 32, which is common to the 1969 and 1986 Vienna Conventions—the preparatory work and the circumstances of the treaty's conclusion—could be considered only as a subsidiary recourse where it was not possible to establish the parties' intention in interpreting the meaning of the treaty's terms. Indeed, recourse to supplementary means of interpretation is only admissible at a later stage, either to confirm the results of the interpretation or to avoid reaching ambiguous or

manifestly absurd or unreasonable results on the sole basis of the primary elements.¹⁶⁵ There is no doubt as to the importance of the preparatory work despite the criticisms levelled, particularly in relation to the lack of homogeneity, the proliferation which defies all classification and the lack of differentiation which impedes all categorization,¹⁶⁶ which is reflected in international case law, of which there are specific recent examples in, *inter alia*, the ICJ decision in the case of the delimitation of the maritime boundary between Guinea and Guinea-Bissau¹⁶⁷—although in this case, the parties requested that recourse should be had to the supplementary means laid down in article 32 common to the 1969 and 1986 Vienna Conventions.

146. It should be stressed that resort to preparatory work is not always necessary in order to interpret a text. ICJ has stated in this regard that PCIJ consistently maintained that “there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself”,¹⁶⁸ and this was confirmed in the *Ambatielos* case when ICJ held that “where ... the text to be interpreted is clear, there is no occasion to resort to preparatory work”.¹⁶⁹

147. In the case of unilateral acts, it is difficult to incorporate resort to preparatory work into a provision for resort to additional means, since in many cases the preparatory work is difficult to locate and therefore to examine, as may be seen in the *Nuclear Tests* and *Frontier Dispute* cases, where neither the Court nor the Chamber make any reference whatsoever to resort to preparatory work. It must be borne in mind, however, that preparatory work may exist and may be made available for purposes of interpretation, even though there is of course no guarantee that it can be made available at any time. Preparatory work in the context of unilateral acts may take the form of the notes and internal memorandums of ministries for foreign affairs or other organs of State, which will not always be easy to obtain and whose value will not be easy to determine. However, in seeking to demonstrate its intention, a State may have recourse to documents which, given the characteristics of the unilateral act, may be likened to the preparatory work to which the 1969 Vienna Convention refers.

148. International courts have given serious consideration to these documents which, in the context of unilateral acts, may be likened to preparatory work. For example, in its decision in the *Eritrea/Yemen* case, the Arbitral Tribunal notes that:

The former interest in these islands of Great Britain, Italy and to a lesser extent of France and the Netherlands, is an important element

¹⁶⁵ Reuter, *Introduction to the Law of Treaties*, p. 97, para. 145.

¹⁶⁶ Canal-Forgues, “Remarques sur le recours aux travaux préparatoires dans le Contentieux International”, p. 902.

¹⁶⁷ See footnote 141 above; and Pambou-Tchivounda, “Le droit international de l'interprétation des traités à l'épreuve de la jurisprudence (réflexions à partir de la sentence rendue le 15 février 1985 par le tribunal arbitral pour la délimitation de la frontière maritime entre la Guinée et la Guinée-Bissau)”.

¹⁶⁸ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948, I.C.J. Reports 1947–1948, p. 63.

¹⁶⁹ *Ambatielos, Preliminary Objection, Judgment*, I.C.J. Reports 1952, p. 45.

¹⁶¹ *Ibid.*

¹⁶² Agreement on Energy Cooperation Program for the Countries of Central America and the Caribbean, done at San José on 3 August 1980 (ILM, vol. XIX, No. 5 (September 1980), p. 1126).

¹⁶³ Capotorti, “Sul valore della prassi applicativa dei trattati secondo la Convenzione di Vienna”, p. 197.

¹⁶⁴ I.C.J. Reports 1992 (see footnote 23 above), pp. 585–586, paras. 378–380.

of the historical materials presented to the Court by the Parties, not least because they have had access to the archives of the time, and especially to early papers of the British Government of the time... Some of this material is in the form of internal memoranda.

However, the Tribunal minimized the importance of these documents when it stated:

The Tribunal has been mindful that these internal memoranda do not necessarily represent the view or policy of any government, and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment: it is not always easy to disentangle the personality elements from what were, after all, internal, private and confidential memoranda at the time they were made.¹⁷⁰

Even though it may be difficult to obtain such documents, it is possible to consider their importance on a case-by-case basis since, like preparatory work in the context of treaties, they are clearly helpful in interpreting the intention of the State. A reference to preparatory work in this context should therefore be included in the draft article set out below.

149. With regard to the circumstances, the situation is different, as is clear from a review of the ICJ decisions in two particular cases that illustrate the importance of the circumstances to interpreting the intention of the author, where an interpretation is not possible on the basis of the meaning itself of the words used in the respective declarations. In the *Nuclear Tests* case, the Court stated in this regard that “[i]t is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced”.¹⁷¹ The Court reached a similar conclusion after examining the declaration made by the Head of State of Mali, in the *Frontier Dispute* case, when it stated that “[i]n order to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act occurred ... The circumstances of the present case are radically different. Here, there was nothing to hinder the Parties from manifesting an intention to accept the binding character of the conclusions of the ... Mediation Commission”.¹⁷²

150. In the *Frontier Dispute* case between Mali and Burkina Faso, the Chamber of the Court stated, with reference to the unilateral declaration of the Government of France on nuclear tests, that, in the particular circumstances of those cases, that Government “could not express an intention to be bound otherwise than by unilateral declarations. It is difficult to see how it could have accepted the terms of a negotiated solution with each of the applicants without thereby jeopardizing its contention that its conduct was lawful”.¹⁷³

151. The reference to the circumstances as an additional means of interpretation, as indicated in article 32 of the 1969 and 1986 Vienna Conventions, may naturally be also applied and incorporated into a provision on the interpretation of unilateral acts.

152. In this connection, the question arises as to whether such rules would be applicable to the two categories of unilateral acts discussed, in other words, all unilateral acts, or whether, on the contrary, specific rules should be elaborated for each category. In this regard, consideration must be given to the fact that upon formulating a unilateral act, whether this is an act by virtue of which it assumes an obligation or an act by which it reaffirms a right or legal claim, the State expresses its intention and manifests its will, which in all cases reflects the same intention and to which the same rules apply for determining its validity or invalidity. Recourse to a review of the legal effects of such acts on the elaboration of different norms therefore appears unnecessary. The rules of interpretation that are elaborated may thus be uniformly applied and placed in the first general part of the draft articles.

B. Draft articles

153. In the light of the foregoing, the Special Rapporteur proposes draft articles (a) and (b) reproduced in the following paragraph. While these articles are based on articles 31–32 of the 1969 Vienna Convention, they have been adapted to reflect the particular nature of the unilateral act. The reference to “object and purpose”, an inherent concept in treaty law that is inapplicable to unilateral acts, has thus been removed from article (a), paragraph 1. Moreover, doctrine, case law and the views of Governments have all emphasized the “subjective” rather than the “objective” nature of the interpretation of a unilateral act and have shown that the self-imposed restriction on sovereignty implied by the act must be interpreted in its restrictive sense. This was the reason for including the criterion of intention in paragraph 1 by adding the phrase “and in the light of the intention of the author State”. Because of this addition to paragraph 1, a paragraph similar to article 31, paragraph 4, of the Convention was not included, since this would have been redundant. In article (b), the words “circumstances of its formulation”, were replaced, *mutatis mutandis*, by the words “circumstances of the formulation of the act”.

154. The text of the proposed draft articles (a) and (b) therefore reads as follows:

“Article (a). General rule of interpretation

“1. A unilateral act shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the declaration in their context and in the light of the intention of the author State.

“2. The context for the purpose of the interpretation of a unilateral act shall comprise, in addition to the text, its preamble and annexes.

“3. There shall be taken into account, together with the context, any subsequent practice followed in the application of the act and any relevant rules of international law applicable in the relations between the author State or States and the addressee State or States.

¹⁷⁰ *Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute)*, decision of 9 October 1998 (UNRIIAA, vol. XXII, part III (Sales No. E/F.00.V.7)), pp. 235–236, para. 94.

¹⁷¹ *I.C.J. Reports 1974* (see footnote 82 above), p. 269, para. 51.

¹⁷² *I.C.J. Reports 1986* (see footnote 135 above), p. 574, para. 40.

¹⁷³ *Ibid.*

“Article (b). Supplementary means of interpretation

“Recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of the formulation of the act, in order to confirm the meaning resulting from the

application of article (a), or to determine the meaning when the interpretation according to article (a):

“(a) Leaves the meaning ambiguous or obscure; or

“(b) Leads to a result which is manifestly absurd or unreasonable.”

RESERVATIONS TO TREATIES

[Agenda item 5]

DOCUMENT A/CN.4/518 and Add.1-3

Sixth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

[Original: French]
[3 and 21 May, 6 and 7 June 2001]

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Multilateral instruments cited in the present report

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International Opium Convention (Geneva, 19 February 1925)	League of Nations, <i>Treaty Series</i> , vol. LXXXI, No. 1845, p. 317.
Convention on the Pan American Union (Havana, 20 February 1928)	James Brown Scott, ed., <i>The International Conferences of American States, 1889–1928</i> (New York, Oxford University Press, 1931), p. 398.
General Act (Pacific Settlement of International Disputes) (Geneva, 26 September 1928)	League of Nations, <i>Treaty Series</i> , vol. XCIII, No. 2123, p. 343.
Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, <i>Treaty Series</i> , vol. 15, No. 102, p. 295.
Constitution of the World Health Organization (New York, 22 July 1946)	WHO, <i>Basic Documents</i> , 42nd ed. (Geneva, 1999), p. 1.
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, <i>Treaty Series</i> , vol. 55, No. 814, p. 187.
Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947)	<i>Ibid.</i> , vol. 33, No. 521, p. 261.
Convention on the International Maritime Organization (Geneva, 6 March 1948)	<i>Ibid.</i> , vol. 289, No. 4214, 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.
European Convention on Extradition (Paris, 13 December 1957)	<i>Ibid.</i> , vol. 359, No. 5146, p. 273.
Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of These Prescriptions (Geneva, 20 March 1958)	<i>Ibid.</i> , vols. 335, 516, 609 and 1891, No. 4789, pp. 211, 378, 290 and 381 respectively.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
Agreement establishing the Caribbean Development Bank (Kingston, 18 October 1969)	<i>Ibid.</i> , vol. 712, 1021 and 1401, No. 10232, pp. 217, 437 and 265 respectively.
International Convention on the Suppression and Punishment of the Crime of <i>Apartheid</i> (New York, 30 November 1973)	<i>Ibid.</i> , vol. 1015, No. 14861, p. 243.
Agreement establishing the Asia-Pacific Institute for Broadcasting Development (Kuala Lumpur, 12 August 1977)	<i>Ibid.</i> , vols. 1216 and 2167, No. 19609, pp. 81 and 422 respectively.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	<i>Ibid.</i> , vol. 1946, No. 33356, p. 3.
Agreement establishing the African Development Bank, as amended (Lusaka, 7 May 1982)	<i>Ibid.</i> , vol. 1276, No. 21052, p. 3.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , vol. 1833, No. 31363, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

	<i>Source</i>
Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora (Lusaka, 8 September 1994)	United Nations, <i>Treaty Series</i> , vol. 1950, No. 33409, p. 35.
Inter-American Convention against Corruption (Caracas, 29 March 1996)	ILM, vol. 35, No. 3 (May 1996), p. 724.
European Social Charter (revised) (Strasbourg, 3 May 1996)	United Nations, <i>Treaty Series</i> , vol. 2151, No. 37549, p. 277.
Agreement establishing the Bank for Economic Cooperation and Development in the Middle East and North Africa (Cairo, 28 August 1996)	<i>United Nations Juridical Yearbook, 1996</i> (United Nations publication, Sales No. E.01.V.10), p. 286.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, <i>Treaty Series</i> , vol. 2187, No. 38544, p. 3.
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Introduction

1. As an introduction to his sixth report, the Special Rapporteur deems it useful to present, as he did in his previous reports:

(a) A brief summary of the lessons which in his view can be drawn from the consideration of his preceding report both by the Commission itself and by the Sixth Committee of the General Assembly;

(b) A concise account of the main developments with regard to reservations that occurred during the past year and were brought to his attention;

(c) A general presentation of this report.

A. Outcome of the fifth report

1. OBJECT OF THE FIFTH REPORT

2. The fifth report on reservations to treaties,¹ which essentially replaced the fourth report,² comprised, in addition to a general introduction drafted along the same lines as the one in this report, a part one on alternatives to reservations and interpretative declarations³ and a part two dealing with the procedure regarding reservations and interpretative declarations.⁴

3. The Special Rapporteur, who had hoped to dispose of these procedural issues in his fifth report, had planned to deal in two separate chapters with the formulation, modification and withdrawal of reservations and with the formulation and withdrawal of acceptances of, and objections to, reservations and of reactions to interpretative declarations. In addition, he had planned to present a general overview of the effects of reservations, acceptances and objections.⁵

4. Regrettably, the Special Rapporteur is compelled to admit that he had somewhat overestimated his capabilities; it proved impossible for him to deliver in time for translation not only the parts of his report dealing with the effects of reservations, but also the entire chapter on the reactions of other parties to reservations and interpretative declarations made by a State or an international organization, and even the end of the chapter dealing with the procedure for formulating reservations and interpretative declarations.

5. Nevertheless, this failing, for which the Special Rapporteur bears sole responsibility, has not had any consequences, since the Commission was unable to consider the fifth report, as presented to it, in its entirety.

¹ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1-4, p. 139.

² On this subject, see paragraphs 21 and 59 of the fifth report (*ibid.*).

³ *Ibid.*, paras. 66-213. See also annex II (*ibid.*), containing the consolidated text of all draft guidelines dealing with definitions adopted on first reading or proposed in the fifth report.

⁴ *Ibid.*, paras. 214-332.

⁵ *Ibid.*, paras. 63-65.

2. CONSIDERATION OF THE FIFTH REPORT BY THE COMMISSION

6. During its fifty-second session, at its 2630th to 2633rd meetings held on 31 May and 2, 6 and 7 June 2000, the Commission considered part one of the fifth report on alternatives to reservations. Upon the conclusion of this consideration, it sent the draft guidelines proposed on this topic by the Special Rapporteur to the Drafting Committee, which considered and amended them at its meetings held from 6 to 8 June 2000.⁶

7. At its 2640th meeting on 14 July 2000, the Commission adopted on first reading draft guidelines 1.1.8 (Reservations formulated under exclusionary clauses), 1.4.6 (Unilateral statements adopted under an optional clause), 1.4.7 (Unilateral statements providing for a choice between the provisions of a treaty), 1.7.1 (Alternatives to reservations) and 1.7.2 (Alternatives to interpretative declarations). This concluded, at least provisionally,⁷ the adoption of part one of the Guide to Practice in respect of reservations to treaties.⁸

8. The commentaries on the new draft guidelines were adopted by the Commission at its 2659th and 2660th meetings on 15 and 16 August 2000. They are contained in the report of the Commission on the work of its fifty-second session.⁹

9. The Special Rapporteur presented part two of his fifth report to the Commission at the 2651st meeting. A summary of this presentation can be found in the report of the Commission.¹⁰

10. Owing to lack of time, the Commission was unable either to consider this part of the fifth report or, consequently, to transmit the 14 draft guidelines contained therein to the Drafting Committee. It will need to do so during its fifty-third session, in 2001.

3. CONSIDERATION OF CHAPTER VII OF THE REPORT OF THE COMMISSION BY THE SIXTH COMMITTEE

11. Chapter VII of the report of the Commission on the work of its fifty-second session deals with reservations to treaties. This report was considered by the Sixth Committee of the General Assembly from 23 October to 3 November 2000.¹¹

⁶ *Yearbook ... 2000*, vol. II (Part Two), p. 102, paras. 635-636.

⁷ It is not precluded that in the course of its further work, the Commission may find it necessary to add to part one of the Guide to Practice in respect of reservations to treaties, if it believes that some additional clarifications might prove useful.

⁸ For the full text of this part, see *Yearbook ... 2000* (footnote 6 above), p. 106, para. 662.

⁹ *Ibid.*, p. 108, para. 663.

¹⁰ *Ibid.*, pp. 103-106, paras. 639-660.

¹¹ See the summary records of the 14th to 24th meetings, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee* (A/C.6/55/SR.14-A/C.6/55/SR.24); see also the very useful topical summary of the discussions (A/CN.4/513, paras. 283-312). To his great regret, when drafting his report, the Special Rapporteur had at his disposal only the English version of the summary records of the debate in

12. Generally speaking, the part of the report of the Commission that dealt with reservations to treaties was well received by the States whose representatives made statements in the Sixth Committee on this topic. All of them reaffirmed their interest in the Guide to Practice¹² and most of them welcomed the additional clarifications on the nature of ambiguous unilateral declarations¹³ and the efforts made by the Commission to specify the possible alternatives to reservations.¹⁴

13. Nevertheless, several delegations again made known their impatience to see the Commission address the crux of the issue, namely, the legal effects of reservations—whether lawful or unlawful—and the objections that may be made to them.¹⁵

14. The Special Rapporteur understands this impatience, which he knows is shared by a number of members of the Commission. Unfortunately, he can only repeat what he wrote in his fifth report:¹⁶ he takes 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 would not place excessive demands on the secretariat, given its heavy workload, and that the topic itself proved to be sprawling and complex.

15. During the debate many delegations also made very useful comments and suggestions regarding the draft guidelines already adopted by the Commission.¹⁷ While endeavouring to keep these remarks in mind for the remainder of his study, the Special Rapporteur nonetheless believes that these comments can only be taken fully into consideration when the Commission takes up the consideration of the Guide to Practice on second reading; otherwise, his work would be a truly Herculean effort.¹⁸

the Sixth Committee, with two exceptions; while paying tribute to the outstanding work of the secretariat, he wishes to draw its attention to the fact that French is also an official working language of the General Assembly and the Commission.

¹² A/CN.4/513 (see footnote 11 above), para. 283.

¹³ See, in particular, the statements by Chile, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 17th meeting (A/C.6/55/SR.17), para. 59; Austria, *ibid.*, 22nd meeting (A/C.6/55/SR.22), para. 1; Colombia, on behalf of the Rio Group, *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 7; France, *ibid.*, 22nd meeting (A/C.6/55/SR.22), para. 14; and the Russian Federation, *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 64.

¹⁴ Cf. the statements by Germany, *ibid.*, 21st meeting (A/C.6/55/SR.21), paras. 59–60; Sweden, on behalf of the Nordic countries, *ibid.*, para. 107; Mexico, *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 18; or Greece, *ibid.*, 24th meeting (A/C.6/55/SR.24), para. 46; against Bahrain, *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 24, and Japan, *ibid.*, para. 85.

¹⁵ A/CN.4/513 (see footnote 11 above), para. 288.

¹⁶ *Yearbook ... 2000* (see footnote 1 above), p. 154, footnote 95.

¹⁷ A/CN.4/513 (see footnote 11 above), paras. 291–312.

¹⁸ The Special Rapporteur does not, however, consider it necessary to defer his reply to a question raised somewhat insistently by Greece on 3 November 2000, concerning the nature of declarations made by States under article 124 of the Rome Statute of the International Criminal Court, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 24th meeting (A/C.6/55/SR.24), para. 45; see also the comments by Austria (*ibid.*, 22nd meeting (A/C.6/55/SR.22), para. 2). In his view, there is no doubt that such statements are akin to genuine reservations provided for in the treaty (see *Yearbook ... 2000* (foot-

16. The situation is different with regard to the comments of States concerning the draft guidelines submitted by the Special Rapporteur in his fifth report, which the Commission has not yet had the opportunity to consider. Likewise, it would be useful for the Commission to be informed of the valuable observations transmitted to him by the United Kingdom of Great Britain and Northern Ireland on 21 February 2001, for which he especially wishes to thank that country.

17. Essentially, these comments pertain to the following draft guidelines:

(a) 2.2.1 (Reservations formulated when signing and formal confirmation) and 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation), which, it was suggested, could be combined;¹⁹ moreover, the United Kingdom fears that the inclusion of guideline 2.2.2 would enshrine a practice that has no legal basis;

(b) 2.2.4 (Reservations formulated when signing for which the treaty makes express provision),²⁰ about which the question was asked whether it was not the expression of a *lex specialis*, which is always possible;²¹ and

(c) 2.3.1 (Late reservations).²²

18. With regard to this latter draft, a fair number of speakers expressed agreement with the Special Rapporteur²³ and dwelt on the need to limit the practice of late reservations.²⁴ Moreover, during the consideration

note 1 above), paras. 148–167); see also Pellet, “Entry into force and amendment of the statute”.

¹⁹ See the comments by Austria, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 22nd meeting (A/C.6/55/SR.22), para. 3; Hungary stated that it fully endorsed the text of draft guideline 2.2.2 (*ibid.*, para. 40).

²⁰ Moreover, the United Kingdom suggests amendments to the wording of draft guideline 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]).

²¹ See the comments by Austria, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 22nd meeting (A/C.6/55/SR.22), para. 3; see also the drafting amendment suggested by the United Kingdom; Romania in particular welcomed draft guideline 2.2.4 (*ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 77.

²² The Netherlands, sceptical of the very notion of “conditional interpretative declarations”, also expressed doubts regarding the validity of draft guidelines 2.4.4–2.4.6 (*ibid.*, 24th meeting (A/C.6/55/SR.24), para. 6. See also the comments by the United Kingdom on draft guidelines 2.3.2–2.3.3 and 2.4.3–2.4.8 (the latter were deemed unnecessary).

²³ See *Yearbook ... 2000* (footnote 1 above), paras. 305–306 and 311.

²⁴ See, in particular, the statements by South Africa, on behalf of SADC, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 15th meeting (A/C.6/55/SR.15), para. 73; Chile, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 60; Austria, *ibid.*, 22nd meeting (A/C.6/55/SR.22), para. 4; Germany, *ibid.*, 21st meeting (A/C.6/55/SR.21), para. 61; Spain, *ibid.* (A/C.6/55/SR.21), para. 81; Sweden, on behalf of the Nordic countries, *ibid.*, para. 108; France, *ibid.*, 22nd meeting (A/C.6/55/SR.22), para. 21; Romania, *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 78; Brazil, *ibid.*, 24th meeting (A/C.6/55/SR.24), para. 17; and Portugal, *ibid.*, para. 27. Mexico and the Netherlands both have doubts as to the appropriateness of this draft guideline (*ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 16, and 24th meeting (A/C.6/55/SR.24), para. 7). See also the written observations of the United Kingdom, which also proposes some drafting amendments.

of draft guideline 2.3.1, several delegations expressed a positive assessment of the decision by the Secretary-General to extend to 12 months the period during which States can react to late reservations.²⁵

19. Moreover, several States took the opportunity afforded by this debate to express their views on the rules applicable to amendments to reservations.²⁶ The Special Rapporteur took these remarks into consideration in the drafting of this report.

B. Recent developments with regard to reservations to treaties

20. The fifth report sought to give an account of action by other bodies with regard to reservations to treaties.²⁷ The Special Rapporteur provided additional information during the oral presentation of his report to the 2630th meeting of the Commission²⁸ with regard to the decision of 2 November 1999 of the Human Rights Committee in the *Rawle Kennedy v. Trinidad and Tobago* case²⁹ and the working paper prepared by Ms. Françoise Hampson pursuant to decision 1998/113 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.³⁰

21. On 26 August 1999 the Sub-Commission, which had become the Sub-Commission on the Promotion and Protection of Human Rights, took note of that working paper, endorsed the conclusions contained therein and decided to appoint Ms. Hampson as Special Rapporteur “with the task of preparing a comprehensive study on reservations to human rights treaties”.³¹ Nevertheless,

[i]n view of the fact that the Commission on Human Rights at its fifty-sixth session decided to request the Sub-Commission to request Ms. Hampson to submit to the Sub-Commission revised terms of reference for her proposed study further clarifying how this study would complement work already under way on reservations to human rights treaties, in particular by the International Law Commission (decision 2000/108), no document has been prepared by Ms. Hampson³²

for the fifty-second session of the Sub-Commission in July-August 2000.

22. In the light of this request, the Sub-Commission on the Promotion and Protection of Human Rights, in its resolution 2000/26 of 18 August 2000, renewed its 1999 decision, stipulating that Ms. Hampson’s “study will not duplicate the work of the International Law Commission, which concerns the legal regime applicable to

²⁵ See the comments by Germany, *ibid.*, 21st meeting (A/C.6/55/SR.21), para. 62; Spain, *ibid.*, para. 82; Sweden, on behalf of the Nordic countries, *ibid.*, para. 109; Italy, *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 36; Romania, *ibid.*, para. 78; and Brazil, *ibid.*, 24th meeting (A/C.6/55/SR.24), para. 17.

²⁶ See the statements by Germany, *ibid.*, 21st meeting (A/C.6/55/SR.21), paras. 65–67; Spain, *ibid.*, para. 82; the Netherlands, *ibid.*, 24th meeting (A/C.6/55/SR.24), para. 8; and Portugal, *ibid.*, para. 27.

²⁷ *Yearbook ... 2000* (see footnote 1 above), p. 157, paras. 51–56.

²⁸ *Yearbook ... 2000*, vol. I, 2630th meeting, p. 145.

²⁹ *Official Records of the General Assembly, 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.

³⁰ E/CN.4/Sub.2/1999/28 and Corr.1.

³¹ E/CN.4/2000/2-E/CN.4/Sub.2/1999/54, resolution 1999/27, adopted without a vote, p. 72, para. 3.

³² E/CN.4/Sub.2/2000/32, para. 2.

reservations and interpretative declarations in general, whereas the proposed study involves the examination of the actual reservations and interpretative declarations made to human rights treaties in the light of the legal regime applicable to reservations and interpretative declarations, as set out in the working paper”;³³ accordingly, the Sub-Commission requested the Special Rapporteur (Ms. Hampson) to submit “a preliminary report to the Sub-Commission at its fifty-third session [2001], a progress report at its fifty-fourth session [2002] and a final report at its fifty-fifth session [2003]”.³⁴

23. In this same resolution, the Sub-Commission

Requests the Special Rapporteur to seek the advice and cooperation of the Special Rapporteur of the International Law Commission and of all relevant treaty bodies and, to that end, requests the authorization of a meeting between the Special Rapporteur of the Sub-Commission, the Special Rapporteur of the International Law Commission and the Chairpersons of the relevant treaty bodies or their nominees, when both the International Law Commission and the Sub-Commission are in session.³⁵

24. Even before the adoption of this resolution, the Special Rapporteur had made contact with Ms. Hampson, as the Commission had authorized him to do in the previous year. He had gathered from these informal contacts that the future report of the Special Rapporteur appointed by the Sub-Commission on the Promotion and Protection of Human Rights would not necessarily duplicate the work of the Commission if, as Ms. Hampson had assured him it would, her study dealt exclusively with the *practice* of reservations to human rights treaties. Quite the contrary, such a study could provide the Commission with food for thought when it returned to the study of reservations to human rights treaties in order to arrive at definitive conclusions in that regard.

25. It must be stated, however, that if the Special Rapporteur appointed by the Sub-Commission on the Promotion and Protection of Human Rights keeps to the agenda that she set out in the 1999 working paper³⁶ and that the Sub-Commission endorsed in its resolutions of 26 August 1999 and 18 August 2000, the study that she proposes to undertake goes well beyond a survey of the practice of States and human rights treaty monitoring bodies, and deals specifically with the regime of reservations to treaties—assuming that such a regime exists. If this proved to be the case, such a study would inevitably duplicate the work of the Commission.

26. Moreover, the Commission on Human Rights appears to share this concern; in its decision 2001/113, adopted on 25 April 2001,³⁷ it again requested the Sub-Commission on the Promotion and Protection of Human Rights to reconsider its decision in the light of the work undertaken by the International Law Commission.

27. The Special Rapporteur cannot hide his confusion over what attitude to take. It cannot be ruled out

³³ E/CN.4/2001/2-E/CN.4/Sub.2/2000/46, resolution 2000/26, pp. 73–74, para. 3.

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 5.

³⁶ See footnote 30 above.

³⁷ *Official Records of the Economic and Social Council, Fifty-seventh Session, Supplement No. 3* (E/2001/23-E/CN.4/2001/167, p. 348).

that the Sub-Commission on the Promotion and Protection of Human Rights might disregard what on its face would appear to be a refusal on the part of the Commission on Human Rights, and it does not seem appropriate for the International Law Commission to intervene in the relations between those two bodies. Accordingly, if the International Law Commission agrees, the Special Rapporteur proposes to write to Ms. Hampson to enquire about her intentions and convey to her the possible observations of the Commission.

28. For its part, the Committee on the Elimination of Discrimination against Women, during its session held from 15 January to 2 February 2001, “requested the Secretariat to prepare ... an analysis of the approach of other human rights treaty bodies to reservations to human rights treaties in the consideration of reports and communications of States parties”.³⁸ Unless otherwise instructed by the Commission, the Special Rapporteur proposes to transmit to the Chairperson of the Committee a copy of the preliminary conclusions of the Commission on reservations to normative multilateral treaties including human rights treaties, adopted in 1997,³⁹ together with relevant extracts from the report of the Commission on its forty-ninth session and his own second report on reservations to treaties.⁴⁰

29. Moreover, the Special Rapporteur participated, at the invitation of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, in the twentieth meeting of that body in Strasbourg on 12–13 September 2000. This gathering provided an opportunity for a new and fruitful exchange of views.

C. General presentation of the sixth report

30. The primary object of this report is to conclude the study of the formulation of reservations and interpretative declarations and of reactions of other Contracting Parties, which could not be completed last year owing to lack of time.⁴¹

31. This study will, as envisaged,⁴² be organized in two parts: the first will present aspects of the formulation, modification and withdrawal of reservations and interpretative declarations that could not be addressed

in the fifth report, and the second part will deal with what might be termed the “reservations dialogue”, in other words, the formulation and withdrawal of acceptances of and objections to reservations and of reactions to interpretative declarations, along with any “counter-reactions” to one or the other.

32. Once again, the Special Rapporteur wishes to note that he will confine himself strictly to the approach proposed in the “provisional general outline of the study” contained in his second report,⁴³ which the Commission approved.⁴⁴ In these two parts, therefore, it is only a matter of examining *procedural* issues relating to the *formulation* of these various unilateral statements, to the exclusion of issues concerning their lawfulness.

33. Nevertheless, if time permits, the Special Rapporteur will begin the study of the effects of reservations, still in accordance with the 1996 general outline.

34. It goes without saying that the Special Rapporteur will remain faithful to the conclusions which he drew following the conclusion of the consideration by the Commission of his first report:

(b)⁴⁵ 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.⁴⁶

35. Lastly, the Special Rapporteur, mindful of the impatience aroused by the slowness of his approach,⁴⁷ will resign himself, albeit somewhat reluctantly, to going a little less deeply into the various issues raised than he endeavoured to do in his previous reports.

³⁸ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 38 (A/56/38)*, p. 37, para. 363.

³⁹ See *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157.

⁴⁰ *Yearbook ... 1996*, vol. II (Part One), p. 37, document A/CN.4/477 and Add.1.

⁴¹ See paragraphs 4–5 and 10 above.

⁴² See the fifth report, *Yearbook ... 2000* (footnote 1 above), p. 158, para. 65, and pp. 180–181, paras. 214–222.

⁴³ *Yearbook ... 1996* (see footnote 40 above), p. 48, para. 37.

⁴⁴ See *Yearbook ... 1996*, vol. II (Part Two), p. 83, para. 136, and *Yearbook ... 1997* (footnote 39 above).

⁴⁵ Item (a) dealt with the change in the title of the topic, which was initially entitled “The law and practice relating to reservations to treaties”.

⁴⁶ *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487.

⁴⁷ See paragraph 13 above.

Formulation, modification and withdrawal of reservations and interpretative declarations

36. In his fifth report, the Special Rapporteur introduced 14 draft guidelines⁴⁸ concerning the moment when a reservation or an interpretative declaration may be made.⁴⁹ This question need not be further considered here, given that the Commission and the Drafting Committee will doubtless wish to take account of the comments made by States during the discussions in the Sixth Committee on some of these drafts.⁵⁰

37. It was not, however, possible in the fifth report to address the question of the modalities of formulating reservations and interpretative declarations in terms of both their form and their notification. This will be the subject of the present part of this report, while the second part will deal with their withdrawal and modification.

A. Modalities of formulating reservations and interpretative declarations

38. Under article 23, paragraph 1, of the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention),⁵¹ a reservation “must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”. The provision thus imposes two conditions on the formulation of reservations: one purely of form—they must be in writing; the other of a procedural nature—they must be communicated to other “interested” States and international organizations.⁵²

⁴⁸ These are draft guidelines 2.2.1 (Reservations formulated when signing and formal confirmation), 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation), 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]), 2.2.4 (Reservations formulated when signing for which the treaty makes express provision), 2.3.1 (Reservations formulated late—see also the three draft model clauses annexed to the provision), 2.3.2 (Acceptance of reservations formulated late), 2.3.3 (Objection to reservations formulated late), 2.3.4 (Late exclusion or modification of the legal effects of a treaty by procedures other than reservations), 2.4.3 (Times at which an interpretative declaration may be formulated), 2.4.4 (Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation), 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]), 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision), 2.4.7 (Interpretative declarations formulated late), 2.4.8 (Conditional interpretative declarations formulated late).

⁴⁹ *Yearbook ... 2000* (see footnote 1 above), pp. 180–199, paras. 214–332.

⁵⁰ See paragraphs 17–18 above.

⁵¹ As in the previous reports on reservations to treaties, unless otherwise indicated, quotations refer to the text of the 1986 Vienna Convention, which reproduces the 1969 text, but includes international organizations.

⁵² To use a neutral term provisionally. On the exact definition of “other States and international organizations”, see paragraphs 98–114 below.

39. An additional question is whether these two conditions are also applicable, *mutatis mutandis*, to interpretative declarations, whether conditional or not.

1. FORM AND NOTIFICATION OF RESERVATIONS AND INTERPRETATIVE DECLARATIONS

(a) *Form of reservations*

40. Although it is not included in the actual definition of a reservation⁵³ and the word “statement”, which is included, refers to both oral and written statements, the need for a reservation to be in writing was never called into question during the *travaux préparatoires* for the Vienna Conventions. The Commission’s final commentary on what was then the first paragraph of draft article 18 and was to become, without any change in this regard,⁵⁴ article 23, paragraph 1, of the 1969 Vienna Convention, presents it as self-evident that a reservation must be in writing.⁵⁵

41. That was the opinion expressed in 1950 by Mr. James Brierly, who, in his first report on the law of treaties, suggested the following wording for article 10, paragraph 2:

Unless the contrary is indicated in a treaty, the text of a proposed reservation thereto must be authenticated together with the text or texts of that treaty or otherwise formally communicated in the same manner as an instrument or copy of an instrument of acceptance of that treaty.⁵⁶

42. This suggestion elicited no objections (except to the word “authenticated”) during the discussions in 1950,⁵⁷ but the question of the form that reservations should take was not considered again until the first report by Sir Gerald Fitzmaurice in 1956; under draft article 37, paragraph 2, which he proposed and which is the direct precursor of current article 23, paragraph 2,

Reservations must be formally framed and proposed in writing, or recorded in some form in the minutes of a meeting or conference.⁵⁸

⁵³ See draft guideline 1.1 of the Guide to Practice, which combines the definitions in article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions and article 2, paragraph 1 (*j*), of the Vienna Convention on Succession of States in respect of Treaties (hereinafter the 1978 Vienna Convention):

“‘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.”

⁵⁴ The United Nations Conference on the Law of Treaties added a more precise definition of those to be notified of reservations: see paragraph 105 below.

⁵⁵ See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208.

⁵⁶ *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 239.

⁵⁷ *Ibid.*, vol. I, 53rd meeting, pp. 91–92.

⁵⁸ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115.

43. In 1962, following the first report on the law of treaties by Sir Humphrey Waldock,⁵⁹ the Commission elaborated on this theme:

Reservations, which must be in writing, may be formulated:

- (i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connexion with the adoption of the treaty;
- (ii) Upon signing the treaty at a subsequent date; or
- (iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it.⁶⁰

This provision was hardly discussed by the members of the Commission.⁶¹

44. In conformity with the position of two Governments,⁶² which had suggested “some simplification of the procedural provisions”,⁶³ the Special Rapporteur made a far more restrained drafting proposal on second reading, namely:

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.⁶⁴

This draft is the direct source of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions.

45. While the wording was changed, neither the Commission⁶⁵ nor the United Nations Conference on the Law of Treaties of 1968–1969⁶⁶ ever called into question

the need for reservations to be formulated in writing. And neither Mr. Paul Reuter, Special Rapporteur on the law of treaties between States and international organizations or between two or more international organizations, nor the participants in the United Nations Conference on the Law of Treaties of 1986 added clarifications or suggested any changes in this regard.⁶⁷ The *travaux préparatoires* thus show remarkable unanimity in this respect.

46. This is easily explained. It has been written that:

Reservations are formal statements. Although their formulation in writing is not embraced by the term of the definition, it would according to article 23 (1) of the Vienna Convention seem to be an absolute requirement. It is less common nowadays that the various acts of consenting to a treaty occur simultaneously, therefore it is not possible for an orally presented reservation to come to the knowledge of all contracting parties. In the era of differentiated treaty-making procedures it becomes essential for reservations to be put down in writing in order to be registered and notified by the depositary, so that all interested states would become aware of them. A reservation not notified cannot be acted upon. Other states would not be able to expressly accept or object to such reservations.⁶⁸

47. Nonetheless, during the discussions at the Commission’s fourteenth session in 1962, Sir Humphrey Waldock, replying to a question raised by Mr. Tabibi, did not totally exclude the idea of “oral reservations”. He thought, however, that the question “belonged rather to the question of reservations at the time of the adoption of the treaty, which was dealt with in sub-paragraph 2 (a) (i)” and that in any case, the requirement of a formal confirmation “should go a long way towards disposing of the difficulty”.⁶⁹

48. Ultimately, it hardly matters how reservations are formulated at the outset, if they must be formally confirmed at the moment of the definitive expression of consent to be bound. That is undoubtedly how article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions should be interpreted in the light of the *travaux préparatoires*: a reservation need be in writing only when formulated definitively, namely:

(a) When signing a treaty where the treaty makes express provision for this,⁷⁰ or if it is an agreement in simplified form,⁷¹ and

(b) In all other cases, where the State or international organization expresses its definitive consent to be bound.⁷²

⁵⁹ Under his proposal for draft article 17, paragraph 3 (a):

“Reservations shall be formulated in writing either:

- “(i) On the face of the treaty itself, and normally in the form of an adjunct to the signature of the representative of the reserving State;
- “(ii) In a Final Act of a conference, protocol, *procès-verbal* or other instrument related to the treaty and executed by a duly authorized representative of the reserving State;
- “(iii) In the instrument by which the reserving State ratifies, accedes to or accepts the treaty, or in a *procès-verbal* or other instrument accompanying the instrument of ratification, accession or acceptance and drawn up by the competent authority of the reserving State”.

(*Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 60)

In his commentary Sir Humphrey restricts himself to saying that this provision “does not appear to require comment” (*ibid.*, p. 66).

⁶⁰ *Ibid.*, document A/5209, draft art. 18, para. 2 (a), p. 176; for the commentary on this provision, see page 180; see also the fifth report on reservations to treaties (*Yearbook ... 2000* (footnote 1 above), para. 239).

⁶¹ See the fifth report, *Yearbook ... 2000* (footnote 1 above), para. 237; however, see also paragraph 47 below.

⁶² Denmark and Sweden (see the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, pp. 46–47); see also paragraph 51 below.

⁶³ *Yearbook ... 1965* (see footnote 62 above), p. 53, para. 13.

⁶⁴ *Ibid.*, draft art. 20, para. 1.

⁶⁵ See the final text of the draft articles in *Yearbook ... 1966* (footnote 55 above), draft art. 18, para. 1.

⁶⁶ *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), report of the Committee of

the Whole on its work at the first session of the Conference, document A/CONF.39/14, pp. 138–139, paras. 190–196.

⁶⁷ See the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 1 above), p. 185, para. 242.

⁶⁸ Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, p. 44; see also Lijnzaad, *Reservations to U.N. Human Rights Treaties: Ratify and Ruin?*, p. 50.

⁶⁹ *Yearbook ... 1962*, vol. I, 663rd meeting, p. 223, para. 34. See also a remark made by Mr. Brierly in 1950: “Mr. Brierly agreed that a reservation must be presented formally, but it might be announced informally during negotiations” (*Yearbook ... 1950*, vol. I, 53rd meeting, p. 91, para. 19).

⁷⁰ See *Yearbook ... 2000* (footnote 1 above), draft guideline 2.2.4, p. 189, para. 264.

⁷¹ *Ibid.*, draft guideline 2.2.3, para. 260.

⁷² *Ibid.*, draft guidelines 2.2.1–2.2.2, para. 251.

49. These conclusions are not strictly in conformity with the letter of the text of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, which does not recognize such a distinction. In order to avoid giving the impression of rewriting the text, the Commission could perhaps simply restate it in a draft guideline 2.2.1 and explain, in a draft guideline 2.2.2, that the formal confirmation of a reservation should also be in writing, where necessary:

“2.1.1 Written form

“A reservation must be formulated in writing.

“2.1.2 Form of formal confirmation

“When formal confirmation of a reservation is necessary, it must be made in writing.”

50. The Special Rapporteur is aware that this type of approach would seem to exclude the possibility of an exclusively oral initial formulation, even though there is no real drawback to making such formulations. The question could perhaps be left open. As was very aptly pointed out by Sir Humphrey Waldock,⁷³ the answer has no practical impact: a Contracting Party can in any event formulate a reservation up to the date of its expression of consent to be bound; thus, even if its initial oral statement could not be regarded as a true reservation, the “confirmation” made in due course would serve as a formulation.

51. The question also arises as to whether other clarifications are necessary. It is all the more legitimate in that, in the draft articles on the law of treaties adopted on first reading, the Commission incorporated quite a number of clarifications regarding the instrument in which the reservation should appear.⁷⁴ And while these clarifications were omitted in the final draft, that was, as Sweden noted, because they were “procedural rules which would fit better into a code of recommended practices”,⁷⁵ which is precisely the function of the Guide to Practice.

52. After careful consideration, however, the Special Rapporteur has concluded that it is not useful, with one exception, to include the clarifications which appeared in draft article 17, paragraph 3 (a), of 1962,⁷⁶ the long

⁷³ See paragraph 47 above.

⁷⁴ See paragraph 43 above. Similar clarifications are found in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties* prepared by the Treaty Section of the Office of Legal Affairs in 1959 (ST/LEG/7), p. 31, para. 57:

“In practice, the Secretary-General, in the exercise of his functions as depositary, has always considered that reservations submitted at the time of signature must either be entered in the space reserved on the original for signatures, and above the signature, or be set forth in a separate document signed by the plenipotentiary; if the reservation is made at the time of ratification or accession, it must be inserted in the instrument or appear in an annexed document emanating from the authorities which drew up the instrument. Otherwise, at the time of deposit of the instrument, the representative of the Government concerned, duly authorized for that purpose, signs a *procès-verbal*, a certified copy of which is addressed to the States concerned.”

It is perhaps significant that these clarifications were omitted in 1994 (see ST/LEG/7/Rev.1 (United Nations publication, Sales No. E.94.V.15), in particular, p. 49, para. 161).

⁷⁵ Fourth report on the law of treaties by Sir Humphrey Waldock (see footnote 62 above), p. 47.

⁷⁶ Cited in footnote 59 above.

list of instruments in which reservations may appear does not add much, particularly since the list is not restrictive, as is indicated by the reference in two places to an instrument other than those expressly mentioned.

53. On one point, however, clarification is needed. This concerns the author of the instrument in question. As the Commission specified in the 1962 draft, a reservation must be formulated by “the representative of the reserving State”, at the time of signature; “a duly authorized representative of the reserving State”; or “the competent authority of the reserving State”.⁷⁷ This, in reality, amounts to saying the same thing three times; but it is not quite sufficient, because the question is whether there are rules of general international law to determine in a restrictive manner which authority or authorities are competent to formulate a reservation at the international level or whether this determination is left to the domestic law of each State.

55. In the opinion of the Special Rapporteur, the answer to this question may be deduced both from the general framework of the 1969 and 1986 Vienna Conventions and from the practice of States and international organizations in this area.

56. By definition, a reservation has the purpose of modifying the legal effect of the provisions of a treaty in the relations between the parties; although it appears in an instrument other than the treaty, the reservation is therefore part of the corpus of the treaty and has a direct influence on the respective obligations of the parties. It leaves intact the *instrumentum* (or *instrumenta*) which constitute the treaty, but it directly affects the *negotium*. In this situation, it seems logical and inevitable that reservations should be formulated under the same conditions as the consent of the State or international organization to be bound. And this is not an area in which international law is based entirely on domestic laws.

57. Article 7 of the 1969 and 1986 Vienna Conventions contains precise and detailed provisions on this point which undoubtedly reflect positive law on the subject.⁷⁸ In the words of that article in the 1986 Convention:

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) that person produces appropriate full powers; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty ...

(b) representatives accredited by States to an international conference, for the purpose of adopting the text of a treaty ...

(c) representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ;

⁷⁷ See the full text in footnote 59 above.

⁷⁸ See, however, paragraph 63 below.

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty, if:

(a) that person produces appropriate full powers; or

(b) it appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with the rules of the organization, without having to produce full powers.

58. *Mutatis mutandis*, these rules, for the reasons indicated above, may certainly be transposed to the competence to formulate reservations, on the understanding, of course, that the formulation of reservations by a person who cannot “be considered ... as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization”.⁷⁹

59. Moreover, these restrictions on the competence to formulate reservations at the international level have been broadly confirmed in practice.

60. In an aide-memoire of 1 July 1976, the United Nations Legal Counsel said:

A reservation must be formulated in writing (article 23, paragraph 1, of the [1969 Vienna] Convention), and both reservations and withdrawals of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally.⁸⁰

61. Similarly, the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* prepared by the Treaty Section of the United Nations Office of Legal Affairs confines itself to noting that “[t]he reservation must be included in the instrument or annexed to it and must emanate from one of the three qualified authorities” and to referring to general developments concerning the “deposit of binding instruments”.⁸¹ Likewise, according to this document, “[r]eservations made at the time of signature must be authorized by the full powers granted to the signatory by one of the three qualified authorities or the signatory must be one of these authorities”.⁸²

62. These rules seem to be strictly applied; all the instruments of ratification (or equivalents) of treaties containing reservations for which the Secretary-General is depositary and which the Special Rapporteur was able to consult with the help of the Treaty Section of the Office of Legal Affairs are signed by one of the “three authorities” and, if they are signed by the permanent representative, the latter has attached full powers emanating from one of these authorities. Moreover, it was explained to the Special Rapporteur that where this was not the case,

⁷⁹ Art. 8 of the 1969 and 1986 Vienna Conventions.

⁸⁰ *United Nations Juridical Yearbook, 1976* (United Nations publication, Sales No. E.78.V.5), p. 211, para. 7.

⁸¹ ST/LEG/7/Rev.1 (see footnote 74 above), p. 49, para. 161; the passage refers to page 36, paragraphs 121–122.

⁸² *Ibid.*, p. 62, para. 208; refers to chapter VI (Full powers and signatures) of ST/LEG/7/Rev.1.

the permanent representative was requested, informally but firmly, to make this correction.⁸³

63. The question arises, however, whether this practice, which transposes to reservations the rules contained in article 7 of the Vienna Conventions, referred to above,⁸⁴ is not excessively rigid. It might, for example, be considered whether it would not be legitimate to accept that the accredited representative of a State to an international organization, which is the depositary of the treaty to which the State that he represents wishes to make a reservation, should be authorized to make that reservation. The issue is particularly relevant because this practice is accepted in international organizations other than the United Nations.

64. Thus it seems, for example, that the OAS Secretary-General accepts that reservations of member States may be transmitted to him by their permanent representatives to the organization. This practice is in conformity with the provisions of article VII of the Convention on the Pan American Union, on treaties (not yet entered into force), which provides that all instruments relating to the expression of consent to be bound by treaties concluded at the International Conferences of American States shall be deposited “by the respective representative on the Governing Board ... without need of special credentials for the deposit of the ratification”.⁸⁵ Likewise, in the Council of Europe, many reservations appear to have been “registered” in letters from permanent representatives.⁸⁶

65. It might also be considered that the rules applying to States should be transposed more fully to international organizations than they are in article 7, paragraph 2, of the 1986 Vienna Convention and, in particular, that the head of the secretariat of an international organization or its accredited representatives to a State or another organization should be regarded as having competence *ipso facto* to bind the organization.

66. The Special Rapporteur considers that the recognition of such limited extensions to competence for the

⁸³ This is confirmed, by analogy, by the procedural incident between India and Pakistan that recently came before ICJ in *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction, Judgment, I.C.J. Reports 2000*, p. 12. Oral pleadings revealed that in an initial communication dated 3 October 1973, the Permanent Mission of Pakistan to the United Nations gave notification of that country’s intent to succeed British India as a party to the General Act (Pacific Settlement of International Disputes). In a note dated 31 January 1974, the Secretary-General requested that such notification should be made “in the form prescribed”, in other words, that it should be transmitted by one of the three authorities mentioned above; this notification took the form of a new communication (formulated in different terms than that of the preceding year), dated 30 May 1974 and signed this time by the Prime Minister of Pakistan (see the pleadings by Sir Elihu Lauterpacht on behalf of Pakistan, 5 April 2000, CR/2000/3, and by Alain Pellet on behalf of India, 6 April 2000, CR/2000/4). While this episode concerned a notification of succession and not the formulation of reservations, it testifies to the great vigilance with which the Secretary-General applies the rules set forth above (para. 61) with regard to the general expression by States of their consent to be bound by a treaty.

⁸⁴ Para. 57.

⁸⁵ See the reply by OAS in the report of the Secretary-General on depositary practice in relation to reservations, submitted in accordance with General Assembly resolution 1452 B (XIX) (document A/5687), reproduced in *Yearbook ... 1965*, vol. II, p. 84.

⁸⁶ See the European Convention on Extradition.

purpose of formulating reservations would constitute a limited but welcome progressive development. He does not, however, propose to include them in the Guide to Practice. “There is a consensus in the Commission”, consistently approved by a large majority of States, “that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions”.⁸⁷ However, even if the provisions of article 7 of the 1969 and 1986 Conventions do not expressly deal with the competence to formulate reservations, they are nonetheless rightfully⁸⁸ regarded as transposable to this case.

67. On the other hand, it may be necessary to adopt a sufficiently flexible draft guideline which, while referring to the rules in article 7, maintains the less rigid practice followed by international organizations other than the United Nations as depositaries;⁸⁹ this can be done by including an “escape clause” in the relevant draft guideline.

68. The latter can be formulated in two ways:⁹⁰ either we confine ourselves to indicating that the authorities competent to formulate reservations at the international level are the same as those having competence to adopt or authenticate the text of a treaty or to express the consent of the State or the international organization to be bound, or the draft guideline adapts the text of article 7 of the 1986 Vienna Convention. Each of these solutions has its merits: the first, that of restraint; the second, that of convenience for users. The Special Rapporteur’s preference tends towards the latter.

69. In the first case, the draft guideline might read as follows:

“[2.1.3 *Competence to formulate a reservation at the international level*

“Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.]”

70. Under the second hypothesis, draft guideline 2.1.3 might be drafted as follows:

“[2.1.3 *Competence to formulate a reservation at the international level*

⁸⁷ *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (d).

⁸⁸ See paragraph 56 above.

⁸⁹ See paragraph 64 above. ITU is also a special case in this regard, but in a different sense and for different reasons, since reservations to texts equivalent to treaties adopted by that body “can be formulated only by delegations, namely, *during conferences*” (reply by ITU to the Commission’s questionnaire on reservations—reproduced in *Yearbook ... 1996* (footnote 40 above), annex III, p. 107). The Special Rapporteur has no knowledge of the practices followed by depositary States.

⁹⁰ The Special Rapporteur considers that a third possibility, i.e. simply referring to article 7 of the 1969 and 1986 Vienna Conventions, should be firmly ruled out; for reasons of convenience (and legal logic), the Guide to Practice should be self-sufficient.

“1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to formulate a reservation on behalf of a State or an international organization if:

“(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

“(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

“2. By virtue of their functions and without having to produce full powers, the following are competent to formulate a reservation at the international level on behalf of a State:

“(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

“(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

“(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

“[(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization).]”

71. In this second case, however, paragraph 2 (d) could probably be omitted, as the hypothesis envisaged is marginal; it might perhaps be sufficient to mention it in the commentary.

72. It is self-evident that the international phase of formulating reservations is only the tip of the iceberg; as is true of the entire procedure whereby a State or an international organization expresses its consent to be bound, it is the outcome of an internal process that may be quite complex. Like the ratification procedure (or the acceptance, approval or accession procedure), from which it is indissociable, the formulation of reservations is a kind of “internal parenthesis” within an overwhelmingly international process.⁹¹

73. As Reuter has noted, “[n]ational constitutional practice regarding reservations and objections varies from country to country”,⁹² and to describe them, however, briefly, would be beyond the scope of this report. At best it can be noted that, of the 33 States which replied to the Commission’s questionnaire on reservations to treaties⁹³ and whose answers to questions 1.7, 1.7.1,

⁹¹ See Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, p.144.

⁹² *Introduction to the Law of Treaties*, p. 93, note to para. 133.

⁹³ See the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 1 above), p. 147, paras. 3–4.

1.7.2, 1.8, 1.8.1 and 1.8.2⁹⁴ are utilizable,⁹⁵ competence to formulate a reservation belongs to: the executive branch alone in six cases;⁹⁶ the parliament alone in five cases;⁹⁷ and it is shared between them in 12 cases.

74. In this last hypothesis, there are various modalities for collaboration between the executive branch and the parliament. In some cases, the parliament is merely kept informed of intended reservations⁹⁸—although not always systematically.⁹⁹ In others, it must approve all reservations before their formulation¹⁰⁰ or, where only certain treaties are submitted to the parliament, only those which relate to those treaties.¹⁰¹ Moreover, a judicial body may be called upon to intervene in the internal procedure for formulating reservations.¹⁰²

75. It is interesting to note that the procedure for formulating reservations does not necessarily follow the one generally required for the expression of the State's consent to be bound. Thus, in France, only recently was the custom established of transmitting to the parliament the text of reservations which the President of the Republic or the Government intended to attach to the ratification of treaties or the approval of agreements, even where such instruments must be submitted to the parliament under article 53 of the 1958 Constitution.¹⁰³

76. The diversity which characterizes the competence to formulate reservations and the procedure to be followed for that purpose among States seems to be mirrored among international organizations. Only two of them¹⁰⁴ answered questions 3.7, 3.7.1 and 3.7.2 of the

questionnaire on reservations:¹⁰⁵ FAO states that such competence belongs to the Conference, whereas ICAO, while emphasizing the lack of real practice, believes that if a reservation were formulated on its behalf, it would be formulated by the Secretary-General as an administrative matter and, as the case may be, by the Assembly or the Council in their respective areas of competence,¹⁰⁶ with the stipulation that it would be "appropriate" for the Assembly to be informed of the reservations formulated by the Council or by the Secretary-General.

77. In the view of the Special Rapporteur, the only conclusion that can be drawn from these observations is that international law does not impose any specific rule with regard to the internal procedure for formulating reservations. This, to be frank, seems so obvious that it hardly seems worthwhile to stipulate it expressly in a draft guideline of the Guide to Practice. If, however, the Commission holds a contrary view (which can be defended in the light of the pragmatic character of the Guide to Practice), the following type of guideline could be adopted:

“[2.1.3 bis *Competence to formulate a reservation at the internal level*]

“The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or international organization.”]

78. However, the freedom of States and international organizations to determine the authority competent to decide that a reservation will be formulated and the procedure to be followed in formulating it, raises problems similar to those arising from the same freedom the parties to a treaty have with respect to the internal procedure for ratification: what happens if the internal rules are not followed?

79. In the 1986 Vienna Convention, article 46 on the provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties, provides that:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the

⁹⁴ Question 1.7: “At the internal level, which authority or authorities decide(s) that the State will formulate a reservation: The Head of State? The Government or a government body? The parliament?”; question 1.7.1: “If it is not always the same authority which has competence to decide that a reservation will be formulated, on what criteria is this competence based?”; question 1.7.2: “If the decision is taken by the Executive, is the parliament informed of the decision? A priori or a posteriori? Invited to discuss the text of the intended reservation(s)”; question 1.8: “Is it possible for a national judicial body to oppose or insist on the formulation of certain reservations?”; question 1.8.1: “If so, which authority and how is it seized of the matter?”; question 1.8.2: “What reason(s) can it invoke in taking such a decision?” (*Yearbook ... 1996* (footnote 40 above), annex II, p. 98–99).

⁹⁵ Unfortunately, several of the 33 States which replied to the questionnaire gave incomplete answers.

⁹⁶ Bolivia (the Parliament can suggest reservations), Colombia (for certain treaties), Croatia (the Parliament can oppose a proposed reservation, which would imply that it is consulted), Denmark, the Holy See and Malaysia. See also the States mentioned in footnotes 98–99 below.

⁹⁷ Colombia (for certain treaties), Estonia, San Marino, Slovenia, Switzerland (but the proposal is generally made by the Federal Council), unless the Federal Council has its own competence.

⁹⁸ Kuwait since 1994 (consultation of an ad hoc commission); New Zealand “until recently” (system provisionally established).

⁹⁹ France (if the rapporteurs of the parliamentary assemblies so request and as a mere “courtesy”), Israel, Japan (if the treaty does not contain a reservation clause), Sweden (the “outlines” of reservations are transmitted to Parliament, never their exact text).

¹⁰⁰ Argentina and Morocco.

¹⁰¹ Finland, the Republic of Korea, Slovakia and Spain.

¹⁰² Colombia, Finland and Malaysia.

¹⁰³ See Pellet, “Article 53”, pp. 1047–1050.

¹⁰⁴ This is explained by the fact that international organizations are parties to treaties much more rarely than States and that, where they are parties, they generally do not formulate reservations. The sole exception concerns the European Union which, regrettably, has not replied to the questionnaire to date.

¹⁰⁵ Question 3.7: “At the internal level, which organ(s) decide(s) that the State will formulate a reservation: The chief executive officer? The general assembly? Another organ?”; question 3.7.1: “If it is not always the same organ that has competence to decide that a reservation will be formulated, on what criteria is this competence based?”; question 3.7.2: “If the decision is taken by the chief executive officer, is the general assembly: Informed of the decision? A priori or a posteriori? Invited to discuss the text of the intended reservation(s)?” (*Yearbook ... 1996* (see footnote 40 above), annex III, p. 110).

¹⁰⁶ See articles 49–50 of the Convention on International Civil Aviation, which established ICAO.

matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

80. In the absence of practice, it is difficult to take a categorical position on the transposition of these rules to the formulation of reservations. Some elements argue in its favour: as discussed above, the formulation of reservations cannot be dissociated from the procedure for expressing definitive consent to be bound; it occurs or must be confirmed at the moment of expression of consent to be bound and, in almost all cases, emanates from the same authority. In the opinion of the Special Rapporteur, however, these arguments are not decisive. Whereas the internal rules on competence to conclude treaties are laid down in the constitution, at least in broad outline, that is not the case for the formulation of reservations, which derives from practice, and practice not necessarily in line with that followed when expressing consent to be bound.

81. That being so, it is unlikely that a violation of internal provisions can be “manifest” in the sense of article 46 cited above, and one must fall back on international rules such as those set forth in draft guideline 2.1.3.¹⁰⁷ The conclusion to be drawn is that a State or an international organization should never be allowed to claim that a violation of the provisions of internal law or of the rules of the organization has invalidated a reservation that it has formulated, if such formulation was the act of an authority competent at the international level.

82. Since this conclusion differs from the rules applicable to “defective ratification” as set forth in article 46, it seems essential to state it expressly in a draft guideline, which might read as follows:

“**2.1.4** *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*

“A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.”

(b) *Form of interpretative declarations*

83. In view of the lack of any provision on interpretative declarations in the 1969 and 1986 Vienna Conventions and the scarcity or relative uncertainty of practice with regard to such declarations, they cannot be considered in isolation. We can hardly proceed except by analogy with (or in contrast to) reservations, taking great care, of course, to distinguish conditional interpretative declarations from those that are not conditional.¹⁰⁸

84. With respect to conditional interpretative declarations, there is hardly any *prima facie* reason to depart from the rules of form and procedure applicable to the formulation of reservations; by definition, the State or international organization formulating such declara-

tions subjects its consent to be bound to a specific interpretation.¹⁰⁹ The reasons that make it necessary for reservations to be formulated in writing and authenticated by a person empowered to engage the State or the international organization are equally valid here. Since conditional interpretative declarations are indissociably linked to the consent of their author to be bound, they must be known to the other parties against whom they may be invoked, since they purport to produce effects on the treaty relations.

85. Draft guidelines 2.1.1, 2.1.2 and 2.1.3 may therefore simply be transposed to the formulation of conditional interpretative declarations, i.e. they must be formulated in writing by a person competent to represent the State or the international organization formulating the reservation with regard to the expression of consent to be bound by a treaty, and the same rules should apply if the interpretative declaration is subject to formal confirmation under the conditions stated in draft guideline 2.4.4.¹¹⁰

86. For the reasons outlined in paragraphs 270–271 of his fifth report, the Special Rapporteur believes that it would be preferable to state the applicable rules expressly (even if they are the same as those that apply to reservations), rather than refer to the draft guidelines on reservations; however, their wording could be simplified, as the Commission is not obliged to restate the provisions of the 1969 and 1986 Vienna Conventions word for word, for there are none on this topic. Nevertheless, since all interpretative declarations must be formulated by an authority competent to engage the State,¹¹¹ there would appear to be no need to repeat that rule specifically in connection with conditional declarations.

87. In the light of these observations, a single draft guideline could combine the substance of the provisions contained in draft guidelines 2.1.1, 2.1.2 and 2.1.3, as follows:¹¹²

“**2.4.2** *Formulation of conditional interpretative declarations*

“A conditional interpretative declaration must be formulated in writing. Where necessary, formal confirmation of a conditional interpretative declaration must be effected in the same manner.”

88. A very different problem arises with regard to interpretative declarations purporting to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions, without subjecting its consent to be bound to that interpretation. The author of the declaration is taking a position,¹¹³ but is not at-

¹⁰⁹ See draft guideline 1.2.1.

¹¹⁰ See the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 1 above), p. 190, para. 272.

¹¹¹ See paragraph 90 below.

¹¹² This draft guideline could be supplemented by a stipulation concerning the need to communicate conditional interpretative declarations to the other interested States and international organizations; in this regard, see paragraph 133 below.

¹¹³ One which can have “considerable probative value” when it contains “recognition by a party of its own obligations under an instrument” (*International Status of South-West Africa, Advisory*

¹⁰⁷ See paragraphs 69–70 above.

¹⁰⁸ On the distinction, see draft guidelines 1.2 and 1.2.1 and the commentaries thereto (*Yearbook ... 1999*, vol. II (Part Two), pp. 97–106).

tempting to make it binding on the other Contracting Parties. Hence it is not essential for such declarations to be in writing, as it is in the case of conditional interpretative declarations and reservations. It is certainly preferable that they should be known to the other parties, but ignorance of them would not necessarily void them of all legal consequences. Moreover, the oral formulation of such declarations is not uncommon, and has not kept judges or international arbitrators from recognizing that they have certain effects.¹¹⁴

89. It goes without saying, however, that an interpretative declaration can only produce such effects if it emanates from an authority competent to engage the State. And since the declaration purports to produce effects in relation to a treaty, it would seem appropriate to limit the option of formulating it to the authorities competent to engage the State at the international level through a treaty.

90. There is no need for a draft guideline on the form that simple interpretative declarations may take, since the form is unimportant. The silence of the Guide to Practice on that point should make it sufficiently clear. The draft guideline on competence to formulate an interpretative declaration should be modelled on the one concerning reservations:

“2.4.1 Formulation of interpretative declarations

“An interpretative declaration must be formulated by a person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State or international organization to be bound by a treaty.”

91. Moreover, the remarks that apply in the case of reservations also apply to the formulation of interpretative declarations at the internal level. National rules and practice are highly diverse in this regard.

92. This becomes clear from the replies of States to the Commission’s questionnaire on reservations to treaties. Of the 22 States that replied to questions 3.5 and 3.5.1,¹¹⁵ in seven cases, only the executive branch is competent to formulate a declaration;¹¹⁶ in two cases, only the parliament has such competence;¹¹⁷ and in 13 cases, competence is shared between the two,¹¹⁸ and the modalities for collaboration between them are as diverse as they are with regard to reservations.¹¹⁹

Opinion, I.C.J. Reports 1950, pp. 135–136; see the commentary to draft guideline 1.2.1 (*Yearbook ... 1999* (footnote 108 above), p. 101, footnote 342).

¹¹⁴ See the commentary to draft guideline 1.2.1 (*ibid.*)

¹¹⁵ Question 3.5: “At the internal level, what authority or authorities take(s) the decision to make such interpretative declarations?”; question 3.5.1: “Is the Parliament involved in the formulation of these declarations?” (*Yearbook ... 1996* (see footnote 40 above), annex II, p. 101). This list of States is not identical to the list of States that responded to similar questions on reservations.

¹¹⁶ Chile, the Holy See, India, Israel, Italy, Japan and Malaysia.

¹¹⁷ Estonia and Slovakia.

¹¹⁸ Argentina, Bolivia, Croatia, Finland, France, Germany, Mexico, Panama, Slovenia, Spain, Sweden, Switzerland and the United States of America.

¹¹⁹ See paragraph 74 above.

93. In general, the executive branch probably plays a more distinct role than it does in the case of reservations.

94. It follows *a fortiori* that the determination of competence to formulate interpretative declarations and the procedure to be followed in that regard is purely a matter for internal law, and that a State or an international organization would not be entitled to invoke a violation of internal law as invalidating the legal effect that its declarations might produce—especially since it appears that, in general, there is greater reliance on practice than on formal written rules. The Special Rapporteur’s only doubt is whether a guideline is needed in this regard.

95. If the Commission believes that a draft guideline is needed, it might be worded as follows:

“[2.4.1 bis Competence to formulate an interpretative declaration at the internal level

“1. The determination of the competent body and the procedure to be followed for formulating an interpretative declaration at the internal level is a matter for the internal law of each State or international organization.

“2. A State or international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]”

2. PUBLICITY OF RESERVATIONS AND INTERPRETATIVE DECLARATIONS

96. Once it has been formulated, the reservation (or interpretative declaration) must be made known to the other States or international organizations concerned. Such publicity is essential for enabling them to react through either a formal acceptance or an objection.

97. Article 23 of the 1969 and 1986 Vienna Conventions specifies the recipients of reservations formulated by a State or an international organization, but is silent on the procedure to be followed in effecting such notification, the burden of which is borne by the depositary in nearly all cases.

(a) *Recipients of reservations and interpretative declarations*

(i) *Reservations*

98. Under article 23, paragraph 1, of the 1986 Vienna Convention, a reservation must be communicated “to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”. In addition, article 20, paragraph 3, which stipulates that a reservation to a constituent instrument requires “the acceptance of the competent organ” of the organization in order to produce effects, implies that the reservation must be communicated to the organization in question.

- a. Reservations to treaties other than constituent instruments of international organizations

99. The first group of recipients (contracting States and contracting organizations) does not pose any particular problem. These terms are defined in article 2, paragraph 1 (f), of the 1986 Vienna Convention¹²⁰ as meaning, respectively:

- (i) a State, or
- (ii) an international organization, which has consented to be bound by the treaty, whether or not the treaty has entered into force.

100. Much more problematic, in contrast, are the definition and, still more, the determination in each specific case of the “other States and international organizations entitled to become parties to the treaty”. As has been noted, “[n]ot all treaties are wholly clear as to which other States may become parties”.¹²¹

101. In his 1951 report on reservations to multilateral treaties, Mr. Brierly suggested the following provision:

The following classes of States shall be entitled to be consulted as to any reservations formulated after the signature of this convention (or after this convention has become open to signature or accession):

- (a) States entitled to become parties to the convention,
- (b) States having signed or ratified the convention,
- (c) States having ratified or acceded to the convention.¹²²

102. In conformity with these recommendations, the Commission suggested that, “in the absence of contrary provisions in any multilateral convention ... [t]he depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention”.¹²³

103. More vaguely, Mr. H. Lauterpacht, in his first report on the law of treaties, in 1953, proposed in three of the four alternative versions of draft article 9 on reservations a provision stating that “[t]he text of the reservations received shall be communicated by the depositary authority to all the interested States”.¹²⁴ But he does not comment on this phrase,¹²⁵ which is reproduced in the first report on the law of treaties by Mr. G. G. Fitzmaurice in 1956,¹²⁶ who clarifies it as fol-

lows in draft article 39: these are “all the States which have taken part in the negotiation and drawing up of the treaty or which, by giving their signature, ratification, accession or acceptance, have manifested their interest in it”.¹²⁷

104. Conversely, in his first report on the law of treaties, in 1962, Sir Humphrey Waldock reverted to the 1951 formulation¹²⁸ and proposed that any reservation formulated “by a State signing, ratifying, acceding to, or accepting a treaty subsequently to the meeting or conference at which it was adopted shall be communicated to all other States which are, or are entitled to become, parties”.¹²⁹ This was also the formula adopted by the Commission after the Drafting Committee had considered it and made minor drafting changes.¹³⁰ While States had not expressed any objections, in this regard in their comments on the draft articles adopted on first reading, Sir Humphrey, with no explanations, proposed in his fourth report in 1965 to revert to the phrase “other States concerned”,¹³¹ which the Commission replaced by “contracting States”¹³² on the ground that the notion of “States concerned”¹³³ was “very vague”, finally adopting, at its eighteenth session in 1966, the requirement of communication “to the other States entitled to become parties to the treaty”,¹³⁴ a phrase which was “regarded as more appropriate to describe the recipients of the type of communications in question”.¹³⁵

105. At the United Nations Conference on the Law of Treaties, Mr. McKinnon pointed out, on behalf of Canada, that that wording “might create difficulties for a depositary, as there was no criterion for deciding which were those States. It would therefore be preferable to substitute the phrase ‘negotiating States and contracting States’ as proposed in his delegation’s amendment (A/CONF.39/C.1/L.158)”.¹³⁶ Although this common-sense proposal was submitted to the Drafting Commit-

¹²⁷ *Ibid.*, art. 39 (b) (ii).

¹²⁸ See paragraphs 101–102 above.

¹²⁹ *Yearbook ... 1962* (see footnote 59 above), p. 60. Not without reason, Sir Humphrey believed that it was unnecessary to notify the other States which took part in the negotiations of a reservation formulated “when signing a treaty at a meeting or conference of the negotiating States” if it appeared at the end of the treaty itself or in the final act of the conference.

¹³⁰ *Ibid.*, document A/5209, p. 176, draft art. 18, para. 3. In its commentary, the Commission considered that this phrase was equivalent to “other interested States” (p. 180).

¹³¹ *Yearbook ... 1965* (see footnote 62 above), p. 56.

¹³² *Yearbook ... 1965*, vol. II, document A/6009, p. 162.

¹³³ Explanation given by Sir Humphrey at the 813th meeting of the Commission (*ibid.*, vol. I, p. 267).

¹³⁴ Draft art. 18, para. 1 (see footnote 55 above).

¹³⁵ *Yearbook ... 1966*, vol. I (Part II), 887th meeting, p. 293 (explanation given by Mr. Briggs, Chairman of the Drafting Committee).

¹³⁶ *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), 23rd meeting of the Committee of the Whole, p. 124, para. 38. Frowein (“Some considerations regarding the function of the depositary: comments on art. 72, para. 1 (d), of the ILC’s 1966 draft articles on the law of treaties”, p. 533) points out that the United States had expressed the same concern in 1966 in the General Assembly’s discussion of the Commission’s draft articles relating to depositaries (*Yearbook ... 1966* (see footnote 55 above), p. 352) see also Rosenne, “More on the depositary of international treaties”, pp. 847–848.

¹²⁰ See article 2, paragraph 1 (f), of the 1969 Vienna Convention and article 2, paragraph 1 (k), of the 1978 Vienna Convention, which define the term “contracting State” in the same way.

¹²¹ Jennings and Watts, eds., *Oppenheim’s International Law*, p. 1248, footnote 4.

¹²² *Yearbook ... 1951*, vol. II, document A/CN.4/41, annex E, p. 16. This puzzling formulation is explained by the fact that these are alternative model clauses.

¹²³ *Ibid.*, document A/1858, p. 130, para. 34. This point was not extensively discussed; see, however, the statements by Mr. Hudson and Mr. Spiropoulos, the latter of whom considered that communication to States not parties to the Treaty was not an obligation under positive law (*ibid.*, vol. I, 105th meeting, p. 198).

¹²⁴ *Yearbook ... 1953*, vol. II, p. 92, alternative drafts B, C and D; oddly enough, this requirement does not appear in alternative draft A (acceptance of reservations by a two-thirds majority), *ibid.*, p. 91.

¹²⁵ *Ibid.*, p. 136.

¹²⁶ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115, art. 37, para. 2: they “must be brought to the knowledge of the other interested States”.

tee,¹³⁷ the latter preferred an amendment submitted by Spain,¹³⁸ which appears in the final text of article 23, paragraph 1, of the 1969 Vienna Convention and which was reproduced in the 1986 text unchanged except for the addition of international organizations.¹³⁹

106. Not only is the phrase adopted obscure, but the *travaux préparatoires* for the 1969 Vienna Convention do little to clarify it. The same is true of subparagraphs (b) and (e) of article 77, paragraph 1, of the Convention which, while not referring expressly to reservations, provide that the depositary is responsible for transmitting “to the parties and to the States entitled to become parties to the treaty” copies of the texts of the treaty and informing them of “notifications and communications relating to the treaty”;¹⁴⁰ however, the *travaux préparatoires* for these provisions shed no light on this phrase,¹⁴¹ on which the Commission’s members have never focused their attention.

107. This was not the case during the preparation of the 1986 Vienna Convention. Whereas the Special Rapporteur on the law of treaties between States and international organizations or between two or more international organizations had, in his fourth and fifth reports,¹⁴² merely adapted without comment the text of article 23, paragraph 1, of the 1969 Vienna Convention, several members of the Commission expressed particular concern during the discussion of the draft in 1977 regarding the problems posed by the determination of “international organizations entitled to become parties to the treaty”. For example, Mr. Ushakov observed that:

In the case of treaties of a universal character concluded between States and international organizations, such communications would thus have to be made to all existing States. For the same category of treaties and also treaties concluded between international organizations only, it would, however, be more difficult to determine what international organizations were “entitled to become parties”. If 10 international organizations were parties to a treaty, to what other international organizations would the communications have to be sent?¹⁴³

¹³⁷ See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), report of the Committee of the Whole, document A/CONF.39/14, p. 139, para. 194.

¹³⁸ *Ibid.*, document A/CONF.39/C.1/L.149, para. 192 (i); for the text adopted, see paragraph 196 (*ibid.*).

¹³⁹ See paragraph 98 above.

¹⁴⁰ Under article 77, paragraph 1 (f), the depositary is also responsible for “informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited”.

¹⁴¹ On the origin of these provisions, see, in particular, the report by Mr. Briery on reservations to multilateral treaties, *Yearbook ... 1951* (footnote 122 above), p. 27, and the conclusions of the Commission, *ibid.*, document A/1858, p. 130, para. 34 (l); article 17, paragraph 4 (c), and article 27, paragraph 6 (c), of the draft articles proposed by Sir Humphrey Waldock in 1962, *Yearbook ... 1962* (footnote 55 above), pp. 66 and 82–83; article 29, paragraph 5, of the draft adopted by the Commission on first reading, *ibid.*, document A/5209, p. 185; and draft article 72 adopted definitively by the Commission at its eighteenth session, *Yearbook ... 1966* (footnote 55 above), p. 269.

¹⁴² *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.

¹⁴³ *Yearbook ... 1977*, vol. I, 1434th meeting, p. 101, para. 42.

108. For his part, Mr. Schwebel noted that “an international organization was entitled to become a party to a treaty if there was a link between the basic function for which it had been created and the object and purpose of the treaty”.¹⁴⁴ This opinion was not shared by Mr. Reuter, who recalled that “the phrase ‘entitled to become parties to the treaty’” had not been defined in the 1969 Vienna Convention, which “meant that entitlement to become party to a treaty concluded between States was necessarily determined by the treaty itself”, as “treaties which concerned all States should be open to all States”, and the “same would apply to international organizations”.¹⁴⁵ Mr. Ushakov, who maintained his opposition to the wording adopted by the Drafting Committee, made a formal proposal in plenary meeting to limit communications concerning reservations to treaties between States and one or more international organizations¹⁴⁶ to the “contracting organizations” only; as this proposal was not supported, a decision was taken to record it in a footnote to the commentary,¹⁴⁷ and that was done.¹⁴⁸

109. It is certainly regrettable that the limitations proposed by Canada in 1968¹⁴⁹ and by Mr. Ushakov in 1977 regarding the recipients of communications relating to reservations were not adopted (in the second case, probably out of a debatable concern with not deviating from the 1969 wording and not making any distinction between the rights of States and those of international organizations); such limitations would have obviated practical difficulties for depositaries without significantly calling into question the “useful” publicity of reservations among truly interested States and international organizations.¹⁵⁰

110. There is obviously no problem when the treaty itself determines clearly which States or international organizations are entitled to become parties, at least in the case of “closed” treaties; treaties concluded under the auspices of a regional international organization such as the Council of Europe,¹⁵¹ OAS¹⁵² or OAU¹⁵³ generally fall into this category. Things are much more complicated when it comes to treaties that do not indicate clearly

¹⁴⁴ *Ibid.*, p. 102, para. 48; in the same vein, see the statement by Mr. Verosta, *ibid.*, para. 45.

¹⁴⁵ *Ibid.*, para. 51; in the same vein, see the statement by Mr. Calle y Calle, *ibid.*, para. 46.

¹⁴⁶ But not those concerning reservations to treaties between several international organizations (*ibid.*, 1451st meeting, p. 196, para. 19).

¹⁴⁷ *Ibid.*, para. 20.

¹⁴⁸ *Yearbook ... 1977*, vol. II (Part Two), p. 115, footnote 482.

¹⁴⁹ See paragraph 105 above.

¹⁵⁰ It is interesting to note that, while the specialized agencies of the United Nations are not, and are not entitled to become, “parties” to the Convention on the Privileges and Immunities of the Specialized Agencies, they do receive communications relating to the reservations formulated by some States with regard to its provisions. See, in particular, ST/LEG/7/Rev.1 (footnote 74 above), pp. 60–61, paras. 199–203.

¹⁵¹ See, for instance, article K, paragraph 1, of the European Social Charter (revised): “This Charter shall be open for signature by the member States of the Council of Europe”; or article 32, paragraph 1, of the Criminal Law Convention on Corruption.

¹⁵² See, for example, article XXI of the Inter-American Convention against Corruption.

¹⁵³ See, for instance, article 12, paragraph 1, of the Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora.

which States are entitled to become parties to them or “open” treaties containing the words “any State”,¹⁵⁴ or when it is established that participants in the negotiations were agreed that later accessions would be possible.¹⁵⁵ This is obviously the case most particularly when depositary functions are assumed by a State which not only has no diplomatic relations with some States,¹⁵⁶ but also does not recognize as States certain entities which proclaim themselves to be States.

111. The *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* devotes an entire chapter to describing the difficulties encountered by the Secretary-General in determining the “States and international organizations which may become parties”,¹⁵⁷ difficulties which legal theorists have largely underscored.¹⁵⁸ With regard to the depositary notifications of the Secretary-General which the Special Rapporteur has been able to consult, the Special Rapporteur has noted that open treaties limit themselves to indicating that “all States” are to be notified, without giving further details, while others list the member and non-member States to which notification is to be given, whether or not the latter States have observer status.¹⁵⁹ Curiously, States which replied on this point to the Commission’s questionnaire on reservations to treaties do not mention any particular difficulties in this area, but this can probably be explained by the fact that the problem is not specific to reservations and more generally concerns depositary functions.

112. That is also why the Special Rapporteur sees no merit in proposing the adoption of one or more draft guidelines on this point.¹⁶⁰

¹⁵⁴ See, for instance, article XIII of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*: “The present Convention is open for signature by all States”; or article 84, paragraph 1, of the 1986 Vienna Convention: “The present Convention shall remain open for accession by any State, by Namibia ... and by any international organization which has the capacity to conclude treaties”. See also article 305 of the United Nations Convention on the Law of the Sea, which opens the Convention for signature by not only “all States” but also Namibia (before its independence) and self-governing States and territories.

¹⁵⁵ See article 15 of the 1969 and 1986 Vienna Conventions.

¹⁵⁶ See article 74 of the 1969 and 1986 Vienna Conventions.

¹⁵⁷ ST/LEG/7/Rev.1 (see footnote 74 above), chap. V, pp. 21–30, paras. 73–100.

¹⁵⁸ See, *inter alia*, Frowein, *loc. cit.*, and Rosenne, “More on the depositary of international treaties”, pp. 847–848.

¹⁵⁹ The notification dated 7 July 1997 concerning a reservation by Japan to the Agreement establishing the Bank for Cooperation and Development in the Middle East and North Africa (United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. I (United Nations publication, Sales No. E.01.V.5), p. 501), was also sent to the Permanent Observer Mission of Palestine to the United Nations since, under article 53 (a) of the Agreement, the Palestinian Authority is entitled to become a party thereto.

¹⁶⁰ The Special Rapporteur nevertheless acknowledges that his position poses a problem of general principle: must the Commission avail itself of the opportunity afforded by the drafting of the Guide to Practice in the area of reservations to try to solve general problems which arise with regard to reservations, but also with regard to other aspects of the law of treaties? The Special Rapporteur proposes to answer this question pragmatically, answering “yes” if the solution of an unresolved problem will have an impact on the solution of an issue specific to reservations, and “no” in other cases. However, he would welcome any guidance which the Commission might give him in this regard.

113. By contrast, no matter how problematic and arguable the provision may be,¹⁶¹ it is certainly necessary to reproduce in the Guide to Practice the rule set forth in article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions (taking the latter in its broadest formulation), presumably adding that such communication must be made in writing and setting forth this general rule in a single draft guideline, together with a special rule on the communication of reservations to constituent instruments of international organizations.¹⁶² The first paragraph of such a draft could be worded as follows:

“2.1.5 *Communication of reservations* (first paragraph)

“A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.”

114. This latter requirement is only implicit in the 1969 and 1986 Vienna Conventions, but it is clear from the context, since article 23, paragraph 1, is the provision which requires that reservations be formulated in writing¹⁶³ and which uses a very concise formula to link that condition to the requirement that reservations be communicated. Besides, when there is no depositary, the formulation and communication of reservations necessarily go hand in hand.¹⁶⁴ This, moreover, conforms to practice.¹⁶⁵

b. The particular case of reservations to constituent instruments of international organizations

115. Article 23 of the 1969 and 1986 Vienna Conventions does not deal with the particular case of the procedure with regard to reservations to constituent instruments of international organizations. The general rule set forth in paragraph 1 of the article must, however, be clarified and expanded in this particular case.

116. According to article 20, paragraph 3, of the 1986 Vienna Convention:

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

Now, that organ can take a decision only if the organization is aware of the reservation, which must therefore be communicated to it.

¹⁶¹ As the Special Rapporteur noted after the debates on his first report, 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” (see footnote 46 above). There must therefore be compelling reasons for deviating from the Guide to Practice. No matter how unsatisfactory the Special Rapporteur may find the rule in article 23, paragraph 1, he does not think that this condition is met in the present instance.

¹⁶² See paragraph 133 below: “A reservation to a treaty in force which is the constituent instrument of an international organization or creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ”.

¹⁶³ See paragraph 40 above.

¹⁶⁴ See paragraphs 115–129 below.

¹⁶⁵ See the “depositary notifications” of the Secretary-General of the United Nations.

117. This problem was overlooked by the first three Special Rapporteurs on the law of treaties and taken up only by Sir Humphrey Waldock in his first report in 1962. He proposed a long draft article 17 on the power to formulate and withdraw reservations, paragraph 5 of which provided that:

However, in any case where a reservation is formulated to an instrument which is the constituent instrument of an international organization and the reservation is not one specifically authorized by such instrument, it shall be communicated to the Head of the secretariat of the organization concerned in order that the question of its admissibility may be brought before the competent organ of such organization.¹⁶⁶

118. Sir Humphrey Waldock indicated that this clarification was motivated by:

a point to which attention is drawn in paragraph 81 of the Summary of the Practice of the Secretary-General (ST/LEG/7), where it is said:

“If the agreement should be a constitution establishing an international organization, the practice followed by the Secretary-General and the discussions in the Sixth Committee show that the reservation would be submitted to the competent organ of the organization before the State concerned was counted among the parties. The organization alone would be competent to interpret its constitution and to determine the compatibility of any reservation with its provisions.”¹⁶⁷

119. This provision disappeared from the draft after its consideration by the Drafting Committee,¹⁶⁸ probably because the latter’s members felt that the adoption of an express stipulation that the decision on the effect of a reservation to a constituent instrument must be taken by “the competent organ of the organization in question”¹⁶⁹ made that clarification superfluous. The question does not appear to have been raised again subsequently.

120. It is not surprising that Sir Humphrey Waldock asked the question in 1962: three years earlier, the problem had arisen critically in connection with a reservation by India to the Convention on the Intergovernmental Maritime Consultative Organization (IMCO)—later the International Maritime Organization (IMO). The Secretary-General of the United Nations, as depositary of the Convention, transmitted to IMCO the text of the Indian reservation, which had been made that same day on the opening of the first session of the IMCO Assembly. He suggested that the IMCO secretariat should refer the question to the IMCO Assembly for a decision. When this referral was contested, the Secretary-General, in a well-argued report, maintained that:

This procedure conformed (1) to the terms of the IMCO Convention; (2) to the precedents in depositary practice where an organ or body was in a position to pass upon a reservation; and (3) to the views on this specific situation expressed by the General Assembly during its previous debates on reservations to multilateral conventions.¹⁷⁰

121. The Secretary-General stated, *inter alia*, that “[i]n previous cases where reservations had been made to multilateral conventions which were in force and which either were constitutions of organizations or which oth-

erwise created deliberative organs, the Secretary-General has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question”.¹⁷¹ He cited as examples the communication to the World Health Assembly of the reservation formulated in 1948 by the United States to the Constitution of the World Health Organization¹⁷² and the communication the following year of reservations made by the Union of South Africa and by Southern Rhodesia to GATT to the Contracting Parties to the Agreement.¹⁷³ In the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the Secretary-General gives another example of his consistent practice in this regard:

[W]hen Germany and the United Kingdom accepted the Agreement Establishing the African Development Bank of 17 May 1979, as amended, they made reservations which had not been contemplated in the Agreement. The Secretary-General, as depositary, duly communicated the reservations to the Bank and accepted the deposit of the instruments only after the Bank had informed him that it had accepted the reservations.¹⁷⁴

122. In view of the principle set forth in article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions and of the practice which normally appears to be followed,¹⁷⁵ it does seem appropriate to set forth in a draft guideline the obligation to communicate reservations to the constituent instrument of an international organization to the organization in question.

123. Three questions arise, however, with regard to the precise scope of this rule, the principle of which does not appear to be in doubt:

(a) Should the draft guideline include the clarification (which was included in Sir Humphrey Waldock’s 1962 draft¹⁷⁶) that the reservation must be communicated to the head of the secretariat of the organization concerned?

(b) Should it state that the same rule applies when the treaty is not, strictly speaking, the constituent instrument of an international organization, but creates a “deliberative organ” that may take a position on whether or not the reservation is lawful, as the Secretary-General had done in ST/LEG/7?¹⁷⁷

(c) Does the communication of a reservation to the constituent instrument of an international organization to the latter organization remove the obligation to communicate the text of the reservation also to interested States and international organizations?

¹⁷¹ A/4235 (see footnote 170 above), para. 21.

¹⁷² See also Schachter, “The development of international law through the legal opinions of the United Nations Secretariat part VII: reservations to multipartite treaties”, pp. 124–126.

¹⁷³ A/4235 (see footnote 170 above), para. 22.

¹⁷⁴ ST/LEG/7/Rev.1 (see footnote 74 above), p. 59, para. 198. See also Horn, *op. cit.*, pp. 346–347.

¹⁷⁵ The Special Rapporteur must, however, admit that he is familiar only with the depositary practice of the Secretary-General of the United Nations. Nevertheless, he attaches particular importance to it because the Secretary-General is currently, without a doubt, the principal depositary of constituent instruments of other international organizations.

¹⁷⁶ See paragraph 117 above.

¹⁷⁷ See footnote 74 and paragraph 121 above.

¹⁶⁶ *Yearbook ... 1962* (see footnote 59 above), p. 61.

¹⁶⁷ *Ibid.*, p. 66, para. (12) of the commentary on article 17.

¹⁶⁸ *Ibid.*, document A/5209, draft art. 18, pp. 175–176.

¹⁶⁹ *Ibid.*, draft art. 20, p. 176, para. 4.

¹⁷⁰ *Official Records of the General Assembly, Fourteenth Session, Annexes*, agenda item 65, document A/4235, para. 18. See also, on this incident, Schachter, “The question of treaty reservations at the 1959 General Assembly”.

124. On the first question, the Special Rapporteur is of the view that such a clarification is not necessary: even if, generally speaking, the communication will be addressed to the head of the secretariat, this may not always be the case because of the particular structure of a given organization. In the case of the European Union, for example, the collegial nature of the European Commission might suggest that such a communication should more logically be addressed to the Secretary-General of the organization.¹⁷⁸ Moreover, such a clarification has hardly any concrete value: what matters is that the organization in question be duly alerted to the problem.

125. On the question of whether the same rule should apply to “deliberative organs” created by a treaty which nonetheless are not international organizations in the strict sense of the term, it is very likely that in 1959 the drafters of the report of the Secretary-General of the United Nations had GATT in mind—especially since one of the examples cited related to that organization.¹⁷⁹ The problem no longer arises in that connection, since GATT has been replaced by WTO. The fact remains, however, that certain treaties, especially in the field of disarmament or environmental protection, create deliberative bodies having a secretariat which have sometimes been denied the status of an international organization.¹⁸⁰ While the Special Rapporteur does not share this viewpoint, it would be useful perhaps to include this clarification in the Guide to Practice—on the understanding that it should also be included in the draft guideline(s) that will clarify the meaning of article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions. It would seem justifiable in fact to apply this same rule to reservations to constituent instruments *sensu stricto* and to reservations to treaties creating oversight bodies that assist in the application of the treaty whose status as international organizations might be subject to challenge.

126. The reply to the last question is the trickiest. It is also the one that has the greatest practical significance, for a reply in the affirmative would impose a heavier burden on the depositary than a negative one. Moreover, the practice of the Secretary-General—which does not appear to be wholly consistent¹⁸¹—seems to tend rather in the opposite direction.¹⁸² The Special Rapporteur neverthe-

less believes that a reservation to a constituent instrument should be communicated not only to the organization concerned but also to all other contracting States and organizations and to those entitled to become members thereof.

127. Two arguments are advanced in support of this position. The first is that it is by no means evident that an organization’s acceptance of the reservation precludes member States (and international organizations) from objecting to it. The Special Rapporteur has no final position on the matter, which can be decided only after the Commission undertakes an in-depth study of whether or not it is possible to object to a reservation that is expressly provided for in a treaty. Even if there are good reasons to believe that this is not the case, it would seem premature to make such a claim. Secondly, there is a good practical argument to support this affirmative reply: even if the reservation is communicated to the organization itself, it is in fact its own member States (or international organizations) that will decide. It is therefore important for them to be aware of the reservation. A two-step procedure is a waste of time.

128. Lastly, it goes without saying that the obligation to communicate the text of reservations to a constituent instrument to the international organization concerned arises only if the organization exists, in other words, if the treaty is in force.¹⁸³ The question may nevertheless arise as to whether such reservations should not also be communicated before the effective creation of the organization to the “preparatory committees” (or whatever name they may be given) that are often established to prepare for the prompt and effective entry into force of the constituent instrument. Even if in many cases an affirmative reply again appears necessary, it would be difficult to generalize, since everything depends on the exact mandate that the conference that adopted the treaty gives to the preparatory committee. Moreover, the reference to “deliberative organs” established by a treaty seems to cover this possibility; the Special Rapporteur therefore does not propose to include it in the second paragraph which he proposes to add to draft guideline 2.1.5.

129. This second paragraph could read as follows:

“A reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.”

Draft guideline 2.1.5 in its entirety would therefore read as follows:

“2.1.5 *Communication of reservations*

“1. A reservation must be communicated in writing to the contracting States and contracting organizations

¹⁷⁸ The Special Rapporteur once again regrets that the European Union did not think it necessary to reply to the Commission’s questionnaire on reservations to treaties.

¹⁷⁹ See paragraph 121 above.

¹⁸⁰ See, for example, Churchill and Ulfstein, “Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law”; some authors also argue that the International Criminal Court is not, strictly speaking, an international organization.

¹⁸¹ For an earlier example in which it appears that the Secretary-General communicated the reservation (of the United States to the Constitution of WHO) both to interested States and to the organization concerned, see Schachter, “The development of international law through the legal opinions of the United Nations Secretariat”, p. 125. See also ST/LEG/7/Rev.1 (footnote 74 above), p. 51, para. 170.

¹⁸² In at least one case, however, the State author of a unilateral declaration (which was tantamount to a reservation)—in this case, the United Kingdom—directly consulted the signatories to an agreement establishing an international organization, the Agreement establishing the Caribbean Development Bank, about the declaration (see United Nations, *Multilateral Treaties Deposited with the Secretary-General* (footnote 159 above), pp. 472–473, note 8. The author of the reservation may also take the initiative to consult the international organization

concerned (see the reservation of France to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, *ibid.*, vol. II, p. 291, note 3).

¹⁸³ If the treaty is not in force, according to the information that was kindly communicated to the Special Rapporteur by the Treaty Section of the United Nations Office of Legal Affairs, that is indeed the practice of the Secretary-General of the United Nations, who proceeds in this case as he would in respect of any other treaty.

and other States and international organizations entitled to become parties to the treaty.

“2. A reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.”

(ii) *Interpretative declarations*

130. There seems to be no reason to transpose the rules governing the communication of reservations to simple interpretative declarations, which may be formulated orally,¹⁸⁴ it would therefore be paradoxical to insist that they be formally communicated to other interested States or international organizations. By refraining from such communication, the author of the declaration runs the risk that the declaration may not have the intended effect, but this is a different problem altogether. It does not seem necessary, therefore, to include a clarification of this point in the Guide to Practice.

131. This is not the case, however, with regard to conditional interpretative declarations, which require a reaction from other interested States or international organizations;¹⁸⁵ the procedure regarding their formulation must therefore be the same as that used for reservations.

132. The inclusion of a draft guideline on this point in the Guide to Practice could provide an opportunity for limiting the scope of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions without changing the text, since it does not deal with interpretative declarations, by limiting the recipients of notifications to contracting States and international organizations and negotiating parties. The Special Rapporteur is of the view, however, that this minor change, while positive in itself, could give rise to confusion and that it would be artificial to provide for different procedures for the notification of instruments that are often difficult to distinguish clearly.

133. For this reason, he believes that draft guideline 2.4.2¹⁸⁶ could be supplemented by a paragraph based on the text of draft guideline 2.1.5 and could also include the special rule governing the communication of reservations to the constituent instruments of international organizations, proposed above to supplement draft guideline 2.1.5.¹⁸⁷ The full text of the draft would therefore read as follows:

“2.4.2 Formulation of conditional interpretative declarations

“1. A conditional interpretative declaration must be formulated in writing.

“2. Where necessary, the formal confirmation of a conditional interpretative declaration must be effected in the same manner.

“3. A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.”

B. Communication of reservations and interpretative declarations

134. Article 23 of the 1969 and 1986 Vienna Conventions requires that reservations be communicated to recipients whom the provision defines, albeit somewhat enigmatically; it is silent, however, as to the person responsible for such communication. In most cases this will be the depositary, as shown by the general provisions of article 79 of the 1986 Convention,¹⁸⁸ which also give some information on the modalities for such communication and its effects. Nevertheless, it follows from both article 78¹⁸⁹ and the legal regime of reservations, as established by the Conventions, that the depositary's role is strictly limited and that he appears largely as a mere “conveyor belt” between the author of the reservation (or conditional interpretative declaration) and the States and international organizations to which it must be communicated. These considerations do not apply as strongly in the case of “simple” interpretative declarations; they are, however, equally compelling, and for the same reasons, in the case of conditional interpretative declarations.

1. AUTHORITY RESPONSIBLE AND MODALITIES FOR COMMUNICATING RESERVATIONS

135. On prior occasions when the topic of reservations to treaties was considered, the Commission or its special rapporteurs planned to stipulate expressly that it was the duty of the depositary to communicate the text of formulated reservations to interested States. Thus, in 1951 at its third session, for example, the Commission believed that “[t]he depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention”.¹⁹⁰ Likewise, in his fourth report on the law of treaties in 1965, Sir Humphrey Waldock proposed that a reservation “must be notified to the depositary or, where there is no depositary, to the other interested States”.¹⁹¹

136. In the end, this formula was not adopted by the Commission, which, noting that the drafts previously adopted “contained a number of articles in which reference was made to communications or notifications to be made directly to the States concerned, or if there was a depositary, to the latter”, came to the conclusion that “it would allow a considerable simplification to be

¹⁸⁴ See paragraph 88 above.

¹⁸⁵ See paragraph 84 above.

¹⁸⁶ For the first two paragraphs of this draft guideline, see paragraph 87 above.

¹⁸⁷ See paragraphs 113 and 129 above.

¹⁸⁸ Art. 78 of the 1969 Vienna Convention.

¹⁸⁹ Art. 77 of the 1969 Vienna Convention.

¹⁹⁰ *Yearbook ... 1951*, vol. II (see footnote 121 above). See also paragraph 103 above.

¹⁹¹ *Yearbook ... 1965* (see footnote 62 above), p. 53, para. 13. See also paragraph 44 and footnote 64 above.

effected in the texts of the various articles if a general article were to be introduced covering notifications and communications".¹⁹²

137. That is the object of draft article 73 of 1966, now article 78 of the 1969 Vienna Convention, which was reproduced, without change except for the addition of international organizations, in article 79 of the 1986 Vienna Convention:

Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State or any international organization under the present Convention shall:

(a) if there is no depositary, be transmitted direct to the States and organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 78, paragraph 1 (e).

138. Article 79 is indissociable from this latter provision, under which:

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

...

(e) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty.

139. It may be noted in passing that the expression "the parties and the States and international organizations entitled to become parties to the treaty", which is used in that paragraph, is not the exact equivalent of the formula used in article 23, paragraph 1, which refers to "contracting States and contracting organizations". The difference has no practical consequences, since the contracting States and contracting international organizations are entitled to become parties in accordance with the definition of that term given in article 2, paragraph 1 (f), of the 1986 Vienna Convention;¹⁹³ it poses a problem, however, with regard to the wording of the draft guideline(s) to be included in the Guide to Practice.

140. Without doubt, the provisions of article 78, paragraph 1 (e), and article 79 of the 1986 Vienna Convention should be reproduced in the Guide to Practice and adapted to the special case of reservations; otherwise, the Guide would not fulfil its pragmatic purpose of making available to users a full set of guidelines enabling them to determine what conduct to adopt whenever they are faced with a question relating to reservations. But in preparing this draft (or these drafts), should the wording of these two provisions be reproduced, or that of article 23, paragraph 1?

¹⁹² *Yearbook ... 1966* (see footnote 55 above), p. 270, para. (1) of the commentary to draft article 73.

¹⁹³ See paragraph 99 above.

141. The question is a minor one; the Commission need not resolve it. The Special Rapporteur has a slight preference for the second solution; since it is primarily a matter of clarifying and completing the provisions of the 1969 and 1986 Vienna Conventions relating to reservations, it would seem logical to adopt the terminology used in those provisions so as to avoid any ambiguity and conflict—even purely superficial—between the various guidelines of the Guide to Practice.

142. Moreover, there can be no doubt that communications relating to reservations—especially those concerning the actual text of reservations formulated by a State or an international organization—are communications "relating to the treaty", within the meaning of article 78, paragraph 1 (e), referred to above. Furthermore, in its 1966 draft, the Commission expressly entrusted the depositary with the task of examining "whether a signature, an instrument or a reservation* is in conformity with the provisions of the treaty and of the present articles"¹⁹⁴. This expression was replaced in the 1969 Vienna Convention with a broader one—"the signature or any instrument, notification or communication relating to the treaty"¹⁹⁵—which cannot, however, be construed as excluding reservations from the scope of the provision.

143. In addition, as indicated in the Commission's commentary on draft article 73 (now article 79 of the 1986 Vienna Convention), the rule laid down in subparagraph (a) of this provision "relates essentially to notifications and communications relating to the 'life' of the treaty—acts establishing consent, reservations,* objections, notices regarding invalidity, termination, etc."¹⁹⁶

144. In essence, there is no doubt that both article 78, paragraph 1 (e), and article 79 (a) reflect current practice.¹⁹⁷ They warrant no special comment, except for the observation that, even in cases where there is a depositary, the State which is the author of the reservation may directly inform the other States or international organizations concerned of the text of the reservation. Thus, the United Kingdom, for example, informed the Secretary-General of the United Nations, as depositary of the Agreement establishing the Caribbean Development Bank, that it had consulted all the signatories to that Agreement with regard to an aspect of the declaration (constituting a reservation) which it had attached to its instrument of ratification (and which was subsequently accepted by the Board of Governors of the Bank, and then withdrawn by the United Kingdom).¹⁹⁸ Likewise, France itself submitted to the Board of Governors of the Asia-Pacific Institute for Broadcasting Development a

¹⁹⁴ *Yearbook ... 1966* (see footnote 55 above), p. 269, para. 1 (d). On the substance of this provision, see paragraph 164 below.

¹⁹⁵ Art. 77, para. 1 (d). The new formula is derived from an amendment proposed by the Byelorussian Soviet Socialist Republic, which was adopted by the Committee of the Whole by 32 votes to 24, with 27 abstentions (*Official Records of the United Nations Conference on the Law of Treaties* (see footnote 66 above), p. 202, para. 657 (iv) (4), and p. 203, para. 660 (i); see also paragraph 164, third bullet, below.

¹⁹⁶ *Yearbook ... 1966* (see footnote 55 above), p. 270, para. (2).

¹⁹⁷ *Ibid.*, with regard to draft article 73 (a) (which became article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention).

¹⁹⁸ See footnote 182 above.

reservation which it had formulated to the agreement establishing that organization, for which the Secretary-General is also depositary.¹⁹⁹

145. There seem to be no objections to this practice, provided that the depositary is not thereby released from his own obligations.²⁰⁰ It is, however, a source of confusion and uncertainty in the sense that the depositary could rely on States formulating reservations to perform the function expressly conferred on him by article 78, paragraph 1 (e), and the final phrase of article 79 (a), of the 1986 Vienna Convention.²⁰¹ The practice should probably not be encouraged; for this reason, the Special Rapporteur will refrain from proposing a draft guideline enshrining it and will, unless otherwise instructed by the Commission, confine himself to noting its existence in the commentary to draft guideline 2.1.6.²⁰²

146. In its 1966 commentary, the Commission dwelt on the importance of the task entrusted to the depositary in draft article 72, paragraph 1 (e) (now art. 78, para. 1 (e), of the 1986 Vienna Convention), and stressed “the obvious desirability of the prompt performance of this function by a depositary”.²⁰³ This is an important issue, which is linked to article 79 (b)–(c) of the Convention:²⁰⁴ the reservation produces effects only as from the date on which the communication relating thereto is received by the States and organizations for which it is intended, and not as from the date of its formulation. In truth, it matters little whether the communication is made directly by the author of the reservation, who will have no one but himself to blame if it is transmitted late to its recipients. On the other hand, if there is a depositary, it is essential for the latter to display promptness; otherwise, the depositary could stall both the effect of the reservation and the opportunity for the other States and international organizations concerned to react to it.²⁰⁵

147. Some of the main international organizations which are depositaries of treaties and which were consulted by the Secretariat at the Special Rapporteur’s request were kind enough to send information on their practice in this regard.²⁰⁶ This information shows that, at the current stage of modern means of communication, they perform their tasks with great speed.

148. In its reply, the Treaty Section of the United Nations Office of Legal Affairs²⁰⁷ stated:

1. The time period between receipt of a formality by the Treaty Section and its communication to the parties to a treaty is approximately 24 hours unless a translation is required or a legal issue is involved. If a translation is required, in all cases, it is requested by the Treaty Section on an urgent basis. If the legal issue is complex or involves communications with parties outside the control of the United Nations, then there may be some delay; however, this is highly unusual. It should be noted that, in all but a few cases, formalities are communicated to the relevant parties within 24 hours.

2. Depositary notifications are communicated to permanent missions and relevant organizations by both regular mail and electronic mail, within 24 hours of processing (see LA41TR/221). Additionally, effective January 2001, depositary notifications can be viewed in the United Nations Treaty Collection on the Internet at <http://untreaty.un.org> (depositary notifications on the Internet are for information purposes only and are not considered to be formal notifications by the depositary). Depositary notifications with bulky attachments, for example those relating to chapter XI.B.16,²⁰⁸ are sent by facsimile.²⁰⁹

149. For its part, IMO has indicated²¹⁰ that the time period between the communication of a reservation to a treaty for which the organization is depositary and its transmittal to the States concerned is generally from one to two weeks. Communications, which are translated into the three official languages of the organization (English, Spanish and French), are always transmitted by regular mail.

150. The practice of the Council of Europe has been described as follows:

The usual period is two to three weeks (notifications are grouped and sent out approximately every two weeks). In some cases, delays occur owing to voluminous

¹⁹⁹ *Ibid.*

²⁰⁰ See paragraphs 156–170 below.

²⁰¹ In the aforesaid case of the reservation of France to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, it seems that the Secretary-General confined himself to taking note of the absence of objections from the organization’s Governing Council (see *Multilateral Treaties Deposited with the Secretary-General* (footnote 159 above), vol. II, p. 291, note 2. The Secretary-General’s passivity in this instance is subject to criticism.

²⁰² See paragraph 153 below.

²⁰³ *Yearbook ... 1966* (see footnote 55 above), p. 270, para. (5) of the commentary to article 72.

²⁰⁴ See the text of these provisions in paragraph 137 above; see also the text of draft guideline 2.1.6 in paragraph 153 below.

²⁰⁵ See the commentary on draft article 72, *Yearbook ... 1966* (footnote 55 above), pp. 270–271, paras. (3)–(6); see also Elias, *The Modern Law of Treaties*, pp. 216–217.

²⁰⁶ The Special Rapporteur wishes to express his gratitude to the persons who kindly sent him this valuable information.

²⁰⁷ In the past, the time period between the receipt of reservations and their communication to the parties was longer than the one now mentioned by the Treaty Section. In the 1980s, this period varied between one and, in exceptional cases, two or even three months.

²⁰⁸ These are communications relating to the Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of These Prescriptions (see *Multilateral Treaties Deposited with the Secretary-General*, vol. I (footnote 159 above), p. 584).

²⁰⁹ Electronic mail of 25 May 2001. The Treaty Section has also advised:

3. Please note that the depositary practice has been changed in cases where the treaty action is a modification to an existing reservation and where a reservation has been formulated by a party subsequent to establishing its consent to be bound. A party to the relevant treaty now has 12 months within which to inform the depositary that it objects to the modification or that it does not wish to consider the reservation made subsequent to ratification, acceptance, approval, etc. The time period for this 12 months is calculated by the depositary on the basis of the date of issue of the depositary notification (see LA41TR/221 (23–1) (*Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2, p. 42).

²¹⁰ Telephone conversation of 24 May 2001.

declarations/reservations or appendices (descriptions or extracts of domestic law and practices) that must be checked and translated into the other official language (the Council of Europe requires that all notifications be made in one of the official languages or at least be accompanied by a translation into one of these languages. The translation into the other official language is provided by the Treaty Office). Urgent notifications that have immediate effect (e.g. derogations under article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)) are carried out within a couple of days.

Unless they prefer notifications to be sent directly to the Ministry for Foreign Affairs (currently 11 out of 43 member States), the original notifications are sent out in writing to the permanent representations in Strasbourg, France, which in turn forward them to their capitals. Non-member States that have no diplomatic mission (consulate) in Strasbourg are notified via a diplomatic mission in Paris or Brussels or directly. The increase in member States and notifications over the last 10 years has prompted one simplification: since 1999, each notification is no longer signed individually by the Director-General of Legal Affairs (acting for the Secretary-General of the Council of Europe), but notifications are grouped and only each cover letter is signed individually. There have not been any complaints against this procedure.

Since the new website (<http://conventions.coe.int>) became operational in January 2000, all information relating to formalities is immediately made available on the website. The texts of reservations or declarations are put on the website the day they are officially notified. Publication on the website is, however, not considered to constitute an official notification.²¹¹

151. At OAS:

Member States are notified of any new signatures and ratifications to inter-American treaties through the OAS Newspaper which circulates every day. In a more formal way, OAS notifies member States every three months through a *procès-verbal* sent to the permanent missions to OAS or after meetings where there are a significant number of new signatures and ratifications such as, for example, the General Assembly.

The formal notifications, which also include the bilateral agreements signed between the General Secretariat and other parties, are done in Spanish and English.²¹²

152. While it is probably unnecessary for these very helpful clarifications to be reproduced in full in the Guide to Practice, it would nevertheless be useful to give some information in the form of general guidelines intended both for the depositary (where there is one) and for the authors of reservations (where there is no depositary). This draft guideline might provide that:

(a) The communication must be made in writing (and that, where it is transmitted by electronic mail,

confirmation must be sent by regular mail, or even by facsimile);

(b) The communication should be transmitted with all due speed (even though it appears neither possible nor necessary to set a fixed time limit).

On the other hand, it is difficult to be specific about the language or languages in which such communications must be transmitted, since the practices of depositaries vary.²¹³ Similarly, it is no doubt better to follow the customary practice on the question of to whom, specifically, the communications should be addressed.²¹⁴

153. The draft guideline could combine the text of the two above-mentioned provisions of the 1986 Vienna Convention and read as follows:

“2.1.6 Procedure for communication of reservations

“1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations,²¹⁵ a communication relating to a reservation to a treaty shall be transmitted:

“(a) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or,

“(b) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

“2. Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile].”

154. The *chapeau* of the draft guideline reproduces the relevant parts that are common to the *chapeaux* of articles 77–78 of the 1969 Vienna Convention and articles 78–79 of the 1986 Vienna Convention, with some simplification: the wording decided upon in Vienna to introduce article 78 of the 1986 Convention (“the contracting States and contracting organizations or, as the case may be, by the contracting organizations” appears to be unnecessarily cumbersome and contains little additional information. Moreover, as was mentioned above,²¹⁶ the text of the draft reproduces the formulation used in article 23, paragraph 1, of the 1986 Convention (“to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”), in preference to that used in article 78, paragraph 1 (e), (“the parties

²¹³ Where the depositary is a State, it seems that such communications are generally made in the official language or languages of that State. Where the depositary is an international organization, it may use either all its official languages (IMO) or one or two working languages (United Nations).

²¹⁴ Ministries for foreign affairs, diplomatic missions to the depositary State or States, permanent missions to the depositary organization.

²¹⁵ The official French text (art. 78, para. 1) of the 1986 Convention adopted in Vienna uses the word in its feminine form (“*contractantes*”). Since the masculine form takes precedence over the feminine form, this is a grammatical error.

²¹⁶ Paras. 139–141 above.

²¹¹ Electronic mail of 25 May 2001.

²¹² Electronic mail of 29 May 2001.

and the States and international organizations entitled to become parties to the treaty”). While the latter formulation is probably more elegant and has the same meaning, it departs from the terminology used in the section of the Vienna Conventions relating to reservations. Nevertheless, it did not seem useful to burden the text by using this expression twice in paragraph 1 (a)–(b) of the guideline; in order to remove any ambiguity, however, the commentary should clearly specify that the expression “States and organizations for which it is intended” (subpara. (b)) refers to the “contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty” (subpara. (a)). Lastly, the division of paragraph 1 of the draft guideline into two subparagraphs probably makes it easier to understand without changing the meaning.

155. It is also essential to reproduce the rule contained in article 79 (b)–(c) of the 1986 Vienna Convention,²¹⁷ adapting it to the specific case of reservations. However, since the distinction made in these two paragraphs can be understood²¹⁸ only in relation to article 78, paragraph 1 (e), which it does not appear useful to reproduce separately in the Guide to Practice²¹⁹ and since, in any event, a reservation can in principle produce effects only if it is accepted by the other Contracting Parties²²⁰ (so that it is the date on which it is received by the other parties that matters), draft guideline 2.1.8 could no doubt be drafted more simply and concisely, as follows:

“2.1.8 Effective date of communications relating to reservations

“A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon its receipt by the State or organization to which it was transmitted.”

2. FUNCTIONS OF DEPOSITARIES

156. The belated decision to subsume the provisions relating to the communication of reservations within the general articles of the 1969 Vienna Convention relating to depositaries²²¹ explains the lack of any reference to the depositary in the section on reservations. On the other hand (and consequently), it is self-evident that the provisions of articles 77–78 of the 1986 Convention²²² are fully applicable to reservations insofar as they are relevant to them.

157. This is clearly the case with regard to article 78, paragraph 1 (e), under which the depositary is responsible for “informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty”. This rule, combined with the one in article 79 (a), is reproduced in draft guideline 2.1.6.²²³ This

same draft implies also that the depositary receives and keeps custody of reservations;²²⁴ it therefore seems unnecessary to mention this expressly.

158. It goes without saying that the general provisions of article 77, paragraph 2, of the 1986 Vienna Convention, relating to the international character of the functions of depositaries and their obligation to act impartially apply to reservations as to any other field.²²⁵ In this general form, these guidelines do not specifically concern the functions of depositaries in relation to reservations and, accordingly, there seems to be no need to reproduce them as such in the Guide to Practice. But these provisions should be placed in the context of those in article 78, paragraph 2:

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter’s functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the international organization concerned.

159. These substantial limitations on the functions of depositaries were enshrined as a result of problems that arose with regard to certain reservations; hence, it appears all the more essential to recall these provisions in the Guide to Practice, adapting them to the special case of reservations.

160. As has been noted, the problem is posed in different terms when the depositary is a State that is itself a party to the treaty, or when it is “an international organization or the chief administrative officer of the organization”.²²⁶ In the first case, “if the other parties found themselves in disagreement with the depositary on this question—a situation which, to our knowledge, has never materialized—they would not be in a position to insist that he follow a course of conduct different from the one he believed that he should adopt”.²²⁷ In contrast, in the second case, the political organs of the organization (composed of States not necessarily parties to the treaty) can give instructions to the depositary. It is in this context that problems arose, and their solution has consistently tended towards a strict limitation on the depositary’s power of judgement, culminating finally in the rules laid down in the 1969 Vienna Convention and reproduced in the 1986 Convention.

161. As early as 1927, as a result of the difficulties created by the reservations to which Austria intended to subject its deferred signature of the International Opium Convention, the Council of the League of Nations adopted a resolution endorsing the conclusions of a Committee of

²²⁴ See article 78, paragraph 1 (c), of the 1986 Vienna Convention.

²²⁵ “The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter’s functions shall not affect that obligation.”

²²⁶ Art. 77, para. 1, of the 1986 Vienna Convention.

²²⁷ Dehaussy, “Le dépositaire de traités”, p. 515.

²¹⁷ Para. 137 above.

²¹⁸ It is also difficult to understand.

²¹⁹ See paragraphs 139 and 153 above.

²²⁰ See article 20, paragraphs 4–5, of the 1969 and 1986 Vienna Conventions.

²²¹ See paragraph 136 above.

²²² Arts. 76–77 of the 1969 Vienna Convention.

²²³ See paragraph 153 above.

Experts²²⁸ and giving instructions to the Secretary-General of the League on what conduct to adopt.²²⁹ But it is in the context of the United Nations that the most serious problems have arisen.

162. It is sufficient to recall the main stages in the evolution of the role of the Secretary-General as depositary in respect of reservations:²³⁰

(a) Initially, the Secretary-General “seemed to determine alone ... his own rules of conduct in the matter”²³¹ and subjected the admissibility of reservations to the unanimous acceptance of the Contracting Parties or the international organization whose constituent instrument was involved;²³²

(b) Following the ICJ advisory opinion of 28 May 1951 on *Reservations to the Convention on Genocide*,²³³ the General Assembly adopted its first resolution calling on the Secretary-General, in respect of future conventions:

(i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications;²³⁴

These guidelines were extended to all treaties for which the Secretary-General assumes depositary functions under resolution 1452 B (XIV) of 7 December 1959, adopted as a result of the problems related to the reservations formulated by India to the constituent instrument of IMCO.²³⁵

163. This is the practice followed since then by the Secretary-General of the United Nations and, apparently, by all international organizations (or the heads of the secretariats of international organizations) with regard to reservations where the treaty in question does not contain a reservations clause.²³⁶ And this is the practice that the

²²⁸ See the report of the Committee of Experts for the Progressive Codification of International Law on the admissibility of reservations to general conventions, of which the subcommittee was composed of Messrs. Fromageot, McNair and Diena, League of Nations, *Official Journal*, 8th year, No. 7 (July 1927), p. 880.

²²⁹ *Ibid.*, resolution of 17 June 1927, p. 800. See also resolution XXIX of the Eighth International Conference of American States (Lima, 1938) which established the rules to be followed by the Pan American Union with regard to reservations (*Yearbook ... 1965*, vol. II, document A/5687, p. 80).

²³⁰ See also, for example, Imbert, “A l’occasion de l’entrée en vigueur de la Convention de Vienne sur le droit des traités: réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l’exercice de ses fonctions de dépositaire”, pp. 528–529; or Rosenne, *Developments in the Law of Treaties 1945-1986*, pp. 429–434.

²³¹ Dehaussy, *loc. cit.*, p. 514.

²³² See ST/LEG/7/Rev.1 (footnote 74 above), pp. 50–51, paras. 168–172.

²³³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15.

²³⁴ Resolution 598 (VI) of 12 January 1952, para. 3 (b).

²³⁵ See paragraph 120 above.

²³⁶ See ST/LEG/7/Rev.1 (footnote 74 above), pp. 52–56, paras. 177–188.

Commission drew on in formulating the rules to be applied by the depositary in this area.

164. It should also be noted that here, too, the formulation adopted tended towards an ever greater limitation on the depositary’s powers:

- In the draft articles on the law of treaties adopted by the Commission on first reading at its first session in 1962, paragraph 5 of draft article 29 on the functions of a depositary provided that:

On a reservation having been formulated, the depositary shall have the duty:

(a) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be, to communicate on the point with the State which formulated the reservations;

(b) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested States as prescribed in articles 18 and 19.²³⁷

- The draft articles adopted on second reading in 1966 further provided that the functions of the depositary comprised:

Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question;²³⁸

The commentary on this provision dwelt, however, on the strict limits on the depositary’s examining power:

Paragraph 1 (d) recognizes that a depositary has a certain duty to examine whether signatures, instruments and reservations are in conformity with any applicable provisions of the treaty or of the present articles, and if necessary to bring the matter to the attention of the State in question. That is, however, the limit of the depositary’s duty in this connexion. It is no part of the functions to adjudicate on the validity of an instrument or reservation. If an instrument or reservation appears to be irregular, the proper course of a depositary is to draw the attention of the reserving State to the matter and, if the latter does not concur with the depositary, to communicate the reservation to the other interested States and bring the question of the apparent irregularity to their attention.²³⁹

- During the United Nations Conference on the Law of Treaties an amendment proposed by the Byelorussian Soviet Socialist Republic²⁴⁰ further attenuated the provision in question: even if the disappearance of any express reference to reservations certainly does not prevent the rule laid down in article 77,²⁴¹ paragraph 1 (d), from applying to these instruments,²⁴² the fact remains that the depositary’s power is limited henceforth to examining the *form* of reservations, his function being that of:

Examining whether the signature or any instrument, notification or communication relating to the treaty is *in due and proper form** and, if need be, bringing the matter to the attention of the States in question*.²⁴³

²³⁷ *Yearbook ... 1962*, vol. II, document A/5209, p. 185.

²³⁸ *Yearbook ... 1966* (see footnote 55 above), p. 269, draft art. 72, para. 1 (d).

²³⁹ *Ibid.*, pp. 269–270, para. (4) of the commentary to article 72.

²⁴⁰ See footnote 195 above.

²⁴¹ Art. 78 of the 1986 Vienna Convention.

²⁴² See footnote 195 and paragraph 142 above.

²⁴³ The 1986 text.

165. In this way the principle of the depositary as “letter box” has been enshrined. As Elias has written:

It is essential to emphasize that it is no part of the depositary’s function to assume the role of interpreter or judge in any dispute regarding the nature or character of a party’s reservation vis-à-vis the other parties to a treaty, or to pronounce a treaty as having come into force when that is challenged by one or more of the parties to the treaty in question.²⁴⁴

166. Opinions are divided as to the advantages or disadvantages of this diminution of the depositary’s competencies with regard to reservations. Of course, as ICJ emphasized in its 1951 advisory opinion, “the task of the [depositary] would be simplified and would be confined to receiving reservations and objections and notifying them”.²⁴⁵

The effect of this, it is suggested, is to transfer the undoubted subjectivities of the United Nations system from the shoulders of the depositary to those of the individual States concerned, in their quality of parties to that treaty, and in that quality alone. This may be regarded as a positive innovation, or perhaps clarification of the modern law of treaties, especially of reservations to multilateral treaties, and is likely to reduce or at least limit the “dispute” element of unacceptable reservations.²⁴⁶

167. Conversely, we may also see in the practice followed by the Secretary-General of the United Nations and embodied, indeed “solidified”, in the 1969 Vienna Convention, “an unnecessarily complex system”²⁴⁷ insofar as the depositary is no longer able to impose the least amount of coherence and unity in the interpretation and implementation of reservations.²⁴⁸

168. The fact remains that distrust of the depositary, as reflected in the provisions analysed above of the relevant articles of the 1969 and 1986 Vienna Conventions, is too deeply entrenched, both in minds and in practice, for there to be any consideration of revising the rules adopted in 1969 and perpetuated in 1986. In the view of the Special Rapporteur, there is little choice but to reproduce them verbatim in the Guide to Practice, combining the relevant provisions of article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention²⁴⁹ in a single guideline, and applying them only to the functions of depositaries with regard to reservations.

²⁴⁴ *Op. cit.*, p. 213.

²⁴⁵ *I.C.J. Reports 1951* (see footnote 233 above), p. 27; and it may be considered that:

“It is that passage which has established the theoretical basis for the subsequent actions by the General Assembly and the International Law Commission. For it is in that sentence that the essentially administrative features of the function [of the depositary] are emphasized and any possible political (and that means decisive) role is depressed to the greatest extent.”

(Rosenne, “The depositary of international treaties”, p. 931)

²⁴⁶ Rosenne, *op. cit.*, pp. 435–436.

²⁴⁷ Imbert, *loc. cit.*, p. 534; the author applies the term only to the practice of the Secretary-General and seems to consider that the 1969 Vienna Convention simplifies the context of the problem; this is doubtful.

²⁴⁸ The depositary can, however, play a not insignificant role in the “reservations dialogue” in reconciling opposing points of view, where appropriate. See Han, “The U.N. Secretary-General’s treaty depositary function: legal implications”, pp. 570–571; the author here dwells on the importance of the role that the depositary can play.

²⁴⁹ In view of its highly general character, it does not seem appropriate to recall in the Guide to Practice the general principle set forth in article 77, paragraph 2 (see footnote 225 above).

169. On this basis, draft guideline 2.1.7 would read as follows:

“2.1.7 Functions of depositaries

“1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

“2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter’s functions, the depositary shall bring the question to the attention of:

“(a) The signatory States and organizations and the contracting States and contracting organizations; or

“(b) Where appropriate, the competent organ of the international organization concerned.”

170. Paragraph 1 of this draft guideline reproduces the text of the first phrase of article 78, paragraph 1 (d), of the 1986 Vienna Convention, referring expressly and exclusively to the attitude to be adopted by the depositary with regard to reservations. In contrast, it did not seem useful to transpose the second phrase of this provision since article 78, paragraph 2, which is reproduced word for word in paragraph 2 of draft guideline 2.1.7, contains the same rule in greater detail.

3. COMMUNICATION OF INTERPRETATIVE DECLARATIONS

171. In view of the very informal character of the formulation of “simple” interpretative declarations,²⁵⁰ the problem of communicating them obviously does not arise.

172. The situation is different with regard to conditional interpretative declarations. The reasons which justify the transposition of the rules relating to the formulation of reservations to the formulation of such declarations²⁵¹ are equally compelling when it comes to their communication and publicity: at issue are, inevitably, formal declarations which, by definition, establish the conditions for their author’s expression of consent to be bound by the treaty and to which other interested States and international organizations must have an opportunity to react.

173. It seems legitimate, therefore, to include in the Guide to Practice a consolidated draft guideline which, in order to avoid reproducing the entire text of draft guidelines 2.1.5–2.1.8, could simply refer to them, without, however, formally citing them for the reasons outlined in paragraph 86 of this report. In that case, the text would read as follows:

²⁵⁰ See paragraphs 88 and 90 above.

²⁵¹ See paragraph 84 above.

“2.4.9²⁵² *Communication of conditional interpretative declarations*

“1. A conditional interpretative declaration must be communicated in writing to the contracting States and

²⁵² It would probably be preferable to insert this draft guideline between draft guidelines 2.4.2 (Formulation of conditional interpretative declarations) and 2.4.3 (Times at which an interpretative declaration may be formulated)—indeed, to include it in draft guideline 2.4.2.

contracting organizations and other States and international organizations entitled to become parties to the treaty under the same conditions as a reservation.

“2. A conditional interpretative declaration to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.”

Annex

**PROCEDURE: CONSOLIDATED TEXT OF DRAFT GUIDELINES
DEALING WITH THE FORMULATION OF RESERVATIONS AND INTERPRETATIVE
DECLARATIONS PROPOSED IN THE FIFTH AND SIXTH REPORTS**

2.1 Form and notification of reservations**2.1.1 Written form**

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation

When formal confirmation of a reservation is necessary, it must be made in writing.

[2.1.3 Competence to formulate a reservation at the international level

Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.]

[2.1.3 Competence to formulate a reservation at the international level

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to formulate a reservation on behalf of a State or an international organization if:

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to formulate a reservation at the international level on behalf of a State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

[(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization).]

[2.1.3 bis Competence to formulate a reservation at the internal level

The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or international organization].

2.1.4 Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 Communication of reservations

1. A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. A reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 Procedure for communication of reservations

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(a) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(b) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

2. Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile].

2.1.7 Functions of depositaries

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

2.1.8 Effective date of communications relating to reservations

A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon its receipt by the State or organization to which it was transmitted.

2.2 Confirmation of reservations made when signing

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.

2.2.2 Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation¹

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

¹ Draft guidelines 2.2.1 and 2.2.2 could be combined into a single draft guideline as follows:

“Reservations formulated when negotiating, adopting or authenticating or when 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, 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.”

The Special Rapporteur is not in favour of this combination (see his fifth report (*Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1-4, p. 188, para. 257).

the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.

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]²

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.

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.

2.3 Reservations formulated late

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.

Model clauses 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 or at any time thereafter.

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.

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.

² The alternative draftings that have been proposed relate to the fact that, as indicated in footnote 446 of the fifth report (see footnote 1 above), p. 188, the term “agreements in simplified form”, familiar to jurists schooled in the Roman law tradition, might bewilder those with training in common law.

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.

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.

2.4 Procedure regarding interpretative declarations

2.4.1 *Formulation of interpretative declarations*

An interpretative declaration must be formulated by a person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.1 bis] *Competence to formulate an interpretative declaration at the internal level*

1. The determination of the competent body and the procedure to be followed for formulating an interpretative declaration at the internal level is a matter for the internal law of each State or international organization.
2. A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

2.4.2 *Formulation of conditional interpretative declarations*

1. A conditional interpretative declaration must be formulated in writing.
2. Where necessary, the formal confirmation of a conditional interpretative declaration must be effected in the same manner.
3. A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

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].

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, 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.

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 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.

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.

2.4.9 *Communication of conditional interpretative declarations*

1. A conditional interpretative declaration must be communicated in writing to the contracting States and

contracting organizations and other States and international organizations entitled to become parties to the treaty under the same conditions as a reservation.

2. A conditional interpretative declaration to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

**INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES
ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW
(PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)**

[Agenda item 6]

DOCUMENT A/CN.4/516

Comments and observations received from Governments: report of the Secretary-General

[Original: English]
[3 April 2001]

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Introduction¹

1. On 12 December 2000, the General Assembly adopted resolution 55/152, entitled “Report of the International Law Commission on the work of its fifty-second session”. In paragraph 3 of the 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) as referred to the Drafting Committee.¹

2. As at 21 March 2001, a reply had been received from the United Kingdom of Great Britain and Northern Ireland. 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.

¹ The text of the draft articles may be found in *Yearbook ... 2000*, vol. II (Part Two), p. 128, para. 721.

**Comments and observations received from Governments:
United Kingdom of Great Britain and Northern Ireland**

General remarks

The United Kingdom reiterates its general satisfaction with the overall direction of the work of the Commission and its Special Rapporteur on this topic, and presents its observations in that context.

Title

1. The United Kingdom has welcomed the conciseness of the new title, “Convention on the Prevention of Significant Transboundary Harm”, and endorsed the deletion of

the expression “injurious consequences of acts not prohibited by international law”. It could be further improved by the deletion of the word “significant”, this word being an element of definition best left to the body of the text. The reference to “hazardous activities” should remain deleted, as it does not reflect the text of article 1. It would however be desirable to add to the title some succinct reference to the type of harm covered by the convention. The Commission may wish to consider the following possibility (with or without the bracketed words):

“The [Framework] Convention on Prevention of Transboundary Harm caused by Activities Involving Risk [of Such Harm].”

2. If the final instrument is intended to be adopted as a framework convention, it would be desirable to include the word “framework” in the title. However, the text as currently drafted seems to be in the nature of a free-standing convention rather than a framework. To turn it into a framework convention would require some modest adaptations to the body of the text, for example to accommodate other agreements and/or unilateral declarations within its framework.

Article 1

1. The United Kingdom refers to its detailed written comments on article 1 in its submission of 24 March 2000.² Since it is now proposed to adopt the draft articles in the form of a binding instrument, the United Kingdom considers it essential that the scope of the articles be more precisely defined, or at least that the instrument contain a mechanism for generating the necessary definition. Three possible ways of providing for clarification of the activities covered were suggested in the previous submission. These could be employed singly or in combination, for example, by setting out a minimum core of activities to be covered in a list; by obliging States parties to designate unilaterally further activities within their territory, jurisdiction or control which involve risk of causing significant transboundary harm; and by providing for the more detailed designation of activities within the scope of the convention by specific agreements between neighbouring or regional States.

2. The United Kingdom considers that the provision of mechanisms such as those suggested above for defining the activities to which the articles apply would fit well with the concept of a framework convention.

Articles 2, 8 [9] and 9 [10]: “States likely to be affected”

1. The United Kingdom has come to the view that the expression “States likely to be affected” and its definition in article 2 (e) are not entirely consistent with the expression “risk of causing significant transboundary harm” and its definition in subparagraph (a). Where the “risk involving transboundary harm” constitutes a low probability of causing disastrous harm there will be no public and no State likely to be affected. The concept of risk as defined in subparagraph (a) is, and should be, central to the structure of the articles.

2. To render subparagraph (e) consistent with subparagraph (a), it could be recast to refer to the State in the territory of which there is a risk of significant transboundary harm occurring. That State might be more aptly referred to as the “potentially affected State”.

² Yearbook ... 2000, vol. II (Part One), document A/CN.4/509, p. 132.

3. As drafted, article 8 only requires notification of the public likely to be affected, and article 9 only requires notification of States likely to be affected. Likewise, articles 10–11 apply to the “States concerned”, which is defined in article 2 (f) as including “States likely to be affected”, but this expression does not include all States which are at risk. It would follow that articles 8–11 do not apply to some activities which are within the scope of the draft convention. In the opinion of the United Kingdom, these articles should apply to all such activities.

4. The United Kingdom believes that if the modification to article 2 (e) suggested above were made, consistency could then be achieved by referring to potentially affected States and the public potentially affected throughout the text, in place of references to the likelihood of being affected.

Article 7 [8]

1. The United Kingdom welcomes the replacement of the word “evaluation” by the word “assessment” in the body of this article. However, there seems still to be some inconsistency between the title of this article and the text. An “environmental impact assessment”, as referred to in the title, must necessarily involve assessment of the entire environmental impact of a proposed activity, within and outside the territory of the State of origin. The obligations in article 9 would only apply in the event that the assessment were to indicate a risk of causing significant transboundary harm, but the assessment cannot realistically be carried out only in relation to the transboundary dimension.

2. The United Kingdom would prefer this article to require a decision to authorize an activity to be based on an assessment of the possible impact of the proposed activity on the environment, including the possible transboundary harm.

3. If, however, the text of the article remains as drafted, the title should be modified lest the impression be given that the assessment referred to would amount to an “environmental impact assessment” in the sense in which that term is normally used, for example, in principle 17 of the Rio Declaration on Environment and Development.³ The title could, for example, be qualified by adding the word “Transboundary” at the beginning, or substituting the word “transboundary” for the word “environmental”.

Relationship between articles 3, 10 [11] and 11 [12]

1. The United Kingdom remains concerned that the concept of solutions based on an equitable balancing of interests might be interpreted in a way which undermines the duty of prevention set out in article 3. For example, it might be understood as implying that some potential solutions regarding the implementation of the duty in article 3 are unacceptable or inequitable.

³ 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. The United Kingdom is in agreement with the Special Rapporteur's explanation of the mutually interacting relationship between these articles, as set out in the note in bold print at the end of the annex to his third report.⁴ The United Kingdom considers it necessary to add a clarification to this effect to the text of the convention, in order to eliminate the present ambiguity. The third and fourth sentences of the Special Rapporteur's explanation could lend themselves particularly well to insertion into the text of article 10.

The precautionary principle, polluter-pays and sustainable development

The United Kingdom has already expressed disappointment that the revised text does not take greater account of the principles of precautionary action, that the polluter should pay and that development should be sus-

tainable. States should take these principles into account when making decisions on prior authorization of activities involving risk and when consulting on an equitable balancing of interests. The principles would be most effective if incorporated explicitly into the operational part of the convention text. For example, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, 29 January 2000)⁵ not only sets out a preambular reaffirmation of the precautionary approach contained in principle 15 of the Rio Declaration on Environment and Development,⁶ but also spells out in the operational part of the text how this approach is to be applied in the context of the Protocol (arts. 10–11). The Commission might likewise consider incorporating reference to the above principles into one or more of the relevant operational articles of the present convention. The United Kingdom believes that adherence to these principles should not be taken for granted.

⁴ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/510, annex, p. 125.

⁵ United Nations, *Treaty Series*, vol. 2226, No. 30619, p. 208.

⁶ See footnote 3 above.

CHECKLIST OF DOCUMENTS OF THE FIFTY-THIRD SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/512	Provisional agenda	Mimeographed. For agenda as adopted, see <i>Yearbook ... 2001</i> , vol. II (Part Two), p. 16, para. 10.
A/CN.4/513	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-fifth session of the General Assembly	Mimeographed.
A/CN.4/514 [and Corr.1]	Second report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur	Reproduced in the present volume.
A/CN.4/515 and Add.1-3	State responsibility: comments and observations received from Governments	<i>Idem.</i>
A/CN.4/516	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	<i>Idem.</i>
A/CN.4/517 and Add.1	Fourth report on State responsibility, by Mr. James Crawford, Special Rapporteur	<i>Idem.</i>
A/CN.4/518 and Add.1-3	Sixth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/519	Fourth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.601 [and Corr.1 and 2]	International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities). Draft preamble and draft articles adopted by the Drafting Committee on second reading	Reproduced in <i>Yearbook ... 2001</i> , vol. I, summary record of the 2675th meeting (para. 3).
A/CN.4/L.602/Rev.1	State responsibility. Titles and texts of the draft articles adopted by the Drafting Committee on second reading	Mimeographed. For the final text, see <i>Yearbook ... 2001</i> , vol. II (Part Two), p. 26.
A/CN.4/L.603 [and Corr.1 and 2]	Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee: guidelines 2.2.1, 2.2.2 [2.2.3], 2.2.3 [2.2.4], 2.3.1, 2.3.2, 2.3.3, 2.3.4, 2.4.3, 2.4.4 [2.4.5], 2.4.5 [2.4.4], 2.4.6 [2.4.7] and 2.4.7 [2.4.8]	Reproduced in <i>Yearbook ... 2001</i> , vol. I, summary record of the 2694th meeting (para. 1).
A/CN.4/L.604	Draft report of the Commission on the work of its fifty-third session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)</i> . The final text appears in <i>Yearbook ... 2001</i> , vol. II (Part Two), p. 15.
A/CN.4/L.605	<i>Idem</i> : chapter II (Summary of the work of the Commission at its fifty-third session)	<i>Idem</i> , p. 17.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.606 and Add.1–2	<i>Idem</i> : chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem</i> , p. 18.
A/CN.4/L.607 and Add.1 [and Corr.1]	<i>Idem</i> : chapter IV (International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities))	<i>Idem</i> , p. 144.
A/CN.4/L.608 [and Corr.1] and Add.1 [and Corr.1] and Add.2–10	<i>Idem</i> : chapter V (State responsibility)	<i>Idem</i> , p. 20.
A/CN.4/L.609 and Add.1–5	<i>Idem</i> : chapter VI (Reservations to treaties)	<i>Idem</i> , p. 171.
A/CN.4/L.610	<i>Idem</i> : chapter VII (Diplomatic protection)	<i>Idem</i> , p. 196.
A/CN.4/L.611	<i>Idem</i> : chapter VIII (Unilateral acts of States)	<i>Idem</i> , p. 202.
A/CN.4/L.612	<i>Idem</i> : chapter IX (Other decisions and conclusions of the Commission)	<i>Idem</i> , p. 206.
A/CN.4/SR.2665–A/ CN.4/SR.2710	Provisional summary records of the 2665th to 2710th meetings	Mimeographed. The final text appears in <i>Yearbook ... 2001</i> , vol. I.