

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2007

Volume II
Part One

Documents of the fifty-ninth session

UNITED NATIONS



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NOTE

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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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CONTENTS

	<i>Page</i>
Abbreviations.....	iv
Note concerning quotations	iv
 Shared natural resources (agenda item 2)	
<i>Document A/CN.4/580</i> . Fourth report on shared natural resources: transboundary groundwaters, by Mr. Chusei Yamada, Special Rapporteur.....	1
 Responsibility of international organizations (agenda item 3)	
<i>Document A/CN.4/583</i> . Fifth report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur.....	5
<i>Document A/CN.4/582</i> . Comments and observations received from international organizations.....	17
 Reservations to treaties (agenda item 4)	
<i>Document A/CN.4/584</i> . Twelfth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	33
<i>Document A/CN.4/586</i> . Note by Mr. Alain Pellet, Special Rapporteur	51
 Effects of armed conflicts on treaties (agenda item 5)	
<i>Document A/CN.4/578</i> . Third report on the effects of armed conflicts on treaties, by Mr. Ian Brownlie, Special Rapporteur.....	55
 The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>) (agenda item 6)	
<i>Document A/CN.4/585</i> . Second report on the obligation to extradite or prosecute (<i>aut dedere aut judicare</i>), by Mr. Zdzislaw Galicki, Special Rapporteur	67
<i>Document A/CN.4/579 and Add.1–4</i> . Comments and observations received from Governments...	81
 Expulsion of aliens (agenda item 7)	
<i>Document A/CN.4/581</i> . Third report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur	109
Checklist of documents of the fifty-ninth session.....	133

ABBREVIATIONS

FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IMCO	Intergovernmental Maritime Consultative Organization (now IMO)
IMF	International Monetary Fund
IMO	International Maritime Organization (formerly IMCO)
INTERPOL	International Criminal Police Organization
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OPCW	Organization for the Prohibition of Chemical Weapons
PCIJ	Permanent Court of International Justice
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	Office of the United Nations High Commissioner for Refugees
UPU	Universal Postal Union
WHO	World Health Organization

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AC	Appeals Court
ECHR	European Court of Human Rights
<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> (Cambridge)
<i>OJ L</i>	<i>Official Journal of the European Communities</i> , L Series
<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>Judgments, Orders and Advisory Opinions</i> (Nos. 1–18: up to and including 1930)
RGDIP	<i>Revue générale de droit international public</i> (Paris)
SLR	<i>Sri Lanka Law Reports</i>
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>
U.S.C.	United States Code

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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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SHARED NATURAL RESOURCES

[Agenda item 2]

DOCUMENT A/CN.4/580

Fourth report on shared natural resources: transboundary groundwaters, by Mr. Chusei Yamada, Special Rapporteur

[Original: English]
[6 March 2007]

CONTENTS

	Paragraphs	Page
INTRODUCTION	1–5	1
<i>Chapter</i>		
I. OIL AND NATURAL GAS	6–12	2
II. RELATIONSHIP BETWEEN THE WORK ON GROUNDWATERS AND THAT ON OIL AND GAS	13–15	3

Introduction

1. The International Law Commission, at its fifty-fourth session in 2002, decided to include the topic “Shared natural resources” in its programme of work.¹ It proceeded with the examination of the topic based on the three reports² submitted by the Special Rapporteur, who proposed a step-by-step approach to the topic beginning with transboundary groundwaters. The Commission, at its fifty-eighth session in 2006, adopted on first reading draft articles on the law of transboundary aquifers consisting of 19 draft articles, together with commentaries thereto.³ It also decided to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2008.⁴

2. In the debate on the report of the Commission on the work of its fifty-eighth session held in the Sixth Committee during the sixty-first session of the General Assembly in 2006, delegations welcomed the completion of the first reading of the draft articles on the law of transboundary

aquifers and made their comments and observations⁵ on all aspects of the draft articles and the commentaries thereto and on the final form of the draft articles as requested by the Commission.⁶ The Special Rapporteur wishes to defer the examination of these comments and observations until January 2008, when he will have received further written submissions from Governments.

3. There is, however, one aspect that the Commission needs to address at its fifty-ninth session in 2007. That is the aspect concerning the future work on the topic “Shared natural resources”, in particular the relationship between the work on groundwaters, on one hand, and the work on oil and natural gas, on the other hand. The Commission decided to focus on transboundary groundwaters for the time being, but the question of oil and natural gas was raised by some members from time to time. In response to the queries from those members, the Special Rapporteur clarified his position in his summing up of the debate in 2005 that due attention should be given to the question of oil and natural gas before consideration of the second reading of the draft articles on the law of transboundary aquifers was completed, because the proposed measures relating to aquifers might have implications for the future work of the Commission on oil and natural gas and conversely current

¹ *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 518 (a).

² *Yearbook ... 2003*, vol. II (Part One), p. 117, document A/CN.4/533 and Add.1; *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/539 and Add.1; and *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/551 and Add.1.

³ *Yearbook ... 2006*, vol. II (Part Two), paras. 75–76.

⁴ *Ibid.*, para. 73. See also General Assembly resolution 61/34 of 4 December 2006, paras. 2 (c) and 5.

⁵ *Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 13th–16th, 18th–19th meetings (A/C.6/61/SR.13–16, 18 and 19); and Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session (A/CN.4/577).

⁶ *Yearbook ... 2006*, vol. II (Part Two), para. 26.

State practice and norms relating to oil and natural gas might also have implications for the work of the Commission on aquifers.⁷ The Working Group on Shared Natural Resources, which was established to consider substantive elements of the draft articles on transboundary aquifers, informally requested the Special Rapporteur to present a preliminary study on oil and natural gas to the Commission at its fifty-ninth session in 2007.

4. During the debate held in the Sixth Committee in 2006, delegations also commented on future work on the topic “Shared natural resources”.⁸ Some delegations were of the view that once the Commission had completed its codification on groundwaters, it should turn its attention to the other shared natural resources such as oil and natural gas,⁹ while some others called on a decision on future work to be made only after the completion of the draft articles on transboundary aquifers, expressing concern regarding the complexity of taking up oil and gas¹⁰

⁷ See *Yearbook ... 2005*, vol. I, 2836th meeting.

⁸ See A/CN.4/577 (footnote 5 above), para. 24.

⁹ Greece, Indonesia, Mexico, Poland and Portugal.

¹⁰ Russian Federation, United Kingdom of Great Britain and Northern Ireland and United States of America.

or doubting the need for universal rules relating to oil and natural gas.¹¹ Yet another delegation called on the Commission to commence its consideration of other transboundary resources during the second reading of the draft articles on the law of transboundary aquifers, expressing the view that the Commission would be forgoing the opportunity to develop an overarching set of rules for all shared natural resources.¹²

5. The question of oil and natural gas requires extensive studies not only on scientific and technical aspects but also on political and economic aspects. However, the current task of the Commission is limited to ascertaining whether it is appropriate for the Commission to proceed with the second reading of the draft articles on the law of transboundary aquifers independently from the work on oil and natural gas. For such purpose, the study could be rather brief. The present report is only intended to assist the Commission in making the required decision on the future work on transboundary aquifers.

¹¹ Russian Federation.

¹² The Netherlands.

CHAPTER I

Oil and natural gas

6. An oil or natural gas field is developed where a hydrocarbon accumulation has been discovered which is capable of producing a sufficient quantity of oil and/or natural gas for commercial purposes. The origin of oil and natural gas (petroleum) has been debated for many years. There were opposing theories. The first of them has assumed that the source material was inorganic. The second has argued that petroleum was derived from former living organisms. It seems that the second, in particular, the kerogen origin theory, now prevails. According to this theory, living organisms (animal and plant) that were piled up at the bottom of ocean and lake have fossilized and formed, together with sediment, material termed as “kerogen”. With the effect of bacteria, geothermal heat and underground pressure, kerogen turns into petroleum and residual water. Owing to underground pressure, petroleum and water move upwards through rock formation until they reach cap rock, which is less permeable. These are stored in the pores of the “reservoir rock”. The reservoir rock is the geological formation, which usually consists of sands, sandstones or various kinds of limestone. Within the reservoir rock, petroleum and water are distributed vertically in the order of their densities. Natural gas is in the upper zone and oil in the lower zone when both oil and natural gas exist. Water is in the bottom zone. However, the gas zone is not sharply separated from the oil zone, while there is a transition zone between the oil and water zones, or between the gas and water zones in the absence of oil. The reservoir rock is usually of marine origin and the waters stored therein are termed “brine”, which is salt water.

7. The process of formulation and accumulation of hydrocarbons as described in paragraph 6 above occurred

over periods of hundreds of millions of years. That process may also be taking place today. However, for all practical purposes, any current recharge of hydrocarbons in existing oilfields is negligible. Accordingly, oil and natural gas should be considered as non-renewable resources.

8. The cap rock which overlies the reservoir rock functions as a seal that prevents further upward movement of oil and natural gas. And oil and natural gas are stored in reservoir rock under pressure, usually higher than atmospheric pressure. When a well is drilled through cap rock, oil and natural gas shoot up.

9. In the history of mankind, oil has been obtained in small quantities for many centuries from surface seepages. But it was not until 1859 that the modern oil industry was born, when E. L. Drake successfully drilled the first oil well in Pennsylvania, United States. The well produced only 30 barrels per day from a depth of 69 feet. With the development of exploration and production technology, such as seismic surveys and drilling techniques for several thousand metres, on one hand, and the rapidly growing demand for various uses on the other, petroleum production has increased by leaps and bounds in almost every continent and also on continental shelves. It is now taking place within the jurisdiction of more than 70 States and reached the level of 71.8 million barrels per day in the year 2005. Petroleum is the one of the most important energy resources and is also the raw material for various petrochemical products. Petroleum and its by-products are now internationally traded widely and in large quantity. Petroleum production and its trade have significant implications for the world economy and international politics.

10. In general, States or their political subdivisions retain the right to lease oilfields under their jurisdiction. Petroleum is explored, produced and traded by private oil companies or State enterprises. Activities of State enterprises in this context would be deemed to be of a commercial nature under current international law.¹³

11. It seems that transboundary oilfields exist in many parts of the world, in particular on continental shelves. As oil and natural gas are fluid, exploitation of such an

¹³ United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49), vol. I, resolution 59/38.

oilfield by one party may affect other parties in another jurisdiction sharing the same oilfield. Information on this aspect is not readily available, however, and extensive research would be required in the future.

12. The problem of pollution itself of oil and natural gas stored in reservoir rock by exploitation seems to be minimal. On the other hand, the exploitation of an oilfield and transportation of petroleum have a risk of causing significant harm to the marine environment. Uses of petroleum as an energy source are emitting tremendous amounts of greenhouse-effect gases and may be a major contributing factor to global warming. Waste disposal of petrochemical products is also causing environmental problems.

CHAPTER II

Relationship between the work on groundwaters and that on oil and gas

13. As oil and natural gas often coexist in the same reservoir rock, they should be treated as one resource for the purpose of the work of the Commission. The reservoir rock and the natural condition of the oil and natural gas stored therein are almost identical to a non-recharging and confined aquifer. But the similarity between groundwaters on one hand and oil and natural gas on the other ends there.

14. Groundwater is the life-supporting resource of mankind and there exists no alternative resource. While oil and natural gas are important resources, they are not essential for life and there are various alternative resources. The consideration of vital human needs does not arise here. Survey and extraction of groundwaters take place on the land. A substantial part of survey and production of oil and natural gas takes place on the sea within the outer limits of continental shelves. Oil and natural gas are commercial commodities and their values are more or less determined by market forces. Groundwater is

not internationally traded, with a few exceptional cases, and its value is determined by the social considerations of each community. The consideration of environmental problems of oil and natural gas requires an entirely different approach from that of groundwaters.

15. The Special Rapporteur considers that some of the regulations of the law of the non-recharging transboundary aquifer might be relevant to the question of oil and natural gas. Nevertheless, the majority of regulations to be worked out for oil and natural gas would not be directly applicable to groundwater. It means that a separate approach is required for oil and gas. If one tries to link the work on groundwaters with the work on oil and natural gas, it would result in undue delay in the completion of the work on groundwaters. It is therefore the view of the Special Rapporteur that the Commission should proceed with and complete the second reading of the law of transboundary aquifers independently from its future work on oil and natural gas.

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

[Agenda item 3]

DOCUMENT A/CN.4/583

Fifth report on responsibility of international organizations,* by Mr. Giorgio Gaja, Special Rapporteur

[Original: English]
[2 May 2007]

CONTENTS

	Paragraphs	Page
Multilateral instruments cited in the present report		5
Works cited in the present report		6
INTRODUCTION	1–12	6
<i>Chapter</i>		
I. CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION: GENERAL PRINCIPLES.....	13–38	8
Draft article 31. Legal consequences of an internationally wrongful act	18	8
Draft article 32. Continued duty of performance	18	8
Draft article 33. Cessation and non-repetition	18	8
Draft article 34. Reparation.....	31	10
Draft article 35. Irrelevance of the rules of the organization	35	11
Draft article 36. Scope of international obligations set out in this part	38	11
II. REPARATION FOR INJURY	39–54	11
Draft article 37. Forms of reparation	54	13
Draft article 38. Restitution.....	54	13
Draft article 39. Compensation	54	13
Draft article 40. Satisfaction	54	13
Draft article 41. Interest	54	13
Draft article 42. Contribution to the injury	54	13
III. SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW	55–65	13
Draft article 43. Application of this chapter	65	14
Draft article 44. Particular consequences of a serious breach of an obligation under this chapter.....	65	15

Multilateral instruments cited in the present report

	Source
Convention on Privileges and Immunities of the United Nations (New York, 13 February 1946)	United Nations, <i>Treaty Series</i> , vol. 1, No. 4, p. 15, and vol. 90, p. 327 (corrigenda to vol. 1).
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

* The Special Rapporteur gratefully acknowledges the assistance given in the preparation of this report by Stefano Dorigo (PhD, University of Pisa, Italy), Paolo Palchetti (Associate Professor, University of Macerata, Italy) and Quang Trinh (LLM, New York University).

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Introduction

1. The International Law Commission has so far provisionally adopted 30 draft articles on "Responsibility of international organizations".¹ These articles build up part one, entitled "The internationally wrongful act of an international organization". They include an introduction (arts. 1–3) that considers the scope of the draft, defines the use of terms and states a few general principles. This introduction is followed by chapters on attribution of conduct to international organizations (arts. 4–7), breach of an international obligation (arts. 8–11), responsibility of an international organization in connection with the act of a State or another international organization (arts. 12–16), circumstances precluding wrongfulness (arts. 17–24) and responsibility of a State in connection with the act of an international organization (arts. 25–30).

2. While the latter chapter does not have a parallel in the articles on responsibility of States for internationally wrongful acts,² articles 1–24 of the current draft follow the pattern and often the language of articles 1–27 on State responsibility, which build up part one of those articles, entitled "The internationally wrongful act of a State".³ This is not a mechanical replica of the earlier text nor based on a presumption that solutions applying to States are generally applicable to international organizations, but is the result of an analysis of the available materials.

3. There are a few outstanding issues that concern part one of the draft articles on responsibility of international organizations. Article 2 on the use of terms should no doubt be widened in order to include at least the definition of "rules of the organization", which has provisionally been placed in article 4, paragraph 4. The text of article 19 on "countermeasures" has been left blank pending an examination of the issues relating to countermeasures by an international organization: this will be undertaken in the context of the study of implementation of responsibility. A decision will have to be taken on the placement of the chapter concerning responsibility of a State in connection with the act of an international organization. Some provisions will have to be added, in a place yet to be determined, with regard to the responsibility of an international organization as a member of another international organization, since articles 28–29 only consider the case of members of international organizations that are States.

4. While decisions on some of these questions could be taken at the forthcoming session, it seems preferable to postpone all these decisions to the time when the Commission will have the opportunity to reconsider certain issues that are dealt with in the draft articles hereto provisionally adopted, in the light of the comments made by States and international organizations. While this could take place at the second reading, a practical reason suggests that it should preferably be done before the end of the first reading.⁴ This reason consists in the fact that the Commission

¹ The text of the draft articles is reproduced in *Yearbook ... 2006*, vol. II (Part Two), chap. VII, sect. C, para. 90.

² The text of these articles and their related commentaries are reproduced in *Yearbook ... 2001*, vol. II (Part Two), pp. 31–143, para. 77.

³ *Ibid.*, p. 32.

⁴ This suggestion had already been voiced in the Special Rapporteur's second (*Yearbook ... 2004*, vol. II (Part One), document A/CN.4/541), para. 1, and third reports (*Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553), para. 1.

has so far provisionally adopted all its draft articles on the current topic at the same session in which the respective drafts were submitted by the Special Rapporteur. Thus, unlike what has occurred with regard to most other topics, in its work on responsibility of international organizations the Commission has so far been able to avail itself only of responses given to questions raised in chapter III of its annual reports. These concerned specific issues on which comments were considered to be of particular interest to the Commission. The Commission has not yet been able to take further comments made in the Sixth Committee and in written observations into account.

5. The reconsideration of certain issues would no doubt greatly benefit from elements of practice that States and international organizations could supply in the meantime. Any indication of accessible materials that the Commission may have ignored⁵ would also be helpful. A wider knowledge of practice would clearly allow a better apprehension of questions relating to the international responsibility of international organizations. Moreover, the Commission would then be more consistently able to illustrate its draft articles with examples drawn from practice.

6. The review of the articles provisionally adopted before the end of the first reading will be introduced by a comprehensive analysis by the Special Rapporteur of the comments made by States and international organizations and of practice that has taken place or has become accessible since the draft articles were originally adopted. Views expressed in legal writings would also be considered.

7. It may be useful at this stage to make a couple of preliminary comments. One of the remarks frequently made on the current draft is that it takes insufficiently into account the great variety of international organizations.⁶ However, most, if not all, articles that the Commission has so far adopted on international responsibility, whether of States or of international organizations, have a level of generality that does not make them appropriate only for a certain category of entities. The fact that certain articles, for instance, the article on self-defence, are unlikely to be relevant for many international organizations does not require as a consequence that the draft should not include a general provision that refers to all international organizations. The inclusion of such a provision does not imply that all international organizations would necessarily be affected. On the other hand, should the particular features of certain international organizations warrant the application of some special rules, this could be taken into account by including a text similar to article 55 on responsibility

of States for internationally wrongful acts in the final provisions of the draft; according to that provision, the articles “do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law”.⁷

8. The second remark of the Special Rapporteur concerns an aspect of the definition of international organization that is given in draft article 2. This states that an international organization is covered by the current draft only if it is an entity possessing “its own international legal personality”.⁸ This is easily understandable since an international organization that has no legal personality under international law cannot be held internationally responsible. The text of draft article 2 does not say whether legal personality depends or not on the recognition by the injured State. Only the commentary notes that ICJ:

appeared to favour the view that when legal personality of an organization exists, it is an “objective” personality. Thus, it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present draft articles.⁹

9. Some comments were made to the effect that the draft articles should consider recognition of an international organization on the part of the injured States as a prerequisite of its legal personality and hence of its international responsibility. For instance, this seems implied by the Director-General of Legal Service of the European Commission when he made the following criticism in a letter of 18 December 2006:

The European Commission is also of the view that a clear distinction must be made between the legal positions of States that are members of international organizations, third States that recognize the organization and third States that explicitly refuse to do so.¹⁰

Should this view be accepted, the consequence would be that responsibility of an international organization would arise only towards non-member States that recognize it. With regard to non-member States that do not recognize the organization, member States would have to be held responsible and the articles on responsibility of States for internationally wrongful acts would then apply. The content of the draft articles on the responsibility of international organizations would not be affected.

10. The passage quoted from the letter of the European Commission also mentions the need to single out the relations between an international organization and

⁵ This is not the case of the judgement of the European Court of Human Rights in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005, *Reports of Judgments and Decisions 2005–VI*, p. 107. Although Austria maintained that “the draft did not take the *Bosphorus* decision into account” (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 13th meeting (A/C.6/61/SR.13), para. 40), the key passage of this judgement had been quoted in extenso and endorsed in paragraph (4) of the commentary to article 28 (*Yearbook ... 2006*, vol. II (Part Two)).

⁶ For instance, the United Kingdom of Great Britain and Northern Ireland complained of “no allowance [being made] for the diversity of types of international organization and of their functions” (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 15th meeting (A/C.6/61/SR.15), para. 24).

⁷ *Yearbook ... 2001*, vol. II (Part Two), p. 30.

⁸ *Yearbook ... 2003*, vol. II (Part Two), p. 18, para. 53.

⁹ *Ibid.*, para. (9) of the commentary to article 2, p. 21.

¹⁰ A/CN.4/582, sect. J (reproduced in the present volume). A similar view was expressed by Austria (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 13th meeting (A/C.6/61/SR.13), para. 36). Curiously, the European Commission’s view that absence of recognition by non-member States is relevant is close to the approach that the Soviet Union had taken for several years towards the European Community. This outdated practice was recently invoked as an argument for maintaining that recognition is a prerequisite of legal personality, by Mendelson, “The definition of ‘international organization’ in the International Law Commission’s current project on the responsibility of international organizations”, p. 387.

its member States. It should not be controversial that an international organization incurs international responsibility for the breach of an obligation under international law that it may have towards its member States. However, the rules of the organization may come into play with regard to the content of international responsibility and its implementation. The first issue will be considered in the present report in chapter I below, and the second one in the following report.

11. Postponing the review of some of the questions already dealt with in the articles provisionally adopted is not likely to affect the analysis of the following parts of

the draft. In accordance with the general pattern of the articles on responsibility of States for internationally wrongful acts, the questions still to be addressed are “content of the international responsibility”, “implementation of the international responsibility” and “general provisions”.

12. The present report addresses issues relating to the content of international responsibility. The analysis will be divided into chapters corresponding to the three chapters of part two of the articles on responsibility of States for internationally wrongful acts: “general principles”, “reparation for injury” and “serious breaches of obligations under peremptory norms of general international law”.

CHAPTER I

Content of the international responsibility of an international organization: general principles

13. The applicability to international organizations of the first three general principles that are stated in part two on responsibility of States for internationally wrongful acts seems uncontroversial. The first one (art. 28)¹¹ is merely an introduction to part two and says that the following articles define the legal consequences of the internationally wrongful act. Since the current draft is intended to follow the same general pattern as that of the articles on State responsibility, a similar provision can usefully be included with regard to the responsibility of international organizations.

14. Part one of the current draft envisages certain cases in which the responsibility of States arises in connection with that of an international organization. The content of the responsibility concerning a State would then be covered by the rules that generally apply to the international responsibility of States. This seems self-explanatory. It is therefore not necessary to restate those rules in the present draft or to make a reference to the articles adopted by the Commission in 2001.

15. Article 29 on responsibility of States for internationally wrongful acts asserts that the breach of an international obligation and the new set of legal relations which result from an internationally wrongful act do not affect the continued existence of the obligation breached as long as the obligation has not ceased. As was outlined in the commentary to article 29:

Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.¹²

For instance, an obligation not to interfere with the internal affairs of a State does not cease according to whether or not it has been breached, while an obligation to preserve a certain object ends once the object has been destroyed. Also in this regard, the fact that the obligation rests on a State or on an international organization is immaterial.

16. The first part of article 30 on responsibility of States for internationally wrongful acts represents an implication of what has been stated in the previous article. If the

international obligation that was breached subsists and the breach continues, the author of the wrongful act is required to cease that act. This clearly applies to international organizations as well as to States. It is not a legal consequence of the breach but of the fact that the obligation subsists.

17. The same article also provides for assurances and guarantees of non-repetition. These are not *per se* legal consequences of the breach of an international obligation, although only the occurrence of a breach may reveal the need for those assurances and guarantees in order to prevent a repetition of the wrongful act. While the related practice mainly concerns States, there is no reason to distinguish international organizations from States in this respect and to rule out that assurances and guarantees may also be required from international organizations.

18. Given the applicability of the three principles hereto considered also to international organizations, the following texts, which are as close as possible to the corresponding articles on responsibility of States for internationally wrongful acts, are proposed:

“Draft article 31. Legal consequences of an internationally wrongful act

“The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

“Draft article 32. Continued duty of performance

“The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible international organization to perform the obligation breached.

“Draft article 33. Cessation and non-repetition

“The international organization responsible for the internationally wrongful act is under an obligation:

“(a) to cease that act, if it is continuing;

“(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”

¹¹ *Yearbook ... 2001*, vol. II (Part Two), p. 28.

¹² *Ibid.*, p. 88, para. (4) of the commentary to article 29.

19. Article 31 on responsibility of States for internationally wrongful acts declares that “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act”. The provision further specifies that “[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State”.¹³

20. The principle stated in the articles on responsibility of States for internationally wrongful acts reflects the well-known dictum by PCIJ in the *Factory at Chorzów* case that:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.¹⁴

In the same case the Court later added:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.¹⁵

21. Although PCIJ was considering relations between States, the principle requiring reparation is worded more generally so as to apply to breaches of international obligations by any subject of international law. As was recently noted by France in the Sixth Committee:

The jurisprudence of the *Chorzów Factory* case should apply as much to international organizations as to States.¹⁶

22. It would be absurd to exempt international organizations from facing reparation as the consequence of their internationally wrongful acts.¹⁷ This would be tantamount to saying that international organizations would be entitled to ignore their obligations under international law.

23. The existence of an obligation to make reparation has often been acknowledged by international organizations. A particularly clear example may be found in a report by the Secretary-General of the United Nations on the administrative and budgetary aspects of the financing of United Nations peacekeeping operations:

The applicability of international humanitarian law to United Nations forces when they are engaged as combatants in situations of armed conflict entails the international responsibility of the Organization and its

liability in compensation for violations of international humanitarian law committed by members of United Nations forces.¹⁸

24. In its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ considered “the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity”¹⁹ and said:

The United Nations may be required to bear responsibility for the damage arising from such acts.²⁰

25. Practice of international organizations concerning reparation for wrongful acts is extensive, although compensation is seldom granted *ex gratia* even when it may be due under international law. It must also be considered that, with regard both to international organizations and to States, claims for reparation are not always actively pursued by the injured party, whose main interest may be the cessation of the wrongful act. Some instances of practice relating to reparation by international organizations will be referred to in chapter II below.

26. The fact that reparation may also apply to moral damages by international organizations finds confirmation in practice, especially in judgements by administrative tribunals, for instance in the judgement given by the United Nations Administrative Tribunal on 17 November 2000 in *Robbins v. The Secretary-General of the United Nations*,²¹ or in arbitral awards, such as that of 4 May 2000 in *Boulois v. UNESCO*.²²

27. Part one of the current draft identifies some cases in which States that are members of an international organization incur responsibility in connection with an internationally wrongful act of the organization. Should member States not incur responsibility, the problem arises whether they have any obligation to provide the organization with the necessary means to face claims for reparation, especially when reparation implies some financial compensation that exceeds the budgetary resources of the organization. In chapter III of its 2006 report to the General Assembly, the Commission asked the following question:

Do members of an international organization that are not responsible for an internationally wrongful act of that organization have an obligation to provide compensation to the injured party, should the organization not be in a position to do so?²³

28. With one or two possible exceptions, all the States that responded were firm in holding that there was “no

¹³ *Ibid.*, p. 28.

¹⁴ *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21.

¹⁵ *Ibid.*, Merits, *Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

¹⁶ *Official Records of the General Assembly, Sixty-first Session, Sixth Committee, 14th meeting (A/C.6/61/SR.14)*, para. 63.

¹⁷ According to Dominicé (“The international responsibility of the United Nations for injuries resulting from non-military enforcement measures”, p. 368), articles 28–39 on responsibility of States for internationally wrongful acts “express rules of customary international law. They are without a doubt also to be applied in matters of international responsibility of international organizations, including the United Nations”. However, Alvarez (“International organizations: accountability or responsibility?”, p. 18) recently wrote: “When it comes to IO [international organizations], some of which are purposely kept by their members at the edge of bankruptcy, the concept of responsibility-cum-liability seems something only a law professor (or the writer of a Jessup Moot problem) would love”.

¹⁸ A/51/389, para. 16.

¹⁹ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 88, para. 66.

²⁰ *Ibid.*, p. 89.

²¹ The Tribunal concluded that “[t]he seriousness of the wrong and moral injury done the Applicant warrants more than the compensation paid her by the Respondent” (AT/DEC/974, Judgement No. 974, sect. XI).

²² Unpublished. The Tribunal awarded the sum of two million French francs for “moral damage”.

²³ *Yearbook ... 2006*, vol. II (Part Two), para. 28 (a).

basis for such an obligation”.²⁴ The same view was expressed in a statement by OPCW.²⁵ This seems consistent with practice, which does not show any instance that would clearly support the existence of the obligation in question under international law.²⁶

29. A different question is whether an obligation for members to provide financial support exists under the rules of the organization concerned. As was stated by Belgium:

If those contributions were in keeping with the law of the international organization, the members would have to comply. That did not signify that the members were under an obligation to make reparation to the injured third party or that the latter could institute direct or indirect action against the members.²⁷

In other words, the existence of an obligation for member States would entirely depend on the rules of the organization; when the obligation existed, it would benefit the injured party only indirectly. Several States took the same view.²⁸ According to the Russian Federation, States establishing an international organization are required to “give it the means to fulfil its functions, including those which had led it to incur responsibility towards a third party”,²⁹ but apparently this would not imply that an obligation arises towards the injured party.³⁰

30. The views expressed in response to the Commission’s question make it clear that, while the Commission

²⁴ Thus the Netherlands saw no basis for such an obligation (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 14th meeting (A/C.6/61/SR.14), para. 23). Similar views were expressed by Belarus (*ibid.*, para. 100); Belgium (*ibid.*, paras. 41–42); Cuba (*ibid.*, 16th meeting (A/C.6/61/SR.16), para. 13); Denmark, also on behalf of Finland, Iceland, Norway and Sweden (*ibid.*, 13th meeting, para. 32); France (*ibid.*, 14th meeting, para. 63); Italy (*ibid.*, para. 66); Romania (*ibid.*, 19th meeting (A/C.6/61/SR.19), para. 60); Spain (*ibid.*, 14th meeting, paras. 52–53); Switzerland (*ibid.*, 15th meeting (A/C.6/61/SR.15), para. 5); and the United States of America (*ibid.*, 14th meeting (A/C.6/61/SR.14), para. 83). Belarus, however, suggested that “a scheme of subsidiary responsibility for compensation could be established as a special rule, for example in cases where the work of the organization was connected with the exploitation of dangerous resources” (*ibid.*, para. 100). Although sharing the prevailing view, Argentina (*ibid.*, 13th meeting (A/C.6/61/SR.13), para. 49) requested the Commission to “analyse whether the special characteristics and rules of each organization, as well as considerations of justice and equity, called for exceptions to the basic rule, depending on the circumstances of each case”.

²⁵ See A/CN.4/582, sect. U.1 (reproduced in the present volume).

²⁶ The opinion that “members are obliged not to compensate creditors directly, but to put the organization in funds to meet its liabilities” was voiced by Schermers and Blokker, *International Institutional Law: Unity within Diversity*, p. 992, para. 1586. See also Schermers, “Liability of international organizations”, pp. 12–13. Hirsch (*The Responsibility of International Organizations toward Third Parties: Some Basic Principles*, p. 165), added that: “Where the organization does not comply with its duty to resort to all the available legal measures available to it (including litigation) against the recalcitrant members, the injured party should be entitled to implement the rights of the organization and bring claims against those members.” According to Klein (*La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, pp. 599–600), this opinion has no legal basis.

²⁷ *Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 14th meeting (A/C.6/61/SR.14), para. 42.

²⁸ Denmark, also on behalf of Finland, Iceland, Norway and Sweden (*ibid.*, 13th meeting (A/C.6/61/SR.13), para. 32); France (*ibid.*, 14th meeting (A/C.6/61/SR.14), para. 63); Spain (*ibid.*, para. 53); and Switzerland (*ibid.*, 15th meeting (A/C.6/61/SR.15), para. 5).

²⁹ *Ibid.*, 18th meeting (A/C.6/61/SR.18), para. 68.

³⁰ This was made clear in the similar remark by the Netherlands (*ibid.*, 14th meeting (A/C.6/61/SR.14), para. 24).

should state the principle that international organizations are required to provide reparation for their internationally wrongful acts, no additional obligation should be envisaged for member States. The same applies to international organizations that are members of other organizations. Obligations existing for member States or organizations under the rules of the responsible organization need not be recalled here.

31. On the basis of the foregoing remarks, the following text is proposed:

“Draft article 34. *Reparation*

“1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

“2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.”

32. Article 32 on responsibility of States for internationally wrongful acts provides that “[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part”.³¹ The relations between international law and the internal law of a State are not similar to those existing between international law and the internal rules of an international organization. As has already been noted, in relation to draft article 8, the latter rules are, at least to a large extent, part of international law.³² They cannot thus be considered irrelevant in respect of the obligations under the present part.

33. A distinction needs to be made, however, between obligations that international organizations have towards their members and those that they possess towards non-members. With regard to non-members, the rules of the organization are like the internal rule of a State and cannot *per se* impinge on the obligations set out in this part. On the contrary, those rules may affect the relations of the organization with its members. This possibility must be reflected in the text of the current draft.

34. Article 32 on responsibility of States for internationally wrongful acts is said to be “modelled on article 27 of the 1969 Vienna Convention [on the law of treaties], which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.³³ Although the corresponding article of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations similarly states that “[a]n international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty”,³⁴ it seems logical to introduce a distinction between relations concerning non-members and those concerning

³¹ *Yearbook ... 2001*, vol. II (Part Two), p. 28.

³² *Yearbook ... 2005*, vol. II (Part Two), para. (5) of the commentary to article 8.

³³ *Yearbook ... 2001*, vol. II (Part Two), p. 94, para. (2) of the commentary to article 32.

³⁴ Art. 27, para. 2.

members and provide for a possible exception for the latter case. This is to be worded so as not to affect the obligations that members have with regard to serious breaches of obligations arising under a peremptory norm of general international law in accordance with chapter III.

35. The following text is suggested:

“Draft article 35. Irrelevance of the rules of the organization

“Unless the rules of the organization otherwise provide for the relations between an international organization and its member States and organizations, the responsible organization may not rely on the provisions of its pertinent rules as justification for failure to comply with the obligations under this part.”

36. The last item that the articles on responsibility of States for internationally wrongful acts consider in the corresponding chapter of part two, and also the last one that needs to be examined here, is the scope of international obligations set out in this part. While part one of the articles on State responsibility covers all the cases of internationally wrongful acts committed by a State, part two is limited to the obligations that the responsible State owes “to another State, to several States, or to the international community as a whole”: this “without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”.³⁵

³⁵ *Yearbook ... 2001*, vol. II (Part Two), p. 28, art. 33.

The scope of part three, concerning implementation of international responsibility, is limited in the same way.

37. There are good reasons for taking a similar option with regard to international organizations and thus limiting the scope of part two to obligations that a responsible organization has towards one or more other organizations, one or more States, or the international community. This would not only be a way of following the general pattern provided by the articles on responsibility of States for internationally wrongful acts, it would also avoid the complications that would no doubt arise if the scope of obligations considered here were widened in order to include those existing towards subjects of international law other than States or international organizations.

38. The following text is proposed:

“Draft article 36. Scope of international obligations set out in this part

“1. The obligations of the responsible international organization set out in this part may be owed to one or more other organizations, to one or more States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

“2. This part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to a person or entity other than a State or an international organization.”

CHAPTER II

Reparation for injury

39. Consistent with the principle of reparation set out in article 31, articles 34–39 on responsibility of States for internationally wrongful acts examine the various forms of reparation. Article 34 has an introductory character, while the other provisions cover restitution, compensation, satisfaction, interest and contribution to the injury.

40. If it is accepted that responsible international organizations are under an obligation to provide reparation in the same way as States, it is difficult to see why restitution, compensation or satisfaction should be excluded or apply differently when the responsible entity is an international organization rather than a State. The same applies to interest and contribution to the injury.

41. Thus, in a note of 24 June 1970 entitled “The international responsibility of the Agency in relation to safeguards”, the Director General of IAEA, wrote that, although there might be circumstances when the giving of satisfaction by the Agency might be appropriate, it was proposed to give consideration only to reparation properly so called. Generally speaking, reparation properly so called might be either restitution in kind or payment of compensation.³⁶

42. While practice relating to reparation given by international organizations is certainly more limited than practice concerning responsible States, examples of international organizations providing the various forms of reparation may be found.

43. The principle that restitution, whenever possible, should be given by an international organization was for instance expressed by the United Nations Administrative Tribunal in *Leak v. The Secretary-General of the United Nations* with the following words:

[I]t is probably no longer possible at the present time for the Respondent to restore the situation—in respect of the re-employment of the Applicant—that would have existed if the summary dismissal had never taken place.

That being so, an award of compensation is the only means of drawing, in this respect, the legal inferences from the obligations resulting from the rescission.³⁷

44. With regard to compensation provided by an international organization, the most well-known instance of practice concerns the settlement of claims arising from

³⁶ GOV/COM.22/27, para. 27 (see *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, annex, and sect. H.2, paras. 2–3).

³⁷ Judgement No. 97 of 4 October 1965, *Judgments of the United Nations Administrative Tribunal* (United Nations publication, Sales No. E.68.X.1), Nos. 87–113 (1963–1967), pp. 97–98, para. VIII.

the United Nations Operation in the Congo. Compensation of nationals of Belgium, Greece, Italy, Luxembourg and Switzerland, was granted through exchanges of letters between the Secretary-General and the permanent missions of the respective States. In the text of each letter, the United Nations

stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties.³⁸

With regard to the same operation, further settlements were made with France, the United Kingdom, the United States of America and Zambia,³⁹ and also with ICRC.⁴⁰

45. The fact that these compensations were given as reparation for breaches of obligations under international law may be gathered not only from some of the claims, but also from a letter, dated 6 August 1965, addressed by the Secretary-General to the Acting Permanent Representative of the Union of Soviet Socialist Republics. In this letter, the Secretary-General said:

It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore.⁴¹

46. A report of the Secretary-General dated 20 September 1996 on the administrative and budgetary aspects of the financing of the United Nations peacekeeping operations recalled that:

The applicability of international humanitarian law to United Nations forces when they are engaged as combatants in situations of armed conflict entails the international responsibility of the Organization and its liability in compensation for violations of international humanitarian law committed by members of United Nations forces. The scope of third-party liability of the Organization, however, will have to be determined in each case according to whether the act in question was in violation of any particular rule of international humanitarian law or the laws of war.⁴²

Criteria and guidelines for the payment of compensation were approved by the General Assembly in its resolution 52/247 on third-party liability resulting or arising from peacekeeping operations conducted by the United Nations.⁴³

³⁸ United Nations, *Treaty Series*, vol. 535, No. 7780, p. 199; vol. 565, No. 8230, p. 5; vol. 588, No. 8525, p. 198; and vol. 585, No. 8487, p. 198.

³⁹ See Schmalenbach, *Die Haftung Internationaler Organisationen*, pp. 314–321.

⁴⁰ The text of the agreement was reproduced by Ginther, *Die Völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten*, pp. 166–167.

⁴¹ *United Nations Juridical Yearbook, 1965* (United Nations publication, Sales No. 67.V.3), p. 41. The view that the United Nations placed its responsibility at the international level was maintained by Salmon, “Les accords Spaak-U Thant du 20 février 1965”, pp. 483 and 487.

⁴² See footnote 18 above.

⁴³ General Assembly resolution 52/247 of 26 June 1998 on third-party liability: temporal and financial limitations.

47. In relation to some incidents that had occurred during the NATO air strikes in 1999, the Ombudsperson Institution in Kosovo requested NATO to provide “some kind of relief” for the victims, including “the possibility of compensation”.⁴⁴

48. A reference to the obligation for the United Nations to pay compensation was also made by ICJ in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.⁴⁵

49. Practice offers some examples of satisfaction, generally in the form of an apology or an expression of regret. Although the examples that follow do not expressly refer to the existence of a breach of an obligation under international law, they at least imply that an apology or an expression of regret by an international organization would be one of the appropriate legal consequences for such a breach.

50. With regard to the fall of Srebrenica, the Secretary-General said:

The United Nations experience in Bosnia was one of the most difficult and painful in our history. It is with the deepest regret and remorse that we have reviewed our own actions and decisions in the face of the assault on Srebrenica.⁴⁶

51. On 16 December 1999, when receiving the report of the independent enquiry into the actions of the United Nations during the 1994 genocide in Rwanda (S/1999/1257), the Secretary-General stated:

All of us must bitterly regret that we did not do more to prevent it. There was a United Nations force in the country at the time, but it was neither mandated nor equipped for the kind of forceful action which would have been needed to prevent or halt the genocide. On behalf of the United Nations, I acknowledge this failure and express my deep remorse.⁴⁷

52. Shortly after the NATO bombing of the Embassy of China in Belgrade, a NATO spokesman, Jamie Shea, said in a press conference:

I think we have done what anybody would do in these circumstances, first of all we have acknowledged responsibility clearly, unambiguously, quickly; we have expressed our regrets to the Chinese authorities.⁴⁸

A further apology was addressed on 13 May 1999 by the German Chancellor Gerhard Schröder on behalf of Germany, NATO and NATO Secretary-General Javier Solana to the Minister for Foreign Affairs of China, Tang Jiaxuan and to Premier Zhu Rongji.⁴⁹

⁴⁴ Attempts to obtain an official recognition of damages caused to victims of the 1999 NATO bombings of the bridge in Luzhan/Luzane, *Fourth Annual Report, 2003–2004* (12 July 2004), annex 4, p. 69. Arrangements made by NATO and the Implementation Force for damages caused in Bosnia and Herzegovina were described by Guillaume, “La réparation des dommages causés par les contingents français en ex-Yougoslavie et en Albanie”, pp. 151–155.

⁴⁵ See footnote 19 above.

⁴⁶ Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica (A/54/549), para. 503.

⁴⁷ United Nations press release SG/SM/7263–AFR/196 (16 December 1999).

⁴⁸ <http://www.nato.int/kosovo/press/p990509b.htm>.

⁴⁹ “Schröder issues NATO apology to the Chinese”, *Irish Examiner*, 13 May 1999.

53. With regard to contribution to the injury, one author referred to an unpublished document relating to the shooting of a civil vehicle in the Congo in which compensation by the United Nations was reduced because of the contributory negligence by the driver of the vehicle.⁵⁰

54. The following draft articles, which are based on the corresponding articles on responsibility of States for internationally wrongful acts, are proposed below:

“Draft article 37. Forms of reparation

“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

“Draft article 38. Restitution

“An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

“(a) is not materially impossible;

“(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

“Draft article 39. Compensation

“1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

⁵⁰ Klein, *op. cit.*, pp. 606–607.

“2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

“Draft article 40. Satisfaction

“1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

“2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

“3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

“Draft article 41. Interest

“1. Interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

“2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

“Draft article 42. Contribution to the injury

“In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.”

CHAPTER III

Serious breaches of obligations under peremptory norms of general international law

55. Like internationally wrongful acts committed by States, infringements by international organizations may constitute serious breaches of obligations under peremptory norms of general international law. The problem arises whether international organizations would then incur the same additional consequences that are defined for States in article 41 on responsibility of States for internationally wrongful acts. These include the duty of States other than the responsible State to cooperate to bring the breach to an end.

56. Even if it were difficult to find any specific practice relating to this type of infringement by an international organization, there appears to be no reason why the situation of an international organization should in this case be any different from that of a State. As was observed by OPCW:

States should definitely be under an obligation to cooperate to bring such a breach to an end because in the case when an international organization acts in breach of a peremptory norm of general international law, its position is not much different from that of a State.⁵¹

⁵¹ A/CN.4/582, sect. U.2 (reproduced in the present volume).

57. The same approach was taken by several States⁵² in response to a question raised by the Commission in its 2006 report to the General Assembly.⁵³ For instance, Spain said that:

[T]here were not sufficient grounds *a priori* for concluding that, in the event of an international organization committing a serious breach of an obligation stemming from a peremptory norm, a regime different to that laid down for cases in which the same conduct would be attributable to a State should apply.⁵⁴

⁵² Thus the interventions by Argentina (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 13th meeting (A/C.6/61/SR.13), para. 50); Belarus (*ibid.*, 14th meeting (A/C.6/61/SR.14), para. 101); Belgium (*ibid.*, paras. 43–46); Denmark, also on behalf of Finland, Iceland, Norway and Sweden (*ibid.*, 13th meeting, para. 33); France (*ibid.*, 14th meeting, para. 64); Jordan (*ibid.*, 16th meeting (A/C.6/61/SR.16), para. 5); Netherlands (*ibid.*, 14th meeting, para. 25); Romania (*ibid.*, 19th meeting (A/C.6/61/SR.19), para. 60); Russian Federation (*ibid.*, 18th meeting (A/C.6/61/SR.18), para. 68); Spain (*ibid.*, 14th meeting, para. 54); and Switzerland (*ibid.*, 15th meeting (A/C.6/61/SR.15), para. 8).

⁵³ *Yearbook ... 2006*, vol. II (Part Two), para. 28.

⁵⁴ *Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 14th meeting (A/C.6/61/SR.14), para. 54.

58. Certain States have emphasized in their response the role that States should play, when cooperating to bring the breach by an international organization to an end, if they are members of that organization.⁵⁵ It may be agreed that the duty to cooperate is particularly significant when States are in a position to make a significant contribution in order to achieve the intended result and also that in many cases member States could be so described. Hence, it could be maintained that member States would then have a stricter duty. However, it is difficult to generalize and conclude that all the members of an organization always are in that position. The role that members can play clearly varies according to the situation. It is moreover likely that the position of members will not be identical in this respect. It is therefore preferable not to attempt to define a specific duty that members of the responsible organization would have.

59. In its 2006 report to the General Assembly, the Commission also raised the question whether international organizations have a duty to cooperate with States in bringing the breach of an obligation under peremptory norms to an end.⁵⁶ The question was raised in the context of the current draft, although the answer may also have implications in the case where the breach is committed by a State and therefore the legal consequences are governed by article 41 on responsibility of States for internationally wrongful acts.⁵⁷

60. While neither the text of article 41 on responsibility of States for internationally wrongful acts nor the related commentary expressly envisage cooperation by international organizations, this is not ruled out. The commentary considers that States may resort to an international organization for their response:

Cooperation could be organized in the framework of a competent international organization, in particular the United Nations.⁵⁸

61. An international organization may in fact have among its purposes that of bringing certain serious breaches of obligations under peremptory norms, for instance aggressions, to an end. Whether or not the current draft will contain a provision like article 59 on responsibility of States for internationally wrongful acts, which says that “[t]hese articles are without prejudice to the Charter of the United Nations”,⁵⁹ there would not be any need to include a provision referring to the fact that the United Nations or other organizations have among their purposes that of combating serious breaches of obligations under peremptory norms. What may be controversial is whether international organizations have a duty like States to cooperate in order to bring those breaches to an end.

62. The great majority of responses to the question raised by the Commission were in favour of stating that

international organizations have a duty like States to cooperate to bring the serious breach committed by another organization to an end.⁶⁰ As was said by the Russian Federation:

It should also be evident that States and international organizations were bound to cooperate to terminate unlawful acts by an international organization, just as if it were a State.⁶¹

63. When cooperating to bring a serious breach to an end, international organizations would not be required to act inconsistently with their constitutive instruments or other pertinent rules. OPCW called attention to this issue:

[I]t can be argued that the extent of the obligation of any international organization to bring a breach of *jus cogens* to an end, unlike that of States, should also be limited by the same, i.e. it must always act within its mandate and in accordance with its rules.⁶²

However, an exception has to be made for the case that the pertinent rules of the organization are in conflict with a peremptory norm.

64. While the focus of the discussion on the legal consequences of a serious breach of an obligation under a peremptory norm is on cooperation to bring the breach to an end, article 41 on responsibility of States for internationally wrongful acts also refers to other consequences, such as the prohibition to “recognize as lawful a situation created by a serious breach”.⁶³ Some instances of practice relating to serious breaches by States concern the duty for international organizations not to recognize as lawful the situation created by the breach. For instance, with regard to the annexation of Kuwait by Iraq, Security Council resolution 662 (1990) called upon “all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation”.⁶⁴ Another example is provided by the declaration that member States of the European Community made in 1991 on the Guidelines on the recognition of new States in Eastern Europe and in the Soviet Union. This text included the following sentence:

The Community and its Member States will not recognize entities which are the result of aggression.⁶⁵

65. The following draft articles are proposed below:

“Draft article 43. Application of this chapter

“1. This chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

⁵⁵ *Ibid.*, 13th meeting (A/C.6/61/SR.13), para. 33, intervention by Denmark, also on behalf of Finland, Iceland, Norway and Sweden. Switzerland made a different point, when it noted that “for the members of an organization, there might be an obligation to cooperate that extended beyond the prevention of violations of *jus cogens* only” (*ibid.*, 15th meeting (A/C.6/61/SR.15), para. 8).

⁵⁶ *Yearbook ... 2006*, vol. II (Part Two), para. 28 (b).

⁵⁷ *Yearbook ... 2001*, vol. II (Part Two), p. 29.

⁵⁸ *Ibid.*, p. 114, para. (2) of the commentary to article 41.

⁵⁹ *Ibid.*, p. 30.

⁶⁰ Reference is to be made to the interventions listed in footnote 52 above. However, Jordan only mentioned States and Romania did not specifically refer to a duty to cooperate for international organizations.

⁶¹ *Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 68.

⁶² A/CN.4/582, sect. U.2 (reproduced in the present volume).

⁶³ *Yearbook ... 2001*, vol. II (Part Two), p. 29.

⁶⁴ Security Council resolution 662 (1990), para. 2.

⁶⁵ *Bulletin of the European Communities*, vol. 24, No. 12 (1991), p. 119. See also *International Legal Materials*, vol. 31 (1992), p. 1487.

“2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

“Draft article 44. Particular consequences of a serious breach of an obligation under this chapter

“1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 43.

“2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 43, nor render aid or assistance in maintaining that situation.

“3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.”

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

[Agenda item 3]

DOCUMENT A/CN.4/582

Comments and observations received from international organizations

[Original: English]
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CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
Multilateral instruments cited in the present report.....		18
Works cited in the present report		18
INTRODUCTION	1–2	19
COMMENTS AND OBSERVATIONS RECEIVED FROM INTERNATIONAL ORGANIZATIONS.....		19
A. General remarks		19
European Commission		19
International Monetary Fund.....		19
Organization for the Prohibition of Chemical Weapons		20
B. Draft article 3. General principles.....		20
International Monetary Fund.....		20
C. Draft article 8. Existence of a breach of an international obligation.....		20
International Monetary Fund.....		20
D. Draft article 11. Breach consisting of a composite act.....		21
International Monetary Fund.....		21
E. Responsibility of an international organization in connection with the act of a State or another international organization: general considerations.....		21
International Monetary Fund.....		21
F. Draft article 12. Aid or assistance in the commission of an internationally wrongful act		22
International Monetary Fund.....		22
G. Draft article 13. Direction and control exercised over the commission of an internationally wrongful act		22
International Monetary Fund.....		22
H. Draft article 14. Coercion of a State or another international organization		22
International Monetary Fund.....		22
I. Draft article 15. Decisions, recommendations and authorizations addressed to member States and international organizations		23
International Monetary Fund.....		23
J. Circumstances precluding wrongfulness: general considerations.....		24
European Commission		24
K. Draft article 17. Consent		24
European Commission		24
International Monetary Fund.....		24
L. Draft article 18. Self-defence		25
European Commission		25
International Monetary Fund.....		25
M. Draft article 19. Countermeasures.....		25
International Monetary Fund.....		25
N. Draft article 21. Distress.....		25
European Commission		25
Organization for the Prohibition of Chemical Weapons		25

O. Draft article 22. Necessity	26
European Commission	26
International Monetary Fund	26
P. Responsibility of a State in connection with the act of an international organization: general considerations	26
European Commission	26
Q. Draft articles 25–26	26
International Monetary Fund	26
R. Draft article 27. Coercion of an international organization by a State	27
International Monetary Fund	27
S. Draft article 28. International responsibility in case of provision of competence to an international organization	27
European Commission	27
International Monetary Fund	28
T. Draft article 29. Responsibility of a State member of an international organization for the internationally wrongful act of that organization	28
European Commission	28
Organization for the Prohibition of Chemical Weapons	29
U. Specific issues raised in chapter III.B of the report of the Commission on the work of its fifty-eighth session	29
1. Obligation of members of an international organization to provide compensation to the injured party	29
International Monetary Fund	29
Organization for the Prohibition of Chemical Weapons	30
2. Obligation of cooperation in case of a serious breach by an international organization of an obligation under a peremptory norm of general international law	30
International Monetary Fund	30
Organization for the Prohibition of Chemical Weapons	31

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Articles of Agreement of the International Monetary Fund (Washington, 27 December 1945)	United Nations, <i>Treaty Series</i> , vol. 2, No. 20, p. 39.
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.
Treaty establishing the European Economic Community (Treaty of Rome) (Rome, 25 March 1957)	<i>Treaties establishing the European Communities</i> (Luxembourg, Office for Official Publications of the European Communities, 1987), p. 207.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	United Nations, <i>Treaty Series</i> , vol. 993, No. 14531, p. 3.
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Introduction

1. At its fifty-fifth session, in 2003, the International Law Commission asked the Secretariat to circulate, on an annual basis, the portions of its report relevant to the topic “Responsibility of international organizations” to international organizations for their comments.¹ Pursuant to that request, selected international organizations were invited to submit their comments on the relevant portions of the Commission’s 2003 to 2006 reports.² Most recently, the Commission sought comments on chapter VII of its 2006 report³ and on the issues of particular interest to it noted in paragraphs 27–28 of that report.⁴

¹ *Yearbook ... 2003*, vol. II (Part Two), p. 18, para. 52.

² The written comments of international organizations received prior to 12 May 2006 are contained in *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556 and *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/568 and Add.1.

³ *Yearbook ... 2006*, vol. II (Part Two).

⁴ Paragraphs 27–28 of *Yearbook ... 2006*, vol. II (Part Two) read as follows:

“27. The Commission would welcome comments and observations from Governments and international organizations on draft articles 17 to 30, in particular on those relating to responsibility in case

2. As at 30 April 2007, written comments had been received from the following three international organizations (dates of submission in parentheses): European Commission (18 December 2006); IMF (12 March 2007); OPCW (8 January 2007). Those comments are reproduced below, in a topic-by-topic manner.

of provision of competence to an international organization (draft article 28) and to responsibility of a State member of an international organization for the internationally wrongful act of that organization (draft article 29).

“28. The Commission would also welcome views from Governments and international organizations on the two following questions, due to be addressed in the next report:

“(a) Do members of an international organization that are not responsible for an internationally wrongful act of that organization have an obligation to provide compensation to the injured party, should the organization not be in a position to do so?

“(b) According to article 41, paragraph 1, on responsibility of States for internationally wrongful acts, when a State commits a serious breach of an obligation under a peremptory norm of general international law, the other States are under an obligation to cooperate to bring the breach to an end through lawful means. Should an international organization commit a similar breach, are States and also other international organizations under an obligation to cooperate to bring the breach to an end?”

Comments and observations received from international organizations

A. General remarks

EUROPEAN COMMISSION

The European Commission largely supports draft articles 17–24 on circumstances precluding wrongfulness, but it has some concerns as regards certain details of the new draft articles 28–29 in the chapter on responsibility of a State in connection with the acts of international organizations. The European Commission hopes that the International Law Commission will take good note of these concerns.

INTERNATIONAL MONETARY FUND

Before addressing the specific articles, IMF would like to reiterate some of the general points that it had made on earlier occasions regarding the Commission’s approach to this topic.

First, IMF does not believe that it is appropriate to rely on the rules applicable to State responsibility when analysing the international responsibility of international organizations. As has been recognized by ICJ, international organizations, unlike States, do not possess general competence. An international organization is established by the agreement of its membership for the specific purposes set out in its constituent agreement. Unless that agreement itself is inconsistent with international law (in which case the wrongfulness of the agreement should be attributed to the member States rather than to the organization), the responsibility of the organization should be assessed by reference to whether it has acted in accordance with that agreement, i.e. whether it has acted *ultra vires*. In addition, and consistent with the above, while States are organizationally and functionally similar to each other, the powers and functions of international

organizations will vary, depending on the terms of their charters. These distinctions must be taken into consideration when assessing the international responsibility arising from acts of different organizations.

Secondly, when an organization acts in accordance with the terms of its constituent charter, such acts can only be wrongful in relation to another norm of international law if the other norm in question is either a “peremptory norm” (*jus cogens*) or arises from a specific obligation that has been incurred by the organization in the course of its activities (e.g. by entering into a separate treaty with another subject of international law). However, *vis-à-vis* all other norms of international law, both the charter and the internal rules of the organization would be *lex specialis* as far as the organization’s responsibility is concerned and, accordingly, cannot be overridden by *lex generalis*, which would include the provisions of the draft articles.

Finally, IMF continues to be uncertain as to the basis for the proposed norms that are being developed. It recognizes that article I of the Commission’s statute provides that the “Commission shall have for its object the promotion of the progressive development of international law and its codification”.¹ The Commission has not indicated whether the draft provisions under consideration represent a codification of existing principles, or alternatively, are intended for the progressive development of the law. If the former provides the basis for the current work, it would be helpful if the Commission identified the practice that is being codified in each instance. If, however, the latter approach is being followed, IMF thinks it important that the study elaborate on the policy bases for the recommendations.

¹ General Assembly resolution 174 (II) of 21 November 1947, annex, para. 1.

IMF recognizes that these points have been made by the Fund on earlier occasions. Nevertheless, from its review of the Commission's responses to the comments it made on earlier occasions, it appears the Commission has not yet responded to these general—and fundamental—issues. IMF would be very grateful if it could do so.

Before commenting on draft articles 17–30, IMF takes this opportunity to comment on certain previously adopted draft articles, in the expectation that these comments will be considered in future readings of these draft articles by the Commission. Moreover, the comments on these previous draft articles would also be relevant to draft articles 25–30, on which comments have now been sought.

ORGANIZATION FOR THE PROHIBITION OF CHEMICAL WEAPONS

The draft articles under consideration could be roughly divided into two groups: (a) adaptations of the articles on responsibility of States for internationally wrongful acts¹ (draft arts. 17–27 and 30); and (b) articles that are unique to the present draft (draft arts. 28–29). The comments below are arranged accordingly.

For the most part, the text of draft articles 17–27 and 30 differs from that of the respective Commission articles on responsibility of States for internationally wrongful acts insofar as the term “State” is replaced with the term “international organization” (or “organization”) since, as far as the above articles are concerned, the position of international organizations does not significantly differ from that of States. Sometimes other adjustments are made, which do not raise any apparent difficulties, and a great deal of case law is quoted in support of the draft provisions. Where there is no or little State practice cited, there does not appear, in the view of OPCW, to be any controversy regarding the subject matter of a given draft article.

As has already been mentioned before, articles 28–29 are unique to the draft articles on responsibility of international organizations for internationally wrongful acts, which would largely explain the vagueness, at times bordering on elusiveness. Of course, it is very likely that the ambiguity is intentional, but it certainly should not result in incomprehensibility. Inclusiveness should not come at the expense of clarity.

¹ *Yearbook ... 2001*, vol. II (Part Two), p. 26.

B. Draft article 3. General principles*

INTERNATIONAL MONETARY FUND

Paragraphs 8–10 of the Special Rapporteur's third report¹ suggest that conduct mandated by the lawful exercise of an organization's decision-making process could give rise to a breach of the organization's obligations.² This suggestion is based on the Special Rapporteur's view that “difficulties with compliance due to the political decision-making process are not the prerogative of international organizations”.³

* See *Yearbook ... 2003*, vol. II (Part Two), p. 18, para. 53.

¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553, chap. I.

² See, for example, *Yearbook ... 2004* (footnote 2 of the Introduction above), sect. A.2, for some of the IMF concerns in this regard.

³ *Yearbook ... 2005* (see footnote 1 above), para. 9.

IMF cannot agree. The decision-making processes of international organizations are legal imperatives in their own right; they are typically established in the organizations' charters. Whatever politics may be involved in reaching particular decisions, compliance with the decision-making process is not a political choice. Unlike a State, an international organization is not sovereign in this regard; it is an instrument of its charter.

The Special Rapporteur's reliance upon United Nations activities in Rwanda and Srebrenica appear misplaced. For example, the cited report on Rwanda seems to address the “responsibility” of the United Nations in a moral sense only. Nowhere in that report is there any suggestion that the United Nations had legal responsibility under international law. Moreover, these examples highlight the reservations previously expressed by IMF, i.e. that the Commission should not attempt to use practice from peacekeeping or use of force to develop principles that would apply to other activities of international organizations, such as developmental and financial activities.⁴

IMF wishes to emphasize again that the fundamental parameters within which all of an international organization's obligations must be contained are established in the constituent agreement of the organization, since the outer limits of what the members have agreed to are set out in that charter. International organizations are limited in their capacity and their obligations are inherently limited by the same capacity—those capacity limitations are established by the organization's charter. This issue is also discussed in a paper presented by the former General Counsel of IMF to the United Nations Committee on Economic, Social and Cultural Rights in 2001, and IMF invites the Commission's particular attention to this paper.⁵

⁴ See, for example, *Yearbook ... 2004* (footnote 2 of the Introduction above), paras. 6–8, for some prior comments of IMF in this regard.

⁵ Gianviti, “Economic, social and cultural human rights and the International Monetary Fund” (discussing the extent to which provisions of the International Covenant on Economic, Social and Cultural Rights have legal effect on IMF, the extent to which IMF is obligated to contribute to the achievement of the objectives of the covenant and the extent to which IMF may contribute to these objectives under its Articles of Agreement).

C. Draft article 8. Existence of a breach of an international obligation*

INTERNATIONAL MONETARY FUND

IMF has two comments on this draft article.

First, critical issues arise from the relationship between (a) the treatment in the draft articles of the breach of an international obligation by an international organization and (b) the treatment of the same act under the rules of the organization.

The commentary to the draft articles asserts, in this regard, that the rules of an organization “do not necessarily prevail over principles set out in the present draft [articles]”.¹ IMF sees no legal basis for this assertion.

* *Yearbook ... 2005*, vol. II (Part Two), para. 205.

¹ *Yearbook ... 2005*, vol. II (Part Two), para. 206, para. (7) of the commentary to article 8.

Nothing in these draft articles suggests that they contain peremptory norms or even principles that are now part of general or customary international law.

To the extent that the Commission seeks to contribute to the progressive development of international law, it is difficult to see how the quoted assertion achieves this aim. The report itself demonstrates considerable divergence of views on this question among members of the Commission, and the assertion would only create uncertainty, where there currently is none, among organizations as to the content and applicability of rules governing their actions. As noted above, and in its comments of 1 April 2005,² IMF is of the opinion that a far better view is that the rules of an organization are not just part of international law, but are *lex specialis* under international law in determining the obligations of the international organization. Moreover, international agreements between an organization's members, and other rules of the organization address the exclusive application of the laws governing their relations. Clearly, then, the general principles contained in the draft articles (as *lex generalis*, to the extent that they reflect obligations binding on all international organizations), would not prevail over the rules of the organization, as *lex specialis*.

For the above-mentioned reasons, IMF reiterates its general comment that the issue of whether there is a breach of an international obligation by an international organization can only be determined by reference to the rules of the organization (save in exceptional cases involving peremptory norms of general international law).

Secondly, and without prejudice to the foregoing, it would be useful to clarify why draft article 8, paragraph 2, is needed. The commentary states that paragraph 2 "intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present draft apply".³ However, by its language, draft article 8, paragraph 1, is sufficient, since it applies to international obligations regardless of their origin and character. Therefore, to the extent an obligation arising from the rules of an organization has to be regarded as an obligation under international law, it would already be covered by draft article 8, paragraph 1. If this is correct, draft article 8, paragraph 2, can be deleted, as it adds little. Issues associated with the application of draft article 8 to the rules of the organization can be sufficiently addressed in the commentary to the draft articles.

² *Ibid.*, vol. II (Part One), document A/CN.4/556, sect. L.3.

³ *Ibid.*, vol. II (Part Two), para. 206, para. (6).

D. Draft article 11. Breach consisting of a composite act*

INTERNATIONAL MONETARY FUND

Draft article 15 of the articles on responsibility of States for internationally wrongful acts, on which article 11 is based, deals with composite acts. These are

* *Yearbook ... 2005*, vol. II (Part Two), para. 205.

"acts ... which concern some aggregate of conduct and not individual acts as such" and which "give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct".¹

Given the limited capacity of international organizations, it is not readily evident that all international organizations would be subject to obligations that could be breached by composite acts. It would therefore be useful if the Commission could provide examples of specific composite acts and related obligations contemplated with regard to international organizations.

¹ *Yearbook ... 2001*, vol. II (Part Two), p. 62, paras. (1)–(2) of the commentary to article 15.

E. Responsibility of an international organization in connection with the act of a State or another international organization: general considerations

INTERNATIONAL MONETARY FUND

IMF is unable to concur with the assumptions underlying this chapter of the draft articles. These assumptions are encapsulated in the following statement drawn from the commentary to the draft articles:

For the purposes of international responsibility, there would be no reason for distinguishing the case of an international organization aiding or assisting a State or another international organization from that of a State aiding or assisting another State.¹

First, in its comments of 1 April 2005, IMF had outlined its reasons for the view that an international organization's role in conduct by a State or another organization is inherently different from one State's role in the conduct of another State.² As explained in the preceding general comments, States and international organizations are fundamentally different in this respect. IMF again draws the Commission's attention to these general observations and to those set out in paragraphs 13–17 of its comments of 1 April 2005.³

Secondly, as explained in the Fund's general comments above, the effects of and responsibility for an international organization's role in conduct by a member State are both generally and exclusively governed by the rules of each international organization. The relevant rules applicable to each international organization are varied in substance. To the extent an attempt is being made to progressively develop general principles in this area, this should primarily be based on the specific rules of the various international organizations, before relying on provisions that were drawn up from, and were intended to apply exclusively to, relations between States.

¹ *Yearbook ... 2005*, vol. II (Part Two), para. 206, p. 44, para. (1) of the commentary to chapter IV.

² *Ibid.*, vol. II (Part One), document A/CN.4/556, sect. N.3.

³ *Ibid.* Among other things, IMF noted in those comments that States and international organizations seldom have identical or even similar obligations. Thus, the situations envisaged in draft articles 12, 13 and 15 will seldom, if ever, arise. By way of example, the respective obligations of IMF and of States Members of the United Nations as regards decisions of the Security Council under Chapter VII of the Charter of the United Nations are very different. While Member States are obliged to carry out such decisions under the Charter, the United Nations has recognized and agreed with IMF that the Fund's only obligation is to "have due regard for" such decisions, as discussed (see section U.2 below).

Thirdly, the principle that *lex specialis* prevails over *lex generalis* would also apply to such general principles. Therefore, the specific rules of an organization governing relations with member States would prevail over any general principles on the responsibility of international organizations for aid or assistance provided to States generally.

Finally, it is useful to note that the statement that there would be “no reason” for distinguishing such cases appears to be contradicted by the Commission’s admission later in the commentary, i.e. that the consequences of the ability of international organizations to influence State conduct through non-binding acts “does not have a parallel in the relations between States”.⁴

⁴ *Ibid.*, vol. II (Part Two), para. 206, p. 44, para. (3) of the commentary to chapter IV.

F. Draft article 12. Aid or assistance in the commission of an internationally wrongful act*

INTERNATIONAL MONETARY FUND

For the reasons stated in the above paragraphs, IMF is unable to concur with the proposition that the application of article 16 of the draft articles on responsibility of States for internationally wrongful acts to international organizations “is not problematic”,¹ and it cannot agree with the blanket application of article 16 of the draft articles on State responsibility to international organizations.

In addition, it should be emphasized, in line with the commentary to article 16 of the draft articles on responsibility of States for internationally wrongful acts, that “aid or assistance”² as used in those draft articles entails knowingly and intentionally providing a facility or financing that is essential or contributed significantly to the wrongful conduct in question. Given the fungible nature of financial assistance, such references in the case of financial assistance can only mean assistance that is earmarked for the wrongful conduct. This should be distinguished from the aid and assistance, as those words are used colloquially, which international organizations regularly provide to their members.

For example, IMF was established, *inter alia*, to provide financial assistance to its members to assist in addressing their balance of payment problems. Consistent with its charter, IMF regularly provides such financial assistance.

That said, a member receiving financial assistance from IMF may still engage in wrongful conduct. Neither IMF itself, nor the provision of financial assistance by IMF, is capable of precluding such conduct or contributing significantly to it. First, IMF cannot preclude such conduct because, as explained in its comments to draft article 14 below, a member always has an effective choice not to follow the conditions on which IMF assistance is provided. Secondly, IMF cannot contribute significantly to such conduct because IMF financing is not targeted

to particular conduct; it is provided to support a member’s economic programme that addresses its balance of payment problems. The financial resources utilized by the member to engage in particular conduct can be, and typically are, obtained from a variety of sources—domestic taxpayers, domestic and international creditors and international donors. The fungible character of financial resources also means that IMF financial assistance can never be essential, or contribute significantly, to particular wrongful conduct of a member State, for purposes of this draft article 12.³

³ The Special Rapporteur also acknowledges this view in his third report (*Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553) by reference in footnote 41, to the article by Shihata, “Human rights, development and international financial institutions”, p. 35.

G. Draft article 13. Direction and control exercised over the commission of an internationally wrongful act*

INTERNATIONAL MONETARY FUND

While recognizing the relevance to international organizations of the principle in article 17 of the draft articles on responsibility of States for internationally wrongful acts, IMF has great difficulty with the broad expansion of that principle found in the commentary to the present draft article 13. The adoption of a decision by an international organization that is legally binding upon its member States is not the same as direction or control by the organization, any more than the invocation of a binding contractual commitment would as a general matter constitute direction or control over a contractual counterparty. The international organization’s decision is legally binding only because of the bound State’s prior consent to the legal regime under the organization’s charter. This circumstance simply cannot be equated to direction and control of a dependent State by a dominant State. This principle of direction and control would therefore clearly not apply to organizations, such as international financial institutions, that are incapable of the threat or use of force. This issue is further explained in the Fund’s comments on draft article 15 below, and the Commission’s attention is drawn to those comments as well.

* *Yearbook ... 2005*, vol. II (Part Two), para. 205.

H. Draft article 14. Coercion of a State or another international organization*

INTERNATIONAL MONETARY FUND

Again, IMF is compelled to take exception to the expansion of a principle on State responsibility in the commentary to draft article 14. A binding decision of an international organization cannot constitute coercion, which is defined in the commentary to article 18 on responsibility of States for internationally wrongful acts as “[n]othing less than conduct which forces the will ...giving [the coerced State] no effective choice but to comply”.¹ Because of member States’ acceptance of and

* *Yearbook ... 2005*, vol. II (Part Two), para. 205.

¹ *Yearbook ... 2005*, vol. II (Part Two), para. 206, commentary to article 12.

² *Yearbook ... 2001*, vol. II (Part Two), para. 66, para. (5) of the commentary to article 16.

* *Yearbook ... 2005*, vol. II (Part Two), para. 205.

¹ *Yearbook ... 2001*, vol. II (Part Two), p. 69, para. (2) of the commentary to article 18.

participation in the decision-making processes, IMF does not see how the Commission could conclude that binding decisions of an international organization could be equated with coercion in the above sense. This issue is further explained in the Fund's comments on draft article 15, and the Commission's attention is drawn to those comments.

Furthermore, IMF disagrees with the suggestion, in the Special Rapporteur's third report,² at paragraph 28, that an international financial institution's conditions for providing financial assistance to a member State could ever constitute coercion. The Special Rapporteur's reference to the reported filing of a lawsuit against IMF in Romania is inapposite; that failed attempt to bring a case against IMF stands for nothing in the law and is only a reminder of the perennial creativity of plaintiff lawyers. IMF welcomes the Commission's omission of that discussion from its own report, but nevertheless takes this opportunity to emphasize that a member State always has an effective choice between following the conditions of IMF financing, having recourse to other sources of external financing, or not accepting any external financing.

Two points are worth highlighting in this regard. First, as has been explained in various publications, including the rules of the Fund, the provision of IMF financing does not entail the establishment of contractual relations between IMF and the member obtaining financial assistance.³ Therefore, a member's inability to or desire not to comply with a condition for the provision of such financing does not result in a breach of obligation by the member. Secondly, while IMF is fully responsible to its membership for the establishment and monitoring of conditions attached to the use of its resources, in responding to members' requests to use these resources and in setting these conditions, IMF is "guided by the principle that the member has primary responsibility for the selection, design and implementation of its economic and financial policies".⁴

² *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553.

³ See, for example, IMF Guidelines on Conditionality, decision No. 12864-(02/1020) of 25 September 2002, as amended by decision No. 13814-(06/98) of 15 November 2006, *Selected Decisions and Selected Documents of the International Monetary Fund*, 31st issue (Washington, D.C., 31 December 2006), p. 250. See also Gold, *Financial Assistance by the International Monetary Fund: Law and Practice*, pp. 17–19.

⁴ IMF Guidelines on Conditionality (see footnote 3 above).

I. Draft article 15. Decisions, recommendations and authorizations addressed to member States and international organizations*

INTERNATIONAL MONETARY FUND

IMF wishes to echo and endorse the concerns and reservations that were expressed by INTERPOL and WHO and reproduced in the report of the Special Rapporteur, regarding draft article 15, which purports to hold an international organization responsible for an act by a member State or another international organization, committed not with the aid or assistance, direction or control of the first organization, but merely in reliance upon a binding or

non-binding decision, authorization or recommendation of that organization.¹

Furthermore, for the reasons set out below, IMF believes this draft article should be deleted in its entirety.

As stated in its comments of 1 April 2005,² this draft article appears to be based on a contradiction manifesting a fundamental misconception of an international organization's capacity to act inconsistently with its international obligations.

When conduct is "authorized" under the rules of an international organization, the fact that the organization can lawfully "authorize" that conduct necessarily implies that the conduct is not a violation of the organization's charter. If the conduct does not violate the organization's charter, the only question that remains is whether the conduct is consistent with the organization's other international obligations. Because an international organization is created by, and therefore primarily subject to, its charter, the international organization's other obligations are required to be consistent with the charter. It follows, as indicated in the general comments above, that this situation could only arise where the other obligation derives from a peremptory norm or a specific bilateral obligation entered into between the organization and another subject of international law.

The contradiction contained in this draft article 15 is also manifest in the commentary to the draft article. For instance, the commentary states that since compliance with an international organization's binding decisions is to be expected, it appears preferable to hold the organization responsible even before any act implementing such decisions has been committed.³ This proposition suggests that the act of taking a binding decision alone constitutes wrongful conduct, as this act gives rise to the breach of an obligation. Since the act of taking a binding decision must necessarily be consistent with the organization's charter, that act by itself cannot amount to wrongful conduct which gives rise to the breach of an obligation of that international organization. As such, this proposition is inconsistent with the fundamental principle that there must be conduct constituting a breach of an international obligation for responsibility to arise.⁴

IMF is also unable to agree with the assertion in the commentary to this draft article 15 that where a decision of an international organization allows "the member State or [other] international organization some discretion to take an alternative course which does not imply circumvention, responsibility would arise for the international organization that has taken the decision only if circumvention actually occurs".⁵

¹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/568 and Add.1, sect. I.

² *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, sect. N.3.

³ *Ibid.*, vol. II (Part Two), para. 206, para. (5) of the commentary to article 15.

⁴ See article 2 of the draft articles on responsibility of States for internationally wrongful acts (*Yearbook ... 2001*, vol. II (Part Two), p. 26) and article 3 of the present draft articles on the responsibility of international organizations (*Yearbook ... 2005*, vol. II (Part Two), para. 205).

⁵ *Yearbook ... 2005*, vol. II (Part Two), para. 206, para. (7) of the commentary to article 15.

* *Yearbook ... 2005*, vol. II (Part Two), para. 205.

States are independent actors. The mere recommendation or specification of a certain objective by an international organization, which a State (or other international organization) decides to then achieve in a manner of its own determination, cannot result in international responsibility for the organization that authorizes, recommends or specifies the objective. For the same reason, reliance on such authorization or recommendation cannot be a sufficient basis to attribute responsibility to the international organization.

As expressed in its comments of 1 April 2005, an international organization cannot be responsible for the manner in which its membership, or non-member States, or other international organizations, choose to implement, or not, the organization's decisions, authorizations or recommendations.⁶ Likewise, INTERPOL had explained previously that action by a country pursuant to an authorization by, or cooperation with, an international organization does not engage the responsibility of the international organization merely by reason of such authorization or cooperation.⁷

The Special Rapporteur, in his third report, recognized that there are no clear examples in practice of an international organization being responsible for acts of its member States taken under a binding decision or an authorization of the organization where such acts would have been internationally wrongful if taken by the organization itself.⁸

In view of the above, the assertion, as in paragraph (8) of the commentary to draft article 15, that an organization's authorizations and recommendations are "susceptible of influencing the conduct of member States"⁹ or others is insufficient to establish the responsibility of the international organization. Mere susceptibility to influence the conduct of another is not a recognized test for legal responsibility. If it were, there would be no need for the qualifications and limitations upon responsibility for aid or assistance, direction or control, or coercion of another, that are incorporated in articles 16–18 on responsibility of States for internationally wrongful acts,¹⁰ and their counterparts at draft articles 12–14, and 25–27 of the current project. Draft article 15 and its analogue draft article 28, discussed below, potentially erase all of those qualifications and limitations. IMF sees no basis or rationale for the Commission to suggest that the inclusion of this provision represents either the codification or the progressive development of international law in this area.

⁶ *Ibid.*, vol. II (Part One), document A/CN.4/556, sect. N.3.

⁷ *Ibid.*, sect. N.2.

⁸ *Ibid.*, document A/CN.4/553, paras. 27–28.

⁹ *Ibid.*, vol. II (Part Two), para. 206, para. (8) of the commentary to article 15.

¹⁰ *Yearbook ... 2001*, vol. II (Part Two), p. 27.

J. Circumstances precluding wrongfulness: general considerations

EUROPEAN COMMISSION

Draft articles 17–24 follow very closely the model of the relevant articles on responsibility of States for

internationally wrongful acts. In most cases this may be acceptable, but in others it is not.

The European Community recalls the diversity of the structures, forms and functions of international organizations and the fact that some of the concepts applying to States are not relevant in this context. This is most important for the European Union, given the specific nature of the organization and in the light of the direct applicability of European Community law to member States and its supremacy over national laws.

The European Community is also of the view that a clear distinction must be made between the legal positions of States that are members of international organizations, third States that recognize the organization and third States that explicitly refuse to do so.

K. Draft article 17. Consent*

EUROPEAN COMMISSION

Draft article 17 is vitally important for many of the external relations activities of the European Community/European Union. When discussing draft article 17 on consent, the Special Rapporteur referred to invitations issued from States to the United Nations to verify their election processes. In addition to the Union civil crisis instruments, there is considerable European Community practice in the field. Under two regulations of 1999, the Community provides support for electoral processes, in particular by supporting independent electoral commissions, granting material, technical and legal assistance in preparing for elections, including electoral censuses, taking measures to promote the participation of specific groups, particularly women, in the electoral process and by training observers. Community election observation missions are usually led by a member of the European Parliament upon the invitation of the host Government. Article 17 is therefore of vital importance for the Union's external relations activities, which could otherwise be seen as undue interference in the domestic affairs of third States.

INTERNATIONAL MONETARY FUND

Regarding the issue of consent discussed in draft article 17, an important example that should be included by the Commission in its commentary to the draft articles is the consent that occurs upon a State's accession to an international organization's charter.

The charter of an international organization is agreed to by its members. For example, the very first sentence in the Fund's Articles of Agreement reads: "The Governments on whose behalf the present Agreement is signed *agree*^{*} as follows."¹

* *Yearbook ... 2006*, vol. II (Part Two), para. 90.

¹ The preamble to the Charter of the United Nations contains a similar statement, that is: "Accordingly, our respective Governments ... have *agreed*" to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations."

To the extent that an organization's conduct is therefore consistent with its charter, such conduct has been agreed to by the organization's members. Therefore, conduct of an organization that is taken consistent with the organization's charter has the consent of the organization's members and the wrongfulness of such conduct would *prima facie* be precluded *vis-à-vis* those members.²

This is another reason, additional to those based upon *lex specialis* and advanced in IMF responses to the Commission in its general comments above and in its comments made in prior years, why conduct by an international organization that is authorized by its rules cannot be internationally wrongful conduct *vis-à-vis* the organization's membership.

The preceding observations should not be read to suggest that consent can only arise in the case of dealings between an organization and its member States. The principle of consent precluding the wrongfulness of an organization's conduct would also apply to relations with non-members, to the extent that such consent is express or implied.

² It may also be noted that the Fund's Articles of Agreement do not allow any qualifications or reservations to the obligations of membership.

L. Draft article 18. Self-defence*

EUROPEAN COMMISSION

On draft article 18 on self-defence, there is a need for further discussions as to how self-defence would apply in relation to an international organization. Much of the discussion in the International Law Commission commentary is based on the use of self-defence in peacekeeping operations, but that right arose in many cases from the terms of the mandate given to a peacekeeping force. It is difficult to extrapolate from those specific mandates a wider right that would exist in different circumstances.

INTERNATIONAL MONETARY FUND

This draft article highlights the Fund's preceding general comment on the differences between international organizations. As the Commission notes, the issues addressed in draft article 18 (Self-defence) would only be relevant to a small number of organizations, such as those administering territory or deploying an armed force. It is unclear why a provision of such limited relevance is proposed to be included in draft articles that purport a wider applicability, i.e. to all international organizations, not just those engaged in administering territory or deploying an armed force. In contrast, article 21 of the draft articles on responsibility of States for internationally wrongful acts,¹ on which the present article 18 is based, was relevant and applicable to all States.

* *Yearbook ... 2006*, vol. II (Part Two), para. 90.

¹ *Yearbook ... 2001*, vol. II (Part Two), p. 27.

M. Draft article 19. Countermeasures*

INTERNATIONAL MONETARY FUND

While recognizing the Commission's statement that the provision on countermeasures will be drafted at a later stage, IMF wishes to provide the following observations on the issue of countermeasures in the context of international organizations.

IMF is of the view that the wrongfulness of conduct by an international organization might also be precluded by the principle of countermeasures, i.e. because the conduct was undertaken to procure cessation of wrongful conduct against the organization. This view is based on the fact that in practice international treaties provide organizations with rights to undertake measures that are similar to countermeasures.

For example, under article V, section 5, of the Fund's Articles of Agreement, whenever IMF is of the opinion that a member is using the Fund's general resources in a manner contrary to the organization's purposes, upon issuing a report to the member setting forth those views and prescribing a suitable time for reply, IMF can limit the use of its general resources by such member. If no reply or an unsatisfactory reply is received, it may even declare the member ineligible to use the Fund's general resources. While such limitations on use of resources to which IMF members otherwise may have access involve the exercise of treaty-based rights by IMF, they are similar in effect to countermeasures that another organization might take to procure cessation of wrongful conduct against the organization.

* The text of this draft article will be drafted at a later stage, when the issues relating to countermeasures by an international organization are examined in the context of the implementation of the responsibility of an international organization.

N. Draft article 21. Distress*

EUROPEAN COMMISSION

The European Community would like the International Law Commission to give examples of when distress would apply to an international organization and if it would ever extend to an international organization performing its normal humanitarian functions in respect of persons entrusted to its care.

* *Yearbook ... 2006*, vol. II (Part Two), para. 90.

ORGANIZATION FOR THE PROHIBITION OF CHEMICAL WEAPONS

The commentary to the draft article quotes the commentary to article 24 on responsibility of States for internationally wrongful acts, particularly the example from practice of a British military ship entering Icelandic territorial waters to seek shelter during a heavy storm. This incident is described as follows: "[T]he author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other

persons entrusted to the author's care".¹ This wording implies that but for distress, the act of a British warship entering the Icelandic territorial sea would have been considered internationally wrongful.

The incident in question occurred in December 1975, at which time perhaps not all maritime powers recognized the right of warships to innocent passage through the territorial sea of a coastal State. The situation has changed now and the right of warships to innocent passage is reflected in the provisions of the United Nations Convention on the Law of the Sea as well as in State practice.² Thus, today a similar act would not be internationally wrongful as, under the Convention,³ it would not be wrongful for reasons of *force majeure* or distress. Owing to developments in the international law of the sea and the current international recognition of the right of innocent passage for warships, the example given in the commentaries to the articles on responsibility of States for internationally wrongful acts may be somewhat outdated. Therefore, in order to avoid confusion, it might be specified that the position in general international law on this specific topic has changed.

¹ *Yearbook ... 2001*, vol. II (Part Two), p. 78, art. 24, para. 1.

² See especially the United States/Union of Soviet Socialist Republics joint statement with attached uniform interpretation of rules of international law governing innocent passage (*International Legal Materials*, vol. 28 (1989), p. 1444), and the Secretary-General of the United Nations' annual reports on the law of the sea.

³ Article 18, paragraph 2, of the Convention on the meaning of passage provides:

"Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."

O. Draft article 22. Necessity*

EUROPEAN COMMISSION

As regards draft article 22 on necessity, the Special Rapporteur reports that a majority of statements in the Sixth Committee had been in favour of including such an article among the circumstances precluding wrongfulness.¹ However, some States members of the European Union sounded a note of caution in this respect, citing the lack of relevant practice, the risk of abuse and the need to provide stricter conditions than those applying to States.

The European Commission would recommend further clarification of what is meant by "an essential interest" and when an international organization would have the "function to protect" that interest.

* *Yearbook ... 2006*, vol. II (Part Two), para. 90.

¹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/564 and Add.1-2, para. 39.

INTERNATIONAL MONETARY FUND

IMF would like to supplement its earlier observations on the topic of necessity.

When it addressed necessity in its correspondence to the Commission on 1 April 2005, IMF wondered whether

international organizations could claim "essential interests" similar to those of States.¹ Following a very useful discussion of this issue with the Special Rapporteur and the then Chairman of the Drafting Committee, organized by the World Bank, IMF sees strong merit in the view that there could be interests essential to the purposes of an organization, which interests would allow an international organization to invoke the principle of necessity. Analogous principles, i.e. where a predominant interest overrides other stated purposes, are reflected in the rules of organizations.

For example, article VII, section 3, of the Fund's Articles of Agreement authorizes IMF formally to declare a member's currency scarce when it becomes evident that such scarcity "seriously threatens" the Fund's ability to supply such currency.² The declaration then operates as an authorization for IMF members, after consultation with IMF, to temporarily impose limitations on the freedom of exchange operations in the scarce currency. Without the "serious threat" referred to in article VII, the effect of such a declaration would be at odds with the Fund's purpose of assisting in the elimination of exchange restrictions.

For the above reasons, IMF urges a broader construction of "essential interest" than is suggested by the Commission's commentary on draft article 22.

¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, sect. M.3.

² IMF has not to date had occasion to invoke article VII, section 3.

P. Responsibility of a State in connection with the act of an international organization: general considerations*

EUROPEAN COMMISSION

On the one hand, for the reasons given by the Special Rapporteur, draft articles 25-27 and 30, which correspond to articles 16-18 of the draft articles on responsibility of States for internationally wrongful acts, look to be acceptable. However, such direct borrowing from the draft articles on State responsibility deserves careful attention. On the other hand, the new draft articles 28-29 are without precedent and merit close scrutiny. It is on these articles that the special character of the European Community causes particular problems.

* The location of this section will be determined at a later stage (see *Yearbook ... 2006*, vol. II (Part Two), footnote 569).

Q. Draft articles 25-26*

INTERNATIONAL MONETARY FUND

IMF concurs with the view that mere participation by a member State in the decision-making process of an international organization could not constitute aid or assistance in, or direction or control over, the commission of an internationally wrongful act by the organization.¹

* *Yearbook ... 2006*, vol. II (Part Two), para. 90.

¹ *Yearbook ... 2006*, vol. II (Part Two), commentary to articles 25-26.

However, as indicated in its comments on draft article 12, it should be emphasized in line with the commentary to article 16 of the draft articles on responsibility of States for internationally wrongful acts, that “aid or assistance” entails knowingly and intentionally providing a facility or financing that is essential or contributed significantly to the wrongful conduct in question.¹ Given the fungible nature of financial assistance, such references in the case of financial assistance can only mean assistance that is earmarked for the wrongful conduct. The threshold of the aid or assistance being essential or contributing significantly to the act should be similarly included in draft article 25.

With regard to the suggestion, contained in the commentary to draft articles 25–26, of wrongfulness arising even in the case of conduct taken by the State within the framework of the organizations, IMF again draws the Commission’s attention to the preceding general comments and to its comments on draft article 15. Specifically, when conduct is “authorized” under the rules of an international organization, the fact that the organization can lawfully “authorize” that conduct necessarily implies that the conduct is not a violation of the organization’s charter. If the conduct does not violate the organization’s charter, the only question that remains is whether the conduct is consistent with the organization’s other obligations. As indicated above, this situation could only arise where the other obligation derives from a peremptory norm or a specific bilateral obligation entered into between the organization and another subject of international law.

R. Draft article 27. Coercion of an international organization by a State*

INTERNATIONAL MONETARY FUND

IMF similarly concurs with the view that mere participation by a member State in the decisions of an international organization could not constitute coercion.¹ As the term has been used by the Commission, coercion means nothing less than conduct which forces the will, giving no effective choice but to comply.² A member State cannot be said to have coerced an international organization through its participation in the decision-making process, including by its exercise of a range of prerogatives a member State may possess pursuant to provisions contained in the charters of international organizations, including its withdrawal from the organization.

Also, based on the commentary to the draft articles on responsibility of States for internationally wrongful acts, IMF would note that serious financial pressure upon an international organization by a member State could only constitute coercion if it is such as to deprive the organization of any possibility of conforming with the obligation breached.³

This is not to say that there never could be situations of member States coercing international organizations, or *vice versa*, such as through the illegal use of force or illegal threat of force by one against another. But IMF cannot envisage any circumstance in which coercion could arise from those financial dealings between an international organization and member States which are contemplated under and carried out in accordance with the organization’s charter and rules.

S. Draft article 28. International responsibility in case of provision of competence to an international organization*

EUROPEAN COMMISSION

Draft article 28 puts forward the new idea that a State member of an international organization may be held responsible for bestowing competence on it. Paragraph 1 requires that a State “circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation”. Paragraph 2 explains that State responsibility is triggered in such a situation irrespective of the question whether the act is internationally wrongful for the international organization itself. In other words, a State may be liable for the mere fact of transferring competence to an international organization, even if the organization acts lawfully, if and insofar as the State thereby “circumvents one of its international obligations”.

From the point of view of the European Community/European Union, this approach is difficult to understand. Would member States face responsibility because they entrusted (by concluding the Treaty of Rome) the European Community, and in particular the European Commission, with the power to take antitrust decisions, because those decisions may or may not infringe certain procedural rights guaranteed under human rights law binding on the member States or be contrary to customary rules on the limits to jurisdiction? The Special Rapporteur’s explanations are not particularly illuminating in this regard. His example “of a State that is a party to a treaty which forbids the development of certain weapons and that indirectly acquires control of those weapons by making use of an international organization which is not bound by the treaty”¹ seems to be a bit far-fetched.

But also the more relevant examples relating to the jurisprudence of the European Court of Human Rights (*Waite and Kennedy*, *Bosphorus*, and *Senator Lines* cases)² do not support the broad language of draft article 28. While the European Court emphasized that States

* *Yearbook ... 2006*, vol. II (Part Two), para. 90.

¹ *Yearbook ... 2006*, vol. II (Part Two), para. (2) of the commentary to article 27.

² *Yearbook ... 2001*, vol. II (Part Two), p. 69, para. (2) of the commentary to article 18.

³ *Ibid.*, p. 70, para. (3).

* *Yearbook ... 2006*, vol. II (Part Two), para. 90.

¹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/564 and Add.1–2, para. 66.

² *Waite and Kennedy v. Germany*, judgment of 18 February 1999, *Reports of Judgments and Decisions 1999–I*, p. 393; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005, *ibid.*, 2005–VI, p. 107; *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, decision of 10 March 2004, *ibid.*, 2004–IV, p. 331.

parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) may not evade their obligations by transferring powers to an international organization, it also underlined that State responsibility for an act of that organization does not arise where the organization offers a level of protection equivalent to that to which member States are held by international law, in this case the European Convention. This criterion of equivalence is simply missing in draft article 28. As the vague term “circumvention” does not require intent to escape from one’s obligations, the draft seems overinclusive. At the very least, it would have to be clarified that there is no “circumvention” if a State transfers powers to an international organization which is not bound by the State’s own treaty obligations, but whose legal system offers a comparable level of guarantees. Otherwise this draft article may be very difficult to accept for the European Community.

INTERNATIONAL MONETARY FUND

IMF has serious concerns and reservations about this draft article. The Commission’s commentary points out that this provision is analogous to draft article 15, another very troubling proposal that IMF has commented on above. IMF again draws the Commission’s attention to those comments on draft article 15.

For the reasons set out below, it urges the Commission to delete this provision from the draft articles.

The provision envisages two theoretical scenarios: (a) the act is wrongful for the State but not wrongful for the organization; and (b) the act is wrongful for both the State and the organization.

In the former scenario, where the act is wrongful for the State, but is not wrongful for the organization, the issue of State responsibility should be determined solely by reference to the rules on State responsibility. A provision dealing with such a situation has no place in draft articles that concern the responsibility of international organizations.

The latter scenario, where the act is wrongful for both the State and the organization, seems entirely untenable and lacking support in law or practice. The Commission wrote that “[c]ircumvention is more likely to occur when the international organization is not bound by the international obligation”.¹ IMF would go further and say that circumvention can only occur if the organization is not bound by the international obligation, because it can foresee no circumstance in which the State could validly grant competence to the international organization to breach their common obligation.

The Commission will find no support for this latter scenario in the line of cases from the European Court of Human Rights, cited in the commentary to draft article 28, concerning the protection of fundamental human rights from circumvention by States parties to the European Convention on Human Rights. As both of the cases cited noted, the obligations under the Convention were obligations of the Contracting Parties to those conventions.

They were not obligations that could be readily imputed to all subjects of international law, least of all international organizations that are not parties to those conventions.² The decisions cited do not establish the wrongfulness of any conduct by the organizations concerned and therefore they do not bear upon a State’s supposed circumvention through an international organization of their common obligation.

In advancing this latter scenario, the commentary also appears to suggest that international organizations can be vested with “competence” by a single member State. IMF does not understand how this could occur. As international organizations are created by treaties and as their competence can only be based on such treaties, it is necessary that the vesting of competence in such organizations necessarily requires action by more than one State. If the obligation in question is only binding on one or some of the States but not others, the Commission by this provision would purport to extend such obligations to the entire membership of an international organization, merely by reason of membership in the organization. This would be at odds with the rule, subsequently recognized by the Commission as a “clear” rule, that “membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act”,³ and with the numerous judgements on this point cited by the Commission. IMF therefore sees no basis for the extension of such obligations to all member States under international law.

In the event that the Commission sees fit to continue advancing the provision set out in draft article 28, a further material aspect would need to be considered (in addition to the two issues addressed above). The text from the *Bosphorus* case cited by the Commission contains a key temporal element that has not been addressed in the provision nor the commentary.⁴ The Court, in that case, stated that the “State is considered to retain Convention liability in respect of treaty commitments *subsequent* to the entry into force of the Convention”.⁵

Therefore, the granting of competence to an international organization could only give rise to responsibility by States for an act of the organization if the grant of such competence occurs “subsequent” to entry into force of the obligation that is breached. The entry into force of an obligation of the States would not itself constrain the previously established competence of an international organization in which the States are members.

² See generally Gianviti, *loc. cit.*

³ *Yearbook ... 2006*, vol. II (Part Two), para. 91, para. (2) of the commentary to article 28.

⁴ *Ibid.*, para. (2) of the commentary to article 29.

⁵ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, Judgments and Decisions 1999-I*, Judgment of 30 June 2005, p. 158, para. 154.

T. Draft article 29. Responsibility of a State member of an international organization for the internationally wrongful act of that organization*

EUROPEAN COMMISSION

A number of questions also arise with respect to draft article 29 on responsibility of a State member of an

¹ *Yearbook ... 2006*, vol. II (Part Two), para. 91, para. (7) of the commentary to article 28.

* *Yearbook ... 2006*, vol. II (Part Two), para. 90.

international organization for the internationally wrongful act of that organization. While supporting the principle deduced from *Westland Helicopters* and the *International Tin Council* case law¹ that such responsibility, if any, is presumed to be at best subsidiary (para. 2), the conditions under paragraph 1 are potentially very far-reaching. Under paragraph 1 (a), a State is responsible for an internationally wrongful act of an organization of which it is a member if it has accepted responsibility for that act. In this respect, it should be mentioned that in some international organizations, such as the European Community, such explicit acceptance of responsibility is severely curtailed by the “constitutional” law of the organization and hence the freedom States members of the Community may have under draft article 29, paragraph 1 (a), in reality does not go very far. For example, if a State member of the Community assumed responsibility for a matter over which the Community enjoyed “exclusive competence”, the member State would be liable to face infringement proceedings.

Under paragraph 1 (b), a State is also responsible for illegal acts of an international organization to which it is a member if it has led the injured party to rely on its responsibility. This may be problematic as regards mixed agreements of the European Community and its member States with third States. Such agreements are concluded by both the Community and its member States “of the one part” and another State “of the other part”. Should this lead the other State to believe that the member States are responsible under international law for the implementation of the whole agreement even though large parts may fall within exclusive Community competence? Again, it may be said that Community law has to find its own solutions to such complications, but the draft of article 29 is not exactly helpful, seen from the Community’s perspective.

The European Commission feels a strong need that the European Community be apportioned the responsibility for any breach of its treaties. Otherwise, a third State and a member State might decide on their own about the international responsibility of the Community and hence about the interpretation of the agreement in question and about the external relations powers of the Community.

The European Commission believes that the correct approach would be for the provision to reflect the presumption that a State does not, as a general rule, incur international responsibility for the act of an international organization of which it is a member. In particular, responsibility should not be incurred merely by virtue of membership. This would be more consistent with existing judicial authorities. Carefully defined exceptions could then flow from this modified general rule.

¹ *Ibid.*, paras. (4) and (9) of the commentary to article 29.

ORGANIZATION FOR THE PROHIBITION OF CHEMICAL WEAPONS

The concluding sentence of paragraph (10) of the commentary reads: “There is clearly no presumption that a third party should be able to rely on the responsibility of member States.”¹ It is not clear why a third party should

not be able to rely on the responsibility of member States if such responsibility is established in accordance with article 29, paragraph 1 (a)–(b). It may be that this statement in paragraph (10) of the commentary is based on draft article 29, paragraph 2, which describes the responsibility of States as being “subsidiary”. If so, the draft articles could be more specific in elaborating on the distinction between “primary” and “subsidiary” responsibility.

Also, paragraph (12) of the commentary appears to raise many questions, and clarification is required concerning the possibility of “only of certain member States”² being responsible.

² *Ibid.*, para. (12).

U. Specific issues raised in chapter III.B of the report of the Commission on the work of its fifty-eighth session

1. *Obligation of members of an international organization to provide compensation to the injured party*

INTERNATIONAL MONETARY FUND

The commentary to draft article 29, on responsibility of international organizations, acknowledges that membership of an international organization does not as such entail for member States international responsibility when the organization commits an internationally wrongful act. IMF observes that this follows from the Commission’s previous commentary, on responsibility of States for internationally wrongful acts, that “the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State”.¹

However, as IMF has noted in its previous comments, in the specific context of State membership in an international organization, such a general principle would also need to be subject to the rules of the organization. Therefore, if the States members of an international organization have made provision in the rules of the organization for the members’ derivative liability for the organization’s conduct, those rules of the organization would provide the basis for determining whether a particular member State is liable for particular conduct of the organization.

It follows that members would ordinarily not have an obligation to provide compensation to the injured party, should the organization not be in a position to do so, unless the rules of the organization called for the members to provide such compensation. IMF believes this is the only conclusion that is consistent with the following established principles: (a) international organizations have independent legal personalities; (b) “attribution” is a necessary requirement for a State to be responsible for a wrongful act; and (c) liability to compensate can only be based on State responsibility or another rule that is binding on the State (i.e. in the present case, the rules of the organization).

¹ *Yearbook ... 2001*, vol. II (Part Two), p. 38, para. (2) of the commentary to chapter II.

¹ *Ibid.*, para. (10).

ORGANIZATION FOR THE PROHIBITION
OF CHEMICAL WEAPONS

The question itself appears to OPCW somewhat opaque. It would be helpful to have illustrations of circumstances in which some member States are responsible for the acts of an organization while others are not. This appears to OPCW to be the threshold question.

Beyond that, the question posed in paragraph 28 (a) of the report of the Commission on the work of its fifty-eighth session¹ is related to draft article 29 (responsibility of a State member of an international organization for the internationally wrongful act of that organization), according to which a member State is responsible for an internationally wrongful act of an international organization if it has either accepted responsibility or has led the injured party to rely on its responsibility. It is presumed that responsibility entails an obligation to provide compensation to the injured party, and it may thus be presumed that if a member State is not responsible, it has no obligation to compensate the injured party.

However, it is essential to bear in mind that liability can exist without responsibility; an obligation to compensate may arise even in the absence of fault (strict liability). Thus, in the final analysis, the answer would depend on the substantive obligation that has been breached, i.e. the standard of conduct required. Some obligations might require fault while others might not.

¹ *Yearbook ... 2006*, vol. II (Part Two).

2. *Obligation of cooperation in case of a serious breach by an international organization of an obligation under a peremptory norm of general international law*

INTERNATIONAL MONETARY FUND

As international organizations are bound by peremptory norms of general international law, it follows that States should have the same positive duty to cooperate to bring an end to serious breaches of peremptory norms by international organizations as they do to bring an end to serious breaches by States.

International organizations, for their part, are involved in bringing an end to such breaches of peremptory norms by subjects of international law to the extent that they provide the framework for such State cooperation, or are tasked by their memberships to give aid or assistance in such State cooperation.

However, unlike States, international organizations do not possess a general competence. It follows that international organizations cannot have the identical duty as States to bring an end to serious breaches of peremptory norms. Rather, any such duty of international organizations would need to take into account the limited competence of the organizations as established by their respective charters.

IMF is unaware of any existing practice that would demonstrate the existence of a general obligation on the

part of international organizations to cooperate in exactly the same manner as States. Rather, practice would suggest that any obligation of international organizations to cooperate would be subject to, and limited by, provisions of their respective charters.

For instance, in another context, it has been argued erroneously that:

[T]here are strong legal arguments to support the position that the IMF is obligated in accordance with international law, to take account of human rights considerations. The first is that the IMF is a United Nations body and must therefore be bound by the principles stated in the U.N. Charter. Among those principles and purposes of the organization is the promotion of respect for human rights. It is not therefore a political objective but a legally mandated one.¹

This argument is based on a number of incorrect assumptions, as has already been noted by Gianviti, the former General Counsel of IMF.² In particular, IMF is not a “United Nations body” as asserted. Rather, it is a specialized agency within the meaning of the Charter of the United Nations, which means that it is an intergovernmental agency, not an agency of the United Nations.³ In accordance with Article 57 of the Charter, the Fund was brought into relationship with the United Nations by a 1947 agreement in which the United Nations recognizes that, “[b]y reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Fund is, and is required to function as, an independent international organization”.⁴ Furthermore, article X of the Fund’s Articles of Agreement, while requiring the Fund to cooperate “with any general international organization” [i.e. the United Nations], specifies that “[a]ny arrangements for such co-operation which would involve a modification of any provision of [the Articles of] Agreement may be effected only after amendment to [the Articles]”. Thus, the relationship established by the Agreement between the United Nations and the International Monetary Fund is not one of “agency”⁵ but one of “sovereign equals”.⁶

¹ Alston, “The International Monetary Fund and the right to food”, p. 479.

² See Gianviti, *loc. cit.*

³ In the French text of the Charter of the United Nations the equivalent references to “specialized agencies” in Articles 57, 63 and 64 are “les diverses institutions spécialisées”, “toute institution visée à l’Article 57” and as “les institutions spécialisées”, respectively. The “spécialisées” clearly refers to the specialized responsibilities of these organizations, but as the French text demonstrates, the term “agencies” is not used in the English text of the Charter in the sense of denoting a principal-agent relationship; rather it is used in the sense of referring to organizations.

⁴ Agreement between the United Nations and the International Monetary Fund, signed in New York on 15 November 1947 (United Nations, *Treaty Series*, vol. 16, No. 108, p. 328), art. I, para. 2.

⁵ In order to avoid any ambiguity on this point, a statement was placed in the record of the negotiations stating that “[i]t was understood ... that the statement in article I, paragraph 2, that the Bank (Fund) is a Specialized Agency established by agreement among its member governments carries with it no implication that the relationship between the United Nations and the Bank (Fund) is one of principal and agent”, Committee on Negotiations with Specialized Agencies, “Report on negotiations with the International Bank for Reconstruction and Development and the International Monetary Fund”, quoted in Holder, “The relationship between the International Monetary Fund and the United Nations”, p. 18.

⁶ Goodrich, Hambro and Simons, *Charter of the United Nations: Commentary and Documents*, p. 421.

Furthermore, article VI, paragraph 1, of the Agreement between the United Nations and the International Monetary Fund provides that:

The Fund takes note of the obligation assumed, under paragraph 2 of Article 48 of the United Nations Charter, by such of its members as are also Members of the United Nations, to carry out the decisions of the Security Council through their action in the appropriate specialized agencies of which they are members, and will, in the conduct of its activities, have due regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter.⁷

As noted by Holder, the former Deputy General Counsel of IMF, this provision presents quite a different balance to that put forward by the United Nations initially, which would have imposed an obligation more directly on the organization.⁸ Under this provision of the Agreement between the United Nations and IMF, a Security Council resolution is not binding on IMF itself: the binding obligation stemming from a Council resolution is directed at “members” of the United Nations. The Fund, while a subject of international law, is not a member of the United Nations. Furthermore, the obligation of the Fund under the provision in the Agreement is to “have due regard”⁹ to Council resolutions under Articles 41 and 42 of the Charter of the United Nations.

It follows from the above that the Fund’s relationship Agreement with the United Nations does not require IMF to give effect to the Charter or resolutions of the United Nations.

Another example of the effect of provisions in an organization’s charter that may be relevant to this discussion are the views expressed by Shihata, the former General Counsel of the World Bank, when discussing the treatment of the General Assembly resolutions passed in the 1960s regarding Portugal and South Africa, which called on international financial institutions not to give financial assistance to these countries:

The Bank took the firm position that by virtue of the Relationship Agreement [between the Bank and the United Nations], it [i.e. the Bank] was under no obligation to implement the UN General Assembly resolutions, not to mention those on which there had been no prior consultation with the Bank. It further argued that it would be improper for it to accept the recommendations of the General Assembly in the cases involved because of the prohibition contained in Article IV, Section 10 of the Bank’s Articles of Agreement, which reads: “The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.”¹⁰

Shihata went on to note that the controversy over the Portugal and South Africa “resolutions ended with the Bank

maintaining its position that it was prohibited under its Articles from interfering in the political affairs of its members but would review the economic conditions and prospects of these two countries ‘to take account of the situation as it developed’.”¹¹

If, notwithstanding the above, the Commission believes that framing such an obligation on the part of international organizations, in the same terms as the obligation applicable to States, would contribute to the progressive development of international law, then the Commission should, in evaluating the possible scope of such an obligation for international organizations, pay due regard to the limited capacity and other constraints that apply, under current international law, to actions by international organizations.

¹¹ *Ibid.*, p. 104.

ORGANIZATION FOR THE PROHIBITION OF CHEMICAL WEAPONS

States should definitely be under an obligation to cooperate to bring such a breach to an end because in the case when an international organization acts in breach of a peremptory norm of general international law, its position is not much different from that of a State.

In principle, international organizations are legal persons and should be bound to bring an end to violations of peremptory norms, as must be the case with all subjects of the law. However, there are some practical issues to be taken into account. While the legal personality of States is in principle not limited, the legal personality of international organizations is limited by its mandate, its powers, and its rules as set out in its constituent instrument. Thus, it can be argued that the extent of the obligation of any international organization to bring a breach of *jus cogens* to an end, unlike that of States, should also be limited by the same, i.e. it must always act within its mandate and in accordance with its rules.

Finally, as regards the obligation to cooperate to bring the situation to an end, reference may be made to article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts regarding the modalities of such cooperation.¹

¹ In paragraph (2) of the commentary to article 41, it is stated that “[b]ecause of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation”. Paragraph (3) adds that such “cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation”. Notably, “the obligation to cooperate applies to States whether or not they are individually affected by the serious breach”. Most importantly, paragraph (3) stipulates that “in fact such cooperation, especially in the framework of international organizations,” is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy” (Yearbook ... 2001, vol. II (Part Two), p. 114).

⁷ The Agreement, approved by the Board of Governors of IMF on 17 September 1947 and by the General Assembly of the United Nations on 15 November 1947, entered into force on 15 November 1947.

⁸ Holder, *loc. cit.*, p. 21.

⁹ *Ibid.*

¹⁰ Shihata, *The World Bank in a Changing World: Selected Essays*, p. 103.

RESERVATIONS TO TREATIES

[Agenda item 4]

DOCUMENT A/CN.4/584*

Twelfth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

[Original: French]
[15 May 2007]

CONTENTS

	Paragraphs	Page
Multilateral instruments cited in the present report		33
Works cited in the present report		34
PROCEDURE FOR ACCEPTANCES OF RESERVATIONS	1–95	35
1. Express or tacit acceptance of reservations	5–44	35
2. Form and procedure for express acceptances of reservations.....	45–59	42
3. Acceptance of reservations to the constituent instrument of an international organization.....	60–90	44
4. Irreversibility of acceptances of reservations	91–95	50

Multilateral instruments cited in the present report

	Source
Convention providing a Uniform Law for Cheques (Geneva, 19 March 1931)	League of Nations, <i>Treaty Series</i> , vol. CXLIII, No. 3316, p. 355.
Convention on International Civil Aviation (Chicago, 7 December 1944), as amended	ICAO, document 7300/9, 9th ed. (2006).
Constitution of the Food and Agriculture Organization of the United Nations (Quebec City, 16 October 1945)	FAO, <i>Basic Texts of the Food and Agriculture Organization of the United Nations</i> , vol. I (Rome, FAO, 2001)
Constitution of the United Nations Educational, Scientific and Cultural Organisation (London, 16 November 1945)	United Nations, <i>Treaty Series</i> , vol. 4, No. 52, p. 275. See also UNESCO, <i>Basic Texts</i> (Paris, UNESCO, 2004).
Constitution of the World Health Organization (New York, 22 July 1946)	<i>Ibid.</i> , vol. 14, No. 221, p. 185.
Constitution of the International Refugee Organization (New York, 15 December 1946)	<i>Ibid.</i> , vol. 18, No. 283, p. 3.
Convention on the International Maritime Organization (Geneva, 6 March 1948)	<i>Ibid.</i> , vol. 1276, No. A–4214, p. 468.
Convention on road traffic (Geneva, 19 September 1949)	<i>Ibid.</i> , vol. 125, No. 1671, p. 3.
Convention concerning Customs Facilities for Touring (New York, 4 June 1954)	<i>Ibid.</i> , vol. 276, No. 3992, p. 191.
Statute of the International Atomic Energy Agency (New York, 26 October 1956)	<i>Ibid.</i> , vol. 276, No. 3988, p. 3.
Convention on the nationality of married women (New York, 20 February 1957)	<i>Ibid.</i> , vol. 309, No. 4468, p. 65.
Constitution of the Universal Postal Union (Vienna, 10 July 1964)	<i>Ibid.</i> , vol. 611, No. 8844, p. 7.

* Incorporating A/CN.4/584/Corr.1.

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
Statutes of the World Tourism Organization (WTO) (Mexico City, 27 September 1970)	<i>Ibid.</i> , vol. 985, No. 14403, p. 339.
Agreement establishing the Asia-Pacific Institute for Broadcasting Development (Kuala Lumpur, 12 August 1977)	<i>Ibid.</i> , vol. 1216, No. 19609, p. 81.
Agreement establishing the African Development Bank (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.
Statutes of the International Centre for Genetic Engineering and Biotechnology (Madrid, 13 September 1983)	<i>Ibid.</i> , vol. 1763, No. 30673, p. 91.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Constitution of the International Telecommunication Union (Geneva, 22 December 1992)	United Nations, <i>Treaty Series</i> , vol. 1825, No. 31251, p. 3.

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Procedure for acceptances of reservations

1. According to the provisional general outline of this study,¹ the second section of part III (on the formulation and withdrawal of reservations, acceptances and objections) should deal with the formulation of acceptances of reservations and be structured as follows:

B. Formulation of acceptances of reservations

1. Procedure regarding formulation of an acceptance (1969 and 1986, art. 23, paras. 1 and 3);

2. Implicit acceptance (1969 and 1986, art. 20, paras. 1 and 5);

3. Obligations and express acceptance (1969 and 1986, art. 20, paras. 1–3).³

2. Subject to transposing sections B (Formulation of acceptances of reservations) and C (Formulation and withdrawal of objections to reservations), the explanation for which had already been given by the Special Rapporteur in the eighth report on reservations to treaties,⁴ the following should be noted with respect to this framework:

(a) First, unlike the case of reservations and objections and following the example of articles 22 and 23, paragraph 4, of the 1969 and 1986 Vienna Conventions,⁵ it does not mention the withdrawal of acceptances, which appear to be considered as irreversible.⁶

(b) Secondly, it should be noted that only questions relating to the form and procedure for the formulation of acceptances of reservations will be addressed; in accordance with the provisional plan of the study,⁷ difficulties relating to their effects will be covered in subsequent chapters. The focus at this stage should be on how and under what procedural conditions a State or international organization may expressly accept a reservation by leaving open the question of whether and under which circumstances such an express acceptance is necessary for the sake of “establishing” the reservation (within the meaning of the *chapeau* of article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions).

3. As in the case of objections, each of the questions dealt with in this section will be presented in the following manner:

(a) To the extent that they are covered by express provisions of the 1969 and 1986 Vienna Conventions, these provisions will be discussed in the light of the *travaux préparatoires*;

(b) Such provisions, which should be reproduced in the Guide to Practice, will then be supplemented on the basis of an in-depth study, as far as possible, of practice, jurisprudence and legal doctrine;

(c) This should result in draft guidelines which are sufficiently clear to enable users of the Guide to find answers to any questions they may have in practice.

4. Under the provisions of the 1969 and 1986 Vienna Conventions, save in exceptional cases, the acceptance of a reservation, which is not always necessary for a reservation to be established,⁸ may be either express, tacit or implicit (sect. 1). It is assumed that the tacit (or implicit) acceptance results from silence on the part of contracting States or international organizations during a specific period or at a time when they should have objected; thus, no procedural difficulty is likely to arise, contrary to what occurs when the acceptance is express (sect. 2), including in the particular case of reservations to constituent instruments of international organizations (sect. 3). In every case, whether express or tacit, the acceptance of a reservation is irreversible (sect. 4).

1. EXPRESS OR TACIT ACCEPTANCE OF RESERVATIONS

5. In accordance with article 20, paragraph 5,⁹ of the 1986 Vienna Convention:

For the purposes of paragraphs 2 and 4,¹⁰ and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

6. Acceptance of a reservation is therefore defined as the absence of an objection and occurs in principle when an objection is not raised under either of the two conditions specified by this provision: by the date of receipt of the notification of the reservation or the date of the expression of consent to be bound. In these two cases, which are conceptually distinct but yield identical results in practice, silence is tantamount to acceptance without the need for a formal unilateral statement. This does not mean, however, that acceptance is necessarily tacit: nothing prevents a

¹ *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 48, para. 37. See also *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3, p. 9, para. 18.

² Any reference to article 20, paragraph 2, is obviously erroneous: in no way does this provision either specify or imply that the acceptance of a reservation to a limited treaty must be express (see paragraphs 41–44 below).

³ *Yearbook ... 1996* (see footnote 1 above). The parenthetical references relate to the relevant provisions 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).

⁴ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 42, para. 69.

⁵ “The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.”

⁶ See paragraphs 91–95 below.

⁷ See *Yearbook ... 1996* (footnote 1 above), p. 49, para. 37, part IV (Effects of reservations, acceptances and objections), sects. B–C.

⁸ See paragraph 8 below.

⁹ This article is entitled “Acceptance of and objection to reservations”. Unlike the English text, the French version of the two Vienna Conventions keeps the word “acceptance” in the singular but leaves “objections” in the plural. This distortion, which appeared in 1962 (see *Annuaire de la Commission du droit international 1962*, vol. I, 663rd meeting, p. 248, *Yearbook ... 1962*, vol. I, p. 223 (text adopted by the Drafting Committee); *Annuaire ... 1962*, vol. II, document A/5209, p. 194, and *Yearbook ... 1962*, *ibid.*, p. 176) was never corrected or explained.

¹⁰ Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, treaties with limited participation and the constituent acts of international organizations.

State or an international organization from expressly formulating it, and such acceptance may be binding, which is implied by the phrase “unless the treaty otherwise provides”—even if it was inserted in this provision for other reasons¹¹—and the omission, in paragraph 5, of any reference to article 20, paragraph 3, which does indeed require a particular¹² form of acceptance.

7. It has been argued nevertheless that this division between formal acceptances and tacit acceptances of reservations disregards the necessary distinction between two forms of acceptance without a unilateral statement, which could be either tacit or implicit. Furthermore, according to some authors, reference should be made to “early” acceptance when the reservation is authorized by the treaty: “Reservations may be accepted, according to the Vienna Convention, in three ways: in advance, by the terms of the treaty itself, in accordance with Article 20(1).”¹³ None of these arguments, in the view of the Special Rapporteur, should be reflected in the Guide to Practice.

8. With respect to so-called “early” acceptances, the Commission’s commentary on draft article 17 (current article 20) clearly indicates that:

Paragraph 1 of this article covers cases where a reservation is expressly or impliedly authorized by the treaty; in other words, where the consent of the other contracting States has been given in the treaty. No further acceptance of the reservation by them is therefore required.¹⁴

In fact, the silence of the other parties does not constitute a tacit acceptance: in the absence of a conflicting provision of the treaty, an acceptance is simply not a condition for a reservation to be established; it is established *ipso facto* by virtue of the treaty. Although this does not prohibit States from expressly accepting a reservation of this kind, such an express acceptance is a redundant act, with no specific effect, and of which, in any case, there is no example known to the Special Rapporteur. Therefore, it would not be useful to explore this possibility within the framework of the Guide to Practice.¹⁵

9. The same applies to the distinction made by some authors based on the two cases provided for in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions between “tacit” and “implicit” acceptances, depending on whether or not the reservation has already been made at the time when the other interested party expresses its consent to be bound. In the former case, the acceptance would be implicit; in the latter, it would be tacit.¹⁶ In the former case, States or international organizations are deemed to have accepted the reservation if they have raised no

objection thereto when they express their consent to be bound by the treaty. In the latter case, the State or international organization has a period of 12 months to raise an objection, after which it is deemed to have accepted the reservation.

10. Although the result is the same in both cases—the State or international organization is deemed to have accepted the reservation if no objection has been raised at a specific time—their grounds are different. With respect to States or international organizations which become Contracting Parties to a treaty after the formulation of a reservation, the presumption of acceptance is justified not by their silence, but rather the fact that this State or international organization, aware of the reservations formulated,¹⁷ accedes to the treaty without objecting to the reservations. The acceptance is thus implied in the act of ratification of or accession to the treaty, that is, in a positive act which fails to raise objections to reservations already formulated.¹⁸ With respect to States or international organizations which are already parties to a treaty when the reservation is formulated, however, the situation is different: it is their protracted silence—generally for a period of 12 months—or, in particular, the absence of any objection on their part, which is considered as an acceptance of the reservation. This acceptance is therefore inferred only from the silence of the State or international organization concerned; it is tacit.

11. In fact, this doctrinal distinction is of little interest in practice and should probably not be reflected in the Guide to Practice. It is sufficient, for practical purposes, to distinguish the States and international organizations which have a period of 12 months to raise an objection from those which, not yet being parties to the treaty at the time of the formulation of the reservation, have time for consideration until the date of expression of their consent to be bound by the treaty, which nevertheless does not prevent them from raising an objection before this date.¹⁹ This is an issue of a time period, however, not of a definition.

12. Another question relates to the definition itself of tacit acceptances. It may well be asked whether in some cases an objection to a reservation is not tantamount to a tacit acceptance thereof.

13. This paradoxical question stems from the wording of article 20, paragraph 4 (b), of the 1986 Vienna Convention. The paragraph states:

An objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization.

It thus seems to follow that in the event that the author of the objection raises no objection to the entry into force

¹¹ See paragraph 31 below.

¹² See paragraphs 60–90 below.

¹³ Greig, “Reservations: equity as a balancing factor?”, p. 118. This article is perhaps the most thorough study of the rules which apply to the acceptance of reservations (see especially pages 118–135 and 153).

¹⁴ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 207, para. (18).

¹⁵ The rule set out in article 20, paragraph 1, must be borne in mind; it would be more logical to do so, however, in the part of the Guide concerning the effects of acceptances of reservations.

¹⁶ Greig, *loc. cit.*, p. 120; Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, pp. 125–126; Müller, “Convention de Vienne de 1969: article 20”, p. 816, para. 35.

¹⁷ See paragraph 39 below.

¹⁸ See Müller, “Convention de Vienne de 1969: article 20”, p. 816, para. 36. See also draft article 10, paragraph (5), *Yearbook ... 1950*, vol. II, document A/CN.4/23, report on the law of treaties, by J. L. Briery, p. 241, para. 100.

¹⁹ See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, paras. 76–84.

of the treaty between itself and the reserving State, an objection has the same effects as an acceptance of the reservation, at least concerning the entry into force of the treaty (and probably the “establishment” of the reservation itself).

14. This question, which involves much more than purely hypothetical issues, nevertheless primarily concerns the problem of the respective effects of acceptances and objections to reservations. It relates more to the part of the Guide to Practice which deals with these effects. At the present stage, it is probably sufficient to make reference to it in the commentary on draft guideline 2.8.1.²⁰

15. In the light of these observations, for the purpose of defining and categorizing acceptances, it is probably sufficient to indicate in the heading of the section of the Guide to Practice on the formulation of objections:

“2.8 Formulation of acceptances of reservations

“1. The acceptance of a reservation arises from the absence of objections to the reservation formulated by a State or international organization on the part of the contracting State or contracting international organization.

“2. The absence of objections to the reservation may arise from a unilateral statement in this respect [(express acceptance)] or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13 [(tacit acceptance)].”

Even if the bracketed comments may only be used in the commentaries on draft guideline 2.8, their inclusion in parentheses in the text itself would probably have the advantage of emphasizing the guideline’s “definitional” role.

16. Draft guideline 2.8 limits the potential authors of an acceptance to contracting States and organizations alone. This is easily explained: article 20, paragraph 4, takes into consideration only acceptances made by a contracting State or contracting international organization, and article 20, paragraph 5, applies the presumption of acceptance only for States which are parties to the treaty. Thus, a State or an international organization which on the date when notice of the reservation is given is not yet a Contracting Party to the treaty will be considered as having accepted the reservation only on the date when it expresses its consent to be bound, that is, the date when it definitively becomes a contracting State or contracting organization. It is a different matter, however, for the limited treaties referred to in article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions²¹ and constituent instruments of international organizations provided for in paragraph 3 of that article.²²

17. Furthermore, in keeping with the purpose of section 2 of the Guide to Practice in which it is meant to appear, the definition of acceptances to reservations given

in draft guideline 2.8 is purely descriptive and is not intended to establish cases in which it is possible or necessary to resort to either of the two possible forms of acceptances. It arises from both the text of the 1969 and 1986 Vienna Conventions and their *travaux préparatoires* and the practice that tacit acceptance is the rule and express acceptance the exception.

18. In the ICJ advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the Court had emphasized that the “very great allowance made for tacit assent to reservations”²³ characterized international practice which was becoming more flexible with respect to reservations to multilateral conventions. Although, traditionally, express acceptance alone had been considered as expressing consent by other contracting States to the reservation,²⁴ this solution, already outdated in 1951, no longer seemed practicable owing to, as the Court stated, “the very wide degree of participation”²⁵ in some of these conventions.

19. Despite the different opinions expressed by the members of the Commission during the discussion of article 10 of the draft of Mr. Brierly in 1950,²⁶ which asserted, to a limited degree,²⁷ the possibility of consent to reservations by tacit agreement,²⁸ Mr. H. Lauterpacht and Sir Gerald Fitzmaurice have also allowed for the principle of tacit acceptance in their drafts.²⁹ This should come as no surprise. In the traditional system of unanimity widely defended by the Commission’s first three Special Rapporteurs on the law of treaties, the principle of tacit acceptance is bound to be included to avoid excessive periods of legal uncertainty: owing to the lack of presumption in this respect, the protracted silence of a State party to a treaty could hinder the outcome of the reservation and challenge the status of the reserving State in relation to the treaty for an indefinite period.

20. In that light, although the principle of tacit consent does not meet the same requirements in the “flexible” system ultimately upheld by the fourth Special Rapporteur of the Commission on the law of treaties, it maintains some merits and advantages. In his first report, Sir Humphrey Waldock upheld the principle in the draft articles which

²³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 21.

²⁴ Imbert, *Les réserves aux traités multilatéraux*, p. 104. The author refers to the work of Kappeler, *Les réserves dans les traités internationaux*, pp. 40–41.

²⁵ See footnote 23 above.

²⁶ *Yearbook ... 1950*, vol. 1, 53rd meeting, pp. 92–95, paras. 41–84. Mr. el-Khoury even went so far as to say that the mere silence of a State should not be regarded as acceptance, but rather as a refusal to accept the reservation (*ibid.*, p. 94, para. 67); this view remained, however, an isolated view.

²⁷ Mr. Brierly’s draft article 10 in fact envisaged only cases of implicit acceptance, that is, cases where a State accepted all existing reservations to a treaty of which it was aware when it acceded thereto. For the text of draft article 10, see *Yearbook ... 1950* (footnote 18 above), pp. 238–242.

²⁸ In fact, this was rather a matter of implicit acceptance (see paragraph 9 above).

²⁹ See the summary of the position of the Special Rapporteurs and of the Commission in *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, first report on the law of treaties by Sir Humphrey Waldock, pp. 66–67, para. (14).

²⁰ See paragraphs 25–26 below.

²¹ See paragraphs 41–44 below.

²² See paragraphs 60–90 below.

he had submitted to the Commission.³⁰ He put forward the following explanation for doing so:

It is ... true that, under the "flexible" system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State.³¹

21. The provision which would become the future article 20, paragraph 5, was ultimately adopted by the Commission without any discussion.³² During the United Nations Conference on the Law of Treaties, article 20, paragraph 5, also raised no problem and was adopted with the inclusion of the almost useless³³ clarification "unless the treaty otherwise provides" as the only amendment.³⁴

22. The work of the Commission concerning the law of treaties between States and international organizations or between international organizations has not greatly changed or challenged the principle of tacit consent. Nevertheless, the Commission had decided to assimilate international organizations with States concerning the issue of tacit acceptance.³⁵ Following criticism made by some States,³⁶ the Commission decided to refrain "from saying anything in paragraph 5 of article 20, concerning the problems raised by the protracted absence of any objection by an international organization", but "without thereby rejecting the principle that even where treaties are concerned, obligations can arise for an organization from its conduct".³⁷ Draft article 20, paragraph 4, adopted by the Commission thus echoes article 20, paragraph 5, of the 1969 Vienna Convention word for word.³⁸ During

the United Nations Conference on the Law of Treaties, assimilation between States and international organizations was nevertheless reintroduced on the basis of several amendments in this respect³⁹ and thorough discussions.⁴⁰

23. In line with the procedure followed in adopting draft guideline 1.1⁴¹ (which reproduces the wording of article 2, paragraph 1 (d), of the 1986 Vienna Convention), it seems that the Commission's Guide to Practice should include a draft guideline reflecting article 20, paragraph 5, of that Convention. This provision cannot be reproduced word for word, however, as it refers to other paragraphs in the same article which do not belong in the part of the Guide to Practice having to do with the formulation of reservations, acceptances and objections.

24. This problem could easily be resolved by removing the reference to paragraphs 2 and 4 in paragraph 5. These provisions discuss cases in which unanimous acceptance is, and is not, required in order for the reservation to be established and this is a question of validity, not of procedure; these provisions are not, therefore, directly relevant to the question of the formulation (in the procedural sense of the word) of reservations, acceptances and objections, the only question that is relevant in the context of part III of the Guide to Practice. However, in order to remain true to the spirit of article 20 of the 1969 and 1986 Vienna Conventions, it might be useful to specify that cases in which an express acceptance is required are excluded.

25. This clarification appears in square brackets in draft guideline 2.8.1 *bis*, which might be worded as follows:

"2.8.1 *bis* Tacit acceptance of reservations

"Unless the treaty otherwise provides [or, for some other reason, an express acceptance is required], a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

26. However, if the Commission decides to retain draft guideline 2.6.13 (Time period for formulating an objection),⁴² the above wording, if adopted, would have the disadvantage of repeating draft guideline 2.6.13 almost word for word. Therefore, in order to avoid redundancies, draft guideline 2.8.1 could simply refer to draft guideline 2.6.13, as follows:

³⁰ See draft article 18, paragraph 3, of his first report (*ibid.*, p. 61 and pp. 66–68, paras. (14)–(17); reformulated in draft article 19, para. 5, in his fourth report (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 50).

³¹ *Yearbook ... 1962* (footnote 29 above), p. 67, para. (15).

³² *Yearbook ... 1965*, vol. I, 816th meeting, pp. 283–284, paras. 43–53; see also Imbert, *op. cit.*, p. 105.

³³ On the meaning of this part of the provision, see paragraphs 30–31 below.

³⁴ United States amendment (A/CONF.39/C.1/L.127), *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), report of the Committee of the Whole on its work at the first session of the Conference (A/CONF.39/14), p. 136, para. 179 (vi) (a). Two other amendments which would have deleted the reference to paragraph 4 (Australia) (A/CONF.39/C.1/L.166, *ibid.*, para. 179 (vii)) and replaced article 17 with new wording limiting the period for the presumption to six months (Union of Soviet Socialist Republics) (A/CONF.39/C.1/L.115, *ibid.*, p. 133, para. 175 (a)) were either not adopted or withdrawn.

³⁵ See draft articles 20 and 20 *bis* adopted on first reading, *Yearbook ... 1977*, vol. II (Part Two), pp. 111–112.

³⁶ See *Yearbook ... 1981*, vol. II (Part Two), annex II, p. 182, sect. A.2 (Byelorussian Soviet Socialist Republic), p. 190, sect. A.12 (Ukrainian Soviet Socialist Republic), sect. A.13 (Union of Soviet Socialist Republics) and p. 201, sect. C.1 (Council for Mutual Economic Assistance); see also the summary by the Special Rapporteur, Mr. Paul Reuter, in his tenth report, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, p. 61, para. 75.

³⁷ *Yearbook ... 1982*, vol. II (Part Two), p. 36, para. (6) of the commentary to draft article 20.

³⁸ *Ibid.*, para. (4).

³⁹ Austria (A/CONF.129/C.1/L.33), Cape Verde (A/CONF.129/C.1/L.35) and China (A/CONF.129/C.1/L.18, proposing a period of 18 months applicable to States and international organizations), *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986* (United Nations publication, Sales No. E.94.V.5), vol. II, *Documents of the Conference*, report of the Committee of the Whole (A/CONF.129/13), pp. 70–71, para. 70 (a), (c) and (d). See also the amendment by Australia (A/CONF.129/C.1/L.32), which was finally withdrawn, but which proposed a more nuanced solution (*ibid.*, para. 70 (b)).

⁴⁰ *Ibid.*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.129/16), 12th–14th meetings, pp. 104–114.

⁴¹ *Yearbook ... 1998*, vol. II (Part Two), p. 99.

⁴² See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 128.

“2.8.1 Tacit acceptance of reservations

“[Unless the treaty otherwise provides, a] [A] reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation in accordance with guidelines 2.6.1 to 2.6.14.”

27. In the opinion of the Special Rapporteur, this wording cannot be accused of departing from article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions, since it refers to draft guideline 2.6.13, which itself reproduces (from the angle of objections) article 20, paragraph 5. This wording also has a number of advantages. First, it prevents the Guide to Practice from including two provisions which, in reality, relate to the same issue (or two sides of the same coin) and are more or less identically worded. Furthermore, it emphasizes more clearly the dialectic between (tacit) acceptance and objection—objection excludes acceptance and *vice versa*.⁴³ During the United Nations Conference on the Law of Treaties, the representative from France had expressed this idea in the following terms:

[A]cceptance and objection were the obverse and reverse sides of the same idea. A State which accepted a reservation thereby surrendered the right to object to it; a State which raised an objection thereby expressed its refusal to accept a reservation.⁴⁴

28. Admittedly, this idea is included in the wording of article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions which is reproduced in draft guideline 2.8.1 *bis*; however, by removing superfluous elements (most of them temporal in nature), this idea is brought out more clearly.

29. It could, however, be questioned whether it is necessary to include in draft guideline 2.8.1 the phrase in square brackets (“Unless the treaty otherwise provides”).

30. This does not really need to be spelled out, since all the provisions of the 1969 and 1986 Vienna Conventions are of a residuary, voluntary nature and apply only if the treaty does not otherwise provide. The same must therefore be true, *a fortiori*, of the guidelines contained in the Guide to Practice.⁴⁵

31. That said, the *travaux préparatoires* for article 20, paragraph 5, of the 1969 Vienna Convention shed light on why this phrase was inserted. Indeed, this phrase (“unless the treaty otherwise provides”) was included in response to an amendment proposed by the United States of America.⁴⁶ The United States representative to the United Nations Conference on the Law of Treaties explained that an amendment had been proposed because

The Commission’s text seemed to prevent the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months.⁴⁷

The United States amendment was, therefore, aimed not at the principle of tacit assent as such, but rather at the period of 12 months established by the Commission.⁴⁸

32. It therefore seems entirely justified to retain the phrase “unless the treaty otherwise provides” in draft guideline 2.6.13 (Time period for formulating an objection),⁴⁹ if only because it should depart as little as possible from the text of the 1986 Vienna Convention, which it reproduces almost word for word. Furthermore, it is draft guideline 2.6.13 that discusses the time period within which, and the moment at which, an objection can validly be formulated and the United States introduced its amendment to article 20, paragraph 5, during the United Nations Conference on the Law of Treaties precisely in order to draw attention to the possibility of altering the 12-month period indicated therein.⁵⁰ It would not therefore seem useful to repeat this phrase in draft guideline 2.8.1, the purpose of which is to emphasize that the presumption of tacit acceptance in the absence of an objection is the general rule, as the reference to guideline 2.6.13 is a sufficient reminder that this presumption is not absolute. In any case, the provisions of the Convention and, in particular, the provisions relating to reservations may be modified and altered by States or international organizations that are parties to the treaty.

33. The 12-month period enshrined in article 20, paragraph 5, was the result of an initiative by Sir Humphrey Waldock and was not chosen arbitrarily. By proposing such a time period, he did depart from State practice of the time, hardly homogeneous. The Special Rapporteur had found time periods of 90 days and of six months in treaty practice,⁵¹ but preferred to follow the proposal of the Inter-American Council of Jurists.⁵² In that regard, he noted the following:

But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed.⁵³

34. Even though article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions does not seem to be part of customary international law, at least with respect to the 12-month period within which an objection must be formulated in order to reverse the presumption of acceptance,⁵⁴

⁴³ See Müller, “Convention de Vienne: article 20”, pp. 822–823, para. 49.

⁴⁴ *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7) (A/CONF.39/11), 22nd meeting, p. 116, para. 14.

⁴⁵ For similar comments on the same issue, see, for example, *Yearbook ... 2002* (footnote 1 above) p. 20, para. 86, on draft guideline 2.5.1 (Withdrawal of reservations), which reproduces the provisions of article 22, paragraph 1, of the 1986 Vienna Convention.

⁴⁶ See footnote 34 above.

⁴⁷ A/CONF.39/11 (see footnote 44 above), 21st meeting, p. 108, para. 13.

⁴⁸ Ruda argues, however, that the United States amendment emphasizes the “residual character of Article 20, paragraph 5” (“Reservations to treaties”, p. 185).

⁴⁹ See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 128.

⁵⁰ See paragraph 31 and footnote 47 above.

⁵¹ *Yearbook ... 1962*, vol. II, pp. 66–67, para. (14).

⁵² *Ibid.*, p. 67, para. (16).

⁵³ *Ibid.*

⁵⁴ See Müller, “Convention de Vienne de 1969: article 20”, p. 808, para. 16. See also Gaja, “Unruly treaty reservations”, p. 324; Greig, *loc. cit.*, pp. 127 *et seq.*; and Aust, *Modern Treaty Law and Practice*, p. 127.

the fact remains that this provision does stipulate a 12-month period and, according to the practice adopted by the Commission during its work on reservations, there should be good reason for departing from the wording of the provisions of the Conventions. While the 12-month period did not emerge as a well-established customary rule during the United Nations Conference on the Law of Treaties and is still not one, perhaps, to this day, it is still “the most acceptable”⁵⁵ period. Horn noted the following in that regard:

A too long period could not be admitted, because this would result in a protracted period of uncertainty as to the legal relations between the reserving state and the confronted parties. Nor should the period be too short. That again would not leave enough time for the confronted states to undertake the necessary analysis of the possible effects a reservation may have for them.⁵⁶

35. In fact, this time period—which clearly emerged from the progressive development of international law when the 1969 Vienna Convention was adopted—has never fully taken hold as a customary rule that is applicable in the absence of text. For a long time, the practice of the Secretary-General as depositary of multilateral treaties was difficult to reconcile with the provisions of article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions.⁵⁷ This is because in cases where the treaty was silent on the issue of reservations, the Secretary-General traditionally considered that, if no objection to a duly notified reservation had been received within 90 days, the reserving State became a contracting State.⁵⁸ However, having decided that this practice delayed the entry into force of treaties and their registration,⁵⁹ the Secretary-General abandoned this practice and now considers any State that has formulated a reservation to be a contracting State as of the date of effect of the instrument of ratification or accession.⁶⁰ In order to justify this position, the Secretary-General has pointed out that it is unrealistic to think that the conditions set out in article 20, paragraph 4 (b), can be met, since in order to preclude the entry into force of the treaty for the reserving State, all the Contracting Parties would have had to object to the reservation. The Secretary-General’s comments are, therefore, less about the presumption established in paragraph 5 than about the unrealistic nature of the three subparagraphs of paragraph 4. The Secretary-General also recently stated that he was in favour of the 12-month period specified in paragraph 5, which now applies to the necessarily unanimous acceptance of

late reservations.⁶¹ Moreover, State practice shows that States formulate objections even if the 12-month period specified in article 20, paragraph 5, has ended.⁶² Whatever uncertainties there may be regarding the “positive quality” of the rule with regard to general international law, the rule is retained by the Vienna Conventions and modifying it for the purposes of the Guide to Practice would undoubtedly give rise to more disadvantages than advantages.

36. The role of article 20, paragraph 5, is therefore twofold: on the one hand, it establishes the principle of tacit assent and the relationship between acceptance and objection and, on the other, it provides a time frame for the presumption of tacit acceptance. If a State does not object within a period of 12 months, it is presumed to have accepted the reservation. By the same token, article 20, paragraph 5, implicitly determines the time period within which an objection may be made.⁶³ Once this period ends, the State or international organization is considered to have accepted the reservation and can no longer validly object to it.⁶⁴

37. Article 20, paragraph 5, can therefore be interpreted in two ways that are more complementary than opposing:

(a) On the one hand, it establishes a time limit for raising objections. From this perspective, the provision establishes the principle that it is impossible⁶⁵ for a State to raise objections after the end of the 12-month period⁶⁶ and, in this respect, seems to be no more than a simple provision relating to form applicable to the formulation of an objection.⁶⁷

⁶¹ Note verbale from the Legal Counsel (modification of reservations), 2000, *Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2, p. 45. See also the fifth report on reservations to treaties (*Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4), para. 322. The practice of the Council of Europe regarding the acceptance of late reservations, however, is to give contracting States a period of only ninety days to formulate an objection (Polakiewicz, *Treaty-making in the Council of Europe*, p. 102).

⁶² See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, paras. 136–143.

⁶³ *Ibid.*, paras. 125–129.

⁶⁴ The Secretary-General, as depositary of multilateral treaties, accepts objections formulated after the end of the 12-month period or, where applicable, the time limit prescribed in the treaty, but transmits them only as “communications” (see *Summary of Practice ...* (footnote 58 above)), p. 63, para. 213; see also Kohona, “Some notable developments in the practice of the UN Secretary-General as depositary of multilateral treaties: reservations and declarations”, p. 443, and “Reservations: discussion of recent developments in the practice of the Secretary-General of the United Nations as depositary of multilateral treaties”, p. 444.

⁶⁵ See, however, *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, paras. 136–144, and draft guideline 2.6.15 (Late objections), *ibid.*, para 143.

⁶⁶ This seems to be the interpretation given by Imbert, *op. cit.*, p. 151.

⁶⁷ This solution was explicitly retained in article 8, paragraph 2, of the Convention on the nationality of married women, which states the following: “Any State Party to the Convention or which thereafter becomes a Party may notify the Secretary-General that it does not agree to consider itself bound by the Convention with respect to the State making the reservation. This notification must be made, in the case of a State already a Party, within ninety days from the date of the communication by the Secretary-General; and, in the case of a State subsequently becoming a Party, within ninety days from the date when the instrument of ratification or accession is deposited. In the event that such a notification is made, the Convention shall not be deemed to be in effect as between the State making the notification and the State making the reservation.”

⁵⁵ Imbert, *op. cit.*, p. 107. Greig considers that the 12-month period established in article 20, paragraph 5, of the 1986 Convention is at least “a guide to what is the reasonable time” (*loc. cit.*, p. 128).

⁵⁶ *Op. cit.*, p. 126.

⁵⁷ 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. 524–541; Gaja, *loc. cit.*, pp. 323–324; Riquelme Cortado, *Las reservas a los tratados: lagunas y ambigüedades del régimen de Viena*, pp. 245–250; Müller, “Convention de Vienne de 1969: article 20”, pp. 821–822, para. 48.

⁵⁸ *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1) (United Nations publication, Sales No. E.94.V.15), p. 55, para. 185.

⁵⁹ The 90-day period continued to be applied, however, to the acceptance of late reservations for which unanimous acceptance by the contracting States is generally required (*ibid.*, pp. 61–62, paras. 205–206).

⁶⁰ *Ibid.*, pp. 54–55, paras. 184–187.

(b) On the other hand, it places a silent State, i.e. a State that has not raised any objections during the 12-month period, in the same situation as a State that has explicitly accepted the reservation. This acceptance, albeit tacit, produces the effects envisaged in article 20, paragraph 4 (a), and article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions, provided all the other conditions are met.

38. Sir Humphrey Waldock had noted the existence of these two approaches in treaty practice, but had hardly paid attention to the issue, simply stating that they “achieve the same result”.⁶⁸ This is certainly true: in actual fact, they are two sides of the same coin, or two different ways of establishing concurrently that the objection constitutes the act that reverses the presumption of tacit consent and that, in order to have this effect, it must be raised within certain time periods. This is very much the spirit of article 20, paragraph 5, of the 1969 Vienna Convention.⁶⁹

39. The situation of States and international organizations that are not already Contracting Parties when the reservation is formulated is very different to the situation of those that are and corresponds to the second scenario envisaged in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions. This difference is due to the fact that they have until the date on which they express their consent to be bound by the treaty to raise an objection to a reservation, even if this is later than the date on which the 12-month period ends. This specific rule already appeared in Mr. Brierly’s proposals,⁷⁰ but was not taken up by either Mr. Lauterpacht or Sir Gerald Fitzmaurice or, curiously, retained by the Commission in the articles adopted on first reading in 1962,⁷¹ even though Sir Humphrey Waldock had included it in the draft article 18 presented in his 1962 report.⁷² In the end, following the comments made by Australia, it was reintroduced during the second reading.⁷³

40. Even though it would appear that States and international organizations that are not already parties to the treaty when the reservation is formulated do not enjoy a period of reflection, unlike States and international organizations that are already parties to the treaty when the reservation in question is formulated, they are in no way at a disadvantage. Moreover, the solution ultimately retained in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions is fully justified by the need for legal certainty. Indeed, granting such States a

new period of reflection beginning on the date on which they ratify or accede to the treaty would put the reserving State back in an intermediate and uncertain status *vis-à-vis* the treaty and this does not seem admissible from the point of view of legal certainty. Furthermore, reservations formulated by other States are communicated to States and international organizations that are “entitled to become parties to the treaty”⁷⁴ in exactly the same way that they are communicated to States and international organizations that are already parties to the treaty. As a result, they usually have more than 12 months to consider the reservation that has been formulated and can therefore react at least when they express their consent to be bound by the treaty, if not before.⁷⁵ In any case, the phrase “whichever is later [the end of the period of 12 months or the date on which it expressed its consent to be bound by the treaty]” ensures that States and international organizations have at least one year to consider reservations.

41. The time period relating to implicit acceptance of a reservation by States or international organizations that are entitled to become parties to the treaty is, however, subject to an additional limitation when unanimous acceptance is required in order for the reservation to be established. *A priori*, article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions does not seem to oppose the application of the general rule in this case. However, this provision explicitly refers to article 20, paragraph 2 (treaties with limited participation), which requires unanimity. It is only logical that allowing States and international organizations that are entitled to become parties to the treaty, but have not yet expressed their consent to be bound by the treaty when the reservation is formulated to raise an objection on the date that they become parties to the treaty (even if this date is later than the date on which the objection is notified) would have extremely damaging consequences for the reserving State and, more generally, for the stability of treaty relations. The reason for this is that in such a scenario it could not be presumed, at the end of the 12-month period, that a State that was a signatory of, but not a party to, a treaty with limited participation consented to the reservation and this would prevent unanimous acceptance, even if the said State had not formally objected to the reservation. The application of the presumption established in article 20, paragraph 5, would therefore have exactly the opposite effect to the one desired, i.e. the rapid stabilization of treaty relations and of the reserving State’s status *vis-à-vis* the treaty.

42. This issue was addressed convincingly by Sir Humphrey Waldock in draft article 18 contained in his first report, which made a clear distinction between tacit acceptance and implicit acceptance in the case of multilateral treaties (which are subject to the “flexible” system), on the one hand, and plurilateral treaties (which are subject to the traditional system of unanimity), on the other. Indeed, paragraph 3 (c) of this draft article provided the following:

Furthermore, an amendment proposed by Australia during the United Nations Conference on the Law of Treaties (A/CONF.39/C.1/166 (see footnote 34 above), para. 179 (vi) (c)), and later withdrawn (see footnote 44 above), 25th meeting, p. 135, para. 34) chose a similar solution by establishing a time limit of six months.

⁶⁸ *Yearbook ... 1962* (footnote 29 above), p. 67, para. (14).

⁶⁹ See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, paras. 125–144, and paragraphs 92–94 below.

⁷⁰ See paragraph 19 and footnote 27 above.

⁷¹ Indeed, draft article 19, paragraph 3, presented in the report of the Commission to the General Assembly concerned only implied acceptance in the strict sense of the word (*Yearbook ... 1962*, vol. II, document A/5209, p. 176).

⁷² *Yearbook ... 1962* (see footnote 29 above), p. 61.

⁷³ Fourth report on the law of treaties (*Yearbook ... 1965* (footnote 30 above), pp. 45 and 53, para. 17).

⁷⁴ Art. 23, para. 1, of the Vienna Conventions. See also draft guideline 2.1.5 (Communication of reservations), para. 1, and its commentary, *Yearbook ... 2002*, vol. II (Part Two), pp. 34–38.

⁷⁵ See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, paras. 76–84.

A State which acquires the right to become a party to a treaty after a reservation has already been formulated⁷⁶ shall be presumed to consent to the reservation:

- (i) In the case of a plurilateral treaty, if it executes the act or acts necessary to enable it to become a party to the treaty;
- (ii) In the case of a multilateral treaty, if it executes the act or acts necessary to qualify it to become a party to the treaty without signifying its objection to the reservation.⁷⁷

Sir Humphrey also noted, with reference to the scenario envisaged in paragraph 3 (c) (i) and in which unanimity remains the rule, that lessening the rigidity of the 12-month rule for States that are not already parties to the treaty

is not possible in the case of plurilateral treaties because there the delay in taking a decision does place in suspense the status of the reserving State *vis-à-vis* all the States participating in the treaty.⁷⁸

43. It follows that, wherever unanimity remains the rule, once a State or international organization accedes to the treaty, it may no longer validly object to a reservation that has already been unanimously accepted by the States and international organizations that are parties to the treaty. This does not mean, however, that the State or international organization loses its right to object to the reservation. It may simply not do so after the end of the 12-month period. If it accedes to the treaty after this, it can only consent to the reservation.

44. This specific issue, which characterizes the acceptance of reservations for which unanimity remains the rule, might be reflected in the following guideline:

“2.8.2 Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations

“A reservation requiring unanimous acceptance by the parties in order to produce its effects is considered to have been accepted by all the contracting States or international organizations or all the States or international organizations that are entitled to become parties to the treaty if they shall have raised no objection to the reservation by the end of a period of 12 months after they were notified of the reservation.”

2. FORM AND PROCEDURE FOR EXPRESS ACCEPTANCES OF RESERVATIONS

45. As stated by Greig, “the ... acceptance of reservations is, in the case of multilateral treaties, almost invariably implicit or tacit”.⁷⁹ Nevertheless, it can be express, and there are situations in which a State expressly makes known the fact that it accepts the reservation.

⁷⁶ “Made” would undoubtedly be more appropriate, since if the period within which an objection can be raised following the formulation of a reservation has not yet ended, there is no reason why the new contracting State could not object (see paragraph 37 above).

⁷⁷ *Yearbook ... 1962* (see footnote 29 above), p. 61.

⁷⁸ *Ibid.*, p. 67, para. (16) of the commentary on article 18.

⁷⁹ Greig, *loc. cit.*, p. 120. In the same sense, see also Horn, *op. cit.*, p. 124; Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?*, p. 46; Riquelme Cortado, *op. cit.*, pp. 211 *et seq.*; and Müller, “Convention de Vienne de 1969: article 20”, pp. 812–813, para. 27.

46. The existence of the presumption of article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions in no way prevents States and international organizations from openly expressing their consent to reservations that have been made. This could appear arguable, at least in cases where a reservation does not satisfy the conditions of validity laid down in article 19 of the Conventions. The connection between a reservation’s validity, on the one hand, and the possibility for States and international organizations to express, tacitly or openly, their consent to a reservation, on the other, does not require elucidation in the section of the Guide to Practice concerning procedure. Rather, it concerns the effects of reservations, acceptances and objections, which will be the subject of a later report. At this stage, it is sufficient to note in guideline 2.8.3:

“2.8.3 Express acceptance of a reservation

“A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.”

47. Unlike reservations themselves as well as objections, express acceptances can of course be made at any time. This presents no obstacle for the reserving State, since a State or an international organization which does not expressly consent to a reservation would nevertheless be seen as having accepted it at the end of the 12-month period specified in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions, for which guideline 2.8.1 specifies the legal consequences. Even a State or an international organization which had raised a prior objection to a reservation remains free to accept it expressly (or implicitly, by withdrawing its objection) at any later date.⁸⁰ This amounts to a complete withdrawal of the objection, one that has the same effect as an acceptance.⁸¹

48. In any case, despite these broad possibilities, State practice in the area of express acceptances is practically non-existent. Only a few very isolated examples are to be found, and even some of these are not without problems of their own.

49. An example often cited in the literature⁸² is the acceptance by the Federal Republic of Germany of a reservation by France, communicated on 7 February 1979, to the 1931 Convention providing a Uniform Law for Cheques. It should nevertheless be noted that this reservation on the part of France had been made late, some 40 years after France’s accession to that Convention. The communication⁸³ clearly states that the Federal Republic of Germany

⁸⁰ See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 152, and draft guideline 2.7.1 (*ibid.*, para. 155).

⁸¹ *Ibid.*, paras. 158–160.

⁸² Horn, *op. cit.*, p. 124; and Riquelme Cortado, *op. cit.*, p. 212.

⁸³ This communication was issued on 20 February 1980, more than 12 months after the notification of the reservation by the Secretary-General of the United Nations, depositary of the Convention. At that time, in any case, the (new) reservation by France was “considered to have been accepted” by the Federal Republic of Germany on the basis of the principle of article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions. Furthermore, the Secretary-General had already considered the reservation as having been accepted as of 11 May 1979, three months after its deposit.

“raises no objections”⁸⁴ to it and thus clearly constitutes an acceptance.⁸⁵ The text of the communication from the Federal Republic does not clarify whether it accepted the deposit of the reservation despite its late formulation,⁸⁶ the content of the reservation itself, or both.⁸⁷

50. There are other, less ambiguous cases as well: for example, the declarations and communications of the United States in reaction to the reservations made by Bulgaria,⁸⁸ Romania and the Union of Soviet Socialist Republics to article 21, paragraphs 2–3, of the Convention concerning Customs Facilities for Touring, in which it made clear that it had no objection to these reservations. The United States noted *inter alia* that it would apply the reservation reciprocally with respect to each of the States making reservations,⁸⁹ which, moreover, was its right under article 21, paragraph 1 (b), of the 1969 and 1986 Vienna Conventions.⁹⁰ A declaration by Yugoslavia concerning a reservation by the Soviet Union was similar,⁹¹ but expressly referred to article 20, paragraph 7, of the Convention concerning Customs Facilities for Touring, relating to the reciprocal application of reservations.⁹² That being said, and even if the declarations by the United States and Yugoslavia had been made out of a concern to emphasize the reciprocal application of the reservation and thus refer to article 20, paragraph 7, of the Convention, the fact remains that they indisputably constitute express acceptances. The same is true in the case of the declarations by the United States regarding the reservations raised by Romania and the Soviet Union in relation to the Convention on road traffic⁹³ which are virtually identical to those of the United States concerning the Convention concerning Customs Facilities for Touring, despite the

fact that the Convention on road traffic does not include a provision comparable to article 20, paragraph 7, of the Convention concerning Customs Facilities for Touring.⁹⁴

51. In the absence of a very developed practice in the area of express acceptances, one is forced to rely almost exclusively on the provisions of the 1969 and 1986 Vienna Conventions and their *travaux préparatoires* to work out the principles and rules for formulating express acceptances and the procedures applicable to them.

52. Article 23, paragraph 1, of the 1986 Vienna Convention states that:

A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

The *travaux préparatoires* for this provision were analysed in connection with draft guidelines 2.1.1 and 2.1.5;⁹⁵ that analysis was summarized in the commentaries to those drafts.⁹⁶ It is thus unnecessary to duplicate that general presentation, except to recall that the question of form and procedure for acceptance was touched upon only incidentally.

53. As with objections,⁹⁷ this provision places express acceptances on the same level as reservations themselves in matters concerning written form and communication with the States and international organizations involved. For the same reasons as those given for objections, it therefore suffices, in the framework of the Guide to Practice, to take note of this convergence of procedures and to stipulate, for the sake of clarity, the written form that an express acceptance takes by definition⁹⁸ in a specific draft guideline.

54. The following draft guidelines would appear to be sufficient for this purpose:

“2.8.4 Written form of express acceptances

“The express acceptance of a reservation must be formulated in writing.

“2.8.5 Procedure for formulating express acceptances

“Draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6, and 2.1.7 apply *mutatis mutandis* to express acceptances.”

55. Draft guideline 2.8.5 is, in a sense, the counterpart of draft guideline 2.6.9 on the procedure for the formulation

⁸⁴ United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006*, vol. II (United Nations publication, Sales No. E.07.V.3), part II.11, note 5).

⁸⁵ In effect, provided that no objection has been raised, the State is considered to have accepted the reservation. See article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions, and paragraph 38 above.

⁸⁶ On this topic, see draft guideline 2.3.1 (Reservations formulated late) and its commentary, *Yearbook ... 2001*, vol. II (Part Two), pp. 185–189.

⁸⁷ The disadvantage of using the same terminology for both hypotheses was pointed out in the commentary to draft guideline 2.6.2, para. (2), and in that to draft guideline 2.3.1 in *Yearbook ... 2001*, vol. II (Part Two), p. 189, para. (23) of the commentary. See also the eighth and ninth reports on reservations to treaties, *Yearbook ... 2003* (footnote 4 above), para. 101, and *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/544, para. 27.

⁸⁸ Bulgaria ultimately withdrew this reservation (see *Multilateral Treaties ...* (footnote 84 above), vol. I, chap. XI.A.6, note 16).

⁸⁹ *Ibid.*, notes 16, 19 and 20.

⁹⁰ On the question of reciprocity of reservations, see Müller, “Convention de Vienne de 1969: article 21”, pp. 901–907, paras. 30–38.

⁹¹ See *Multilateral Treaties ...* (footnote 84 above), vol. I, chap. XI.A.6, note 20.

⁹² Article 20, paragraph 7, of the Convention in fact provides that:

“No Contracting State shall be required to extend to a State making a reservation the benefit of the provisions to which such reservation applies. Any State availing itself of this right shall notify the Secretary-General accordingly.”

⁹³ *Multilateral Treaties ...* (see footnote 84 above), vol. I, chap. XI.B.1, note 17. The statements by Greece and the Netherlands concerning the reservation by the Soviet Union are considerably less clear in that they limit themselves to specifying that the two Governments “do not consider themselves bound by the provisions to which the reservation is made, as far as the Soviet Union is concerned” (*ibid.*, note 18). Nevertheless, an acceptance could produce the same effect as a simple objection.

⁹⁴ Article 35, paragraph 1, of the Convention on road traffic simply provides for the reciprocity of a reservation concerning article 32 (Settlement of disputes), without requiring a declaration to that effect on the part of States accepting the reservation.

⁹⁵ Sixth report on reservations to treaties, *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3), pp. 144–145, paras. 40–47.

⁹⁶ *Yearbook ... 2002*, vol. II (Part Two), pp. 28–29, paras. (2)–(7) of the commentary to draft guideline 2.1.1 and pp. 34–35, paras. (5)–(11) of the commentary to draft guideline 2.1.5; as well as p. 39, paras. (3)–(4) of the commentary to draft guideline 2.1.6. See also *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, paras. 87–91.

⁹⁷ See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, paras. 87–91.

⁹⁸ See paragraph 15 above, draft guideline 2.8, para. 2.

of objections, and is based on the same rationale.⁹⁹ It clearly derives from the work of the Commission, which resulted in the wording of article 23 of the 1969 Vienna Convention to the effect that reservations, express acceptances and objections are all subject to the same rules of notification and communication.¹⁰⁰

56. Draft guideline 2.8.4 can in no way be considered superfluous. The simple fact that an acceptance is express does not necessarily mean that it is in writing. The written form is not only called for by article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, upon whose wording draft guideline 2.8.4 is based, but also by the importance of acceptances to the legal regime, validity and effects of reservations to treaties. Although the various proposals of the Special Rapporteurs on the law of treaties never insist, in so many words, that express acceptances must be in writing, it can be seen from their work that they have always leaned towards the maintenance of a certain formality. Sir Humphrey Waldock's proposals and drafts thus require that express acceptances be made within the instrument, or by any other appropriate formal procedure, when a treaty is ratified or approved by the State concerned, or, in other cases, by formal notification;¹⁰¹ this would require a written version in every case. Following the simplification and reworking of the articles concerning the form and procedure for reservations,¹⁰² express acceptances and objections, the Commission decided to include the issue of written form in draft article 20, paragraph 1 (which became article 23, paragraph 1). The harmonization of provisions applicable to the written form and to the procedure for formulating reservations,¹⁰³ objections and express acceptances did not come up for discussion in the Commission¹⁰⁴ or at the United Nations Conference on the Law of Treaties.¹⁰⁵

57. Even though the practice of States with regard to the confirmation of express acceptances made prior to the confirmation of reservations is, in the view of the Special Rapporteur, non-existent, article 23, paragraph 3, of the 1969 and 1986 Vienna Conventions¹⁰⁶ states clearly that:

An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

⁹⁹ See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, paras. 87–94.

¹⁰⁰ See, in particular, the proposal of Mr. Rosenne, *Yearbook ... 1965*, vol. II, document A/CN.4/L.108, p. 73, and *ibid.*, vol. I, 803rd meeting, pp. 197–199, paras. 30–56. See also *Yearbook ... 1966* (footnote 14 above), p. 270, para. (1) of the commentary to draft article 73. For a summary of the work of the Commission, see Pellet and Schabas, “Convention de Vienne de 1969: article 23”, p. 974, para. 5.

¹⁰¹ See *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add. 1, draft article 18, para. 2 (a) (iii)–(iv), p. 61; and *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add. 1 and 2, draft article 20, paragraph 3 p. 53, para. 13. See also draft article 19, para. 2, adopted by the Commission on first reading in 1962 (*Yearbook ... 1962*, vol. II, document A/5209), p. 176).

¹⁰² See Pellet and Schabas, *loc. cit.*, p. 974, para. 5.

¹⁰³ See paragraph 55 above.

¹⁰⁴ See *Yearbook ... 1965*, vol. I, 813th meeting, pp. 268–270, paras. 72–93, and 816th meeting, p. 284, paras. 54–55.

¹⁰⁵ See A/CONF.39/14 (footnote 34 above), pp. 138–139, paras. 190–196.

¹⁰⁶ For the travaux préparatoires for this provision, see *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 113.

58. As has already been noted with regard to the confirmation of objections,¹⁰⁷ common sense would indicate that express acceptances, which are clearly on an equal footing with objections in this regard, should be treated in the same way. One need only reproduce the provision of the 1969 and 1986 Vienna Conventions in the Guide to Practice:

“2.8.6 *Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation*

“An express acceptance of a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.”

59. On the other hand, it would seem inappropriate to include in the Guide to Practice a draft guideline that would amount, with regard to the express acceptance of reservations, to a counterpart of draft guideline 2.6.12 (Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by the treaty):¹⁰⁸ not only is the idea of formulating an acceptance prior to the expression of consent to be bound by the treaty excluded by the very wording of article 20, paragraph 5, which allows the formulation of acceptances only by contracting States or international organizations,¹⁰⁹ but also, in practice, it is difficult to imagine a State or international organization actually proceeding to such an acceptance. In any case, such a practice (which would be tantamount to soliciting reservations) should surely be discouraged, and would not serve the purpose of “preventive objections”: the “warning” made in advance to States and international organizations seeking to formulate reservations unacceptable to the objecting State.

3. ACCEPTANCE OF RESERVATIONS TO THE CONSTITUENT INSTRUMENT OF AN INTERNATIONAL ORGANIZATION

60. Under article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions, worded identically:

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.

61. This provision originated in the first report of Sir Humphrey Waldock, who proposed a draft article 18, paragraph 4 (c), which reads as follows:

In the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, the consent of the organization, expressed through a decision of its competent organ, shall be necessary to establish the admissibility of a reservation not specifically authorized by such instrument, and to constitute the reserving State a party to the instrument.¹¹⁰

¹⁰⁷ *Ibid.*, para. 114.

¹⁰⁸ *Ibid.*, para. 124.

¹⁰⁹ See paragraph 16 above.

¹¹⁰ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add. 1, p. 61. See also draft article 20, paragraph 4, adopted by the Commission on first reading, which restated the principle of intervention of the competent organ of an organization but which appeared to subsume it under cases in which an objection had effectively been raised against the reservation concerned (*ibid.*, vol. II, document A/5209, pp. 176 and 181, para. (25) of the commentary to article 20).

The same idea is taken up in the fourth report of the Special Rapporteur, but the wording of draft article 19, paragraph 3, is simpler and more concise:

Subject to article 3 (*bis*) [originally current art. 5], when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization.¹¹¹

62. The very principle of recourse to the competent organ of an international organization for a ruling on the acceptance of a reservation made regarding its constituent instrument was severely criticized at the United Nations Conference on the Law of Treaties, in particular by the Soviet Union, which said that:

Paragraph 3 of the Commission's article 17 should also be deleted, since the sovereign right of States to formulate reservations could not be made dependent on the decisions of international organizations.¹¹²

63. Other delegations, while less hostile to the principle of intervention by an organization's competent organ in accepting a reservation to its constituent instrument, were of the view that this particular regime was already covered by what would become article 5 of the 1969 Vienna Convention. That provision in effect makes the Convention applicable to the constituent instruments of international organizations "without prejudice to any relevant rules of the organization", including provisions concerning the admission of new members or the assessment of reservations that may arise.¹¹³ Nevertheless, the provision was adopted by the United Nations Conference on the Law of Treaties.

64. The *travaux préparatoires* of the 1986 Vienna Convention also clearly indicate that article 5 of the Convention and article 20, paragraph 3, are neither mutually exclusive nor redundant. In effect, article 20, paragraph 3, was only inserted into the Convention because the Commission finally decided, after much hesitation, to adopt a provision corresponding to article 5 of the 1969 Vienna Convention.¹¹⁴

65. On its own terms, recourse to the organ of an organization for acceptance of reservations formulated with regard to the constituent instrument of that organization is perfectly logical. The constituent instruments of international organizations are not subject to the flexible system.¹¹⁵ Their main objective consists in the establishment

of a new juridical person, in the framework of which the diversity of bilateral relations between States or member organizations is largely inconceivable. There cannot be numerous types of "membership", nor even less can there be numerous decision-making procedures. The usefulness of the principle is particularly obvious where a reserving State is considered a "member" of the organization by some of the other States members and, at the same time, as a third party in relation to the organization and its constituent instrument by other States having made a qualified objection opposing the entry into force of the treaty in their bilateral relations with the reserving State.¹¹⁶ A solution of this sort, creating a hierarchy among or a bilateralization of the membership of the organization, would paralyse the work of the international organization in question and would thus be inadmissible. The Commission, basing itself largely on the practice of the Secretary-General in the matter, therefore rightly noted in its commentary to draft article 20, paragraph 4, adopted on first reading, that:

[I]n the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable.¹¹⁷

66. Furthermore, it is only logical that States or member organizations should take a collective decision concerning acceptance of a reservation, given that they take part, through the competent organ of the organization, in the admissions procedure for all new members and must assess at that time the terms and extent of commitment of the State or organization applying for membership. It is thus up to the organization, and to it alone, and more particularly to the competent organ, to interpret its own constituent instrument and to decide on the acceptance of a reservation formulated by a candidate for admission.

67. This principle is confirmed, moreover, by the practice followed in the matter. Despite some indecision with regard to the practice of depositaries other than the Secretary-General,¹¹⁸ the latter clearly set out his position in the case of the reservation by India to the Convention on the Intergovernmental Maritime Consultative Organization.¹¹⁹ On that occasion, it was specified that "the Secretary-General has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question".¹²⁰ Unfortunately, there are very few examples of acceptances by the

¹¹¹ *Yearbook ... 1965* (footnote 30 above), p. 54.

¹¹² *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 44 above), 21st meeting, p. 107, para. 6.

¹¹³ See the amendment by Switzerland (A/CONF.39/C.1/L.97), *ibid.* (footnote 34 above), p. 135, p. 179 (iv) (b)) and the joint amendment by France and Tunisia (A/CONF.39/C.1/L.113, *ibid.*, p. 179 (iv) (c)). See also interventions by France (*ibid.* (footnote 44 above), para. 16); by Italy (*ibid.*, p. 120, para. 77); by Switzerland (*ibid.*, 21st meeting, p. 111, para. 40); and by Tunisia (*ibid.*, para. 45). Similarly, see Imbert, *op. cit.*, p. 122; and Mendelson, "Reservations to the constitutions of international organizations", p. 151.

¹¹⁴ See *Yearbook ... 1982*, vol. II (Part Two), p. 36, para. (3) of the commentary to article 20. See also the debates within the Commission, *ibid.*, vol. I, 1727th meeting, pp. 177–178, paras. 14–31.

¹¹⁵ Mendelson has demonstrated that:

"[T]he charter of an international organization differs from other treaty regimes in bringing into being, as it were, a living organism, whose decisions, resolutions, regulations, appropriations and the like constantly create new rights and obligations for the members." (*Loc. cit.*, p. 148)

¹¹⁶ See Müller, "Convention de Vienne de 1969: article 20", p. 854, para. 106; and Mendelson, *loc. cit.*, pp. 149–151.

¹¹⁷ *Yearbook ... 1962*, vol. II, document A/5209, p. 181, para. (25) of the commentary to article 20.

¹¹⁸ Thus, the United States always applied the principle of unanimity for reservations to constituent instruments of international organizations (see the examples given by Mendelson, *loc. cit.*, p. 149, and pp. 158–160, and Imbert, *op. cit.*, pp. 122–123, footnote (186)), while the United Kingdom embraced the Secretary-General's practice of referring the question back to the competent organ of the organization concerned (*ibid.*, p. 121).

¹¹⁹ See Mendelson, *loc. cit.*, pp. 162–169, and Imbert, *op. cit.*, pp. 123–125.

¹²⁰ See *Official Records of the General Assembly, Fourteenth Session, Annexes*, agenda item 65, document A/4235, para. 21. See also *Yearbook ... 1965*, vol. II, document A/5687, p. 102, para. 22, and Summary of Practice ... (footnote 58 above), p. 59, paras. 197–198.

competent organ of the organization concerned in the collection of *Multilateral Treaties Deposited with the Secretary-General*, particularly as the depositary does not generally communicate acceptances. It is nonetheless worth noting that the reservations formulated by the Federal Republic of Germany and the United Kingdom to the Agreement establishing the African Development Bank as amended in 1979 were expressly accepted by the Bank.¹²¹ Similarly, the reservation by France to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development was expressly accepted by the Institute's Governing Council.¹²² Chile's instrument of ratification of the Statutes of the International Centre for Genetic Engineering and Biotechnology also took effect on the date that the reservations formulated in respect of that instrument were accepted by the Centre's Board of Governors.¹²³

68. There is no question that, in keeping with the Commission's practice, article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions should be reproduced in draft guideline 2.8.7 in order to stress the special nature of the rules applicable to the constituent instruments of international organizations with regard to the acceptance of reservations:

"2.8.7 Acceptance of reservations to the constituent instrument of an international organization"

"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."

69. The provision in the 1969 and 1986 Vienna Conventions, however, is barely more than a "safeguard clause"¹²⁴ that excludes the case of constituent instruments of international organizations, including the principle of tacit acceptance,¹²⁵ from the scope of the flexible system, while specifying that acceptance by the competent organ is necessary to "establish" the reservation within the meaning of article 21, paragraph 1, of the Conventions. As the Special Rapporteur had already indicated in his first report on the law and practice relating to reservations to treaties, "article 20, paragraph 3, is far from resolving all the problems which can and do arise"¹²⁶ with regard to the legal regime applicable to reservations to constituent instruments. That leaves a number of questions unanswered: what is a constituent instrument of an organization? Which organ is competent to decide on whether to accept a reservation? What effect does acceptance by the competent organ have on the individual reactions of member States and international organizations?

¹²¹ See *Multilateral Treaties ...* (footnote 84 above), vol. I, chap. X.2 (b), note 7.

¹²² *Ibid.*, vol. II, chap. XXV.3, note 4.

¹²³ *Ibid.*, chap. XIV.7, note 6.

¹²⁴ Müller, "Convention de Vienne de 1969: article 20", p. 858, para. 114.

¹²⁵ Article 20, paragraph 5, of the Conventions excludes from its scope the case of reservations to constituent instruments of international organizations, specifying that it applies solely to the situations referred to in article 20, paragraphs 2–4.

¹²⁶ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 148, para. 137.

70. Before attempting to reply to these various questions—to which an answer is not to be found in the 1969 and 1986 Vienna Conventions—it should be specified that the acceptance expressed by the competent organ of an international organization with regard to a reservation to its constituent instrument cannot be presumed. Under article 20, paragraph 5, of the Conventions, the assumption that a reservation is accepted at the end of a 12-month period can apply only to the cases described in paragraphs 2 and 4 of that article. Thus, the case set out in article 20, paragraph 3, is excluded—which amounts to saying that, unless otherwise provided in the treaty (in this case, the constituent instrument of the organization), acceptance must necessarily be express.

71. In practice, even leaving aside the problem of the 12-month period required under article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions, which would be difficult, if not impossible, to respect, in certain organizations where the organs competent to decide on the admission of new members meet only at intervals of more than 12 months,¹²⁷ the absence of any position by the competent organ of the organization concerned would be quite inconceivable. In any case, an organ of the organization must take a position on the admission of a new member at one point or another; without such a decision, the State cannot be considered a member of the organization. Even if the State in question is not going to be admitted by a formal instrument of the organization, but rather will simply adhere to the constituent instrument, article 20, paragraph 3, of the Conventions requires the competent organ to rule on the question. It is possible, however, to imagine cases in which the organ implicitly accepts the reservation and allows the candidate country to participate in the work of the organization without formally ruling on the reservation.¹²⁸

72. It would therefore seem useful to reiterate in a separate guideline that the presumption of acceptance does not apply to constituent instruments of international organizations, at least with regard to acceptance expressed by the competent organ of the organization:

"2.8.8 Lack of presumption of acceptance of a reservation to a constituent instrument"

"For the purposes of applying guideline 2.8.7, acceptance by the competent organ of the organization shall not be presumed. Guideline 2.8.1 is not applicable."

73. The fact remains that neither the 1969 and 1986 Vienna Conventions nor the *travaux préparatoires*¹²⁹ shed

¹²⁷ One example is the case of the General Assembly of the World Tourism Organization which, under article 10 of its statutes, meets every two years.

¹²⁸ See the example of the reservation formulated by Turkey to the Convention on the International Maritime Organization (*Multilateral Treaties ...* (footnote 84 above), chap. XII.1). This reservation was not officially accepted by the Assembly. Nonetheless, the Assembly allowed Turkey to participate in its work. This implied acceptance of the instrument of ratification and the reservation (Bishop Jr., "Reservations to treaties", pp. 297–298; Mendelson, *loc. cit.*, p. 163). Technically, this is not, however, a "tacit" acceptance as Mendelson seems to think (*ibid.*), but rather an "implicit" acceptance (see paragraph 9 above on the distinction).

¹²⁹ Neither the commentary to article 4 (*Yearbook ... 1966* (footnote 14 above), p. 191), nor that to article 17, paragraph 3 (*ibid.*, para. (20)), of the Commission contains a definition of the concept "constituent instrument of an international organization".

any light on what is to be understood by the term “constituent instrument of an international organization”.

74. An international treaty whose sole object is to establish a new international organization and does no more than specify and determine strictly constitutional aspects of the new subject of law, as well as its structure and organization, unquestionably falls within the scope of article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions. Such a treaty constituting the “constituent instrument” of an international organization *sensu stricto* is very rare¹³⁰ and an exception to the rule.

75. The vast majority of treaties establishing international organizations actually do combine rules relating to the organization, structure and functioning of the organization, on the one hand, with material rules establishing specific obligations for the organization and/or its member States, on the other hand. Hence, the Charter of the United Nations contains provisions concerning the functioning, structure and procedures of the Organization on the one hand and material rules applicable to all States Members of the Organization, on the other hand—for example, Articles 1 and 2. This combination of provisions is even more striking in the United Nations Convention on the Law of the Sea¹³¹ and the Convention on International Civil Aviation (establishing ICAO), which established international organizations and, at the same time, contain many material provisions. The same problem arises for treaties which, while setting out material obligations for the States parties, establish oversight and implementing organs, particularly in the case of commodities conventions.¹³²

76. The *ratio legis* of article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions, which avoids paralysing the functioning of the international organization, is not transposable as such to all the provisions of such a hybrid treaty. Mendelson thus proposes distinguishing “between ‘organizational’ provisions [provisions relating “to the structure and operation of the institution”] and ‘substantive’ ones”.¹³³ While the former, which are strictly constitutional in nature, would thus be subject to the regime laid down in article 20, paragraph 3, of the Conventions, the latter exist or could exist independently of the constituent instrument and “would have a legal content even if the organization did not exist”;¹³⁴ consequently, according to the author, these material provisions should not be subject to the more restrictive regime laid down in article 20, paragraph 3, of the Conventions, unless the treaty in question provides otherwise.

¹³⁰ See constituent instruments of UNESCO and FAO, and the constitutions of UPU and ITU.

¹³¹ The problem of reservations does not arise, however, in the context of this Convention, owing to its article 309: “No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.” See also Pellet, “Les réserves aux conventions sur le droit de la mer”.

¹³² These categories of constituent instruments were enumerated by Mr. Rosenne during the discussion of draft article 19, paragraph 3, from which the current article 20, paragraph 3, derives (*Yearbook ... 1965*, vol. I, 798th meeting, p. 159, para. 44).

¹³³ *Loc. cit.*, p. 146.

¹³⁴ *Ibid.*

77. In concrete terms, however, the distinction between the strictly constitutional provisions and the material provisions is not easy and, in the absence of any practice, it would be rash to advance a criterion that would make it possible to distinguish between the two. Furthermore, it is debatable whether a distinction should be made among the various provisions of the constituent instruments when article 20, paragraph 3, is referring only to the treaty itself. Hence, it is the view of the Special Rapporteur that there is no value in introducing a guideline that attempts to define the concept of “constituent instrument” of an international organization, and that it would make more sense to do no more than set out the difficulties of defining the concept in the commentary on draft guideline 2.8.7 or 2.8.8.

78. Nor is an answer to be found in either the *travaux préparatoires* or the 1969 and 1986 Vienna Conventions themselves on the organ competent to decide on acceptance of the reservation. This is easily explained: it is impossible to determine in a general and abstract way the organ of an international organization that is competent to decide on the acceptance of a reservation. This question is covered by article 5 of the Conventions, which deals with the application of the provisions of the Conventions to constituent instruments of international organizations “without prejudice to any relevant rules of the organization”. Thus, the rules of the organization determine the organ competent to accept the reservation, as well as the applicable voting procedure and required majorities. Generally, and given the circumstances in which the reservation can be formulated, it can be assumed that “competent organ” means the organ that decides on the reserving State’s application for admission or, in the absence of a formal admissions procedure, the organ competent to interpret the constituent instrument of the organization. Thus, the reservation by India to the Constitution of the Intergovernmental Maritime Consultative Organization—once the controversy over the procedure to be followed¹³⁵ was over—was accepted by the IMCO Council under article 27 of the Convention¹³⁶ while the reservation by Turkey to this Convention was (implicitly) accepted by the Assembly.¹³⁷ With regard to the United States reservation to the Constitution of the World Health Organization, the Secretary-General addressed the WHO Assembly, which was, by virtue of article 75 of the Constitution, competent to decide on any disputes with regard to the interpretation of that instrument. In the end, the Assembly unanimously accepted the reservation by the United States.¹³⁸

79. An indication in the Guide to Practice of how “competent organ” of the organization is to be understood for the purposes of applying article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions—the text of which should be reproduced in draft guideline 2.8.7—would be helpful:

¹³⁵ See footnote 119 above.

¹³⁶ Under this provision, the Council assumes the functions of the organization if the Assembly does not meet.

¹³⁷ See paragraph 71 and footnote 128 above.

¹³⁸ On this case, see, in particular, Mendelson, *loc. cit.*, pp. 161–162. For other examples, see paragraph 67 above.

“2.8.9 Organ competent to accept a reservation to a constituent instrument

“The organ competent to accept a reservation to a constituent instrument of an international organization is the one that is competent to decide whether the author of the reservation should be admitted to the organization, or failing that, to interpret the constituent instrument.”

80. A particular problem arises, moreover, in cases where the competent organ of the organization does not yet exist because the treaty has not yet entered into force or the organization has not yet been established. Who, in this case, should be deciding on the acceptability of the reservation?

81. This situation occurred with respect to the Convention establishing the International Maritime Organization—at the time still IMCO—to which some States had entered reservations or declarations in their instrument of ratification¹³⁹ or even the Constitution of the International Refugee Organization which France, Guatemala and the United States intended to ratify with reservations¹⁴⁰ before the respective constituent instruments of these two organizations had even entered into force. The Secretary-General, in his capacity as depositary of these Conventions and unable to submit the question of declarations and/or reservations to the organization (as it did not yet exist), decided to consult the States most immediately concerned, in other words, the States that were already parties to the Convention and, if there was no objection, to consider the reserving States as members of the organization.¹⁴¹

82. Moreover, it should be noted that while article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions excludes the application of the “flexible” system for reservations to a constituent instrument of an international organization, it also prohibits a decision by the traditional system of unanimity. The Secretary-General’s practice, however—which is to consult all the States that are already parties to the constituent instrument—is leaning in this direction. Had it been adopted, an amendment by Austria to this provision, submitted at the United Nations Conference on the Law of Treaties, would have led to another solution:

When the reservation is formulated while the treaty is not yet in force, the expression of the consent of the State which has formulated

the reservation takes effect only when such competent organ is properly constituted and has accepted the reservation.¹⁴²

This approach, which was not followed by the Drafting Committee at the time of the Conference,¹⁴³ was upheld by Mendelson, who believes, moreover, that “[t]he fact that ... the instrument containing the reservation should not count towards bringing the treaty into force, is a small price to pay for ensuring the organization’s control over reservations”.¹⁴⁴

83. The organization’s control over the question of reservations is certainly an advantage of the solution advocated by the amendment by Austria. Nonetheless, the undeniable disadvantage of this proposal is that it leaves the reserving State in an undetermined status with respect to the organization, which can be very prolonged, until such time as the treaty enters into force. Thus, it might well be wondered whether the practice of the Secretary-General is more reasonable. Indeed, asking States that are already parties to the constituent instrument to evaluate the reservation with a view to obtaining unanimous acceptance (no protest or objection) places the reserving State in a much more comfortable situation. Its status with respect to the constituent instrument of the organization and with respect to the organization as such is much more rapidly determined.¹⁴⁵ What is more, it should be kept in mind that the organization’s consent is nothing more than the sum total of acceptances of the States members of the organization. Requiring unanimity before the competent organ comes into being can, of course, be a disadvantage to the reserving State, since in most cases—at least, when it comes to international organizations with a global mandate—a decision will probably be taken by majority vote. Nonetheless, if there is no unanimity among the contracting States or international organizations, there is nothing to prevent the author of the reservation from resubmitting its instrument of ratification and accompanying reservation to the competent organ of the organization once it is established.

84. Both solutions seem to have an identical result. The difference, however—and it is substantial—is that the reserving State is spared an intermediate and uncertain status until such time as the organization is established and its reservation can be examined by the competent organ. This is a major advantage for legal certainty. In absolute terms, it seems desirable, however, that during the negotiations,

¹³⁹ See, in particular, the declarations of Ecuador, Mexico, Switzerland and the United States (*Multilateral Treaties ...* (footnote 84 above), chap. XII.1.

¹⁴⁰ These declarations are cited in Imbert, *op. cit.*, p. 40, footnote (6).

¹⁴¹ See Mendelson, *loc. cit.*, pp. 162–163. In this same spirit, the United States, during the United Nations Conference on the Law of Treaties, proposed replacing article 20, paragraph 3, with the following text:

“When a treaty is a constituent instrument of an international organization, it shall be deemed to be of such a character that, pending its entry into force and the functioning of the organization, a reservation may be established if none of the signatory States objects, unless the treaty otherwise provides.”

(A/CONF.39/11 (footnote 44 above), 24th meeting, pp. 130–131, para. 54)). This amendment, which was not adopted, would have considerably enlarged the circle of States that might have made their views on this known.

¹⁴² A/CONF.39/C.1/L.3, *Official Records of the United Nations Conference on the Law of Treaties* (footnote 34 above), p. 135, para. 179 (iv) (a). An amendment by China was very much along these lines, but could have meant that the reserving State becomes a party to the instrument even so. It provided that: “When the reservation is made before the entry into force of the treaty, the reservation shall be subject to subsequent acceptance by the competent organ after such competent organ has been properly instituted.”

(A/CONF.39/C.1/L.162, *ibid.*, para. 179 (iv) (e))

¹⁴³ Mendelson, *loc. cit.*, pp. 152–153. See also *Official Records of the United Nations Conference on the Law of Treaties* (footnote 34 above), pp. 137–138 and 239–240.

¹⁴⁴ Mendelson, *loc. cit.*, p. 153.

¹⁴⁵ The example of the reservation by Argentina to the constituent instrument of IAEA shows that the status of the reserving State can be determined very rapidly and depends essentially on the depositary. Argentina’s instrument of ratification was accepted after a period of only three months (Mendelson, *loc. cit.*, p. 160).

States or international organizations come to an agreement with a view to finding a *modus vivendi* for the period of uncertainty between the time of signature and the entry into force of the constituent instrument, for example, by transferring the competence necessary to accept or reject the reservations to the interim committee responsible for setting up the new international organization.¹⁴⁶

85. It therefore seems useful to clarify this point in article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions in a guideline 2.8.10 which might read as follows:

“2.8.10 Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established

“In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation requires the acceptance of all the States and international organizations concerned. Guideline 2.8.1 remains applicable.”

86. Lastly, the influence of article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions on the right or power of other States to make individual observations, or accept or reject a reservation to the constituent instrument of an international organization must still be examined. In other words, does the competence of the organ of the organization to decide on whether to accept such a reservation preclude individual reactions by other members of the organization? The question may seem odd. Why allow States to express their individual views if they are supposedly making a collective decision on acceptance of the reservation within the competent organ of the organization? Would it not give the green light to reopen the debate on the reservation, particularly for States that were not able to “impose” their point of view within the competent organ, and thereby to imagine a dual or parallel system of acceptance of such reservations that would in all likelihood create an impasse if the two processes had different outcomes?

87. During the United Nations Conference on the Law of Treaties, the United States introduced an amendment to article 17, paragraph 3 (which became article 20, paragraph 3), specifying that “such acceptance shall not preclude any contracting State from objecting to the reservation”.¹⁴⁷ Adopted by a slim majority at the 25th meeting of the Committee of the Whole¹⁴⁸ and

incorporated by the Drafting Committee in the provisional text of article 17, this passage was ultimately deleted from the final text of the Convention by the Committee “on the understanding that the question of objections to reservations to constituent instruments of international organizations formed part of a topic already before the International Law Commission [the question of relations between international organizations and States], and that meanwhile the question would continue to be regulated by general international law.”¹⁴⁹ It became apparent in the work of the Drafting Committee that the formulation of the United States amendment was not very clear and left open the question of the legal effects of such an objection.¹⁵⁰

88. In actual fact, it is hard to understand why member States or international organizations cannot take individual positions on a reservation outside the framework of the international organization and communicate their views to interested parties, including to the organization. In all likelihood, these positions will probably have no particular legal effect; however, this is not an isolated case and the absence of a legal effect *sensu stricto* of such declarations does not rob them of their importance¹⁵¹—they provide an opportunity for the reserving State, in the first instance, and, afterwards, for other interested States, to become aware of and evaluate the position of the State author of the unilaterally formulated acceptance or objection which, in the end, will doubtless be a useful contribution to the discussions within the competent organ of the organization. They might also form the basis for launching a “reservations dialogue” among the key players, or they could be taken into consideration, where appropriate, by a third party who might have to decide on the validity or scope of the reservation.

89. In view of these considerations, the Special Rapporteur believes that it would be useful to include in the Guide to Practice a draft guideline stating that the right of member States or international organizations to give an individual opinion on a reservation to a constituent instrument shall not be affected by the competence of the organ of the international organization to decide on acceptance of the reservation. Such a guideline is in no way contrary to the 1969 and 1986 Vienna Conventions, which take no position on this matter.

90. In this spirit, draft guideline 2.8.11 could be rewritten as follows:

“2.8.11 Right of members of an international organization to accept a reservation to a constituent instrument

“Guideline 2.8.7 does not preclude the right of States or international organizations that are members of an international organization to take a position on the validity or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.”

¹⁴⁶ This solution was envisaged by the Secretary-General in a document prepared for the Third United Nations Conference on the Law of the Sea. In this report, the Secretary-General stated that “before entry into force of the convention on the law of the sea it would of course be possible to consult a preparatory commission or some organ of the United Nations” (*Official Records of the Third United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.77.V.2), vol. VI, document A/CONF.62/L.13, p. 128, note 26). For a brief discussion of the difficulty, in certain circumstances, of determining the “organ that has the capacity to accept a reservation”, see draft guideline 2.1.5 (Communication of reservations), paragraph 2, *Yearbook ... 2002*, vol. II (Part Two), p. 34, and its commentary (*ibid.*, pp. 37–38, paras. 28–29).

¹⁴⁷ A/CONF.39/C.1/L.127 (see footnote 34 above), p. 135, para. 179 (iv) (d).

¹⁴⁸ By 33 votes to 22, with 29 abstentions (A/CONF.39/11 (see footnote 44 above), 25th meeting, p. 135, para. 32).

¹⁴⁹ A/CONF.39/14 (see footnote 34 above), pp. 137–138, para. 186.

¹⁵⁰ A/CONF.39/11 (see footnote 44 above), 72nd meeting, pp. 425–426, paras. 4–14.

¹⁵¹ See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 138 on “preventive objections”.

4. IRREVERSIBILITY OF ACCEPTANCES OF RESERVATIONS

91. Unlike their treatment of objections,¹⁵² neither the 1969 nor the 1986 Vienna Convention contains provisions concerning the withdrawal of the acceptance of a reservation. They neither authorize it nor prohibit it.

92. The fact remains that article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions and its *ratio legis* logically exclude calling into question a tacit (or implicit) acceptance through an objection formulated after the end of the 12-month time period stipulated in this provision (or of any other time period specified by the treaty in question): to allow a “regret” that would call into question the treaty relations between the States or international organizations concerned¹⁵³ to be expressed several years after the intervention of an acceptance that came about because a contracting State or an international organization remained silent on one of the “critical dates”, would pose a serious threat to legal certainty. While States parties are completely free to express their disagreement with a reservation entered after the end of the 12-month time period (or of any other time period specified by the treaty in question), their late “objections” can no longer have the usual effects of an objection, as provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Conventions.¹⁵⁴ A comparable conclusion must be drawn with regard to the question of widening the scope of an objection to a reservation.¹⁵⁵

93. There is no reason to approach express acceptances any differently. Without there being any need for an in-depth analysis of the effects of an express acceptance—which are no different from those of a tacit acceptance,¹⁵⁶ suffice it to say that, like tacit acceptances, the effect of

such an acceptance would in theory be the entry into force of the treaty between the State or international organization author of the reservation and the State or international organization that has accepted it and even, in certain circumstances, between all States or international organizations that are parties to the treaty. It goes without saying that calling the legal consequences into question *a posteriori* would seriously undermine legal certainty and the status of the treaty in the bilateral relations between the author of the reservation and the author of the acceptance. This is just as true, moreover, in the case where acceptance has been made expressly: even if there is absolutely no doubt that a State’s silence in a situation where it should have expressed its view has legal effects by virtue of the principle of good faith (and, here, the express provisions of the 1969 and 1986 Vienna Conventions), it is even more apparent when the State’s position takes the form of a unilateral declaration; the reserving State, as well as the other States parties, can count on the manifestation of the will of the State author of the express acceptance.¹⁵⁷

94. The dialectical relationship between the objection and the acceptance, introduced and affirmed by article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions,¹⁵⁸ and the framework for the objection mechanisms—which is aimed at stabilizing troubled treaty relations, in some sense, through the reservation—necessarily imply that acceptance (whether it is tacit or express) is final.

95. Thus, the Guide to Practice should include a draft guideline stressing the final and irreversible nature of acceptances:

“2.8.12 Final and irreversible nature of acceptances of reservations

“Acceptance of a reservation made expressly or tacitly is final and irreversible. It cannot be subsequently withdrawn or amended.”

¹⁵² *Ibid.*, paras. 145–180, on the question of the withdrawal and modification of objections to reservations.

¹⁵³ *Ibid.*, paras. 139–141.

¹⁵⁴ See draft guideline 2.6.15 (Late objections), *ibid.*, para. 143.

¹⁵⁵ *Ibid.*, para. 179, and draft guideline 2.7.9 (Prohibition against the widening of the scope of an objection to a reservation), para. 180.

¹⁵⁶ The question of the effects of the acceptance of a reservation will be more fully developed in a subsequent report of the Special Rapporteur.

¹⁵⁷ See, *mutatis mutandis*, the first of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (*Yearbook ... 2006*, vol. II (Part Two), para. 176).

¹⁵⁸ See Müller, “Convention de Vienne de 1969: article 20”, pp. 822–823, para. 49; see also paragraph 27 above.

RESERVATIONS TO TREATIES

[Agenda item 4]

DOCUMENT A/CN.4/586

Note by the Special Rapporteur on draft guideline 2.1.9 (Statement of reasons for reservations)

[Original: French]
[26 July 2007]

CONTENTS

	Paragraphs	Page
Multilateral instruments cited in the present document		51
Note on draft guideline 2.1.9	1–13	51

Multilateral instruments cited in the present document

	Source
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	United Nations, <i>Treaty Series</i> , vol. 213, No. 2889, p. 221.
Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994)	<i>Ibid.</i> , vol. 2061, No. A–2889, p. 7.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Vienna Convention on the law of treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
European Agreement supplementing the Convention on road signs and signals (Geneva, 1 May 1971)	<i>Ibid.</i> , vol. 1142, No. 17935, p. 225.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	<i>Ibid.</i> , vol. 1249, No. 20378, p. 13.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	<i>Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations</i> , vol. II (United Nations publication, Sales No. E.94.V.5)
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	United Nations, <i>Treaty Series</i> , vol. 1582, No. 27627, p. 95.

Note on draft guideline 2.1.9 (Statement of reasons for reservations)

1. In his eleventh report on reservations to treaties, devoted to the formulation of objections, the Special Rapporteur proposed a draft guideline 2.6.10 (Statement of reasons), which might read as follows:

Whenever possible, an objection should indicate the reasons why it is being made.¹

¹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 111.

2. During the consideration of this draft guideline in 2007, the Special Rapporteur, supported by several other members, noted with regret that he had not proposed a similar draft guideline on the reasons for reservations. The need for such a guideline was also mentioned at the meeting between members of the Commission²

² See *Yearbook ... 2007*, vol. I, 2919–2920th meetings.

and representatives of human rights bodies, held on 15–16 May 2007.³

3. The Commission's work on the law of treaties, 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) in no way stipulate that a State or international organization which formulates a reservation must give its reasons for doing so and explain why it purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects. Thus, giving reasons is not an additional condition for validity under the Vienna regime and it is not proposed that it should be made obligatory.

4. However, some conventional instruments require States to give reasons for their reservations and to explain why they are formulating them. A particularly clear example is article 57 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which states:

(1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

(2) Any reservation made under this Article shall contain a brief statement of the law concerned.

Under this regime, which is unquestionably *lex specialis* with respect to general international law, indication of the law on which the reservation is based is a genuine condition for the validity of any reservation to the Convention. In its famous *Belilos* case, the European Court of Human Rights decided that article 57 (former art. 64), paragraph 2, “is not a purely formal requirement but a condition of substance.”⁴

In the Court's view, the required reasons or explanations

provide a guarantee—in particular for the other Contracting Parties and the Convention institutions—that a reservation does not go beyond the provisions expressly excluded by the State concerned.⁵

The penalty for failure to meet this requirement to give reasons (or to explain) is the invalidity of the reservation.⁶

5. Under general international law, such a drastic consequence certainly does not follow automatically from a failure to give reasons, but the justification and usefulness of giving reasons for reservations, stressed by the European Court of Human Rights in 1988, are, generally speaking, applicable to treaties and reservations. Stating the reasons for a reservation is not an additional requirement that further limits States' and international organizations' ability

to formulate reservations. It cannot be either the object or the purpose of a provision that encourages indication of the reasons for formulating a reservation. Such an indication gives the author of the reservation an opportunity not only to explain and clarify the reasons why the reservation was formulated—which may include (but not be limited to) impediments under domestic law that may make implementation of the provision on which the reservation is based difficult or impossible—but also to provide information that will be useful in assessing the validity of the reservation. In that regard, it should be borne in mind that the author of a reservation is also responsible for assessing its validity.

6. The reasons and explanations given by the author of a reservation also facilitate the work of the bodies with competence to assess the reservation's validity, including other contracting States or organizations, dispute settlement bodies responsible for interpreting or implementing the treaty and the treaty monitoring bodies.⁷ Giving reasons for a reservation is, therefore, also one of the ways in which States and international organizations can co-operate with the other Contracting Parties and monitoring bodies so that the validity of the reservation can be assessed.⁸

7. Giving and explaining the reasons that, in the author's view, made it necessary to formulate the reservation also help establish a fruitful reservations dialogue among the author of the reservation, the contracting States and international organizations and the monitoring body, if any. This benefits not only the States or international organizations which, under article 20 of the 1969 and 1986 Vienna Conventions, are called upon to comment on the reservation by accepting or objecting to it, but also the author of the reservation, which, to the extent possible, can help allay any concerns that its partners may have regarding the validity of its reservation and steer the reservations dialogue towards greater mutual understanding.

8. Giving reasons (which, in any event, must be optional) is not an additional requirement that would make it more difficult to formulate reservations; it is a useful way for both the author of the reservation and the other States concerned, international organizations or monitoring bodies to fulfil their responsibilities effectively.

9. In practice, reasons are more likely to be given for reservations than for objections. States often formulate reservations without giving any reason for them. For

³ See the tenth report on reservations to treaties (*Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, paras. 151–180) and, in particular, draft guideline 3.2 (Competence to assess the validity of reservations), para. 167.

⁴ The Commission stressed this obligation to cooperate with monitoring bodies in its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, paragraph 9 of which states: “The Commission calls upon States to cooperate with monitoring bodies” (*Yearbook ... 1997*, vol. II (Part Two), p. 57). This obligation to cooperate is explored at greater length in the tenth report of the Special Rapporteur (see footnote 7 above), paras. 178–179, and is the subject of draft guideline 3.2.3 (Cooperation of States and international organizations with monitoring bodies). It was also stressed by the international human rights treaty bodies in 2007 at their Sixth Inter-Committee Meeting (see the report of the meeting of the working group on reservations (HRI/MC/2007/5 and Add.1, para. 19, recommendation 9 (a)).

⁵ *Ibid.*, vol. II (Part Two), para. 398, footnote 572.

⁶ *Belilos v. Switzerland* (European Court of Human Rights, Series A: Judgments and Decisions, vol. 132, Judgement of 29 April 1988, para. 59).

⁷ *Ibid.*

⁸ *Ibid.*, para. 60.

example, Botswana simply appended the following reservation to its instrument of ratification of the Convention relating to the Status of Refugees, without explanation:

Subject to the reservation of articles 7, 17, 26, 31, 32 and 34 and paragraph 1 of article 12 of the Convention.⁹

The same is true of Bahrain's reservation to the Convention on the Elimination of All Forms of Discrimination against Women:

... the Kingdom of Bahrain makes reservations with respect to the following provisions of the Convention:

- Article 2, in order to ensure its implementation within the bounds of the provisions of the Islamic Shariah;
- Article 9, paragraph 2;
- Article 15, paragraph 4;
- Article 16, in so far as it is incompatible with the provisions of the Islamic Shariah;
- Article 29, paragraph 1.¹⁰

10. Nevertheless, this purely “descriptive” formulation of reservations is more rare than might be thought. States and international organizations often make a point of giving their reasons for formulating a particular reservation. In some cases, they do so purely for reasons of convenience, in which case their explanations are of no particular use in assessing the value of the reservation except perhaps insofar as they establish that it is motivated by such considerations of convenience.¹¹ But often, the explanations that accompany reservations shed considerable light on the reasons for their formulation. For example, Barbados justified its reservation to article 14 of the International Covenant on Civil and Political Rights by practical problems of implementation:

The Government of Barbados states that it reserves the right not to apply in full, the guarantee of free legal assistance in accordance with paragraph 3 (d) of Article 14 of the Covenant, since, while accepting the principles contained in the same paragraph, the problems of implementation are such that full application cannot be guaranteed at present.¹²

In another example (among the many precedents), the Congo formulated a reservation to article 11 of the Covenant, accompanying it with a long explanation:

The Government of the People's Republic of Congo declares that it does not consider itself bound by the provisions of article 11 [...]

Article 11 of the International Covenant on Civil and Political Rights is quite incompatible with articles 386 *et seq.* of the Congolese

⁹ United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (United Nations publication, Sales No. E.07.V.3), vol. I, chap. V.2. See also Poland's reservation to the same Convention: “The Republic of Poland does not consider itself bound by the provisions of article 24, paragraph 2” (*ibid.*).

¹⁰ *Ibid.* chap. IV.8.

¹¹ This is true of France's reservation to the European Agreement supplementing the Convention on road signs and signals:

“With regard to article 23, paragraph 3 *bis* (b), of the Agreement on Road Signs and Signals, France intends to retain the possibility of using lights placed on the side opposite to the direction of traffic, so as to be in a position to convey meanings different from those conveyed by the lights placed on the side appropriate to the direction of traffic.”

(*Ibid.*, chap. XI.B.24)

¹² *Ibid.*, chap. IV.4. See also Gambia's reservation (*ibid.*).

Code of Civil, Commercial, Administrative and Financial Procedure, derived from Act 51/83 of 21 April 1983. Under those provisions, in matters of private law, decisions or orders emanating from conciliation proceedings may be enforced through imprisonment for debt when other means of enforcement have failed, when the amount due exceeds 20,000 CFA francs and when the debtor, between 18 and 60 years of age, makes himself insolvent in bad faith.¹³

11. Generally speaking, giving reasons is not a formal obligation on which the validity of the reservation depends. In practice, however, States frequently make a point of explaining the reasons for their reservations. For the aforementioned reasons, this practice should be encouraged.

12. Furthermore, although it seems wise to encourage the giving of reasons, this practice must not become a convenient smokescreen used to justify the formulation of general or vague reservations. According to draft guideline 3.1.7 (Vague or general reservations), adopted during the first part of the 2007 session,

A reservation shall be worded in such a way as to allow its scope to be determined, in order to assess in particular its compatibility with the object and purpose of the treaty.¹⁴

Giving reasons cannot obviate the need for the reservation to be formulated in terms that make it possible to assess its validity. Even without reasons, a reservation must be self-sufficient as a basis for assessment of its validity; the reasons can only facilitate this assessment.¹⁵

13. On the basis of these comments, the Commission will doubtless wish to adopt a draft guideline recommending a statement of reasons for reservations. Logically, it should be included in the first section of the second part of the Guide to Practice having to do with the form and formulation of reservations and might read:

“2.1.9 Statement of reasons

“Whenever possible, a reservation should indicate the reasons why it is being made.”

¹³ *Ibid.*

¹⁴ *Yearbook ... 2007*, vol. II (Part Two), p. 24, para. 153.

¹⁵ Nevertheless, there are cases in which the clarification resulting from the reasons given for the reservation might make it possible to consider a “dubious” reservation to be valid. For example, Belize accompanied its reservation to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances with the following explanation:

“Article 8 of the Convention requires the Parties to give consideration to the possibility of transferring to one another proceedings for criminal prosecution of certain offences where such transfer is considered to be in the interests of a proper administration of justice.

“The courts of Belize have no extra-territorial jurisdiction, with the result that they will have no jurisdiction to prosecute offences committed abroad unless such offences are committed partly within and partly without the jurisdiction, by a person who is within the jurisdiction. Moreover, under the Constitution of Belize, the control of public prosecutions is vested in the Director of Public Prosecutions, who is an independent functionary and not under Government control.

“Accordingly, Belize will be able to implement article 8 of the Convention only to a limited extent insofar as its Constitution and the law allows.”

(*Multilateral Treaties ...* (see footnote 9 above), chap. VI.19)

Without such an explanation, Belize's reservation might have been considered “vague or general” and might thus have fallen within the scope of draft guideline 3.1.7. Accompanied by this explanation, it appears much more defensible.

EFFECTS OF ARMED CONFLICTS ON TREATIES

[Agenda item 5]

DOCUMENT A/CN.4/578*

Third report on the effects of armed conflicts on treaties, by Mr. Ian Brownlie, Special Rapporteur

[Original: English]
[1 March 2007]

CONTENTS

	Paragraphs	Page
Multilateral instruments cited in the present report		56
Works cited in the present report		56
INTRODUCTION	1–5	56
DRAFT ARTICLES	6–67	57
Draft article 1. Scope		57
Comment	6–10	57
Draft article 2. Use of terms		57
Comment	11–15	57
(a) Treaty	11	57
(b) Armed conflict	12–15	57
Draft article 3. Non-automatic termination or suspension		58
Comment	16–19	58
Draft article 4. The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict		58
Comment	20–25	58
Draft article 5. Express provisions on the operation of treaties		59
Comment	26–27	59
Draft article 5 bis. The conclusion of treaties during armed conflict		60
Comment	28	60
Draft article 6 [Withdrawn]	29	60
Draft article 6 bis. The law applicable in armed conflict		60
Comment	30–31	60
Draft article 7. The operation of treaties on the basis of necessary implication from their object and purpose		60
Comment	32–56	60
(a) Is draft article 7 necessary?	34	61
(b) The inclusion in paragraph 2 of reference to treaties codifying <i>jus cogens</i> rules	35	61
(c) The role of an indicative list of categories of treaties	36	61
(d) Opposition to the use of an indicative list	37	61
(e) The enumeration of factors relevant to the determination that a given treaty should continue in operation in the event of armed conflict	38	61
(f) The formulation of draft article 7	39–43	61
(g) Retaining the categories in draft article 7	44–45	61
(h) The significance of State practice	46–48	62
(i) The role of <i>lex specialis</i>	49–50	62
(j) The categories of treaties to be included in draft article 7	51–55	62
(k) The options available	56	63

* Incorporating A/CN.4/578/Corr.1.

Draft article 8.	Mode of suspension or termination	63
	Comment	57 63
Draft article 9.	The resumption of suspended treaties	63
	Comment	58 63
Draft article 10.	Effect of the exercise of the right to individual or collective self-defence on a treaty	63
	Comment	59–62 63
Draft article 11.	Decisions of the Security Council	64
	Comment	63–64 64
Draft article 12.	Status of third States as neutrals	64
	Comment	65 64
Draft article 13.	Cases of termination or suspension	64
	Comment	66 64
Draft article 14.	The revival of terminated or suspended treaties	64
	Comment	67 64
<i>Annex</i>	Text of draft articles (as proposed in the present report)	65

Multilateral instruments cited in the present report

Source

Vienna Convention on the law of treaties (Vienna, 23 May 1969)

United Nations, *Treaty Series*, vol. 1155,
No. 18232, p. 331.

Vienna Convention on succession of States in respect of treaties (Vienna, 23 August 1978)

Ibid., vol. 1946, No. 33356, p. 3.

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McNAIR, Lord

The Law of Treaties. Oxford, Clarendon Press, 1961. 789 p.

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Introduction to the Law of Treaties. 2nd rev. ed. London, Kegan Paul, 1995. 296 p. Translated by José Mico and Peter Haggemacher. (Publication of the Graduate Institute of International Studies, Geneva)

Introduction

1. As a consequence of the exigencies of completing various agenda items, or completing a first reading, experienced by the International Law Commission in the final session of the quinquennium, the results of the first and second reports on the present topic¹ did not include embarking upon a first reading. Moreover, the second report was limited to a summary of the points made during the debates on the first report in the Commission and the Sixth Committee, respectively. At the fifty-eighth session of the Commission, in 2006, there was a somewhat perfunctory discussion of the second report.

2. In the circumstances, the first report stands as the definitive study, together with the second report as a supplement. The second report contained no new drafting.

3. In preparing the present report, account has been taken of the useful memorandum prepared by the Secretariat, entitled “The effect of armed conflict on treaties: an examination of practice and doctrine”.²

4. In the present report, the commentary relies upon cross reference to the first report commentaries.

5. Draft article 6 of the previous reports has been withdrawn.

¹ *Yearbook* ... 2005, vol. II (Part One), document A/CN.4/552, and *Yearbook* ... 2006, vol. II (Part One), document A/CN.4/570, respectively.

² A/CN.4/550 and Corr.1–2 (available on the website of the Commission).

Draft articles

Draft article 1. Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States.

Comment

6. The provisions of article 1 of the Vienna Convention on the law of treaties (hereinafter the 1969 Vienna Convention) have been followed (see also article 1 of the Vienna Convention on succession of States in respect of treaties). The term “treaty” is defined in draft article 2 below.

7. In the Sixth Committee several delegations expressed the view that the draft articles should apply to articles which were being provisionally applied.³ The issue can be resolved by reference to the provisions of article 25 of the 1969 Vienna Convention itself. There are further complexities but it is not appropriate to set about elaborating the provisions of the Convention.

8. During the debates at the fifty-seventh session of the Commission, in 2005, the view was expressed that the topic should be expanded by the inclusion of treaties entered into by international organizations.⁴ Similar views were expressed in the Sixth Committee.⁵

9. The Special Rapporteur is of the opinion that the proposed expansion is based upon a less than mature consideration of the difficulties of “adding on” a qualitatively different subject matter. The United Kingdom of Great Britain and Northern Ireland expressed the following reservations in the Sixth Committee in 2006:

In relation to the inclusion in the study of treaties involving international organizations, the United Kingdom considers that such treaties are perhaps best not included. As we have commented in relation to the topic of responsibility of international organizations, there is a vast variety of international organizations and their functions. We question whether the specificity of such organizations and their treaty arrangements could be dealt with in this study. Moreover, the issues concerning international organizations and armed conflict may be very different to those arising from States and armed conflict.⁶

10. The Special Rapporteur considers these are considerations which should not be rejected lightly.

³ See comments by the Netherlands (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 40); and Malaysia (*ibid.*, *Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 48).

⁴ See *Yearbook ... 2005*, vol. II (Part Two), para. 129.

⁵ See the comments by Austria (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 25); Bulgaria (*ibid.*, para. 20); China (*ibid.*, *Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 8, and *ibid.*, *Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 44); Indonesia (*ibid.*, *Sixtieth Session, Sixth Committee*, 20th meeting (A/C.6/60/SR.20), para. 9); Jordan (*ibid.*, 19th meeting (A/C.6/60/SR.19), para. 32, and *ibid.*, *Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 85); Morocco (*ibid.*, *Sixtieth Session, Sixth Committee*, 11th meeting (A/C.6/60/SR.11), para. 41); Nigeria (*ibid.*, 20th meeting (A/C.6/60/SR.20), para. 47); and Romania (*ibid.*, *Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 63). This expansion of the topic was opposed by the Republic of Korea (*ibid.*, *Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 31); India (*ibid.*, *Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 28); Malaysia (*ibid.*, para. 48); and the United Kingdom (*ibid.*, para. 44).

⁶ Summarized in *Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 44.

Draft article 2. Use of terms

For the purposes of the present draft articles:

(a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

(b) “armed conflict” means a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between State parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

Comment

(a) Treaty

11. The definition is taken from the 1969 Vienna Convention. The meaning and application of the definition is elucidated in the commentary of the Commission in the report of the Commission to the General Assembly in 1966.⁷ The definition is adequate for present purposes and, in any case, it is not appropriate for the Commission to seek to revise the Convention.

(b) Armed conflict

12. The reader is referred to the substantial commentary included in the first⁸ and second reports.⁹ This material is now supplemented in certain respects. In the first place, the division of opinion in the Sixth Committee on the question of including internal armed conflict continued in 2006. The full census is as follows:

(a) States opposed to inclusion: Algeria,¹⁰ Austria¹¹, China¹², Colombia,¹³ India,¹⁴ Indonesia,¹⁵ Iran (Islamic Republic of),¹⁶ Portugal,¹⁷ the Russian Federation¹⁸ and the United Kingdom (a preliminary view),¹⁹

⁷ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 187–189, paras. (1)–(8).

⁸ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, paras. 16–24.

⁹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570, paras. 8–13.

¹⁰ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 20th meeting (A/C.6/60/SR.20), para. 64.

¹¹ *Ibid.*, 18th meeting (A/C.6/60/SR.18), para. 26, and *ibid.*, *Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 25.

¹² *Ibid.*, *Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 8, and *ibid.*, *Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), paras. 45–46.

¹³ *Ibid.*, *Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 64.

¹⁴ *Ibid.*, 19th meeting (A/C.6/61/SR.19), para. 28.

¹⁵ *Ibid.*, para. 19.

¹⁶ *Ibid.*, *Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 2, and *ibid.*, *Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 32.

¹⁷ *Ibid.*, *Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 76.

¹⁸ *Ibid.*, para. 74.

¹⁹ *Ibid.*, 19th meeting (A/C.6/61/SR.19), para. 44.

(b) States in favour of inclusion: Greece,²⁰ Japan,²¹ Malaysia,²² Morocco,²³ Nigeria,²⁴ the Netherlands,²⁵ Poland,²⁶ Romania,²⁷ Sierra Leone²⁸ and Slovakia.²⁹

13. The tally is thus 10 delegations opposed to inclusion and 10 delegations in favour of inclusion. The division of opinion has been reflected in the debates in the Commission.³⁰

14. In conclusion, the following points can be made by way of emphasis. In the first place, the policy considerations point in different directions. Secondly, in practice, and at the factual level, there is sometimes no distinction between international and non-international armed conflicts. Thirdly, the drafting of draft article 2 (b) avoids according an automatic effect to non-international armed conflict. And, in this connection, attention must be paid to draft article 3 below.

15. In any case, it is common for colleagues to ignore the qualification attached to the definition of “armed conflict”. The definition is proposed “for the purpose of the present draft articles”. It is not the business of the Commission to seek to design an all-purpose definition of “armed conflict”.

Draft article 3. Non-automatic termination or suspension

The outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as:

- (a) between the parties to the armed conflict;
- (b) between one or more parties to the armed conflict and a third State.

Comment

16. The reader is referred to the commentaries provided in the first³¹ and second reports.³² There are two alterations to the text. The title has been changed and the phrase *ipso facto* eliminated. In the text the term *ipso facto* has been deleted and replaced by “necessarily”.

²⁰ *Ibid.*, Sixtieth Session, Sixth Committee, 19th meeting (A/C.6/60/SR.19), para. 36.

²¹ *Ibid.*, Sixty-first Session, Sixth Committee, 18th meeting (A/C.6/61/SR.18), para. 28.

²² *Ibid.*, 19th meeting (A/C.6/61/SR.19), para. 50.

²³ *Ibid.*, Sixtieth Session, Sixth Committee, 11th meeting (A/C.6/60/SR.11), para. 41.

²⁴ *Ibid.*, 20th meeting (A/C.6/60/SR.20), para. 47.

²⁵ *Ibid.*, Sixty-first Session, Sixth Committee, 18th meeting (A/C.6/61/SR.18), para. 33.

²⁶ *Ibid.*, Sixtieth Session, Sixth Committee, 19th meeting (A/C.6/60/SR.19), para. 18.

²⁷ *Ibid.*, Sixty-first Session, Sixth Committee, 19th meeting (A/C.6/61/SR.19), para. 63.

²⁸ *Ibid.*, para. 70.

²⁹ *Ibid.*, Sixtieth Session, Sixth Committee, 19th meeting (A/C.6/60/SR.19), para. 45.

³⁰ See *Yearbook ... 2005*, vol. II (Part Two), paras. 139–140; and *Yearbook ... 2006*, vol. II (Part Two), paras. 192–193.

³¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, paras. 25–28.

³² *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570, paras. 14–17.

17. As explained in the first report, draft article 3 is the most significant product of the resolution adopted by the Institute of International Law in 1985.³³ The majority of the delegations in the Sixth Committee did not find draft article 3 to be problematical. Austria expressed the view that the “underlying concept of draft article 3 constituted the point of departure of the whole set of draft articles”.³⁴ As a number of delegations have recognized, draft article 3 reflects an underlying policy and is simply a point of departure. The provisions of draft article 3 are without prejudice to the operation of draft articles 4–7 which follow. This series of draft articles is to be read in sequence and conjointly.

18. Certain delegations opposed the replacement of “*ipso facto*” with “necessarily”, on the ground that “necessarily” is less incisive.³⁵ In the opinion of the Special Rapporteur there is no evident difference of meaning between the two terms.

19. The general opinion in the Sixth Committee during the fifty-seventh and fifty-eighth sessions of the Commission, in 2005 and 2006, was that draft article 3 played a useful role and should be retained.

Draft article 4. The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

- (a) with the provisions of articles 31 and 32 of the Vienna Convention on the law of treaties; and
- (b) the nature and extent of the armed conflict in question.

Comment

20. The reader is referred to the commentaries provided in the first³⁶ and second reports.³⁷

21. The reference to intention attracted considerable attention in the Sixth Committee and opinion was divided as follows:

³³ Institute of International Law, *Yearbook*, vol. 61, part II, session of Helsinki 1985 (Paris, Pedone, 1986), pp. 278–283.

³⁴ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 27.

³⁵ See Austria, *ibid.*, 18th meeting (A/C.6/60/SR.18), para. 27; Colombia, *ibid.*, Sixty-first Session, Sixth Committee, 18th meeting (A/C.6/61/SR.18), para. 65; Jordan, *ibid.*, para. 87; and Malaysia, *ibid.*, 19th meeting (A/C.6/61/SR.19), para. 51. See also the comment of China, *ibid.*, 18th meeting (A/C.6/61/SR.18), para. 48.

³⁶ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, paras. 29–54.

³⁷ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570, paras. 18–28.

(a) States in favour of the criterion of intention: Algeria,³⁸ China,³⁹ Greece,⁴⁰ India,⁴¹ Iran (Islamic Republic of),⁴² Jordan,⁴³ Malaysia,⁴⁴ Romania⁴⁵ and the United Kingdom.⁴⁶

(b) States regarding the criterion of intention as problematical: Austria,⁴⁷ Bulgaria,⁴⁸ Colombia,⁴⁹ France,⁵⁰ Japan,⁵¹ Portugal,⁵² the Republic of Korea,⁵³ and the United States of America.⁵⁴

22. There was a similar division of opinion during the debates in the Commission.⁵⁵ The quality of the debate was not enhanced by assertions of omissions from draft article 4, which were mistaken, or by an unwillingness of some colleagues to read the text of draft article 4 as a whole, and in relation to the following articles. Draft article 4 refers to articles 31–32 of the 1969 Vienna Convention by reference, and yet some States, and some colleagues, have suggested that there should be reference to the text, or the object and purpose, of the treaty. The provisions of article 31 read as follows:

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

23. And thus there is in these provisions reference both to the text and to the object and purpose. A connected point is that it is not appropriate for the Special Rapporteur to reinvent the wheel, and, in any case, the Commission has no mandate to revise and amend the 1969 Vienna Convention.

24. The opposition to the reliance upon intention is normally based upon the problems of ascertaining the intention of the parties, but this is true of so many legal rules, including legislation and constitutional provisions. The statute of the Commission provides no warrant for post-modernist heresies. In a general perspective, the difference between the two points of view expressed in the Sixth Committee is probably not, in practical terms, substantial. As article 31 of the 1969 Vienna Convention makes clear, the meaning of a treaty may be proved by a variety of means. In any event, the existence and interpretation of a treaty is not a matter of intention as an abstraction, but an intention of the parties “*as expressed in the words used by them and in the light of the surrounding circumstances*”.⁵⁶ The ultimate consideration is, what is the aim of interpretation? Surely, it is to discover the intention of the parties and not something else.⁵⁷

25. It has been suggested that the legal consequences of suspension or termination should be defined.⁵⁸ But to do that would be to elaborate the provisions of the 1969 Vienna Convention, which is not an appropriate task.

Draft article 5. Express provisions on the operation of treaties

Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.

³⁸ See *Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 39.

³⁹ *Ibid.*, *Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 9, and *ibid.*, *Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 47.

⁴⁰ *Ibid.*, *Sixtieth Session, Sixth Committee*, 19th meeting (A/C.6/60/SR.19), para. 37.

⁴¹ *Ibid.*, *Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 28.

⁴² *Ibid.*, para. 32.

⁴³ *Ibid.*, *Sixtieth Session, Sixth Committee*, 19th meeting (A/C.6/60/SR.19), para. 30, and *ibid.*, *Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 88.

⁴⁴ *Ibid.*, *Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 52.

⁴⁵ *Ibid.*, *Sixtieth Session, Sixth Committee*, 19th meeting (A/C.6/60/SR.19), para. 41.

⁴⁶ *Ibid.*, 20th meeting (A/C.6/60/SR.20), para. 1, and *ibid.*, *Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 44.

⁴⁷ *Ibid.*, *Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 27.

⁴⁸ *Ibid.*, *Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 23.

⁴⁹ *Ibid.*, para. 65.

⁵⁰ *Ibid.*, *Sixtieth Session, Sixth Committee*, 11th meeting (A/C.6/60/SR.11), para. 75.

⁵¹ *Ibid.*, 20th meeting (A/C.6/60/SR.20), para. 22.

⁵² *Ibid.*, *Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 77.

⁵³ *Ibid.*, *Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 34.

⁵⁴ *Ibid.*, 20th meeting (A/C.6/60/SR.20), para. 32.

⁵⁵ See *Yearbook ... 2005*, vol. II (Part Two), paras. 151–154, and *Yearbook ... 2006*, vol. II (Part Two), para. 203.

⁵⁶ McNair, *The Law of Treaties*, p. 365.

⁵⁷ See Reuter, *Introduction to the Law of Treaties*, p. 96, paras. 141–142.

⁵⁸ See the statement by Austria, *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 27.

Comment

26. The reader is referred to the commentaries provided in the first⁵⁹ and second reports.⁶⁰ While the provisions of draft article 5 received general support, both in the Commission and in the Sixth Committee, several suggestions were made to the effect that it was necessary to present the two paragraphs as separate articles. The Special Rapporteur has recognized the force of these suggestions and proposes the inclusion of former paragraph 2, of draft article 5, in new draft article 5 *bis*.

27. On a strict view of drafting this draft article was redundant, but it was generally accepted that such a provision should be included for the sake of clarity.

Draft article 5 bis. The conclusion of treaties during armed conflict

The outbreak of an armed conflict does not affect the capacity of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the law of treaties.

Comment

28. This provision, previously included as paragraph 2 of draft article 5, is now presented as a separate draft article. The term “competence” has been deleted and replaced by “capacity”. This draft article is intended to reflect the experience of belligerents in an armed conflict concluding agreements between themselves during the conflict.⁶¹

Draft article 6

29. Draft article 6 has been withdrawn by the Special Rapporteur.

Draft article 6 bis. The law applicable in armed conflict

The application of standard-setting treaties, including treaties concerning human rights and environmental protection, continues in time of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict.

Comment

30. This new draft provision originates in certain responses to draft article 5, in its earlier form. A number of delegations in the Sixth Committee proposed the inclusion of a provision based upon the principle stated by ICJ in the *Nuclear Weapons* advisory opinion⁶² relating to the relation between human rights and the applicable *lex*

specialis, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.⁶³ Similar views were expressed in the Commission.⁶⁴

31. While the principle now embodied in draft article 6 *bis* may be said to be, strictly speaking, redundant, the role of the provision in this expository draft is to provide a useful clarification.

Draft article 7. The operation of treaties on the basis of necessary implication from their object and purpose

1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

2. Treaties of this character include the following:

(a) treaties expressly applicable in case of an armed conflict;

(b) treaties declaring, creating, or regulating permanent rights or a permanent regime or status;

(c) treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

(d) treaties for the protection of human rights;

(e) treaties relating to the protection of the environment;

(f) treaties relating to international watercourses and related installations and facilities;

(g) multilateral law-making treaties;

(h) treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(i) obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

(j) treaties relating to diplomatic relations;

(k) treaties relating to consular relations.

Comment

32. The reader is referred to the commentaries provided in the first⁶⁵ and second⁶⁶ reports.⁶⁷

⁶³ See the views of the United States, *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 20th meeting (A/C.6/60/SR.20), para. 33.

⁶⁴ See *Yearbook ... 2005*, vol. II (Part Two), para. 159; and *Yearbook ... 2006*, vol. II (Part Two), para. 206.

⁶⁵ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, paras. 62–118.

⁶⁶ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570, paras. 34–42.

⁶⁷ See *Yearbook ... 2005*, vol. II (Part Two), paras. 167–175; and *Yearbook ... 2006*, vol. II (Part Two), paras. 209–211.

⁵⁹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, paras. 55–58.

⁶⁰ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570, paras. 29–31.

⁶¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, paras. 56–57.

⁶² Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *I.C.J. Reports 1996*, p. 240, para. 25.

33. Draft article 7 attracted comments both fairly numerous and very varied in content. The points of view expressed can be classified as follows:

(a) *Is draft article 7 necessary?*

34. A number of delegations in the Sixth Committee adopted the position that the whole provision was redundant, in view of the role already played by draft articles 3–4. The Special Rapporteur had some sympathy with this position and consequently made the following suggestion:

At the end of the day, it may be that the solution lies within the realm of presentation. On this basis draft article 7 would be deleted: as has been emphasized already, its purpose was indicative and expository. The question then is to find an appropriate container for the materials on which draft article 7 has been built. The obvious answer would be an annex containing an analysis of the State practice and case law which could be prepared by the Secretariat with assistance from the Special Rapporteur.⁶⁸

(b) *The inclusion in paragraph 2 of reference to treaties codifying jus cogens rules*

35. The Special Rapporteur does not regard the inclusion of treaties or treaty provisions codifying *jus cogens* rules⁶⁹ as acceptable. Such possibility raises a major question of general international law, and one which is notoriously difficult. Moreover, this category is not qualitatively similar to the other categories which have been proposed.

(c) *The role of an indicative list of categories of treaties*

36. In the Sixth Committee at least five delegations accepted the role of an indicative list of categories of treaties, though with reservations relating to the substance of the categories proposed.⁷⁰

(d) *Opposition to the use of an indicative list*

37. A number of delegations were opposed to, or sceptical about, the viability of, the use of an indicative list of categories of treaties.⁷¹

(e) *The enumeration of factors relevant to the determination that a given treaty should continue in operation in the event of armed conflict*

38. In the Sixth Committee six delegations expressed support for the identification of factors relevant to the determination that a given treaty should continue in

operation in the event of armed conflict.⁷² It is worth noting that this field of opinion was in favour of the retention of draft article 7 in some form.

(f) *The formulation of draft article 7*

39. In the debate in the Commission in the 2005 session, the policy of the provisions of draft article 7 was explained by the Special Rapporteur as follows:

The Special Rapporteur observed that draft article 7 dealt with the species of treaties the object and purpose of which involved the necessary implication that they would continue in operation during an armed conflict. Paragraph 1 established the basic principle that the incidence of armed conflict would not, as such, inhibit the operation of those treaties. Paragraph 2 contained an indicative list of some such categories of treaties. It was observed that the effect of such categorization was to create a set of weak rebuttable presumptions as to the object and purpose of those types of treaties, i.e. as evidence of the object and purpose of the treaty to the effect that it survives a war. He clarified that while he did not agree with all the categories of treaties in the list, he had nonetheless included them as potential candidates for consideration by the Commission. The list reflected the views of several generations of writers and was to a considerable extent reflected in available State practice, particularly United States practice dating back to the 1940s. While closely linked to draft articles 3 and 4, the draft article was primarily expository and could accordingly be excluded.⁷³

40. The fact is that the provisions of draft article 7 are very flexible. Moreover, it is not exclusive to the categories introduced but applies generally. Thus the second paragraph provides that: “Treaties of this character include the following ...”

41. The use of categories was the object of carefully articulated comment by the United States in the Sixth Committee, at the sixtieth session of the General Assembly, in 2005, and it must be quoted once more:

Article 7 deals with the operation of treaties on the basis of implications drawn from their object and purpose. It is the most complex of the draft articles. It lists 12 categories of treaties that, owing to their object and purpose, imply that they should be continued in operation during an armed conflict. This is problematic because attempts at such broad categorization of treaties always seem to fail. Treaties do not automatically fall into one of several categories. Moreover, even with respect to classifying particular provisions, the language of the provisions and the intention of the parties may differ from similar provisions in treaties between other parties. It would be more productive if the Commission could enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict. The identification of such factors would, in many cases, provide useful information and guidance to States on how to proceed.⁷⁴

42. As was pointed out in the second report,⁷⁵ the categories employed in draft article 7 may stand in need of improvements, but the fact is that most of the categories are derived directly from the policy prescriptions and legal assessments of leading authorities, together with a

⁶⁸ Yearbook ... 2006, vol. II (Part One), document A/CN.4/570, para. 37.

⁶⁹ See the memorandum prepared by the Secretariat (A/CN.4/550 and Corr.1–2, para. 31), available on the website of the Commission.

⁷⁰ See Bulgaria, *Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 23; Jordan, *ibid.*, para. 89; Portugal, *ibid.*, para. 78; the Republic of Korea, *ibid.*, *Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 36; and Romania, *ibid.*, 19th meeting (A/C.6/60/SR.19), para. 43.

⁷¹ See the position of India, *ibid.*, *Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 64; Poland, *ibid.*, 19th meeting (A/C.6/60/SR.19), para. 19; the United Kingdom, *ibid.*, 20th meeting (A/C.6/60/SR.20), para. 1; and the United States, *ibid.*, para. 34, and *ibid.*, *Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 41.

⁷² See the views of China, *ibid.*, *Sixty-first Session, Sixth Committee*, 18th meeting (A/C.6/61/SR.18), para. 49; Colombia, *ibid.*, para. 67; India, *ibid.*, 19th meeting (A/C.6/61/SR.19), para. 29; Malaysia, *ibid.*, para. 54; the United Kingdom, *ibid.*, para. 44; and the United States, *ibid.*, *Sixtieth Session, Sixth Committee*, 20th meeting (A/C.6/60/SR.20), para. 32, and, *ibid.*, *Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 41.

⁷³ Yearbook ... 2005, vol. II (Part Two), para. 167.

⁷⁴ Summarized in *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 20th meeting, para. 34.

⁷⁵ Yearbook ... 2006, vol. II (Part One), document A/CN.4/570, para. 34.

significant amount of jurisprudence and practice. If the first report⁷⁶ is properly examined, it can be seen that the categories employed are not abstract but have strong roots in the matrix of legal sources.

43. Against this background it can be argued that the categories reflect the very factors to which the United States refers in the statement quoted above.

(g) *Retaining the categories in draft article 7*

44. In the second report the Special Rapporteur made a tentative proposal to delete draft article 7, but to produce an annex containing an analysis of the State practice and case law, which could be prepared by the Secretariat.⁷⁷ After further thought, the Special Rapporteur has discarded this proposal and has decided to maintain the original approach adopted in draft article 7.

45. The reasons for this decision are as follows (and in no particular order):

(a) The existing form of draft article 7 still provides a good basis for a fruitful discussion, together with the relevant sections of the memorandum prepared by the Secretariat;⁷⁸

(b) The proposals for an alternative approach by way of relevant factors do not have enough merit and would probably increase the ills which have been accredited to the categories;

(c) The categories put forward by the Special Rapporteur are based upon a considerable quantity of legal experience and doctrine;

(d) The relation between the sequence of draft articles is legally significant and should be maintained.

(h) *The significance of State practice*

46. A number of delegations have pointed out that some of the categories of treaties offered as candidates for inclusion in draft article 7 do not find much support in the practice of States.⁷⁹ Having surveyed the available legal sources, it becomes clear that there are two different situations. The first relates to those cases, such as treaties creating permanent regimes, which have a firm base in State practice. The second situation relates to cases which have a firm basis in the jurisprudence of municipal courts and some executive advice to courts, but are not supported by State practice in a conventional mode.

47. These considerations lead to the important question: should the Commission close the door to those categories of treaty which have substantial recognition in reliable legal sources, in the absence of support by State practice as such? Given the mandate of the Commission to promote “the progressive development of international law and* its codification”,⁸⁰ it would seem to be inappropriate to insist that the categories of treaties admitted to the second paragraph of the draft article should all constitute a part of existing general international law. This is not the applicable standard of admission.

48. With reference to evidence of State practice, two other points should be made. In the first place, the likelihood of a substantial flow of information from States is small. And, secondly, the identification of relevant State practice is, in this sphere, unusually difficult. It often is the case that apparent examples of State practice concern legal principles which bear no relation to the effect of armed conflict on treaties as a precise legal issue. For example, some of the modern State practice which has been cited⁸¹ refers, for the most part, to the effect of a fundamental change of circumstances,⁸² or to the supervening impossibility of performance, and is accordingly irrelevant.

(i) *The role of lex specialis*

49. In the Sixth Committee a number of delegations indicated that draft article 7 needed clarification in respect of the role of *lex specialis*. Accordingly, it should be made clear that the implication of continuity does not affect the application of the law of armed conflict as the *lex specialis* applicable in times of armed conflict.⁸³

50. The Special Rapporteur agrees that such clarification is desirable and therefore proposes the inclusion of draft article 6 *bis*.

(j) *The categories of treaties to be included in draft article 7*

51. It has already been indicated that the Special Rapporteur has decided to maintain draft article 7 in its present form. Notwithstanding the criticisms expressed in some quarters, the existing format still provides a useful starting point for further debate. It must also be recalled that a proportion of the categories deployed are supported by the legal sources, including some State practice. It may be that, if the use of categories of treaties is maintained, the existing selection of 11 categories should be varied.

52. In examining the available materials careful account has been taken of the 16 categories proposed

⁷⁶ Yearbook ... 2005, vol. II (Part One), document A/CN.4/552, paras. 65 *et seq.*

⁷⁷ Yearbook ... 2006, vol. II (Part One), document A/CN.4/570, para. 37.

⁷⁸ See footnote 2 above.

⁷⁹ See the views of Chile, *Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 7; Jordan, *ibid.*, 18th meeting (A/C.6/61/SR.18), para. 89; Malaysia, *ibid.*, 19th meeting (A/C.6/61/SR.19), para. 54; and the Republic of Korea, *ibid.*, *Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 36.

⁸⁰ Art. 1 of the statute of the Commission.

⁸¹ See A/CN.4/550 and Corr.1–2 (footnote 2 above), paras. 82–91.

⁸² See the analysis of the conflict in the former Yugoslavia, *ibid.*, paras. 111–113.

⁸³ See the views of the Republic of Korea, *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 36, and the United Kingdom, *ibid.*, 20th meeting (A/C.6/60/SR.20), para. 1. The United States made a similar observation in the context of draft article 5, *ibid.*, para. 33.

in the memorandum prepared by the Secretariat (paras. 17–78).⁸⁴ The selection proposed therein overlaps substantially with the selection produced in draft article 7 in the first and second reports on the effects of armed conflicts on treaties. No doubt some of the categories in the memorandum not represented in the work of the Special Rapporteur may receive sponsorship in the future, either in the Sixth Committee or in the Commission. In the meanwhile, the selection proposed by the Special Rapporteur has been maintained.

53. It is to be noted that there have been very few proposals for the deletion of the categories deployed by the Special Rapporteur. However, the United Kingdom expressed scepticism concerning the inclusion of treaties relating to the protection of the environment.⁸⁵

54. By way of emphasis, it should be stated that the categories are indicative and are expressed *not* to be an exclusive list. Thus draft article 7, paragraph 1, provides clearly that “the incidence of an armed conflict will not *as such** inhibit their operation”. In the second place, the provision does not seek to prejudice the question of the applicable law, whether this constitutes *lex specialis* or otherwise. The logical progression must be that if the operation of a treaty is inhibited, then *necessarily* it will not form part of the applicable law.

55. In conclusion, draft article 7 is indicative and it is paragraph 1 which governs. Consequently, the “object and purpose” criterion is generally applicable. Draft article 7 is ancillary to draft articles 3–4.

(k) *The options available*

56. It is useful to end this long recital with a list of options which are available in the light of the various discussions of draft article 7. Four options appear to be available:

(a) The deletion of the draft article on the basis that it is not needed because draft articles 3–4 already do the work;

(b) The maintenance of the draft article in its present form but with some variations in the identification of appropriate categories of treaties;

(c) The substitution of a new paragraph 2 relying not upon categories of treaties but upon relevant factors or criteria;

(d) The deletion of draft article 7 accompanied by the preparation of an annex containing an analysis of the State practice and case law.

Draft article 8. *Mode of suspension or termination*

In case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions of articles 42 to 45 of the Vienna Convention on the law of treaties.

⁸⁴ A/CN.4/550 and Corr.1–2 (see footnote 2 above).

⁸⁵ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 20th meeting (A/C.6/60/SR.20), para. 1.

Comment

57. In the first report it was stated that the point in play here stems from the consideration that suspension or termination does not take place *ipso facto* and by operation of law.⁸⁶

Draft article 9. *The resumption of suspended treaties*

1. The operation of a treaty suspended as a consequence of an armed conflict shall be resumed provided that this is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty, the operation of which has been suspended as a consequence of an armed conflict, concerning the susceptibility of the treaty to resumption of operation shall be determined in accordance:

(a) with the provisions of articles 31 and 32 of the Vienna Convention on the law of treaties; and

(b) with the nature and extent of the armed conflict in question.

Comment

58. Draft article 9 constitutes the further development of draft article 4, which lays down the general criterion of intention.

Draft article 10. *Effect of the exercise of the right to individual or collective self-defence on a treaty*

A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor.

Comment

59. This draft replaces the text of former draft article 10 and is taken from article 7 of the resolution of the Institute of International Law adopted in 1985.⁸⁷ It will be recalled that the pertinent provisions of that resolution were set forth (as an alternative approach) in the first report.⁸⁸ The purpose of the new draft is to reflect the concerns expressed, both in the Commission and in the Sixth Committee, to the effect that the previous version of the draft article left open the possibility that there would be no difference in the legal effect concerning treaty relations between an aggressor State and a State acting in self-defence. In the Sixth Committee such opinions were expressed by Algeria,⁸⁹ China,⁹⁰ France,⁹¹

⁸⁶ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, para. 119.

⁸⁷ See footnote 33 above.

⁸⁸ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, para. 123.

⁸⁹ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 20th meeting (A/C.6/60/SR.20), para. 64.

⁹⁰ *Ibid.*, 18th meeting (A/C.6/60/SR.18), para. 10.

⁹¹ *Ibid.*, 11th meeting (A/C.6/60/SR.11), para. 75.

Greece,⁹² Iran (Islamic Republic of),⁹³ Japan,⁹⁴ Malaysia⁹⁵ and Morocco.⁹⁶

60. The earlier version of the draft article read as follows:

The incidence of the termination or suspension of a treaty shall not be affected by the legality of the conduct of the parties to the armed conflict according either to the principles of general international law or the provisions of the Charter of the United Nations.⁹⁷

61. The replacement of the earlier text is called for on a pragmatic basis, as being a necessary clarification. However, the need for clarification arises in fact from a misunderstanding of the former version. The former draft was intended as a corollary to draft article 3. The outbreak of an armed conflict does not lead automatically to termination or suspension. In any event, this principle of continuity is obviously without prejudice to the law applicable to the relations of the States concerned, including the law relating to the use or threat of force by States, and the powers of the Security Council under Chapter VII of the Charter of the United Nations. There is an important factor of legal security involved.⁹⁸ This element was expressed in the Sixth Committee by the United Kingdom:

We think that this draft article is broadly along the right lines. In accordance with our view that this topic is essentially one that concerns the operation of the law of treaties, we do not think that this is the right place in which to review the law on the use of force. We, of course, agree with the general proposition that an aggressor State should not benefit from its aggression. Nevertheless we also share the Special Rapporteur's view that to allow a simple, unilateral assertion of an illegal use of force as a basis for the termination or suspension of treaties is likely to be inimical to the stability of treaty relations.⁹⁹

62. The root of the difference of opinion is technical and legal. The principle of continuity (as in draft articles 3–4) is applied on an ordinal, or sequential, basis, and it applies across the board. Consequently, the principle is entirely without prejudice to the operation of the applicable law, and it is not a principle of validation.

Draft article 11. Decisions of the Security Council

These articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.

Comment

63. The proviso is not strictly necessary but is nonetheless useful in an expository draft. It may be recalled

that article 75 of the 1969 Vienna Convention provides as follows:

Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

64. This draft article received general support both in the Commission and in the Sixth Committee.

Draft article 12. Status of third States as neutrals

The present draft articles are without prejudice to the status of third States as neutrals in relation to an armed conflict.

Comment

65. This proviso is not strictly necessary but has a pragmatic purpose. This draft article received general support both in the Commission and in the Sixth Committee.

Draft article 13. Cases of termination or suspension

The present draft articles are without prejudice to the termination or suspension of treaties as a consequence of:

- (a) the agreement of the parties; or
- (b) a material breach; or
- (c) supervening impossibility of performance; or
- (d) a fundamental change of circumstances.

Comment

66. Once again it can be said that such a reservation states the obvious. However, it is believed that the clarification has some significance.

Draft article 14. The revival of terminated or suspended treaties

The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate the question of the maintenance in force or revival of treaties, suspended or terminated as a result of the armed conflict, on the basis of agreement.

Comment

67. This reservation has the specific purpose of dealing with the situation in which the status of "pre-war" agreements is ambiguous and it is necessary to make an overall assessment of the treaty picture. Such an assessment may, in practice, involve the revival of treaties the status of which was ambiguous or which had been treated as though terminated by one or both of the parties. The draft article received general acceptance both in the Commission and in the Sixth Committee.

⁹² *Ibid.*, 19th meeting (A/C.6/60/SR.19), para. 37.

⁹³ *Ibid.*, 18th meeting (A/C.6/60/SR.18), paras. 6–7.

⁹⁴ *Ibid.*, 20th meeting (A/C.6/60/SR.20), para. 22.

⁹⁵ *Ibid.*, Sixty-first Session, Sixth Committee, 19th meeting (A/C.6/61/SR.19), para. 55.

⁹⁶ *Ibid.*, Sixtieth Session, Sixth Committee, 11th meeting (A/C.6/60/SR.11), para. 42.

⁹⁷ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

⁹⁸ *Ibid.*, para. 122.

⁹⁹ Summarized in *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 20th meeting (A/C.6/60/SR.20), para. 1.

Annex

TEXT OF DRAFT ARTICLES (AS PROPOSED IN THE PRESENT REPORT)

Draft article 1. Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States.

Draft article 2. Use of terms

For the purposes of the present draft articles:

(a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

(b) “armed conflict” means a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between State parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

Draft article 3. Non-automatic termination or suspension

The outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as:

- (a) between the parties to the armed conflict;
- (b) between one or more parties to the armed conflict and a third State.

Draft article 4. The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

- (a) with the provisions of articles 31 and 32 of the Vienna Convention on the law of treaties; and
- (b) the nature and extent of the armed conflict in question.

Draft article 5. Express provisions on the operation of treaties

Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice to the

conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.

Draft article 5 bis. The conclusion of treaties during armed conflict

The outbreak of an armed conflict does not affect the capacity of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the law of treaties.

Draft article 6^a

...

Draft article 6 bis. The law applicable in armed conflict

The application of standard-setting treaties, including treaties concerning human rights and environmental protection, continues in time of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict.

Draft article 7. The operation of treaties on the basis of necessary implication from their object and purpose

1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

2. Treaties of this character include the following:

- (a) treaties expressly applicable in case of an armed conflict;
- (b) treaties declaring, creating, or regulating permanent rights or a permanent regime or status;
- (c) treaties of friendship, commerce and navigation and analogous agreements concerning private rights;
- (d) treaties for the protection of human rights;
- (e) treaties relating to the protection of the environment;
- (f) treaties relating to international watercourses and related installations and facilities;
- (g) multilateral law-making treaties;
- (h) treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

^a Draft article 6 was withdrawn by the Special Rapporteur.

(i) obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

(j) treaties relating to diplomatic relations;

(k) treaties relating to consular relations.

Draft article 8. Mode of suspension or termination

In case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions of articles 42 to 45 of the Vienna Convention on the law of treaties.

Draft article 9. The resumption of suspended treaties

1. The operation of a treaty suspended as a consequence of an armed conflict shall be resumed provided that this is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty, the operation of which has been suspended as a consequence of an armed conflict, concerning the susceptibility of the treaty to resumption of operation shall be determined in accordance:

(a) with the provisions of articles 31 and 32 of the Vienna Convention on the law of treaties;

(b) with the nature and extent of the armed conflict in question.

Draft article 10. Effect of the exercise of the right to individual or collective self-defence on a treaty

A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part

the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor.

Draft article 11. Decisions of the Security Council

These articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.

Draft article 12. Status of third States as neutrals

The present draft articles are without prejudice to the status of third States as neutrals in relation to an armed conflict.

Draft article 13. Cases of termination or suspension

The present draft articles are without prejudice to the termination or suspension of treaties as a consequence of:

(a) the agreement of the parties; or

(b) a material breach; or

(c) supervening impossibility of performance; or

(d) a fundamental change of circumstances.

Draft article 14. The revival of terminated or suspended treaties

The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate the question of the maintenance in force or revival of treaties, suspended or terminated as a result of the armed conflict, on the basis of agreement.

THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

[Agenda item 6]

DOCUMENT A/CN.4/585*

Second report on the obligation to extradite or prosecute (*aut dedere aut judicare*), by Mr. Zdzislaw Galicki, Special Rapporteur

[Original: English]
[11 June 2007]

CONTENTS

	Paragraphs	Page
Multilateral instruments cited in the present report		68
Works cited in the present report		68
Preface.....	1–4	68
INTRODUCTION	5–8	68
<i>Chapter</i>		
I. PRELIMINARY REPORT REVISITED: OLD AND NEW QUESTIONS FOR THE NEWLY ELECTED MEMBERS OF THE COMMISSION	9–72	69
A. Consideration of the topic at the fifty-eighth session of the Commission.....	9–19	69
B. Specific issues on which comments of States would be of particular interest to the Commission	20	70
C. Discussion on the obligation to extradite or prosecute held in the Sixth Committee during the sixty-first session of the General Assembly	21–39	71
1. General comments	22	71
2. Scope of the topic.....	23–24	71
3. Customary law nature of the obligation.....	25–28	71
4. Scope and content of the obligation.....	29–30	71
5. Crimes covered by the obligation	31–33	71
6. Other matters.....	34–39	72
(a) Link with universal jurisdiction	34	72
(b) Surrender of suspects to international criminal tribunals.....	35	72
(c) National legislation and practice.....	36–38	72
(d) Final outcome of the work of the Commission	39	72
D. Concluding remarks of the Special Rapporteur on the debate of the Commission and the Sixth Committee on the preliminary report	40–60	72
E. Comments and information received from Governments	61–72	74
1. International treaties containing the <i>aut dedere aut judicare</i> obligation	64–65	75
2. Domestic legal regulations.....	66–68	75
3. Judicial practice	69–71	75
4. Crimes or offences	72	76
II. DRAFT RULES ON THE OBLIGATION TO EXTRADITE OR PROSECUTE: STARTING POINT.....	73–116	76
A. Scope of application of the draft articles.....	73–104	76
1. Time element.....	79–81	76
2. Substantive element	82–93	77
3. Personal element	94–104	77
B. Plan for further development.....	105–116	79

* Incorporating A/CN.4/585/Corr.1.

Multilateral instruments cited in the present report

Source

European Convention on Extradition (Paris, 13 December 1957)	United Nations, <i>Treaty Series</i> , vol. 359, No. 5146, p. 273.
Convention for the suppression of unlawful seizure of aircraft (The Hague, 16 December 1970)	<i>Ibid.</i> , vol. 860, No. 12325, p. 105.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	<i>Ibid.</i> , vol. 2187, No. 38544, p. 3.

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Preface

1. The present report on the obligation to extradite or prosecute (*aut dedere aut judicare*) is the second report prepared by the Special Rapporteur on the topic in question. The preliminary report,¹ presented in 2006, was discussed by the members of the International Law Commission during its fifty-eighth session.

2. Since then, however, although the topic has been formally continued, around half of the members of the Commission have been replaced, as a result of the election held by the General Assembly in November 2006. Therefore, the Special Rapporteur is of the opinion that it is wise, and even necessary, to recapitulate in the present report the main ideas described in the preliminary report, as well as to summarize the discussion that took place both in the Commission and in the Sixth Committee in 2006. The old Latin maxim *repetitio est mater studiorum* seems to be applicable to the present case.

3. Furthermore, since different opinions were expressed by members of the Commission during the plenary debate in 2006, it seems necessary to obtain the views of the new

members on the most controversial matters covered in the preliminary report before proceeding to a substantive elaboration of possible draft rules or articles concerning the obligation to extradite or prosecute. Consequently, in the present report, the Special Rapporteur will try to describe, or to repeat, some of the essential questions for the benefit mainly of the new members of the Commission in order to avoid any possible confusion in the future.

4. It also seems of crucial importance for the further work on the topic in question that a wider response be obtained from States on the issues identified by the Commission in chapter III of last year's report.² Up to now, only 20 States have transmitted their comments and information concerning those issues.³ This does not seem to constitute a sufficient basis for the formulation of definite conclusions as to the eventual codification of appropriate rules on the obligation to extradite or prosecute. A repetition of last year's request, to be addressed to States, seems necessary in these circumstances.

² *Ibid.*, vol. II (Part Two), para. 30.

³ See, in detail, A/CN.4/579 and Add.1–4 (reproduced in the present volume), and paragraphs 61–72 below.

¹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

Introduction

5. At its fifty-sixth session, in 2004, the Commission, on the basis of the recommendation of the Working Group on the long-term programme of work, identified the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" for inclusion in its long-term programme of work. A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission.⁴ In its resolution

59/41 of 2 December 2004, the General Assembly took note of the Commission's report concerning its long-term programme of work.

6. At its 2865th meeting, held on 4 August 2005, the Commission considered the selection of a new topic for inclusion in the Commission's current programme of work and decided to include the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" on its agenda, and appointed Mr. Zdzisław Galicki as

⁴ See *Yearbook ... 2004*, vol. II (Part Two), annex, paras. 21–24, for the syllabus on the topic, and para. 362.

the Special Rapporteur for the topic.⁵ In paragraph 5 of its resolution 60/22 of 23 November 2005, the General Assembly endorsed the decision of the Commission to include the topic in its programme of work.

7. It should be recalled that the topic in question had already appeared in the list of planned topics at the first session of the Commission in 1949,⁶ but was largely forgotten for more than half a century until it was briefly addressed in articles 8–9 of the 1996 draft Code of Crimes against the Peace and Security of Mankind.⁷ Those articles

⁵ *Yearbook ... 2005*, vol. II (Part Two), para. 500.

⁶ *Yearbook ... 1949*, document A/925, p. 283, para. 16 (4).

⁷ The text of those provisions, as adopted by the Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as part of the Commission's report on its work of that session, was the following:

"Article 8. Establishment of jurisdiction"

"Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article."

(*Yearbook ... 1996*, vol. II (Part Two), p. 27)

"Article 9. Obligation to extradite or prosecute"

"Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual."

(*Ibid.*, p. 30)

set out minimum contours of the *aut dedere aut judicare* principle and the linked principle of universal jurisdiction. It is important to remember that the draft Code was largely a codification exercise of customary international law as it stood in 1996, rather than a progressive development of international law, as confirmed two years later with the adoption of the Rome Statute of the International Criminal Court.

8. In fact, the "[o]bligation to extradite or prosecute" was reflected by the Commission even earlier in article 54 of the draft statute for an international criminal court, adopted at its forty-sixth session in 1994⁸ and submitted to the General Assembly as part of the Commission's report on the work of that session. However, the "obligation", as formulated in the draft Code of Crimes against the Peace and Security of Mankind,⁹ seems to be more general and wider than that contained in the earlier 1994 draft statute.

⁸ *"Article 54. Obligation to extradite or prosecute"*

"In a case of a crime referred to in article 20, subparagraph (e), a custodial State Party to this Statute which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to the crime for the purposes of article 21, paragraph 1 (b) (i), shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose."

(*Yearbook ... 1994*, vol. II (Part Two), p. 65)

⁹ *Yearbook ... 1996*, vol. II (Part Two), p. 17.

CHAPTER I

Preliminary report revisited: old and new questions for the newly elected members of the Commission

A. Consideration of the topic at the fifty-eighth session of the Commission

9. The preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*)¹⁰ was submitted by the Special Rapporteur to the fifty-eighth session of the Commission in 2006. It was prepared by the Special Rapporteur as a very preliminary set of initial observations concerning the substance of the topic, marking the most important points for further consideration and including a very general road map for the future work of the Commission in the field.

10. At the fifty-eighth session, in 2006, the Commission considered the preliminary report of the Special Rapporteur, including the proposed preliminary plan of action.¹¹ In the debate it was suggested that the scope of the topic should be limited to the objective of the obligation, namely, to reduce cases of impunity for persons suspected of having committed international crimes by depriving them of "safe havens". It was proposed that

the topic could be further limited to particular categories of crimes, such as those which were particularly grave and threatened the international community as a whole. It was also suggested that a distinction should be drawn between crimes under international law (defined in treaty instruments), and crimes recognized under international customary law, such as war crimes, genocide and crimes against humanity. There was general support for excluding crimes that were foreseen solely under national laws from the scope of the study.

11. It was observed, in addition, that a more limited form of the obligation existed in regard to treaty crimes. For instance, it was noted that many treaties, including the so-called sectoral conventions for the suppression of international terrorism, contained a more guarded formulation, namely, to submit the case to the competent authorities "for the purpose of prosecution", as opposed to an obligation "to prosecute". It was recalled that Governments typically resisted accepting an obligation "to prosecute" since the independence of prosecution was a cardinal principle in their national criminal procedures.

12. It was suggested that the Commission should focus on gaps in existing treaties, such as the execution

¹⁰ See footnote 1 above.

¹¹ See *Yearbook ... 2006*, vol. II (Part Two), paras. 214–232. For the summary of the debate, see especially paragraphs 220–229, on which this part of the present report is mostly based.

of penalties and the lack of a monitoring system with regard to compliance with the obligation to prosecute. As regards the question of the existence of a customary obligation to extradite or prosecute, it was suggested that any such obligation would have to be based on a two-tier system, as in existing treaties, whereby certain States were given priority jurisdiction and other States would be obliged to exercise jurisdiction if the alleged offender was not extradited to a State having that priority jurisdiction.

13. Concerning the obligation to extradite, it was pointed out that whether that obligation existed depended on the treaties made between the parties and on the circumstances. In addition, since crimes were typically defined very precisely in domestic laws, the question had to be whether there was an obligation to extradite or prosecute for a precisely defined crime in precisely defined circumstances. It was also noted that most of the complex issues in extradition were solved pragmatically. Some members considered that the obligation to extradite or prosecute had acquired a customary status, at least as far as crimes under international law were concerned. In the terms of a further view, the procedure of deportation was relevant to the topic.

14. Furthermore, it was proposed that the Commission could consider the practical difficulties encountered in the process of extradition, including: problems of the sufficiency of evidence, the existence of outdated bilateral and multilateral treaties and national laws allowing multiple grounds for refusal, limitations on the extradition of nationals and the failure to recognize specific safeguards for the protection of the rights of the extradited individual, particularly in situations where extradition could expose the individual to torture, the death penalty or even life imprisonment. It was also recalled that, in the situation of international crimes, some of the limitations on extradition were inapplicable.

15. Some members cautioned against considering the technical aspects of extradition law. What was specific to the topic and the precise meaning of the Latin maxim *aut dedere aut judicare* was that, failing an extradition, an obligation to prosecute arose. The focus, therefore, should be on the conditions for triggering the obligation to prosecute. The view was expressed that the Commission should not deal with all the collateral rules on the subject, which were linked to it but not necessarily part of it. It was also proposed that the focus should be limited to the elaboration of secondary rules.

16. A general preference was expressed for drawing a clear distinction between the concepts of the obligation to extradite or prosecute and that of universal criminal jurisdiction. It was recalled that the Commission had decided to focus on the former and not the latter, even if for some crimes the two concepts existed simultaneously. It was pointed out that the topic did not necessarily require a study in extraterritorial criminal jurisdiction. If the Commission were, nonetheless, to embark on a consideration of the concept of universal jurisdiction, it was suggested that the different kinds of universal jurisdiction, particularly whether it was permissive or compulsory, be considered. It was also considered worth

contemplating whether such jurisdiction could only be exercised when the person was present in a particular State or whether any State could request the extradition of a person from another State on grounds of universal jurisdiction.

17. A suggestion was made that the topic should not include the “triple alternative”, involving the concurrent jurisdiction of an international tribunal, since the existing tribunals had their own *lex specialis* rules. According to another opinion, it would be necessary insofar as possible to favour that third path. It was suggested that the Special Rapporteur should undertake a systematic study of State practice, focusing on contemporary practice, including national jurisprudence.

18. On the question of the final form, while it was recognized that it was premature to consider the matter, a preference was expressed for the eventual formulation of a set of draft articles, although it was noted that if the Commission were to conclude that the obligation existed only under international treaties, then a draft of a recommendatory nature would be more appropriate.

19. The Special Rapporteur decided, however, that in the present report he would propose—at least provisionally—to start the elaboration of the first provision dealing with the scope of application of future draft articles.

B. Specific issues on which comments of States would be of particular interest to the Commission

20. The Commission included in chapter III of its report on the fifty-eighth session, as usual, a list of specific issues on which comments from States would be of particular interest to the Commission. Among others, issues were identified concerning the obligation to extradite or prosecute (*aut dedere aut judicare*). The Commission declared that it would welcome any information that Governments might wish to provide concerning their legislation and practice with regard to the topic, particularly more contemporary ones. If possible, such information should concern:

(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservations made by that State to limit the application of this obligation;

(b) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the obligation to extradite or prosecute (*aut dedere aut judicare*);

(c) Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*;

(d) Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State.¹²

The Commission added that it would also welcome any further information that Governments may consider relevant to the topic.¹³

¹² *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 30.

¹³ *Ibid.*, para. 31.

C. Discussion on the obligation to extradite or prosecute held in the Sixth Committee during the sixty-first session of the General Assembly

21. The present section of this report is based mainly on the document entitled “Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session”.¹⁴ The Special Rapporteur decided to retain the systematic arrangement of this part of the topical summary—together with the subheadings used by the Secretariat—through which the views and opinions of the delegations in the Sixth Committee are presented in a much clearer and more transparent manner. Because of the small number of written observations received from States in response to the request contained in chapter III of last year’s report of the Commission, the opinions expressed by the delegations in the Sixth Committee gain special importance as a means to present the views of States and their practice concerning the topic in question.

1. GENERAL COMMENTS

22. During the sixty-first session of the General Assembly, in 2006, delegations in the Sixth Committee welcomed the first report of the Special Rapporteur and some endorsed the general approach taken in the report. Some delegations were of the view that the Commission should first undertake an analysis of the relevant treaties, national legislation and practice, and it was suggested that the Secretariat could assist the Special Rapporteur in such a task.

2. SCOPE OF THE TOPIC

23. Support was expressed for the cautious approach advanced in the Commission with regard to the scope of the topic. However, according to another view, the topic should have been part of a broader study on jurisdiction. While it was proposed that the Commission also examine extradition procedures, the opinion was expressed that it should not undertake a review of extradition law and deportation. Some delegations invited the Commission to examine the related principle of universal jurisdiction, or at least the relationship between the topic and the principle.

24. Other delegations, while recognizing the link between universal jurisdiction and the obligation to extradite or prosecute, were of the view that the Commission should focus on the latter. It was suggested that the question of universal jurisdiction and the definition of international crimes deserved to be considered as separate topics. It was also proposed that the Commission examine the relationship between the obligation to extradite or prosecute and the principles of State sovereignty and human rights protection.

3. CUSTOMARY LAW NATURE OF THE OBLIGATION

25. It was suggested by some delegations that the Commission should determine whether the obligation

to extradite or prosecute had become part of customary international law. Should that be the case, the Commission would need to specify the offences to which the obligation would apply. It was also remarked that the customary nature of the obligation would not necessarily follow from the existence of multilateral treaties imposing such an obligation.

26. The opinion was expressed that the *aut dedere aut judicare* principle was not part of customary international law and that it certainly did not belong to *jus cogens*. In any event, it was observed that if the obligation had become part of customary international law, that would be true only in respect of a limited number of crimes.

27. According to another view, the *aut dedere aut judicare* principle had started to shape States’ conduct beyond the obligations arising from international treaties with regard to the most heinous international crimes. It was also believed that in certain areas, such as counter-terrorism, the obligation to extradite or prosecute was accepted by the whole international community.

28. It was further suggested that the Commission should concentrate more on the progressive development of international law, which could be an alternative solution if the codification process could not find sufficient substantial background in applicable customary rules.

4. SCOPE AND CONTENT OF THE OBLIGATION

29. A number of delegations expressed support for the approach taken by the Special Rapporteur, according to which the obligation to extradite or prosecute gave States the choice to decide which part of the obligation they were willing to fulfil. However, the point was also made that the obligation to extradite or prosecute presupposed a choice that did not always exist in practice. In that respect, it was suggested that the Commission consider situations in which a State could not or did not extradite an offender. It was considered that the obligation to extradite or prosecute presupposed the presence of the suspect in the territory of the State. It was also observed that the Commission should offer guidance to States as to whether they should extradite or prosecute.

30. The opinion was expressed that the Commission should determine which States should have priority in exercising jurisdiction. In that regard, it was suggested that preference should be given to the State in whose territory the crime had been committed and that priority jurisdiction entailed an obligation to exercise such jurisdiction and to request extradition for that purpose.

5. CRIMES COVERED BY THE OBLIGATION

31. It was suggested that the obligation to extradite or prosecute should be limited to crimes that affect the international community as a whole. In particular, it was considered that the principle would apply to crimes recognized under customary international law as well as serious offences covered by multilateral treaties, such as those relating to the hijacking of aircraft, narcotic drugs and terrorism. It was further noted that the obligation should apply to serious international and transnational crimes,

¹⁴ A/CN.4/577 and Add.1–2. The Special Rapporteur would like to express his gratitude to the Secretariat for its very active assistance in collecting and systematizing materials necessary for the preparation of the present report.

including war crimes, crimes against humanity, genocide, torture and terrorist acts. Moreover, other delegations raised doubts as to the appropriateness of distinguishing, in that context, between crimes recognized under customary international law and crimes defined under treaty law.

32. Different opinions were expressed as to whether the obligation to extradite or prosecute was applicable only to crimes that were covered by the principle of universal jurisdiction, with some delegations favouring that narrower view and others questioning such a limitation. In that context, it was considered that the obligation to extradite or prosecute should first and foremost relate to crimes for which universal jurisdiction already existed.

33. Furthermore, the view was expressed that the obligation to extradite or prosecute should also apply to serious crimes under domestic law that caused significant harm to the State and the public interest of its people. According to another view, crimes that were defined only in domestic legislation should be excluded from the topic.

6. OTHER MATTERS

(a) *Link with universal jurisdiction*

34. It was noted that the principle of universal jurisdiction was instrumental to the full operation of the obligation to extradite or prosecute. It was also observed that a State might not be in a position to extradite if there was no treaty between the requested and the requesting State or if the requirement of double criminality was not met, there being at the same time an inability to prosecute because of the lack of jurisdiction.

(b) *Surrender of suspects to international criminal tribunals*

35. Some delegations referred to the surrender of suspects to an international criminal tribunal as a possible additional option to the alternative offered by the *aut dedere aut judicare* principle. While some delegations emphasized the role of international criminal tribunals in that context, other delegations were of the view that the Commission should not examine the surrender of suspects to such tribunals, which was governed by distinct legal rules.

(c) *National legislation and practice*

36. In providing details on national legislation, some delegations indicated that laws were being or had been passed in order to implement the obligation to extradite or prosecute, in particular with respect to international crimes such as genocide, war crimes, crimes against humanity and torture. However, it was pointed out that some domestic laws on extradition did not provide for the obligation to extradite or prosecute. Other national laws might not allow extradition in the absence of a bilateral extradition treaty, or restrictions imposed upon the extradition of nationals or persons who had been granted political asylum. The extradition of nationals was subject to several limitations relating to the type of crime and the existence of reciprocity established by treaty, as well as the condition that a fair trial should be guaranteed by the law of the requesting State.

37. Attention was also drawn to the existence of bilateral extradition agreements which did not provide for the obligation to extradite or prosecute, and to sectoral conventions on terrorism containing limitations on extradition that could be incompatible with the obligation to extradite or prosecute.

38. It was further observed that reservations to multilateral treaties containing the obligation to extradite or prosecute had been made in line with national legislation prohibiting extradition on political grounds or for crimes which would attract unduly severe penalties in the requesting State, with the exclusion, however, of crimes recognized under customary international law such as genocide, crimes against humanity and war crimes.

(d) *Final outcome of the work of the Commission*

39. Some delegations observed that the final outcome of the work of the Commission on the topic should be determined at a later stage. Without prejudice to a final decision on the matter, other delegations supported the idea of a set of draft rules.

D. Concluding remarks of the Special Rapporteur on the debate of the Commission and the Sixth Committee on the preliminary report

40. Introducing the preliminary report,¹⁵ the Special Rapporteur stressed that his text was, in fact, a very preliminary set of initial observations concerning the substance of the topic, marking the most important points for further consideration and including a very general road map for the future work of the Commission in the field. It was the intention of the Special Rapporteur to include in the preliminary report as many difficult problems and questions as possible in order to obtain answers and suggestions, first from the members of the Commission and later from the delegations in the Sixth Committee.

41. The members of the Commission and the delegations in the Sixth Committee have taken into account that specific nature of the preliminary report, and their comments were aimed at the main issues to be considered by the Commission and the Special Rapporteur in their future work on the topic in question. As far as the Special Rapporteur is concerned, those opinions will be of great value and assistance for him in the process of preparation of subsequent reports, in which draft rules concerning the concept, structure and operation of the *aut dedere aut judicare* obligation will be gradually formulated.

42. There was, however, a great variety of opinions, remarks and suggestions expressed by the members of the Commission, as well as by the delegations in the Sixth Committee, during the debate on the topic in question, which dealt both with the substance and the formal aspects of the present exercise, starting with the very title of the topic and ending with the choice of the final form of the result of the work of the Commission in the field.

43. With regard to the title of the topic, although the view was expressed that it should be changed—referring,

¹⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

for instance, to the “principle”, instead of the “obligation”, to extradite or prosecute—the Special Rapporteur is of the opinion that, at least at the present stage, the current title should be retained. The concept of the *aut dedere aut judicare* “obligation” seems to provide safer grounds for further analysis than that of “principle”. It does not exclude, of course, the possibility of, or even need for—as was suggested by some members—consideration of the parallel question of the right of States to extradite or prosecute as a kind of counterbalance to the obligation.

44. There was a rather general consensus among the participants in the debates that the scope of the work on the topic in question should be limited as far as possible to, and should concentrate on, the main issues directly connected with the obligation to extradite or prosecute and the principal elements of this obligation, namely, “*dedere*” and “*judicare*”.

45. The Special Rapporteur agrees with those suggestions, especially as regards the call for a very careful treatment of the mutual relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction. It seems that the distinction between universal jurisdiction and the *aut dedere aut judicare* obligation should be clearly drawn. In that regard, the Special Rapporteur would like to add that the definitions of “universal jurisdiction” and the “*aut dedere aut judicare* rule” quoted in the preliminary report should be considered only as examples of a possible approach, without any prejudice to the preferences of the Special Rapporteur.

46. A more detailed analysis of the above-mentioned elements of the obligation in question seems necessary, especially as regards “*judicare*”, since the scope of the obligation to prosecute binding upon States may be questioned and understood in different ways, even on the basis of existing treaties. When analysing the obligation to prosecute, it will be necessary to establish to what extent international law, domestic legislation and practice actually impose the implementation of that duty.

47. Furthermore, the obligation of “*dedere*” may also cause some difficulty, as regards, for instance, the possibility raised by the Special Rapporteur (but questioned by one member of the Commission) that the substantive scope of extradition should be extended to the enforcement of a judgement. That possibility and procedure, however, are provided for under certain internal legislations.¹⁶ The Special Rapporteur agrees with the observation that, in the case of crimes covered by the *aut dedere aut judicare* obligation, the application of some limitations traditionally imposed on extradition may raise problems or may even be impossible. Consequently, that question will require careful consideration by the Special Rapporteur and by the Commission. The Special Rapporteur

agrees, however, with the view that the Commission should not consider the technical aspects of extradition law, but rather concentrate on the conditions for the triggering of the obligation in question.

48. Moreover, as was correctly noted by members of the Commission, the question of the so-called “triple alternative”, raised by the Special Rapporteur in connection with the jurisdiction of international criminal tribunals, should be dealt with very carefully and in a very limited manner. As was, for instance, stressed by some members, the distinction between extradition and surrender to the International Criminal Court should be clearly identified.

49. As regards the suggested form of the final result of the work of the Commission on the topic in question, the majority of the participants in the debate were of the opinion that the most suitable form would probably be that of “draft articles”, although it was admitted that it may still be too early to make any definite decision on the matter. However, on the basis of that opinion, the Special Rapporteur, in the reports that he will subsequently prepare, has decided to proceed in the direction of gradually formulating draft rules concerning the concept, structure and operation of the *aut dedere aut judicare* obligation.

50. Another important problem, which was raised by practically all speakers and which seems to have a crucial significance for the final result of the work of the Commission, is that of the legal background of the obligation under discussion. With regard to the proposal made in the preliminary report “to find a generally acceptable answer to the question of whether the legal source of the obligation should be limited to the treaties which are binding on the States concerned, or be extended to appropriate customary norms or general principles of law”,¹⁷ the response given by the members of the Commission and the delegations in the Sixth Committee was rather cautious, generally recognizing that treaties could constitute a basis for such an obligation, but expressing some doubts as regards its support in customary norms.

51. In connection with the sources of the obligation to extradite or prosecute, one member criticized the separation, in the preliminary report, of the section devoted to international custom and general principles of law from the other one concerning national legislation and practice of States. The Special Rapporteur would like to explain that the latter question was identified separately within the part of the report concerning the sources of the obligation to extradite or prosecute with the intention to stress the importance of national legislative, executive and judicial practice of States in the process of formulation of the obligation in question. Furthermore, as was stressed by another participant in the debate, national laws and practice fill some gaps left by international regulations. It was also observed that the Special Rapporteur should not forget that the topic under study is directly linked with domestic criminal law systems. The Special Rapporteur fully agrees with the latter two observations.

52. The above does not contradict in any way, however, the need for such domestic practice to be present for

¹⁶ See, for instance, the Act of 6 June 1997, Code of Criminal Procedure of Poland, which in article 593, paragraph 1, contemplates the possibility of “petitions for extradition by a foreign State of a person against whom criminal proceedings have been instituted, for extradition in order to conduct judicial proceedings or enforce the imposition of the penalty of deprivation of liberty”. Similarly, article 602 of the same Code also envisages requests of an authority of a foreign State for “the extradition of a prosecuted person in order to conduct criminal proceedings against him, or to execute a penalty or a preventive measure previously imposed”.

¹⁷ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

customary rules of international law to exist, in accordance with article 38 of the ICJ Statute. At that stage, in the preliminary report, it was impossible to reflect a full variety of examples of such State practice, a task that—undoubtedly—the Special Rapporteur will have to undertake later.

53. The Special Rapporteur fully agrees with the suggestion expressed by many members of the Commission and delegations in the Sixth Committee that a thorough analysis of the topic in question should take into account international and national judicial decisions to a much wider extent than was done in the preliminary report. Once again, the Special Rapporteur would like to assure members of the Commission that the limited number of examples of judicial decisions described in his 2006 report was only due to the preliminary nature of that report, and definitely not to his detracting from the importance of those decisions.

54. An overwhelming majority of members of the Commission and delegations in the Sixth Committee took a rather reserved position concerning the recognition, at least at the present stage, of the existence of a generally binding customary obligation to extradite or prosecute applicable to all offences under criminal law. However, they seemed to be supportive of the idea of a more selective approach, namely, the identification of certain categories of crimes for which universal jurisdiction and the *aut dedere aut judicare* principle have already received general recognition from States. A variety of terms is used in international practice to designate such crimes, including “international crimes”, “serious international crimes”, “crimes under international law”, “crimes of international concern” and “crimes against humanity”.

55. Bearing in mind this diversification of crimes or offences, the Special Rapporteur agrees with the numerous proposals that such categories of specific crimes be identified, since they could be considered—because of their conventional or customary nature—as a basis for the possible application of the obligation to extradite or prosecute.

56. It seems to be much easier and more effective to formulate some legal rules, in the form of codification or of progressive development of international law, for the crimes so selected than to do it, in a general way, for all crimes and offences. That does not exclude, of course, the possibility of developing, at a later stage, if so decided by the Commission, rules or principles of a more general character.

57. A majority of the members who participated in the debate agreed with the suggestion, made by the Special Rapporteur in the last point of the preliminary plan of action,¹⁸ that the present exercise should also include an analysis of the relation between the obligation to extradite or prosecute and other principles of international law. Some of those principles were identified and proposed by the Special Rapporteur for comparative consideration in the preliminary report.

58. There was, however, a significant difference of opinion concerning the substantive scope of the principles to be taken into account. It seems that, in general, there was consensus that the principle of human rights protection should be followed during all work on the topic in question and that specific attention should be paid therein to human rights law.

59. The Special Rapporteur agrees with those suggestions, as well as with the more general proposal that the elaboration of possible rules in the field should be limited rather to rules of a secondary character than to an attempt to formulate principles of a primary nature. The Special Rapporteur is full of appreciation for the many friendly warnings received from those members who participated in the debate on how to avoid the numerous traps awaiting him in his future work. He hopes that he will manage to avoid these traps, thanks to the active and friendly assistance of, and cooperation with, other members of the Commission.

60. The Special Rapporteur is also grateful for the general support, received during the debate, for his proposal to submit to Governments a written request for information concerning their practice, particularly the most contemporary, with regard to the *aut dedere aut judicare* obligation. It seems that the questions raised by the Special Rapporteur in paragraph 59 of his preliminary report, and included in the relevant section of chapter III of the report of the Commission on the work of its fifty-eighth session¹⁹ (a chapter that traditionally deals with specific issues on which comments would be of particular interest to the Commission), will finally lead to more complete responses from States.

E. Comments and information received from Governments

61. In response to the specific issues on which comments of States would be of particular interest to the Commission, identified by the Commission in chapter III of last year's report,²⁰ some States have already sent their written responses, which have been put together by the Secretariat in a special document entitled “The obligation to extradite or prosecute (*aut dedere aut judicare*): comments and information received from Governments”.²¹ As with the “Topical summary” described above,²² the Secretariat has performed a very useful analytical work, gathering the information received from States in substantive categories.

62. The responses from Governments have been organized by the Secretariat around four clusters of information, concerning:

(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute (*aut dedere aut judicare*), and reservations made by that State to limit the application of this obligation;

¹⁹ See *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 30.

²⁰ See paragraph 20 above.

²¹ A/CN.4/579 and Add.1–4 (reproduced in the present volume).

²² See paragraphs 21–39 above.

¹⁸ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, para. 61, point 10.

(b) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute;

(c) Judicial practice of a State reflecting the application of the *aut dedere aut judicare* obligation;

(d) Crimes or offences to which the principle of the *aut dedere aut judicare* obligation is applied in the legislation or practice of a State.

63. As was mentioned before, a limited number of responses were received from States as at 1 March 2007, written observations, containing relevant comments and information, had been received from the following seven States: Austria, Croatia, Japan, Monaco, Qatar, Thailand and the United Kingdom of Great Britain and Northern Ireland.²³ Although the amount of information received is rather small, it allows for some observations and comparisons concerning the four clusters mentioned above.

1. INTERNATIONAL TREATIES CONTAINING THE *AUT DEDERE AUT JUDICARE* OBLIGATION

64. All responding States confirmed their interest in and commitment to entering into treaties, both bilateral and multilateral, which establish an *aut dedere aut judicare* obligation. All responding States, except Austria, presented a rather lengthy list of multilateral treaties, to which they are parties, providing for the *aut dedere aut judicare* obligation.²⁴ Among those treaties a leading role seems to be played by numerous conventions, both universal and regional, dealing with the suppression and prevention of various forms of terrorism. Some States, such as Austria and Japan, have stressed that they have made no reservations to the relevant multilateral treaties limiting the application of the *aut dedere aut judicare* obligation.

65. In the realm of bilateral treaties, a prevailing position is taken by extradition treaties. Some responding States placed particular emphasis on the bilateral treaties containing an *aut dedere aut judicare* obligation (Austria, Monaco).

2. DOMESTIC LEGAL REGULATIONS

66. The relevant domestic regulations providing for the obligation to extradite or prosecute from some of the above-mentioned seven States were already summarized by the Special Rapporteur in the preliminary report. For instance, Austrian domestic regulations, following the 1803 legislation, includes provisions reflecting the *aut dedere aut judicare* principle in connection with universal jurisdiction.²⁵

²³ Thirteen more States have since responded: Chile, Ireland, Kuwait, Latvia, Lebanon, Mexico, Poland, Serbia, Slovenia, Sri Lanka, Sweden, Tunisia and the United States of America (see A/CN.4/479 and Add. 1–4, reproduced in the present volume).

²⁴ Those instruments are, to a great extent, the treaties and conventions listed by the Special Rapporteur (following a memorandum by Amnesty International) in his preliminary report (see *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, para. 37).

²⁵ *Ibid.*, para. 44.

67. Other States that have presented their observations on their domestic legislations concerning the obligation to extradite or prosecute put special emphasis on the circumstances and conditions for the possible application of that obligation. As was noted, for example, by Monaco, according to its legislation:

(a) The application of the *aut dedere aut judicare* principle is closely linked to the various grounds for refusal of extradition on which the requested State can rely;

(b) The *aut dedere aut judicare* principle is implemented when extradition is refused because of the nationality of the alleged offender;

(c) The *aut dedere aut judicare* principle will be applied only when the courts of Monaco have jurisdiction over foreigners for offences committed abroad.

68. Finally, some States, for instance, the United Kingdom, declared that they do not have any specific legal regulations concerning the obligation to extradite or prosecute. However, on the other hand, the United Kingdom has several statutory provisions establishing jurisdiction for specified crimes, thus enabling the relevant national authorities to prosecute offences, when there is implementing legislation for the international treaties by which the United Kingdom is bound. Furthermore, domestic legislation allows the United Kingdom to extradite for trial when requested by another party to an international convention and where the conduct in question is covered by the provisions of that convention.²⁶

3. JUDICIAL PRACTICE

69. There was a very broad range of different answers regarding the judicial practice of States reflecting the application of the *aut dedere aut judicare* obligation. On the one hand, as was stated by the Austrian authorities, the *aut dedere aut judicare* principle plays a crucial role in Austrian practice. On the other hand, Thailand indicated “no” in response to the question regarding judicial practice. Similarly, Monaco has identified no specific judgement concerning the direct application of the *aut dedere aut judicare* principle.

70. In Austria, the Public Prosecutor, on the basis of the relevant provisions of the Austrian Penal Code,²⁷ has to examine the institution of proceedings in the country if the extradition of a suspect cannot be granted for reasons other than the nature or characteristics of the offence. However, no court decisions instituting proceedings in Austria following the refusal of extradition explicitly refer to the above-mentioned provisions. Therefore, the lack of court decisions seems to weaken the importance of the *aut dedere aut judicare* principle in Austrian judicial practice.

71. Also, in the judicial practice of the United Kingdom, the nature of the obligation to extradite or prosecute was

²⁶ See section 193 of the Extradition Act 2003.

²⁷ See section 65, paragraph 1, No. 2, reflecting the *aut dedere aut judicare* principle in connection with universal jurisdiction.

discussed only in the litigation surrounding the extradition of ex-President Pinochet,²⁸ without any direct reference to the obligation in specific judgements.

4. CRIMES OR OFFENCES

72. The identification of crimes or offences to which the principle of the *aut dedere aut judicare* obligation is applied in the legislation or practice of the above-mentioned States mostly makes no special distinction between certain categories of offences. Consequently:

(a) In Austria, all crimes and offences punishable under the Austrian Penal Code are subject to the obligation;

²⁸ See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, *Law Reports 2000*, Appeal Cases, vol. 1, p. 61; *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), *ibid.*, p. 147; and *T v. Secretary of State for the Home Department*, *Law Reports 1996*, Appeal Cases, p. 742.

(b) In Croatia, the *aut dedere aut judicare* obligation is applicable to all criminal offences;

(c) In the judicial system of Japan, the obligation to extradite or prosecute stipulated by the relevant treaties concluded by Japan is implemented on the basis of the Law of Extradition, the Penal Code and other related laws and regulations;

(d) In Monaco, following articles 7–10 of the Code of Penal Procedure, the *aut dedere aut judicare* principle may be implemented in various cases, including crimes against State security, counterfeiting, crimes or offences against diplomatic, consular or national premises, and torture;

(e) In the United Kingdom, the principle to extradite or prosecute applies to the following crimes: torture, hostage-taking, certain offences against civil aviation and maritime safety and specified terrorist offences.

CHAPTER II

Draft rules on the obligation to extradite or prosecute: starting point

A. Scope of application of the draft articles

73. The Special Rapporteur is of the opinion that one of the aims of the present report, as was the case with the preliminary report, is to encourage and continue a discussion in the Commission on both methodological and substantive issues, in particular concerning the scope of the topic.

74. In connection with the scope of the topic, it also seems necessary to decide if special attention should be paid to the link between the principle of universal jurisdiction and the obligation to extradite or prosecute. In particular, in the Sixth Committee, that question was dealt with in different ways by various States—that either demanded joint treatment of those legal concepts or called for their consideration as separate topics.²⁹

75. Although the comments and information provided by States are still far from being complete and from giving a solid and definite basis for constructive conclusions, it seems possible, already at the present stage, to formulate provisionally a draft article concerning the scope of application of future draft articles on the obligation to extradite or prosecute. That can be done without prejudice to a final decision on the substantive extent of the present exercise, for instance on whether (or not) to include in the draft articles such elements as universal jurisdiction.

76. Taking into account the considerations made in the preliminary and in the present report, the Special Rapporteur would like to suggest the following formulation of that first article.

“Article 1. Scope of application

“The present draft articles shall apply to the establishment, content, operation and effects of the alternative

obligation of States to extradite or prosecute persons under their jurisdiction.”

77. Three elements proposed in draft article 1 could be more closely analysed when formulating a final version of the provision. They are set out below:

(a) The time element—i.e. the extension of the application of the future draft articles to the periods of establishment, operation and production of effects of the obligation in question;

(b) The substantive element, namely, a specific, alternative obligation of States to extradite or prosecute;

(c) The personal element, namely, the persons against whom the above-mentioned obligation of States may be exercised.

78. The Special Rapporteur, in a short survey of those three elements, would like to identify the main problems connected with them, which could become a subject for discussion by the members of the Commission.

1. TIME ELEMENT

79. It is not possible to define the scope of application of the draft articles on the obligation to extradite or prosecute without taking into account the various periods of establishing, operating and producing effects of the obligation in question. Those draft articles cannot be limited exclusively to a presentation of that obligation in a “frozen” form, separate from its origins and the subsequent results of its operation.

80. Consequently, there are at least three specific periods of time, connected with the establishment, operation and effects of the *aut dedere aut judicare* obligation, that possess their particular characteristics, which should be reflected in the draft articles.

²⁹ See A/CN.4/577 and Add.1–2, para. 104.

81. As regards the period of establishment of the obligation to extradite or prosecute, a matter of paramount importance seems to be the question of the sources of the obligation. Questions connected with the other periods shall be identified later in accordance with the preliminary plan of action contained in the preliminary report.³⁰

2. SUBSTANTIVE ELEMENT

82. This part of draft article 1 indicates the alternative nature of the *aut dedere aut judicare* obligation—a characteristic which has to be developed in subsequent articles. The specific construction of that obligation is important for its substantive content. In subsequent draft articles, a more detailed analysis of the mutual impact of the form and the substance of the obligation to extradite or prosecute seems to be required.

83. For the purpose of the present exercise, the term “obligation” seems to be more suitable from the legal point of view than the more passive term “principle”, suggested by some members of the Commission and delegations in the Sixth Committee.

84. Similarly, some members contested the concept of obligation, favouring the right of States to extradite or prosecute. The question was raised whether the State concerned is obliged, or only authorized, to extradite or prosecute. Even while accepting the formula of an obligation, some members wondered whether that obligation was an absolute or just a relative one.

85. As had already been noted in the preliminary report, the Special Rapporteur favoured the concept of “obligation”, which is more useful for codification purposes, rather than the other suggested structure of a “principle”. The concept of obligation also seems to be more appropriate given the rather generally recognized nature of *aut dedere aut judicare* as a secondary rule and not a primary one.

86. Furthermore, as was mentioned before, in its work on the draft statute for an international criminal court, adopted in 1994, as well as in the process of elaboration of the draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996, the Commission consistently used the expression “the obligation to extradite or prosecute”.³¹

87. It has to be stressed, however, that, even while he endorses the concept of obligation, the Special Rapporteur agrees with the suggestion that the obligation in question, as well as its elements—*dedere* and *judicare*—should be very carefully analysed, taking into account, for instance, its specific character as a conditional obligation, as was also pointed out by some members of the Commission. That conditional nature seems to be especially noteworthy with regard to the first part of the alternative obligation, namely, extradition.

88. Similarly, even while preferring to deal with the *aut dedere aut judicare* rule first of all in the context of obligations of States, the Special Rapporteur agrees with the observations of some members that in certain situations

those obligations may be closely connected with appropriate rights of States, especially concerning the establishment of State jurisdiction over certain persons.

89. The alternative structure, deriving directly from the traditional expression *aut dedere aut judicare*, suggests a choice between “extradition” and “prosecution”, although during the debate in the Commission the opinion was expressed that *aut dedere aut judicare* is a conditional obligation and not an alternative one. The Commission has to decide whether, and to what extent, an obligation to extradite or prosecute exists, and whether it is an absolute or relative one. There are numerous questions which may appear in connection with that alternative.

90. The first question is: which part of that alternative should have priority in the practice of implementing the obligation by States, or do States have freedom of choice between the extradition and the prosecution of the persons concerned? And, recalling what was said before about the possibility of extradition provided in some legislations not only for the purpose of prosecution but also for the enforcement of a judgement, in practical terms it is possible that a given State may have a chance to exercise both parts of the *aut dedere aut judicare* obligation towards the same person in the same case (albeit in the reverse order: first, *judicare*, and later, *dedere*).

91. The second question is whether the custodial State, which faces the request for extradition, has sufficient margin of discretion to refuse it when it is ready to enforce its own means of prosecution in that case or when the arguments upon which the request for extradition is based appear to be wrongful and contrary to the legal system of the custodial State.

92. The third question is the following: does the *aut dedere aut judicare* obligation include, or does it exclude, the possibility of any third choice? That question has special importance, in particular in the light of the alternative jurisdiction of the International Criminal Court established on the basis of the Rome Statute of the International Criminal Court. The concept of “triple alternative”, considering a possibility of parallel jurisdictional competences to be exercised not only by the interested States, but also by international criminal courts, had already been presented by the Special Rapporteur in the preliminary report.³²

93. There were, however, some opinions expressed in the Commission and in the Sixth Committee that the concept of “triple alternative” should be treated very carefully and within a very limited scope. As was, for instance, stressed by some members of the Commission, the distinction between extradition and surrender to the International Criminal Court should be taken into account.

3. PERSONAL ELEMENT

94. The obligation of States to extradite or prosecute is not an abstract one, but is always connected with the necessary activities to be undertaken by States *vis-à-vis* particular natural persons. Either extradition or prosecution in a given case has to be addressed to defined persons.

³⁰ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571,

³¹ See footnotes 7–8 above.

³² See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, paras. 52–54.

95. While jurisdiction may be established and exercised *vis-à-vis* both natural and legal persons, extradition can be used exclusively with regard to natural persons. Consequently, it seems that the *aut dedere aut judicare* obligation may be considered only in connection with natural persons.

96. A further condition for natural persons to be covered under the *aut dedere aut judicare* obligation is that they be under the jurisdiction of the States bound by that obligation “under their jurisdiction”. That does not mean, of course, that such natural persons should be physically present in the territory of a given State or in another way be “in the hands” of that State (for example, to be on board aircraft registered in that State).

97. The terms “under their jurisdiction”, proposed in draft article 1, mean both actual jurisdiction that is effectively exercised and potential jurisdiction which a State is entitled to establish over persons committing particular offences. They cover jurisdiction established, or to be established, on various grounds, taking into account that, as was noted in the report prepared by one non-governmental organization, there are in practice:

[D]ifferent types of jurisdiction, including the five principles of geographic jurisdiction (*ratione loci*). These are territorial jurisdiction (based on the place where the crime occurred) and four types of extraterritorial jurisdiction: active personality jurisdiction (based on the nationality of the suspect), passive personality jurisdiction (based on the nationality of the victim), protective jurisdiction (based on harm to the forum state’s own national interests) and universal jurisdiction (not linked to the nationality of the suspect or victim or to harm to the forum state’s own national interests).³³

98. Furthermore, in connection with the concept of jurisdiction used in the present exercise, it has to be recalled that:

Three types of extraterritorial jurisdiction should be distinguished: (1) legislative, prescriptive or substantive (the power of a state to apply its own law to cases with a foreign component), (2) executive (the power of a state to perform acts in another state’s territory) and (3) judicial or adjudicative (the power of a state’s courts to try cases with a foreign component).³⁴

99. It seems that for the identification of rules governing the establishment, content, operation and effects of the obligation to extradite or prosecute, the concept of jurisdiction should be applied in its wider form, including all possible types of jurisdiction—both territorial and extraterritorial. Here, the Commission will have to decide precisely to what extent the concept of universal jurisdiction should be used for a final definition of the scope of the *aut dedere aut judicare* obligation. Bearing in mind all those particularities, a better picture may emerge of the concept of jurisdiction that is supposed to be dealt with in the present report.

100. When talking about the persons who are (actually or potentially) under the jurisdiction of States bound by the obligation to extradite or prosecute, one cannot forget the crimes or offences, to which the obligation is going

to extend, committed by the persons concerned (or, at least, which those persons are suspected or accused of having committed). However, the Special Rapporteur is of the opinion that, for the purposes of the elaboration of the provision dealing with the scope of application of the draft articles on the *aut dedere aut judicare* obligation, it is not essential to include any direct remark concerning those crimes or offences in the actual text of draft article 1.

101. It will, of course, be impossible to avoid the question of such crimes or offences being developed in subsequent draft articles, since the problem of those crimes or offences, to which the obligation in question has to be, or could be, applied, was considered as one of the most important matters of the topic by the participants in the relevant debates both in the Commission and within the Sixth Committee. Consequently, in subsequent draft articles, space will be devoted to a much more precise identification of the crimes or offences covered by the obligation to extradite or prosecute, on the basis either of binding international treaties or of national legislation and practice.

102. At the same time, the consideration of international customary rules as a possible source of criminalization of certain acts seems necessary and, consequently, so does the extension of the scope of the *aut dedere aut judicare* obligation to such internationally recognized criminal acts. There are, however, differences of opinion concerning whether any acts, and if so what kind of acts, could be recognized as crimes or offences covered by the obligation in question.³⁵

103. The Special Rapporteur had already highlighted that problem in the preliminary report, with the various proposals made by States and in the legal literature concerning the crimes or offences which could, or should, be covered by that obligation. It is worth noting that, to some extent, such crimes or offences would fall among the crimes subject to universal jurisdiction. The efforts to identify those crimes continue in numerous proposals made by States and in the legal literature.³⁶

104. A further proposal may be recalled herein in addition to those already presented in the preliminary report; it is linked to the concept of what are known as “serious crimes under international law” and was referred to in *The Princeton Principles on Universal Jurisdiction*.³⁷ According to that proposal, the application of universal jurisdiction to crimes described therein as “serious crimes under international law” would be possible (principle 2, para. 1),³⁸ with the potential for extending that jurisdiction to other crimes

³⁵ See paragraphs 31–33 above.

³⁶ See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, paras. 20–22.

³⁷ Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction*.

³⁸ “Principle 2—Serious Crimes Under International Law

“1. For purposes of these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.”

(*Ibid.*, p. 29)

³³ Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, Introduction, p. 7.

³⁴ *Ibid.*, chap. one, p. 1.

(*ibid.*, para. 2),³⁹ and with the simultaneous application of the *aut dedere aut judicare* obligation (principle 10, para. 2).⁴⁰

B. Plan for further development

105. Draft article 1, dealing with the “scope of application of the draft articles”, as proposed in paragraph 76 of the present report, has to be accompanied directly by other articles connected substantively and formally with the first one. As usual, in conformity with the approach followed in other drafts elaborated by the Commission, the provision following the initial one will include a definition or description of the terms used for the purposes of the draft articles. Although it would be difficult at the present stage to give a full list of such terms, some of them should simply derive from the proposed text of draft article 1.

106. Consequently, a future draft article 2, entitled “Use of terms”, will provide a definition, “for the purposes of the present draft articles”, at least of such terms as extradition, prosecution and jurisdiction. It would probably be useful to describe, in a more detailed way, the term “persons”, perhaps in connection with the crimes or offences committed by them. It seems that draft article 2 should remain open until the end of the exercise to give the opportunity to add other definitions and descriptions whenever necessary.

107. Another draft article (or even a set of articles) that may already be foreseen at the present stage is connected with a more detailed description of the principal *aut dedere aut judicare* obligation. Although there are still some differences of opinion concerning the issue of whether the obligation has a customary source, there is a rather general consensus as to the fact that international treaties are a more generally recognized source of the obligation to extradite or prosecute.⁴¹

108. The growing general nature of such recognition seems to be confirmed by a growing number of international treaties—both multilateral and bilateral—and may serve as justification for at least a provisional formulation of a draft article X, stating that: “Each State is obliged to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.”

³⁹ “Principle 2—Serious Crimes Under International Law

“...

“2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.”

(*Ibid.*)

⁴⁰ “Principle 10—Grounds for Refusal of Extradition

“...

“2. A state which refuses to extradite on the basis of this Principle shall, when permitted by international law, prosecute the individual accused of a serious crime under international law as specified in principle 2(1) or extradite such person to another state where this can be done without exposing him or her to the risks referred to in paragraph 1.”

(*Ibid.*, p. 34)

⁴¹ See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, paras. 35–39.

109. That formulation alone cannot serve as sufficient background for the codification of a generally binding customary rule, but the development of international practice based on the growing number of treaties establishing and confirming such an obligation may lead at least to the beginning of the formulation of an appropriate customary norm.⁴² On the basis of the information contained in the submissions made so far by States, and of the documentation gathered by the Secretariat, in his next report the Special Rapporteur will try to present a systematic survey of the relevant international treaties, together with a classification of the extent of the obligations contained in them. Various criteria may be identified and applied to such a classification.

110. Starting with the best known, and the most often applied, of The Hague model treaties, based on the formula contained in article 7 of the Convention for the suppression of unlawful seizure of aircraft,⁴³ some variants of the application of the model have already been developed and identified in the legal literature.⁴⁴

111. Moreover, some of the treaties imposing the *aut dedere aut judicare* obligation follow, not the so-called “offence-oriented approach” (as in article 7 of the Convention for the suppression of unlawful seizure of aircraft, mentioned above), but rather the “offender approach”, reflected, for instance, in article 6, paragraph 2, of the European Convention on Extradition⁴⁵ and in the United Nations Model Treaty on Extradition.⁴⁶

112. In any case, if a larger number of treaties incorporating clauses that formulate in one way or another the obligation to extradite or prosecute can be identified as binding for a growing number of States, then a more solid basis can be established for further consideration.

⁴² “If a state accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law.”

(Enache-Brown and Fried, “Universal crime, jurisdiction and duty: the obligation of *aut dedere aut judicare* in international law”, p. 629)

⁴³ Under article 7 of the Convention: “The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.”

⁴⁴ For more examples, see Plachta, “*Aut dedere aut judicare*: an overview of modes of implementation and approaches”, p. 360.

⁴⁵ Under article 6, paragraph 2, of that Convention: “If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.”

⁴⁶ Annexed to General Assembly resolution 45/116 of 14 December 1990. Under article 4 (Optional grounds for refusal) of this Model Treaty:

“Extradition may be refused in any of the following circumstances:

(a) If the person whose extradition is requested is a national of the requested State. Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested.”

Thereafter, the question could also be considered of whether a growing quantity of such obligations accepted by States may be considered justification for the change of quality of those obligations—from purely treaty obligations to generally binding customary rules.

113. Apart from the question of the treaty background for the *aut dedere aut judicare* obligation, there is also another source of interesting suggestions concerning the formulation of other subsequent draft articles: the previous observations made by the Commission, which—as had already been mentioned in the preliminary report⁴⁷—incorporated the *aut dedere aut judicare* rule in the 1996 draft Code of Crimes against the Peace and Security of Mankind and simultaneously explained the obligation and its rationale.

114. Certain formulations were included in those explanations which could now serve as *sui generis* directives for possible further draft articles on the obligation to extradite or prosecute. They contain, for instance, quasi-rules such as:

(a) The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present;

(b) The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition;

(c) The custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction;

(d) The obligation to extradite or prosecute applies to a State which has custody of “an individual alleged to have committed a crime”.⁴⁸

115. The Special Rapporteur would like to stress that he is not formally presenting those quasi-rules as proposals for draft articles. They are still just very preliminary ideas regarding the future substance and form of such draft articles. The ideas were once expressed by the Commission, though in a different context, and therefore the Special Rapporteur saw fit to bring them to the attention of the members of the Commission for their comments.

116. At the present stage, the Special Rapporteur would like to confirm that the preliminary plan of action that was formulated in ten main points, as contained in chapter VI of the preliminary report,⁴⁹ remains the main road map for his further work, including the continued gathering and analysis of highly informative materials concerning legislation (international and national), judicial decisions, practice of States and doctrine, collected with the kind assistance of the Secretariat. It should create sufficient background for the effective elaboration of subsequent draft articles.

⁴⁷ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, para. 10. See also the text of the relevant article of the draft Code of Crimes against the Peace and Security of Mankind reproduced in footnote 7 above.

⁴⁸ *Yearbook ... 1996*, vol. II (Part Two), p. 31, para. (3) of the commentary to article 9 of the draft Code of Crimes against the Peace and Security of Mankind.

⁴⁹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, para. 61.

THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

[Agenda item 6]

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Comments and observations received from Governments

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CONTENTS

	Page
Multilateral instruments cited in the present report	82
INTRODUCTION	84
COMMENTS AND OBSERVATIONS RECEIVED FROM GOVERNMENTS	85
A. General comments	85
United States of America	85
B. International treaties by which a State is bound, containing the obligation to extradite or prosecute (<i>aut dedere aut judicare</i>), and reservations made by that State to limit the application of this obligation	86
Austria	86
Chile	86
Croatia	86
Ireland	87
Japan	87
Kuwait	87
Latvia	88
Lebanon	88
Mexico	88
Monaco	89
Poland	90
Qatar	91
Serbia	91
Slovenia	92
Sri Lanka	92
Sweden	93
Thailand	93
Tunisia	93
United Kingdom of Great Britain and Northern Ireland	94
United States of America	94
C. Domestic legal regulation adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute	95
Austria	95
Chile	95
Croatia	95
Ireland	95
Kuwait	96
Latvia	96
Lebanon	97
Mexico	98
Monaco	98
Poland	99
Qatar	100
Serbia	100
Slovenia	102
Sri Lanka	102
Sweden	103
Thailand	104
Tunisia	104
United Kingdom of Great Britain and Northern Ireland	105
United States of America	105

D. Judicial practice of a State reflecting the application of the <i>aut dedere aut judicare</i> obligation	105
Austria	105
Chile	105
Croatia	105
Ireland	105
Latvia	105
Lebanon	105
Mexico	105
Monaco	105
Poland	106
Serbia	106
Slovenia	106
Sri Lanka	107
Thailand	107
United Kingdom of Great Britain and Northern Ireland	107
United States of America	107
E. Crimes or offences to which the principle of the <i>aut dedere aut judicare</i> obligation is applied in the legislation or practice of a State	107
Austria	107
Chile	107
Croatia	107
Ireland	107
Japan	107
Mexico	108
Monaco	108
Poland	108
Slovenia	108
United Kingdom of Great Britain and Northern Ireland	108

Multilateral instruments cited in the present report

Source

International Convention for the Suppression of the Traffic in Women and Children (Geneva, 30 September 1921)	League of Nations, <i>Treaty Series</i> , vol. IX, No. 269, p. 415.
International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications (Geneva, 12 September 1923)	<i>Ibid.</i> , vol. XXVII, No. 685, p. 213.
Code of Private International Law (Bustamante Code) (Convention on Private International Law) (Havana, 20 February 1928)	<i>Ibid.</i> , vol. LXXXVI, p. 254.
International Convention for the Suppression of Counterfeiting Currency (Geneva, 20 April 1929)	<i>Ibid.</i> , vol. CXII, No. 2623, p. 371.
Optional Protocol regarding the Suppression of Counterfeiting Currency (Geneva, 20 April 1929)	<i>Ibid.</i> , vol. CXII, No. 2624, p. 395.
Convention on Extradition (Montevideo, 26 December 1933)	<i>Ibid.</i> , vol. CLXV, No. 3803, p. 45.
Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs (Geneva, 26 June 1936)	<i>Ibid.</i> , vol. CXCVIII, No. 4648, p. 299.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, No. 1021, p. 277.
International Agreement for the Suppression of the White Slave Traffic, signed at Paris on 18 May 1904, and as amended by the Protocol (Lake Success, New York, 4 May 1949)	<i>Ibid.</i> , vol. 92, No. 1257, p. 19.
International Convention for the Suppression of the White Slave Traffic, signed at Paris on 4 May 1910, and as amended by the Protocol (Lake Success, New York, 4 May 1949)	<i>Ibid.</i> , vol. 98, No. 1358, p. 101.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	<i>Ibid.</i> , vol. 75, Nos. 970–973, pp. 31, 85, 135 and 287.
Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field	
Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea	
Geneva Convention relative to the treatment of prisoners of war	
Geneva Convention relative to the protection of civilian persons in time of war	

Source

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.
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (New York, 2 December 1949)	<i>Ibid.</i> , vol. 96, No. 1342, p. 271.
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Slavery Convention, signed at Geneva on 25 September 1926, and amended by the Protocol (New York, 7 December 1953)	<i>Ibid.</i> , vol. 212, No. 2861, p. 17.
European Convention on Extradition (Paris, 13 December 1957)	<i>Ibid.</i> , vol. 359, No. 5146, p. 273.
Additional Protocol to the European Convention on Extradition (Strasbourg, 15 October 1975)	<i>Ibid.</i> , vol. 1161, No. A-5146, p. 450.
Second Additional Protocol to the European Convention on Extradition (Strasbourg, 17 March 1978)	<i>Ibid.</i> , vol. 1496, No. A-5146, p. 328.
Convention on the High Seas (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 450, No. 6465, p. 11.
Single Convention on Narcotic Drugs, 1961 (New York, 30 March 1961)	<i>Ibid.</i> , vol. 520, No. 7515, p. 151.
Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (New York, 8 August 1975)	<i>Ibid.</i> , vol. 976, No. 14152, p. 105.
Convention on offences and certain other acts committed on board aircraft (Tokyo, 14 September 1963)	<i>Ibid.</i> , vol. 704, No. 10106, p. 219.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Convention for the suppression of unlawful seizure of aircraft (The Hague, 16 December 1970)	<i>Ibid.</i> , vol. 860, No. 12325, p. 105.
Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance (Washington, 2 February 1971)	<i>Ibid.</i> , vol. 1438, No. 24381, p. 191.
Convention on psychotropic substances (Vienna, 21 February 1971)	<i>Ibid.</i> , vol. 1019, No. 14956, p. 175.
Convention for the suppression of unlawful acts against the safety of civil aviation (Montreal, 23 September 1971)	<i>Ibid.</i> , vol. 974, No. 14118, p. 177.
Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the above-mentioned Convention (Montreal, 24 February 1988)	<i>Ibid.</i> , vol. 1589, No. 14118, p. 474.
International Convention for the Prevention of Pollution from Ships (London, 2 November 1973, as amended by the Protocol of 1978 (London, 17 February 1978)	<i>Ibid.</i> , vol. 1340, No. 22484, pp. 62 and 184.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	<i>Ibid.</i> , vol. 1015, No. 14861, p. 243.
Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York, 14 December 1973)	<i>Ibid.</i> , vol. 1035, No. 15410, p. 167.
European Convention on the suppression of terrorism (Strasbourg, 27 January 1977)	<i>Ibid.</i> , vol. 1137, No. 17828, p. 93.
Protocol amending the European Convention on the Suppression of Terrorism (Strasbourg, 15 May 2003)	Council of Europe, <i>European Treaty Series</i> , No. 190.
Convention on the Physical Protection of Nuclear Material (Vienna, 26 October 1979)	United Nations, <i>Treaty Series</i> , vol. 1456, No. 24631, p. 101.
International Convention against the taking of hostages (New York, 17 December 1979)	<i>Ibid.</i> , vol. 1316, No. 21931, p. 205.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , vol. 1833, No. 31363, p. 3.
Riyad Arab Agreement for Judicial Cooperation (Riyad, 6 April 1983)	<i>A Collection of the Council's Documents</i> (Rabat, Council of Arab Ministers of Justice), vol. 2 (1988), p. 96.
Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984)	United Nations, <i>Treaty Series</i> , vol. 1465, No. 24841, p. 85.
Inter-American Convention to Prevent and Punish Torture (Cartagena de Indias, 9 December 1985)	OAS, <i>Treaty Series</i> , No. 67.
SAARC Regional Convention on Suppression of Terrorism (Katmandu, 4 November 1987)	<i>International Instruments related to the Prevention and Suppression of International Terrorism</i> (United Nations publication, Sales No. E.03.V.9), p. 153.

Source

Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism (Islamabad, 6 January 2004)	Website of the South Asian Association for Regional Cooperation (http://www.saarc-sec.org)
Convention for the suppression of unlawful acts against the safety of maritime navigation (Rome, 10 March 1988)	United Nations, <i>Treaty Series</i> , vol. 1678, No. 29004, p. 201.
Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf (Rome, 10 March 1988)	<i>Ibid.</i>
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	<i>Ibid.</i> , vol. 1582, No. 27627, p. 95.
International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989)	<i>Ibid.</i> , vol. 2163, No. 37789, p. 75.
SAARC Convention on Narcotic Drugs and Psychotropic Substances (Male, 23 November 1990)	<i>Mutual Assistance in Criminal and Business Regulatory Matters</i> , W. C. Gilmore, ed. Cambridge University Press, 1995, p. 185.
Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal, 1 March 1991)	United Nations, <i>Treaty Series</i> , vol. 2122, No. 36984, p. 359.
Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (Geneva, 3 September 1992)	<i>Ibid.</i> , vol. 1974, No. 33757, p. 45.
Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)	<i>Ibid.</i> , vol. 2051, No. 35457, p. 363.
International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997)	<i>Ibid.</i> , vol. 2149, No. 37517, p. 256.
Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, 17 December 1997)	ILM, vol. XXXVII, No. 1 (January 1998), p. 4.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, <i>Treaty Series</i> , vol. 2187, No. 38544, p. 3.
Criminal Law Convention on Corruption (Strasbourg, 27 January 1999)	<i>Ibid.</i> , vol. 2216, No. 39391, p. 225.
International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)	<i>Ibid.</i> , vol. 2178, No. 38349, p. 197.
United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	<i>Ibid.</i> , vol. 2225, No. 39574, p. 209.
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	<i>Ibid.</i> , vol. 2237, No. A-39574, p. 319.
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	<i>Ibid.</i> , vol. 2241, No. A-39574, p. 480.
Convention on cybercrime (Budapest, 23 November 2001)	<i>Ibid.</i> , vol. 2296, No. 40916, p. 167.
United Nations Convention against Corruption (New York, 31 October 2003)	<i>Ibid.</i> , vol. 2349, No. 42146, p. 41.
International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005)	<i>Ibid.</i> , vol. 2445, No. 44004, p. 89.
Council of Europe Convention on the Prevention of Terrorism (Warsaw, 16 May 2005)	Council of Europe, <i>European Treaty Series</i> , No. 196.

Introduction

1. The present report has been prepared pursuant to General Assembly resolution 61/34 of 4 December 2006, in which the Assembly, *inter alia*, invited Governments to provide to the International Law Commission information on legislation and practice regarding the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”.

2. At its fifty-eighth session in 2006, the Commission decided in accordance with article 19, paragraph 2, of its

statute,¹ to request Governments, through the Secretary-General, to submit information concerning their legislation and practice, particularly more contemporary, with regard to the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”. More specifically, Governments were requested to provide information concerning:

¹ General Assembly resolution 174 (III) of 21 November 1947, annex.

(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservations made by that State to limit the application of this obligation;

(b) Domestic legal regulation adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute (*aut dedere aut judicare*);

(c) Judicial practice of a State reflecting the application of the *aut dedere aut judicare* obligation;

(d) Crimes or offences to which the principle of the *aut dedere aut judicare* obligation is applied in the legislation or practice of a State.²

² Yearbook ... 2006, vol. II (Part Two), p. 21, para. 30.

3. As at 1 March 2007, written observations had been received from the following seven States: Austria, Croatia, Japan, Monaco, Qatar, Thailand and the United Kingdom of Great Britain and Northern Ireland. Additional information has since been received from Chile, Ireland, Kuwait, Latvia, Lebanon, Mexico, Poland, Serbia, Slovenia, Sri Lanka, Sweden, Tunisia and the United States of America.

4. The responses from Governments have been organized around the four clusters of information referred to in paragraph 2 above.

Comments and observations received from Governments

A. General comments

UNITED STATES OF AMERICA

The United States believes that its practice, and that of other countries, reinforces the view that there is not a sufficient basis in customary international law or State practice to formulate draft articles that would extend an obligation to extradite or prosecute beyond binding international legal instruments that contain such obligations.

The United States does not believe that there is a general obligation under customary international law to extradite or prosecute individuals for offences not covered by international agreements containing such an obligation. Rather, the United States believes that States only undertake such obligations by joining binding international legal instruments that contain extradite or prosecute provisions and that those obligations only extend to other States that are parties to such instruments. A number of important policy interests support this conclusion and practice.

First, in the context of an offence-creating convention to which a State is a party, there is no question that the State in which an offender is found will have criminalized and established jurisdiction over the offence in question. But if the obligation to extradite or prosecute were free-standing, that would not always be the case. One State could request the extradition of a person from another State in which the conduct in question was not a crime (and for which, as a result, extradition would not normally be available, as it generally requires dual criminality), and the State which had not criminalized the conduct would nevertheless be required to prosecute the person. Such a result would put the requested State in an untenable position where its domestic law would preclude both prosecution and extradition.

Secondly, and similarly, a free-standing obligation to extradite or prosecute could be seen as implying an obligation to extradite even in the absence of treaties or other legal provisions that might be required by a State as a matter of domestic law to authorize such action. In the United States, for example, a treaty relationship is required (with very limited exceptions) in order for the United States to extradite an offender to a requesting State. Therefore, if a State found that it lacked jurisdiction to prosecute an offender for an offence for which extradition was

requested by a State with which it did not have treaty relations, a Commission article establishing an obligation to extradite or prosecute could purport to requiring the State to extradite the offender even though it lacked the legal authority to do so under domestic law.

Thirdly, if there were a broad State practice of applying an extradite or prosecute regime, one would expect that most States would have enacted laws that generally confer extraterritorial jurisdiction over most offences based solely on the offender being found within their territory. This is not the case for the United States and, in its experience, it is not the case for many other States as well. To the contrary, such “found in” jurisdiction is quite limited and based primarily on the obligations of specific treaties. Thus, adoption of an extradite or prosecute regime would suggest a need for many States to dramatically expand their extraterritorial jurisdiction over offences committed anywhere in the world.

Fourthly, States around the world make and entertain thousands of extradition requests every year. Among those cases, there are undoubtedly many in which the requesting State would not want the requested State to prosecute the case if extradition were not possible. Extradition allows for the vindication of the rights and interests of the victim and the State where the offence occurred in a way that prosecution in a foreign State cannot always meet. Furthermore, there may be cases in which it is impossible for the requested country to prosecute because the underlying investigation did not accord with procedures required by its laws.

Finally, a decision by a State to enter into an extradition relationship with another State involves important considerations with respect to the other State’s adherence to rule of law, due process, human rights and other norms. A general obligation to extradite or prosecute would intrude on the sovereignty of States by either purporting to impose such a relationship where it was not desired by the State or requiring that State to undertake a sovereign act—prosecution—that it did not desire to undertake for legal, policy or other reasons.

The United States believes that the Commission should therefore not formulate draft articles on this topic. Rather, it should conclude that no such obligation exists outside international treaties.

B. International treaties by which a State is bound, containing the obligation to extradite or prosecute (*aut dedere aut judicare*), and reservations made by that State to limit the application of this obligation

AUSTRIA

The following bilateral treaties concluded by Austria contain the *aut dedere aut judicare* obligation:

(a) The Treaty between the Government of the Republic of Austria and the Government of Canada on Extradition, signed on 5 October 1998 in Ottawa (*Canada Gazette*, part I, vol. 134, No. 45, p. 3388). The relevant article 3, paragraph 2, reads as follows:

Extradition may be refused in any of the following circumstances:

(a) if the person whose extradition is requested is a national of the Requested State. Where the Requested State refuses to extradite a national of that State it shall, if the other State so requests, submit the case to the competent authorities in order that proceedings for the prosecution of the person in respect of all or any of the offences for which extradition has been requested may be taken;

(b) if the offence for which extradition is requested is subject to the jurisdiction of the Requested State and that State will prosecute that offence;

(b) The Extradition Treaty between the Government of the Republic of Austria and the Government of the United States of America, signed on 8 January 1998 in Washington, D.C. (*Federal Law Gazette III* No. 216/1999). The relevant article 3, paragraph (2), reads as follows:

If extradition is refused solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its authorities for prosecution.

Austria has made no reservations to relevant multilateral treaties which limit the application of the *aut dedere aut judicare* obligation.

CHILE

Chile submitted a list of multilateral treaties to which it is party: (a) the Convention on Extradition, promulgated by supreme decree of the Ministry of Foreign Affairs, No. 942 of 6 August 1935, *Diario Oficial* (19 August 1935), with the following States parties: Argentina, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, United States (art. II); and (b) the Code of Private International Law (book IV, third title), whose States parties are Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela (Bolivarian Republic of) (art. 345).

Chile also mentioned, in view of their special relevance, two multilateral treaties concerning specific offences to which Chile is party and which deal with the principle in question in their provisions on extradition: (a) the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, promulgated by supreme decree of the Ministry of Foreign Affairs, No. 543 of 1990, *Diario Oficial* (20 August

1990); and (b) the United Nations Convention against Transnational Organized Crime and its Protocols, promulgated by supreme decree of the Ministry of Foreign Affairs, No. 342 of 20 December 2004, *Diario Oficial* (16 February 2005).

Chile also submitted a list of bilateral treaties: (a) the Treaty on Extradition with Australia, signed in Canberra on 6 October 1993 and promulgated by supreme decree of the Ministry of Foreign Affairs, No. 1844 of 27 December 1995, *Diario Oficial* (20 February 1996) (art. 5, para. 1); (b) the Treaty on Extradition with Bolivia, signed in Santiago on 15 December 1910 and promulgated by decree No. 500 of 8 May 1931, *Diario Oficial* (26 May 1931) (art. IV); (c) the Treaty on Extradition with Brazil, signed in Rio de Janeiro on 8 November 1935 and promulgated by decree No. 1180 of 18 August 1937, *Diario Oficial* (30 August 1937) (art. I, para. 1); (d) the Treaty on Extradition with Colombia, signed in Bogota on 16 November 1914 and promulgated by decree No. 1472 of 18 December 1928, *Diario Oficial* (7 January 1929) (art. IV); (e) the Convention on Extradition with Ecuador, signed in Quito on 10 November 1897 and promulgated on 27 September 1899, *Diario Oficial* (9 October 1899) (art. VII, para. 2); (f) the Treaty on Extradition with the Republic of Korea, signed in Seoul on 21 November 1994, promulgated by decree No. 1417 of 1 September 1997, *Diario Oficial* (23 October 1997) (art. 6, para. 2); (g) the Treaty on Extradition and Mutual Legal Assistance in Criminal Matters with Mexico, signed in Mexico City on 2 October 1990 and promulgated by supreme decree of the Ministry of Foreign Affairs, No. 1011 of 30 August 1993, *Diario Oficial* (30 November 1993) (art. 6, para. 2); (h) the Treaty on Extradition and Judicial Assistance in Criminal Matters with Nicaragua, signed in Santiago on 28 December 1993 and promulgated by supreme decree of the Ministry of Foreign Affairs, No. 411 of 8 June 2001, *Diario Oficial* (20 August 2001) (art. 7, para. 2); (i) the Treaty on Extradition with Paraguay, signed in Montevideo on 22 May 1897, *Diario Oficial* (13 November 1928) (art. VII, para. 2); (j) the Treaty on Extradition with Peru, signed in Lima on 5 November 1932 and promulgated by decree No. 1152 of 11 August 1936, *Diario Oficial* (27 August 1936) (art. IV); (k) the Treaty on Extradition and Judicial Assistance in Criminal Matters with Spain, signed on 14 April 1992 and promulgated by supreme decree of the Ministry of Foreign Affairs, No. 31 of 10 January 1995, *Diario Oficial* (11 April 1995) (art. 7, para. 2); (l) the Treaty on Extradition with Uruguay, signed in Montevideo on 10 May 1897, *Diario Oficial* (30 November 1909) (art. 7); and (m) the Treaty on Extradition with Venezuela, signed in Santiago on 2 June 1962 and promulgated by supreme decree of the Ministry of Foreign Affairs, No. 355 of 10 May 1965, *Diario Oficial* (1 June 1965) (art. 3, para. 2).

CROATIA

International treaties containing an obligation to extradite or prosecute for Croatia are: International Convention for the Suppression of Counterfeiting Currency; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; European Convention on Extradition; Single

Convention on Narcotic Drugs, 1961; Convention for the suppression of unlawful seizure of aircraft; Convention on psychotropic substances; Convention for the suppression of unlawful acts against the safety of civil aviation; Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; European Convention on the suppression of terrorism; International Convention against the taking of hostages; Convention against torture and other cruel, inhuman or degrading treatment or punishment; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Convention on the Safety of United Nations and Associated Personnel; International Convention against the Recruitment, Use, Financing and Training of Mercenaries; International Convention for the Suppression of Terrorist Bombings; International Convention for the Suppression of the Financing of Terrorism; Criminal Law Convention on Corruption; United Nations Convention against Transnational Organized Crime; Convention on cyber-crime; United Nations Convention against Corruption.

IRELAND

In submitting a list of international treaties by which it is bound, containing the obligation to extradite or prosecute, Ireland noted that while every effort had been made to ensure accuracy, the information submitted did not purport to constitute a definitive statement of Irish law. The list was as follows: Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field; Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; Geneva Convention relative to the treatment of prisoners of war; Geneva Convention relative to the protection of civilian persons in time of war; European Convention on Extradition; Convention for the suppression of unlawful seizure of aircraft; Convention for the suppression of unlawful acts against the safety of civil aviation; Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; International Convention against the taking of hostages; Convention on the Physical Protection of Nuclear Material; Convention against torture and other cruel, inhuman or degrading treatment or punishment; Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the Convention for the suppression of unlawful acts against the safety of civil aviation; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Convention for the suppression of unlawful acts against the safety of maritime navigation; Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf; Convention on the Safety of United Nations and Associated Personnel; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; International Convention for the Suppression of Terrorist Bombings; Rome Statute of the International Criminal Court; International Convention for the Suppression of the Financing of Terrorism; Criminal Law Convention on Corruption; Council of Europe Convention on the Prevention of Terrorism.

JAPAN

Japan has concluded the following multilateral treaties containing the obligation to extradite or prosecute, and it has made no reservations to limit the application of the obligation in any of these treaties: Convention for the Suppression of the Illicit Traffic in Dangerous Drugs; Geneva Conventions for the protection of war victims of 12 August 1949 (Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field; Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; Geneva Convention relative to the treatment of prisoners of war; Geneva Convention relative to the protection of civilian persons in time of war); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; Convention on the High Seas; Single Convention on Narcotic Drugs, 1961; Convention for the suppression of unlawful seizure of aircraft; Convention on psychotropic substances; Convention for the suppression of unlawful acts against the safety of civil aviation; Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflict; International Convention against the taking of hostages; Convention on the Physical Protection of Nuclear Material; United Nations Convention on the Law of the Sea; Convention for the suppression of unlawful acts against the safety of maritime navigation; Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Convention on the Safety of United Nations and Associated Personnel; International Convention for the Suppression of Terrorist Bombings; International Convention for the Suppression of the Financing of Terrorism.

Japan has also concluded bilateral extradition treaties with the Republic of Korea and the United States. However, they both stipulate only an obligation to extradite under certain conditions,¹ but not “the obligation to extradite or prosecute”.

¹ The complete text of the Treaty, provided by Japan, is available for consultation at the Codification Division of the Office of Legal Affairs.

KUWAIT

The obligation to extradite or prosecute (*aut dedere aut judicare*) is governed by the agreements on legal and judicial cooperation which Kuwait has concluded with other States, in accordance with the objectives of the extradition regime, namely State cooperation in combating crime and achieving justice.

Those international agreements, upon becoming fully binding, be it through ratification, accession or approval, come into effect as enforceable law under the legal system of Kuwait. Such agreements include: the Agreement on mutual extradition between Kuwait and Lebanon (20 July

1963);¹ the Agreement on legal and judicial cooperation in civil, commercial and criminal matters and matters of personal status between Kuwait and Egypt (6 April 1977);² the Agreement on legal and judicial cooperation in civil and criminal matters and matters of personal status between Kuwait and Tunisia (13 June 1977);³ the Agreement on legal and judicial cooperation in civil, commercial and criminal matters between Kuwait and Bulgaria (26 December 1988);⁴ the Agreement on legal and judicial cooperation in civil, commercial and criminal matters between Kuwait and Turkey (24 March 1997);⁵ and the Agreement on legal and judicial cooperation in civil and commercial matters, matters of personal status, the transfer of convicted persons and the settlement of estates between Kuwait and the Syrian Arab Republic (28 June 1999).⁶

¹ Approved pursuant to Act No. 6 of 1962.

² Ratified pursuant to Decree-Law No. 96 of 1977.

³ Ratified pursuant to Decree-Law No. 123 of 1977.

⁴ Ratified pursuant to Decree-Law No. 19 of 1989.

⁵ Ratified pursuant to Decree-Law No. 46 of 1998.

⁶ Ratified pursuant to Decree-Law No. 3 of 2004.

LATVIA

Latvia is party to several international treaties containing the obligation to extradite or prosecute, namely the European Convention on Extradition; the Convention for the suppression of unlawful seizure of aircraft; the Convention for the suppression of unlawful acts against the safety of civil aviation; the Additional Protocol to the European Convention on Extradition; the European Convention on the suppression of terrorism; the Second Additional Protocol to the European Convention on Extradition; the International Convention against the taking of hostages; the Convention on the Physical Protection of Nuclear Material; the Convention for the suppression of unlawful acts against the safety of maritime navigation and its Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf; the Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the Convention for the suppression of unlawful acts against the safety of civil aviation; the Criminal Law Convention on Corruption; the International Convention for the Suppression of the Financing of Terrorism; the United Nations Convention against Transnational Organized Crime; the Protocol amending the European Convention on the Suppression of Terrorism; and the United Nations Convention Against Corruption.

Latvia is also bound by various bilateral treaties containing the obligation: Agreement with Estonia and Lithuania on legal assistance and legal relations (11 November 1992); Agreement with the Russian Federation on legal assistance and legal relations in civil, family and criminal matters (3 February 1993); Agreement with the Russian Federation on transfer of sentenced persons (4 March 1993); Agreement with the Republic of Moldova on legal assistance and legal relations in civil, family and criminal matters (14 April 1993); Agreement with Belarus on legal assistance and legal relations in civil, family and criminal matters (21 February 1994); Agreement with Poland on legal assistance and legal relations in civil, family, labour

and criminal matters (23 February 1994); Agreement with Ukraine on legal assistance relations and legal relations in civil, family and criminal matters (23 May 1995); Agreement with Kyrgyzstan on legal assistance and legal relations in civil, family and criminal matters (10 April 1997); Agreement with Uzbekistan on legal assistance and legal relations in civil, family, labour and criminal matters (23 May 1997); Treaty on extradition with Australia (14 July 2000).

LEBANON

Lebanon submitted a list of relevant treaties as well as legislation giving effect to specific treaties, namely: the agreement on extradition between Lebanon and Yemen; the agreement on extradition and the exchange of judicial documents between Lebanon and Turkey; the law of 13 March 1964 on mutual extradition between Lebanon and Kuwait; the law of 17 November 1964 on extradition between Lebanon and Belgium; law No. 38/68 of 30 December 1968, concerning the agreement on the execution of judgements and the extradition of offenders between Lebanon and Tunisia; the law implemented by decree No. 3257 of 17 May 1972, relating to the judicial agreement between Lebanon and Italy; law No. 630 of 23 April 1997, concerning the judicial agreement between Lebanon and the Syrian Arab Republic; law No. 693 of 5 November 1998, concerning the judicial agreement with Egypt; law No. 467 of 12 December 2002, relating to the agreement on the transfer of convicted persons between Lebanon and Bulgaria; law No. 468 of 12 December 2002, on the agreement on extradition between Lebanon and Bulgaria; law No. 469 of 12 December 2002, concerning the agreement on judicial cooperation in criminal matters between Lebanon and Bulgaria; and law No. 470 of 12 December 2002, on the agreement on judicial cooperation in civil matters between Lebanon and Bulgaria.

MEXICO

Mexico submitted a list of multilateral treaties on substantive matters, as follows: (a) war crimes and crimes against humanity, namely, the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field; the Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; the Geneva Convention relative to the treatment of prisoners of war; the Geneva Convention relative to the protection of civilian persons in time of war; and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts; (b) prohibition of genocide, namely, the Convention on the Prevention and Punishment of the Crime of Genocide; (c) illegal use of weapons, namely, the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction; (d) apartheid, namely, the International Convention on the Suppression and Punishment of the Crime of *Apartheid*; (e) slavery and slavery-like crimes, namely, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; the International Convention for the Suppression of the Traffic in Women and Children; the International Convention for the Suppression of the White Slave Traffic, signed at Paris on 4 May 1910, and as amended by the Protocol; the International

Agreement for the Suppression of the White Slave Traffic, signed at Paris on 18 May 1904, and as amended by the Protocol; and the Slavery Convention, signed at Geneva on 25 September 1926, and amended by the Protocol (New York, 7 December 1953); (f) prohibition of torture, namely, the Convention against torture and other cruel, inhuman or degrading treatment or punishment; and the Inter-American Convention to Prevent and Punish Torture; (g) piracy, namely, the Convention on the High Seas; and the United Nations Convention on the Law of the Sea; (h) hijacking and related crimes, namely the Convention on offences and certain other acts committed on board aircraft; the Convention for the suppression of unlawful seizure of aircraft; the Convention for the suppression of unlawful acts against the safety of civil aviation; (i) crimes against the safety of international maritime navigation, namely, the Convention for the suppression of unlawful acts against the safety of maritime navigation; (j) use of force against internationally protected persons, namely, the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; and the Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance; (k) taking of civilian hostages, namely, the International Convention against the taking of hostages; (l) crimes against health (narcotic drugs, drugs and psychotropic substances), namely the Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs; the Single Convention on Narcotic Drugs, 1961; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; (m) international traffic in obscene material, namely, the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications; (n) protection of the environment, namely, the International Convention for the Prevention of Pollution from Ships; (o) theft of nuclear material, namely the Convention on the Physical Protection of Nuclear Material; and (p) prohibition of counterfeiting, namely, the International Convention for the Suppression of Counterfeiting Currency.

Concerning trial procedures, Mexico noted that it was party to the Convention on Extradition.

In signing the Convention on Extradition, Mexico formulated the following reservation:

Mexico signs the Convention on Extradition with the declaration with respect to Article 3, paragraph (f), that the internal legislation of Mexico does not recognize offenses against religion. It will not sign the Optional Clause of this Convention.¹

In acceding to the Convention for the suppression of unlawful acts against the safety of maritime navigation, Mexico formulated the following reservation:

Mexico's accession to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and to its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988, is on the understanding that in matters relating to extradition, both article 11 of the Convention and article 3 of the Protocol will be applied in the Republic of Mexico subject to the modalities and procedures laid down in the applicable provisions of national law.²

The reservations entered by Mexico do not affect the provisions setting out the obligation to prosecute or extradite in the multilateral treaties to which it is party.

Mexico also has bilateral treaties on extradition with the following countries: Australia, signed on 22 June 1990 and which entered into force on 27 March 1991; Bahamas, signed on 7 September 1886 and which entered into force on 15 February 1889; Belgium, signed on 22 September 1938 and which entered into force on 13 November 1939; Belize, signed on 29 August 1988 and which entered into force on 5 July 1989; Brazil, signed on 28 December 1933 and which entered into force on 23 March 1938, as well as an Additional Protocol, which was signed on 18 September 1935 and which entered into force on 23 March 1938; Canada, signed on 16 March 1990 and which entered into force on 21 October 1990; Chile, signed on 2 October 1990 and which entered into force on 30 October 1991; Colombia, signed on 12 June 1928 and which entered into force on 1 July 1937; Costa Rica, signed on 13 October 1989 and which entered into force on 24 March 1995; Cuba, signed on 25 May 1925 and which entered into force on 17 May 1930; El Salvador, signed on 21 May 1997 and which entered into force on 21 January 1998; France, signed on 27 January 1994 and which entered into force on 1 March 1995; Greece, signed on 25 October 1999 and which entered into force on 29 December 2004; Guatemala, signed on 17 March 1997 and which entered into force on 29 April 2005; Italy, signed on 22 May 1899 and which entered into force on 12 October 1899; Nicaragua, signed on 13 February 1993 and which entered into force on 18 June 1998; Netherlands, signed on 16 December 1907 and which entered into force on 2 July 1909; Panama, signed on 23 October 1928 and which entered into force on 4 May 1938; Peru, signed on 2 May 2000 and which entered into force on 10 April 2001; Portugal, signed on 20 October 1998 and which entered into force on 1 January 2000; Republic of Korea, signed on 29 November 1996 and which entered into force on 27 December 1997; Spain, signed on 21 November 1978 and which entered into force on 1 June 1980, as well as an Additional Protocol, which was signed on 23 June 1995 and which entered into force on 1 September 1996, and Second Protocol, which was signed on 6 December 1999 and which entered into force on 1 April 2001; United Kingdom, signed on 7 September 1886 and which entered into force on 15 February 1889; United States, through an exchange of notes dated 4 May 1978 and which entered into force on 25 January 1980 as well as a Protocol, signed on 13 November 1997 and which entered into force on 21 May 2001; Uruguay, signed on 30 October 1996 and which entered into force on 24 March 2005; and Venezuela (Bolivarian Republic of), signed on 15 April 1998 and which entered into force on 24 November 2005.

MONACO

Monaco is party to the following international treaties containing a disposition on the obligation to extradite or prosecute, which have been given effect in the national legislation through sovereign ordinances: Convention for the suppression of unlawful seizure of aircraft;¹ Convention

¹ League of Nations, *Treaty Series*, vol. CLXV, No. 3803, p. 59.

² United Nations, *Treaty Series*, vol. 1823, No. 29004, p. 389.

¹ Sovereign ordinances No. 7.962 of 24 April 1984 and No. 15.655 of 7 February 2003.

for the suppression of unlawful acts against the safety of civil aviation;² Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents;³ International Convention against the taking of hostages;⁴ Convention on the Physical Protection of Nuclear Material;⁵ Convention against torture and other cruel, inhuman or degrading treatment or punishment;⁶ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;⁷ Convention for the suppression of unlawful acts against the safety of maritime navigation;⁸ Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the Convention for the suppression of unlawful acts against the safety of civil aviation;⁹ Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf;¹⁰ International Convention for the Suppression of Terrorist Bombings;¹¹ International Convention for the Suppression of the Financing of Terrorism;¹² United Nations Convention against Transnational Organized Crime;¹³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;¹⁴ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.¹⁵

Furthermore, Monaco is party to 17 bilateral treaties on extradition with the following countries: Australia, Austria, Belgium, Czech Republic, Denmark, France, Germany, Italy, Liberia, Netherlands, Russian Federation, Spain, Switzerland, United Kingdom, United States. Most of these treaties were concluded at the end of the nineteenth or the beginning of the twentieth century. Accordingly, they provide an exhaustive list of offences for which a person may be extradited without reference to a minimum sentence that may be incurred, as is the case in modern conventions.

12. Some of these bilateral treaties provide for the possibility to prosecute a person if extradition is refused on the ground of the nationality of the person requested, as for example, article 5 of the Convention between Italy and Monaco of 26 March 1866, as amended on

23 December 1896; article 5 of the Treaty on extradition between Australia and Monaco of 19 October 1988;¹⁶ article 6 of the Treaty concerning extradition between France and Monaco of 11 May 1992;¹⁷ and article 5 of the Convention between Belgium and Monaco of 29 June 1874.

¹⁶ United Nations, *Treaty Series*, vol. 1598, No. 27970, p. 139.

¹⁷ *Ibid.*, vol. 1761, No. 30627, p. 181.

POLAND

Poland is party to various international instruments dealing with extradition or containing a clause on the obligation to extradite or prosecute, namely: the International Convention for the Suppression of Counterfeiting Currency, and Optional Protocol; the Geneva Conventions of 12 August 1949 (Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field; Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; Geneva Convention relative to the treatment of prisoners of war; Geneva Convention relative to the protection of civilian persons in time of war); the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; the European Convention on Extradition, its Additional Protocol of and its Second Additional;¹ the Single Convention on Narcotic Drugs, 1961; the Convention for the suppression of unlawful seizure of aircraft; the Convention on psychotropic substances; the Convention for the suppression of unlawful acts against the safety of civil aviation; the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; the European Convention on the suppression of terrorism; the International Convention against the taking of hostages; the Convention on the Physical Protection of Nuclear Material; the Convention against torture and other cruel, inhuman or degrading treatment or punishment; the Convention for the suppression of unlawful acts against the safety of maritime navigation; the Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental

¹ Regarding those instruments, Poland made a declaration contained in the instrument of ratification, deposited on 15 June 1993, in which Poland declared in accordance with article 6, paragraph 1 (a), that it would under no circumstances extradite its own nationals and that, for the purposes of the Convention in accordance with article 6, paragraph 1 (b), persons granted asylum in Poland would be treated as Polish nationals (see United Nations, *Treaty Series*, vol. 1862, p. 469). Later, Poland made another declaration contained in a letter dated 24 February 2005 from the Permanent Representative of Poland and registered at the Secretariat of the Council of Europe on 24 February 2005 which read as follows:

"In accordance with Article 28, paragraph 3, of the Convention, the Republic of Poland hereby declares that since 1 May 2004 in relations with the Member States of the European Union, it will apply the internal legal provisions implementing the provisions of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) insofar as the Framework Decision is applicable in relations between Poland and these States."

(*Ibid.*, vol. 2319, p. 24)

The provisions of the aforementioned Framework Decision were implemented in Polish law by virtue of the statute amending the Penal Code, the Code of Criminal Procedure and the Code of Misdemeanours, dated 18 March 2004.

² Sovereign ordinances No. 7.964 of 24 April 1984 and No. 15.655 of 7 February 2003.

³ Sovereign ordinances No. 15.638 of 24 January 2003 and No. 15.655 of 7 February 2003.

⁴ Sovereign ordinances No. 15.157 of 20 December 2001 and No. 15.655 of 7 February 2003.

⁵ Sovereign ordinances No. 12.093 of 28 November 1996 and No. 15.655 of 7 February 2003.

⁶ Sovereign ordinance No. 10.542 of 14 May 1992.

⁷ Sovereign ordinance of 3 July 1991.

⁸ Sovereign ordinance No. 15.322 of 8 April 2002.

⁹ Sovereign ordinances No. 11.177 of 10 February 1994 and No. 15.655 of 7 February 2003.

¹⁰ Sovereign ordinance No. 15.323 of 8 April 2002.

¹¹ Sovereign ordinances No. 15.083 and No. 15.088 of 30 October 2001 and their annex.

¹² Sovereign ordinance No. 15.319 of 8 April 2002.

¹³ Sovereign ordinance No. 605 of 1 August 2006.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

shelf; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the Convention on the Safety of United Nations and Associated Personnel; the International Convention for the Suppression of Terrorist Bombings; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the Criminal Law Convention on Corruption; the International Convention for the Suppression of the Financing of Terrorism; the United Nations Convention against Transnational Organized Crime; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime; and the United Nations Convention against Corruption.

Poland has also signed several bilateral treaties on extradition and legal assistance: the Treaty with the United Kingdom for the surrender of fugitive criminals (Warsaw, 11 January 1932); the Agreement with Algeria on legal transactions in civil and criminal matters (Algiers, 9 November 1976); the Agreement with Morocco on legal assistance in civil and criminal matters (Warsaw, 21 May 1979); the Agreement with Cuba on legal assistance in civil, family and criminal matters (Havana, 18 November 1982); the Agreement with the Syrian Arab Republic on mutual assistance in civil and criminal matters (Damascus, 16 February 1985); the Agreement with Tunisia on legal assistance in civil and criminal matters (Warsaw, 22 March 1985); the Agreement with the Libyan Arab Jamahiriya on legal assistance in civil, commercial, family and criminal matters (Tripoli, 2 December 1985); the Agreement with the Democratic People's Republic of Korea on legal assistance in civil, family and criminal matters (Pyongyang, 28 September 1986); the Agreement with Iraq on legal and judicial assistance in civil and criminal matters (Baghdad, 29 October 1988); the Agreement with Egypt on legal assistance in criminal matters, transfer of sentenced persons and extradition (Cairo, 17 May 1992); the Agreement with Viet Nam on legal assistance and legal relations concerning civil, family and criminal matters (Warsaw, 22 March 1993); the Agreement with Belarus on legal assistance and legal relations in civil, family, labour and criminal matters (Minsk, 26 October 1994); the Extradition Treaty with the United States (Washington, D.C., 10 July 1996); the Agreement with Slovakia on supplementation and facilitation of the European Convention on Extradition (Jaworzyna Tatrzanska, 23 August 1996); the Treaty with Australia on extradition (Canberra, 3 June 1998); the Agreement with Mongolia on legal assistance and legal relations in civil, family, labour and criminal affairs (Warsaw, 19 October 1998); the Extradition Treaty with India (New Delhi, 17 February 2003); and the Agreement with Germany on supplementation and facilitation of the application of the European Convention on Extradition, Berlin (17 July 2003).

QATAR

There exist a number of multilateral and bilateral conventions ratified by Qatar which relate to legal and judicial cooperation, the extradition of criminals and the exchange

of information relating thereto. Qatar has also signed others and yet others are currently being studied.

Qatar has acceded to the following multilateral agreements: International Convention against the taking of hostages; Convention on psychotropic substances; International Convention on the Suppression and Punishment of the Crime of *Apartheid*; Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; Convention on the Physical Protection of Nuclear Material; Riyadh Arab Agreement for Judicial Cooperation; Convention against torture and other cruel, inhuman or degrading treatment or punishment; Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the Convention for the suppression of unlawful acts against the safety of civil aviation; Convention for the suppression of unlawful acts against the safety of maritime navigation; Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf; International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

Qatar has also ratified the following bilateral agreements: 1982 Agreement with Saudi Arabia on Security Cooperation and Surrender of Criminals; 1996 Memorandum of Understanding on Security Cooperation with France; 2000 Agreement on Security Cooperation with Yemen.

Finally, Qatar has signed the following bilateral agreements: the 1999 Memorandum of Understanding between the Ministry of the Interior of the State of Qatar and the Ministry of the Interior of the Islamic Republic of Iran on Combating Narcotics and Psychotropic Agents; and the Memorandum of Understanding on Security Cooperation and Coordination between the Ministry of the Interior of the State of Qatar and the Ministry of the Interior of the United Arab Emirates.

SERBIA

The obligation to extradite or prosecute an alleged offender is regulated in a number of international conventions in force between Serbia and other countries. The application of internal law (trial taking place in the country which has refused the extradition request) has been provided for in some of these conventions or as a possibility in others.

Serbia has signed or acceded to a number of international instruments, notably the European Convention on Extradition; the Convention for the suppression of unlawful seizure of aircraft; the Convention for the suppression of unlawful acts against the safety of civil aviation; the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; the European Convention on the suppression of terrorism; the International Convention against the taking of hostages; the Convention on the Physical Protection of Nuclear Material; the International Convention for the Suppression of the Financing of Terrorism; the Convention against torture and other cruel, inhuman or degrading treatment or punishment; the United Nations

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the Convention for the suppression of unlawful acts against the safety of maritime navigation; the International Convention for the Suppression of Terrorist Bombings; the Criminal Law Convention on Corruption; and the United Nations Convention against Transnational Organized Crime.

Serbia has also concluded bilateral extradition treaties with Algeria, Austria, Belgium, Bulgaria, the Czech Republic, France, Germany, Greece, Hungary, Iraq, Italy, Mongolia, the Netherlands, Poland, Romania, the Russian Federation, Slovakia, Spain, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, the United Kingdom and the United States.

The above bilateral treaties do not specifically regulate matters related to extradition or prosecution. However, a number of them, *inter alia*, state as a reason to refuse extradition the jurisdictional competence of the requested State to prosecute, meaning that in case extradition is declined, criminal proceedings against the person whose extradition has been refused may be instituted in the requested State. On the other hand, a number of such treaties provide that in the case when criminal proceedings have already been initiated for the same offence, the extradition request will be declined.

In view of the foregoing, when a foreigner commits an offence abroad, there is a possibility that the foreigner will be extradited from Serbia to the requesting State (which is what normally happens). However, if the extradition request is denied, there is the obligation to prosecute the alleged offender in Serbia for the same offence under the terms of either the national legislation or an international treaty which has precedence over the national legislation.

Similarly, the nationals of Serbia, who cannot be extradited to another country, may be prosecuted in Serbia for offences committed abroad under the terms of the national legislation or relevant international treaties.

SLOVENIA

Slovenia submitted a list of international treaties containing the obligation to extradite or prosecute, by which Slovenia is bound, namely: Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field; Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; Geneva Convention relative to the treatment of prisoners of war; Geneva Convention relative to the protection of civilian persons in time of war; European Convention on Extradition; Single Convention on Narcotic Drugs, 1961; Convention for the suppression of unlawful seizure of aircraft; Convention for the suppression of unlawful acts against the safety of civil aviation; Convention on psychotropic substances; Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; International Convention on the Suppression and Punishment of the Crime of *Apartheid*; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the

protection of victims of international armed conflicts; European Convention on the suppression of terrorism; International Convention against the taking of hostages; Convention on the Physical Protection of Nuclear Material; Convention against torture and other cruel, inhuman or degrading treatment or punishment; Convention for the suppression of unlawful acts against the safety of maritime navigation; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

Slovenia has not made any reservations to the above-mentioned conventions limiting their application, including regarding the *aut dedere aut judicare* principle.

In addition to the above-mentioned multilateral conventions, Slovenia has also concluded several bilateral extradition agreements with different countries that include the *aut dedere aut judicare* principle.

SRI LANKA

Sri Lanka is a party to the following treaties containing the obligation to extradite or prosecute, and upon subscribing to these treaties, it has not entered any reservation to limit the application of the obligation: Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field; Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; Geneva Convention relative to the treatment of prisoners of war; Geneva Convention relative to the protection of civilian persons in time of war; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; Convention for the suppression of unlawful seizure of aircraft; Convention for the suppression of unlawful acts against the safety of civil aviation; Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; International Convention against the taking of hostages; Convention against torture and other cruel, inhuman or degrading treatment or punishment; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the Convention for the suppression of unlawful acts against the safety of civil aviation; Convention for the suppression of unlawful acts against the safety of maritime navigation; Convention on the Marking of Plastic Explosives for the Purpose of Detection; International Convention for the Suppression of Terrorist Bombings; the International Convention for the Suppression of the Financing of Terrorism; United Nations Convention against Transnational Organized Crime. Moreover, Sri Lanka has signed the International Convention for the Suppression of Acts of Nuclear Terrorism. It will be ratified shortly, after framing necessary legislation.

At the regional level, Sri Lanka has subscribed to regional conventions that provide for the obligation to extradite or prosecute. Accordingly, within the South Asian Association for Regional Cooperation (SAARC) Sri Lanka subscribed to the SAARC Regional Convention

on Suppression of Terrorism and its Additional Protocol; and the SAARC Convention on Narcotic Drugs and Psychotropic Substances.

Finally, Sri Lanka has signed bilateral extradition treaties with the Hong Kong Special Administrative Region of China, the Maldives and the United States. There are also several pre-independence extradition treaties which could be given effect to, on a case-by-case basis, under the provisions of the Extradition Law No. 8 of 1977.

SWEDEN

The principle of *aut dedere aut judicare* is established in many international treaties. Sweden ratified several of those treaties and is therefore bound by the principle in relation to the States parties to the treaties concerned. The principle is not subject to any specific provision in Swedish legislation on extradition or surrender (in pursuit of a European arrest warrant) or in any other piece of legislation. However, the principle is manifested through Swedish legislation on (extra-territorial) jurisdiction, extradition in general and the conditions for the law enforcement agencies to initiate a preliminary investigation and for the prosecutors to institute prosecution, if an offence was committed according to Swedish criminal law.

Sweden is bound by a very large number of treaties containing the principle. Many of those treaties originate from the United Nations, for example, the International Convention for the Suppression of Terrorist Bombings; and the International Convention for the Suppression of the Financing of Terrorism.

The basic provisions to meet the requirements of the principle are found in chapter 2, section 2, of the Swedish Penal Code.¹ According to the relevant provisions, Swedish courts always have jurisdiction when the crime has been committed by a Swedish citizen or an alien domiciled in Sweden (para. 1), by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in Sweden or who is a Danish, Finnish, Icelandic or Norwegian citizen and is present in Sweden (para. 2) or by any other alien who is present in Sweden, and when under Swedish law the crime can result in imprisonment for more than six months (para. 3). Those provisions, however, apply only when the act is subject to criminal responsibility under the law of the place where it was committed. Thus, in practice, Sweden may always prosecute when the alleged offender is, *inter alia*, a Swedish citizen or resident or at least present on Swedish territory.

Since the generic provisions in the Swedish Penal Code are applicable to any international obligation by which Sweden is bound, Sweden saw no need to list each international treaty containing the principle of *aut dedere aut judicare* in its submission.

¹ "The Extradition for Criminal Offences Act, the Act on surrender from Sweden according to the European arrest warrant and extracts from the Swedish Penal Code are available for consultation in the Codification Division of the Office of Legal Affairs.

THAILAND

International treaties by which Thailand is bound without any reservation to limit the application of the obligation to extradite or prosecute (*aut dedere aut judicare*) could be set out in two main groups, namely: (a) in relation to offences relating to hijacking: Convention on offences and certain other acts committed on board aircraft; Convention for the suppression of unlawful seizure of aircraft; Convention for the suppression of unlawful acts against the safety of civil aviation; and (b) in relation to narcotic drug offences: Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

TUNISIA

Article 32 of the Constitution of Tunisia recognizes the principle of the precedence of international treaties over laws. International agreements ratified in accordance with constitutional procedures are considered to take precedence over laws and take effect automatically aside from certain exceptions pursuant to the application of the principle of legality of crimes and punishment. Such agreements may be bilateral or multilateral.

Tunisia has concluded numerous bilateral agreements relating to judicial cooperation, most of which provide explicitly for the obligation to "extradite or prosecute". Those agreements are either specifically about extradition or general in nature, with some articles touching on extradition. They include: the agreement with the Libyan Arab Jamahiriya on judicial notices, letters rogatory, enforcement of judgements and extradition (art. 20, para. 2); the agreement with Algeria concerning mutual assistance and judicial cooperation (art. 27, para. 2); the agreement with Lebanon concerning judicial cooperation, enforcement of judgements and extradition (art. 22, para. 2); the agreement with Morocco concerning judicial cooperation, enforcement of judgements and extradition (art. 35, para. 2); the agreement with Jordan concerning judicial cooperation, enforcement of judgements and extradition (art. 20, para. 1); the agreement with Mauritania concerning judicial cooperation (art. 29, para. 2); the agreement with the United Arab Emirates on judicial cooperation in civil and criminal matters (art. 27, para. 2); the agreement with Egypt on legal and judicial cooperation in civil, commercial and personal status and criminal matters (art. 37, para. 2); the agreement with Kuwait on legal and judicial cooperation in civil, criminal and personal status matters (art. 38, para. 2); the first annexed agreement to the agreement with Kuwait on legal and judicial cooperation in civil, criminal and personal status matters (art. 39 *bis*); the agreement with the Syrian Arab Republic concerning judicial notices, letters rogatory and enforcement of judgements (art. 26, para. 2); the agreement with Qatar on legal and judicial cooperation (art. 41, para. 2); the agreement with Yemen on judicial cooperation in civil, commercial, criminal and personal status matters (art. 38, para. 2); the agreement with Germany concerning extradition and judicial cooperation in criminal matters (art. 6, para. 2); the agreement with Italy concerning judicial cooperation in civil, commercial and criminal matters, the recognition

and enforcement of judgements and arbitral awards and extradition (art. 15, para. 2); the agreement with France concerning judicial cooperation in criminal matters and extradition (art. 23, para. 2, which contains the phrase “when necessary”); the agreement with Bulgaria concerning judicial cooperation in civil and criminal matters (art. 32); the agreement with Czechoslovakia concerning judicial cooperation in civil and criminal matters, recognition and enforcement of judicial rulings and extradition (art. 48); the agreement with Turkey concerning judicial cooperation in criminal matters and extradition (art. 23, para. 2, which contains the phrase “when necessary”); the agreement with Hungary concerning judicial cooperation in civil and criminal matters, recognition and enforcement of judicial rulings and extradition (art. 47); the agreement with Poland concerning judicial cooperation in civil and criminal matters (arts. 32–33); the agreement with Belgium concerning judicial cooperation on criminal matters and extradition (art. 4, para. 2); the agreement with Greece concerning extradition and judicial cooperation in criminal matters (art. 23, para. 2); the agreement with Portugal on extradition (art. 4); the agreement with Senegal concerning judicial cooperation, enforcement of judgements and extradition (art. 42, para. 2); the agreement with Mali concerning judicial cooperation (art. 38, para. 2); the agreement with Côte d’Ivoire on judicial cooperation (art. 25, para. 2); the agreement with China on judicial cooperation in matters of extradition (art. 5); and the agreement with India on judicial cooperation in matters of extradition (art. 5).

Tunisia also observed that all international and United Nations counter-terrorism conventions provide explicitly for the principle of “extradite or prosecute”, except for the Convention on offences and certain other acts committed on board aircraft and the Convention on the Marking of Plastic Explosives for the Purpose of Detection. Tunisia had ratified all these conventions, except for the Convention for the Suppression of Acts of Nuclear Terrorism, which was still under consideration. In 1988, it also ratified the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND¹

The United Kingdom is party to the following treaties containing the obligation to extradite or prosecute; Geneva Conventions for the protection of war victims of 12 August 1949; Convention for the suppression of unlawful seizure of aircraft; Convention for the suppression of unlawful acts against the safety of civil aviation; Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; European Convention on the suppression of terrorism; International Convention against the taking of hostages; Convention on the Physical Protection of Nuclear Material; Convention against torture and other cruel, inhuman or degrading treatment or punishment; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Protocol

for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the Convention for the suppression of unlawful acts against the safety of civil aviation; Convention for the suppression of unlawful acts against the safety of maritime navigation; Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf; Convention on the Safety of United Nations and Associated Personnel; International Convention for the Suppression of Terrorist Bombings; International Convention for the Suppression of the Financing of Terrorism; United Nations Convention against Transnational Organized Crime; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime; United Nations Convention against Corruption.

The United Kingdom also noted that it is party to the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention on offences and certain other acts committed on board aircraft. These conventions did not contain an obligation to extradite or prosecute, but required States to establish jurisdiction in respect of other offences.

The United Kingdom has also signed but not yet ratified the Protocol amending the European Convention on the Suppression of Terrorism; and the International Convention for the Suppression of Acts of Nuclear Terrorism.

UNITED STATES OF AMERICA

The United States is a party to a number of international conventions that contain the obligation to extradite or prosecute. Among those conventions are the Convention for the suppression of unlawful seizure of aircraft; the Convention for the suppression of unlawful acts against the safety of civil aviation; the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; the International Convention against the taking of hostages; the Convention on the Physical Protection of Nuclear Material; the Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the Convention for the suppression of unlawful acts against the safety of aviation; the Convention for the suppression of unlawful acts against the safety of maritime navigation; the Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf; the International Convention for the Suppression of Terrorist Bombings; and the International Convention for the Suppression of the Financing of Terrorism.

The United States believes that commitments to extradite or prosecute as contained in these conventions are an important aspect of collective efforts to deny terrorists and other criminals a safe haven. The United States strongly supports the implementation of such provisions in international instruments.

¹ The United Kingdom noted that its response does not address issues and/or cases regarding the European Arrest Warrant which has extradition implications for participating States.

The United States notes, however, that recent multilateral criminal law conventions do not uniformly impose extradite or prosecute regimes. Rather, recent conventions of wide application and great importance such as the United Nations Convention against Transnational Organized Crime; the Convention on cybercrime; and the United Nations Convention against Corruption, impose an obligation on a State in which an offender is found to prosecute that offender only when (a) extradition is denied on the basis of the nationality of the offender; and (b) prosecution is requested by the requesting State. Thus, the consensus in the international community suggests that strict extradite or prosecute obligations should apply only to limited categories of the most serious crimes and only to those States that have undertaken such an obligation (and the requisite changes to their criminal and jurisdictional laws) by becoming a party to a legally binding international instrument that encompasses such crimes.

The United States has not taken reservations to limit the application of the obligation to extradite or prosecute *per se*. When becoming a party to these conventions, however, the United States has consistently taken the position that the extradition obligations within the conventions apply only to expand the bases for extradition with countries with which the United States has bilateral extradition treaties. The United States does not use multilateral conventions as a basis for extradition in the absence of a bilateral treaty. This is because, for the United States, extradition is a function of treaty relationships; there is no obligation to extradite absent a bilateral treaty. The obligation to extradite or prosecute is similarly limited.

C. Domestic legal regulation adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute

AUSTRIA

Austria noted that the relevant Austrian legislation had been summarized by Mr. Zdzislaw Galicki, Special Rapporteur, in paragraph 44 of his preliminary report.¹

¹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

CHILE

The regulations followed in order to comply with the obligation to extradite or prosecute derive directly from the treaties signed by Chile. The question is not dealt with in national legal or constitutional regulations.

CROATIA

The Act on Mutual Legal Assistance in Criminal Matters¹ provides that when an extradition from Croatia is not permissible, a domestic judicial authority may, at the request of a foreign judicial authority, take over carrying out criminal proceedings for an offence committed abroad.² The Act does not make extradition conditional upon the existence of an extradition agreement with the

requesting State and, consequently, it does not require the implementation of the *aut dedere aut judicare* principle, but in such a case reciprocity is required, i.e. the request will be granted if, on the basis of the assurances presented by the requesting State, it can be expected that this State would grant a comparable request made by a Croatian judicial body.

IRELAND

The mechanisms allowing Ireland to carry out its international treaty obligations to extradite or prosecute were provided for in domestic law by primary and secondary legislation. Typically, an Act of the Oireachtas (parliament) will provide the necessary grounds for jurisdiction, on the basis of which prosecution in relation to acts committed outside the State may be pursued.

As regards extradition, section 8 of the Extradition Act 1965 allows the Government to transpose its treaty obligations by order into domestic law. Part III of the International Criminal Court Act 2006 provides for the surrender of individuals to the International Criminal Court for the prosecution of offences within the jurisdiction of the Court. Part II of the International War Crimes Tribunals Act, 1998 provides for the surrender of individuals where requested by an “international tribunal” (i.e. the tribunal or court established by the United Nations for the prosecution of persons responsible for serious violations of international humanitarian law committed outside the State to be an international tribunal for the purposes of the Act; that the Minister for Justice, Equality and Law Reform, by regulation, declares to be an international tribunal for the purposes of the Act).

The Extradition Act, 1965, as amended (Extradition (Amendment) Act, 1994), governs extradition with countries other than member States of the European Union. The obligation to extradite is considered paramount, and recourse to prosecution in Ireland is considered only where extradition of an Irish citizen is not permitted because of the absence of reciprocal arrangements. A decision in relation to the prosecution of a person for any offence in Ireland is a matter for the Director of Public Prosecutions. No extradition requests have been refused on the grounds of Irish nationality.

Ireland also transmitted extracts of the following relevant legislation giving effect to treaties by which it is bound: Geneva Conventions Act, 1962; Air Navigation and Transport Act, 1973; Air Navigation and Transport (No. 2) Act, 1975; Extradition (European Convention on the Suppression of Terrorism) Act, 1987; Radiological Protection Act, 1991; Criminal Justice Act, 1994; Criminal Justice (United Nations Convention against Torture) Act, 2000; Criminal Justice (Safety of United Nations Workers) Act, 2000; Prevention of Corruption (Amendment) Act, 2001; Maritime Security Act 2004; Criminal Justice (Terrorist Offences) Act 2005; and International Criminal Court Act 2006.¹

¹ *Official Gazette*, No. 178 (2004), in effect since 1 July 2005.

² Chap. IV (Taking over and surrendering proceedings), art. 62.

¹ The extracts are available for consultation in the Codification Division of the Office of Legal Affairs.

KUWAIT

The international agreements mentioned in section B above by which Kuwait has become bound, constitute applicable legislation on the basis of which rulings are to be handed down by the courts and the provisions of which are to be applied in all matters relating to extradition. They cover cases in which extradition is compulsory, those in which it is not permissible, the conditions that must be fulfilled for an offence to be extraditable, the authorities to be addressed under such agreements, including for the transmittal of extradition requests, the manner of submission of such requests, extradition priority in the event of multiple requests for extradition for the same offence, the trial and prosecution of the person whose extradition is requested, the rights of well-intended third parties, the travel of persons whose extradition has been decided from other countries through the territory of the States parties, the costs of extradition and other questions relating to extradition.

LATVIA

In Latvia the obligation to extradite or prosecute (*aut dedere aut judicare*) is regulated by the Constitution of the Republic of Latvia, the Citizenship Law and the Criminal Procedure Law.¹ In accordance with article 98 of the Constitution, everyone has the right to freely depart from Latvia. Everyone having a Latvian passport shall be protected by the State when abroad, and has the right to freely return to Latvia. A citizen of Latvia may not be extradited to a foreign country, except in the cases provided for in international agreements ratified by the Parliament and under the condition that the basic human rights specified in the Constitution are not violated by the extradition.

The above-mentioned issue is regulated by part C, entitled "International cooperation in the criminal-legal field", of the Criminal Procedure Law. Chapter 64 of part C (General provisions of cooperation), determines different types of international cooperation. Chapter 65 (Extradition of a person to Latvia), contains articles referring to provisions and procedures for the submission of a request for the extradition of a person; grounds and procedures for the announcement of an international search for a person; request for temporary detention; takeover of a person extradited by a foreign State; extradition of a person from a foreign State for a period of time; frameworks of the criminal liability and of the execution of a penalty of a person extradited by a foreign State; inclusion of the time spent in detention in a foreign State; extradition of a person to Latvia from a European Union member State; procedures for the taking of a European detention decision; fulfilment of a European detention decision; and conditions connected with the takeover of a person from a European Union member State.

Chapter 66, entitled "Extradition of a person to a foreign State", establishes principles for extradition of a person. First, a person who is located in the territory of Latvia may be extradited for criminal prosecution, litigation or the execution of a judgement if a request has

been received from a foreign State to extradite such person regarding an offence that, in accordance with the law of Latvia and the foreign State, is criminal. Secondly, a person may be extradited for criminal prosecution, or litigation, regarding an offence the commission of which entails a penalty of deprivation of liberty whose maximum duration is not less than one year, or a more serious penalty. Thirdly, a person may be extradited for the execution of a judgement by the State that rendered the judgement and convicted the person with a penalty that is connected with deprivation of liberty for a period of not less than four months. Fourthly, if extradition has been requested regarding several criminal offences, but extradition may not be applied for one of the offences because that offence does not comply with the conditions regarding the possible or imposed penalty, the person may also be extradited regarding such criminal offence.

If for some reason Latvia is not able to extradite a person, there is a possibility to take over criminal proceedings or to take over a judgement for recognition and fulfilment. In accordance with chapter 67 (Takeover in Latvia of criminal proceedings commenced in a foreign State), and chapter 68 (Transfer of criminal proceedings commenced in Latvia), of the Criminal Procedure Law, the takeover of criminal proceedings is the continuation in Latvia of criminal proceedings commenced in a foreign State, on the basis of a request of the foreign State or with the consent thereof, if such continuation is required by procedural interests and the offence is punishable in accordance with the criminal law of Latvia. Transfer of criminal proceedings is the suspension thereof in Latvia and the continuation thereof in a foreign State, if there are grounds for holding a person suspect, or prosecuting a person, for the commission of an offence, but the successful and timely performance of the criminal proceedings in Latvia is not possible or hindered and, in addition, transfer to the foreign State prevents such impossibility or hindrance. The transfer of criminal proceedings in which a judgement of conviction has entered into effect shall be admissible only if the judgement may not be executed in Latvia, and the foreign State in which the convicted person resides does not accept a judgement of another State for execution.

Chapter 71 (Execution in Latvia of a sentence imposed in a foreign State), of the Criminal Procedure Law establishes content and conditions of the execution of a sentence imposed in a foreign State. In accordance with terms of the Law, the execution in Latvia of a sentence imposed in a foreign State is the uncontested recognition of the justification and lawfulness of such sentence and the execution thereof in accordance with the same procedures, as if the sentence were specified in criminal proceedings taking place in Latvia. Furthermore, the recognition of the justification and lawfulness of a sentence imposed in a foreign State shall not exclude the coordination thereof with the sanction provided for in the criminal law of Latvia regarding the same offence. Article 777 of the Law determines that the execution of a sentence imposed in a foreign State shall be possible if (a) Latvia has a treaty with the foreign State regarding the execution of sentences imposed by that State; (b) a foreign State has submitted a request regarding the execution of the sentence imposed in that State; (c) the sentence has been specified in the foreign State with a valid

¹ Excerpts of national law provided by Latvia are available for consultation at the Codification Division of the Office of Legal Affairs.

adjudication in completed criminal proceedings; (d) the convicted person could be penalized regarding the same offence in accordance with the criminal law of Latvia; (e) a limitation period for the execution of the sentence has not come into effect in the foreign State or in Latvia; (f) at the moment of the rendering of a judgement, a limitation period of criminal liability had not come into effect in accordance with the criminal law of Latvia; and (g) at least one of the reasons for the submission of a request for the execution of a sentence referred to in section 804 of the Law exists in the foreign State.

Chapter 72 (Execution in a foreign State of a sentence imposed in Latvia), of the Criminal Procedure Law provides that the execution in a foreign State of a sentence imposed in Latvia is the recognition of the justification and lawfulness of such sentence and the execution thereof, in accordance with the same procedures as if the sentence were specified in criminal proceedings taking place in the foreign State.

LEBANON

Lebanon transmitted a list containing the legal texts in force in Lebanon in respect of the question of extradition. The provisions governing extradition are those provided for in articles 30–36 of the Lebanese Penal Code and in article 17 of the Lebanese Code of Criminal Procedure. The aforementioned articles of the Penal Code contain elements of the response to the request for a definition of the nature of the crimes for which extradition is permitted or for which it is denied. Under article 17 of the Code of Criminal Procedure, the Public Prosecutor at the Court of Cassation provides information on the judicial application of the principle of extradition.¹

A distinction was drawn between cases in which the person whose extradition is requested is a Lebanese national and those in which the person is a foreign national. With regard to Lebanese nationals, in accordance with the principle that “the State does not extradite its own citizens”, the person sought is not extradited, but rather tried before the Lebanese courts in accordance with the jurisdiction *ratione personae* laid down in article 20 of the Penal Code, which provides for:

Lebanese law shall apply to any Lebanese national who, outside the Lebanese territory, shall have rendered himself guilty, either as author, or abettor, or accomplice, of a crime or of an offence punishable under Lebanese law.

Consequently, Lebanon is bound, in that regard, by the *aut dedere aut judicare* principle. It should be borne in mind, however, that a request for the extradition of a Lebanese national is subject, as far as procedures are concerned, to the very same rules that are followed in respect of requests for the extradition of an alien, which are referred to below.

With regard to foreign nationals, the question of their extradition to the requesting State is handled in accordance with the following mechanism:

(a) On the basis of international “wanted” notices issued by the INTERPOL General Secretariat and the Arab Bureau of Criminal Police, circulars on internationally wanted persons are issued in Lebanon;

(b) Whenever a wanted person, in accordance with the above, is found, he or she is arrested by members of the competent judicial police on the basis of an instruction issued by the Office of the Public Prosecutor at the Court of Cassation;

(c) The State requesting the issuance of a circular on the person in question is notified of the order for his or her arrest and of the need to send a certified copy of his extradition file, if deemed appropriate;

(d) The person whose extradition is requested is held under arrest or released against a residence permit, sufficient safeguards being taken to guarantee that he or she will not flee, such as the issuance of a travel ban, depending on what is decided in that regard by the Public Prosecutor at the Court of Cassation with respect to the duration of arrest or to release. That is done on the basis of the agreements in force, should any exist, and if not, in accordance with the facts of each case, account being taken, in particular, of the principle of reciprocity;

(e) Upon the receipt of the extradition file, the person in question shall be interrogated by the Public Prosecutor at the Court of Cassation or whomever is delegated for that purpose and by the public defenders at the Court. Under article 35 of the Penal Code, the Public Prosecutor may issue a warrant for the arrest of the person whose extradition is requested, after interrogation. The Public Prosecutor prepares a report on the request for extradition, after ascertaining the validity of the charge and the extent to which the legal conditions for accepting the request are met or not met, whether they be those existing in judicial agreements or treaties, if any exist, or, if not, those based on the rules contained in domestic law and the principle of reciprocity. Thereupon, the entire file, together with the report of the Public Prosecutor, is transmitted to the Minister of Justice. At that point, a decision on the request for extradition is taken pursuant to a decree issued on the basis of a proposal of the Minister of Justice;

(f) Following the issuance of the decree accepting or denying the request for extradition, the State requesting extradition is notified to that effect.

In the case of acceptance, the authorities concerned in that State are requested to dispatch a security mission to take custody of the person in question, unless he or she has been arrested on other grounds, in which case extradition only proceeds upon completion of the trial before the Lebanese courts.

In the case of denial, if the denial is not due to the offence having been extinguished for some reason or to the inadmissibility of prosecution on any legal ground, hence the possibility of prosecution in respect of the offence still exists, then, in accordance with article 23 of the Lebanese Penal Code:

¹ The aforementioned articles, provided by Lebanon, are available for consultation at the Codification Division of the Office of Legal Affairs.

Lebanese law shall apply also to any alien residing on Lebanese territory who has committed abroad, either as author, or abettor, or accomplice, a crime or offence not designated under articles 19, 20 and 21, in case his extradition has not been requested or granted.

Accordingly, an alien, a request for whose extradition is denied owing to the absence of the legal requirements provided for in agreements, or, in the absence of any such agreement, in domestic law, must be arraigned before the Lebanese courts for trial.

On the basis of all the foregoing, Lebanon is bound by the “extradite or prosecute” (*aut dedere aut judicare*) principle with respect to both Lebanese nationals and any alien or stateless person in Lebanon who has committed criminal acts abroad.

MEXICO

Article 133 of the Political Constitution of Mexico establishes the hierarchy of legislation in force in Mexico. To that end, it states: this Constitution, the laws of the Congress of the Union that emanate from it and all the treaties that are in accordance with it, concluded and to be concluded by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. Mexico has therefore incorporated the principle of *aut dedere aut judicare* into its legal system by ratifying the international treaties containing that provision.

The obligation underlying this principle of international law is implemented through the following two mechanisms:

(a) Article 4 of the Federal Penal Code establishes the cases in which Mexico may exercise its jurisdiction in order to ensure that federal crimes committed abroad do not go unpunished:

Crimes committed abroad by a Mexican national against Mexican nationals or foreign nationals, or by a foreign national against Mexican nationals, shall be punishable in the Republic, in accordance with federal laws, provided the following conditions are met:

- (i) The accused is inside the Republic;
- (ii) A final verdict has not been rendered in the country where the crime was committed; and
- (iii) The offence with which the accused is charged is considered a crime both in the country where it was committed and in the Republic;

(b) In addition, the third paragraph of article 119 of the Political Constitution provides for the possibility of Mexico conducting extradition proceedings:

Requests for extradition from a foreign State shall be dealt with by the Federal Executive, with the intervention of the judicial authority, in accordance with the terms of this Constitution, the international treaties signed in that respect, and the regulatory laws.

For procedural purposes, therefore, during extradition proceedings Mexico may apply, first, the extradition treaties to which it is a party and, secondly, the International Extradition Act,¹ which entered into force on 29 December 1975 and is the implementing legislation for article 119 of the Political Constitution.

¹ The International Extradition Act provided by Mexico is available for consultation in the Codification Division of the Office of Legal Affairs.

Mexico conducts all its extradition proceedings on the basis of bilateral treaties or the International Extradition Act. To date, it has not received any extradition requests based on a multilateral treaty. If it were to receive such a request, Mexico would conduct extradition proceedings according to the procedural rules established in the aforementioned instruments. The aim is to ensure respect for both procedural safeguards and the human rights of the accused.

In that regard, with a view to providing individual safeguards, article 15 of the Political Constitution establishes the following limitations for extradition proceedings:

No treaty shall be authorized for the extradition of political offenders or of delinquents of the common order who have been slaves in the country where the offense was committed; nor shall any agreement or treaty be entered into which restricts or modifies the guarantees and rights established in this Constitution for man and citizen.

MONACO

Monaco provided national legislation No. 1.222 of 28 December 1999 on extradition.¹ This law establishes a general legal framework for extradition procedure and it applies in the absence of a treaty or of a specific provision in that regard. The application of the *aut dedere aut judicare* principle is closely linked with the various grounds of refusal of extradition upon which the requested State can rely. Article 6 of Law No. 1.222 is fundamental in this regard as it provides that extradition may be refused if the offence for which extradition is requested has been committed in Monaco, or is prosecuted in Monaco, or has been already judged in a third State. Article 6 also provides for refusal when the offence for which extradition is requested is subject to a capital penalty in the legislation of the requesting State, or when the alleged offender may be subject to treatment harming physical integrity.

These limitations are consistent with provisions of national legislation establishing the jurisdiction of the Courts of Monaco on criminal matters (arts. 7–10 of the Code of Penal Procedure).

The *aut dedere aut judicare* principle is implemented when extradition is refused because of the nationality of the alleged offender. Article 7 of Law No. 1.222 provides that Monaco does not extradite its own nationals. However, when the refusal of extradition is based on the nationality of the person requested, upon request of the requesting State, the case is transmitted to the Prosecutor General who may prosecute the person if necessary. The conditions of application of the principle are that the requesting State has to demand that the person should be tried, and that it transmits all the documents, information and relevant evidence regarding the offence. Thereafter, the requested State is under the obligation to inform the requesting State of the follow-up to the demand.

¹ The full texts in their original French version are available for consultation at the Codification Division of the Office of Legal Affairs. See also *Journal de Monaco*, No. 7423 (31 December 1999).

Article 7 of Law No. 1.222 is not deemed to suppress the power of the Prosecutor of Monaco to decide on the opportunity to prosecute, except when such an obligation results directly from international treaties, as for example, the agreements between Monaco and Switzerland or from other multilateral treaties.

When extradition is refused on other grounds, *inter alia*, when the offence has a military, political or fiscal nature, or when the offence has been definitively prosecuted and judged in Monaco, or when the offence, or its prosecution is limited by statute under Monegasque legislation or under the legislation of the requesting State, the *aut dedere aut judicare* principle will be applied only when the Courts of Monaco have jurisdiction on foreigners for offences committed abroad, as established by articles 7–10 of the Code of Penal Procedure.²

Finally, article 265, paragraph (4), of the Penal Code extends the jurisdiction of Monegasque courts regarding the organization or the facilitation of sexual exploitation of minors (18 years old) committed inside or outside the territory of Monaco.

² Art. 7 of the Code: “The following parties can be prosecuted and sentenced in the Principality:

“(1) An alien who has, outside the territory of the Principality, committed a crime against State security, counterfeited national legal tender, national identification documents or currency, either paper or other, which has entered State coffers, or who has committed a crime or offence against agents, diplomatic or consular premises or property of Monaco.

“(2) An alien who is the co-perpetrator of or accomplice to any crime committed outside the territory of the Principality by a Monegasque who is being prosecuted or has been sentenced in the Principality for the crime in question.”

Art. 8: “The following parties can be prosecuted and sentenced in the Principality:

“(1) Any person who is an accomplice on the territory of the Principality to a crime or offence committed abroad, if the issue of complicity is provided for in both the relevant foreign law and in Monegasque law, on the condition that the main act has been certified by a definitive decision of the foreign jurisdiction.

“(2) Anyone who commits acts outside the territory of the Principality qualified as crimes or offences constituting torture as defined in article 1 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted at New York on 10 December 1984, if he or she is found to be in the Principality.”

Art. 9: “An alien can be prosecuted and sentenced in the Principality if he or she has committed one of the following outside its territory:

“(1) A crime or offence against a Monegasque.

“(2) A crime or offence against another alien, if the alien is found in the Principality in possession of items acquired through the commission of the violation.”

POLAND

The Constitution of the Republic of Poland was adopted by the National Assembly on 2 April 1997. Its article 55 reads as follows:

1. The extradition of a Polish citizen shall be prohibited, except in cases specified in paragraphs 2 and 3.

2. Extradition of a Polish citizen may be granted upon a request made by a foreign State or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organization of which the Republic of Poland is a member, provided that the act covered by a request for extradition:

(1) was committed outside the territory of the Republic of Poland; and

(2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.

3. Compliance with the conditions specified in paragraph 2, subparagraphs (1) and (2), shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body.

4. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens.

5. The courts shall adjudicate on the admissibility of extradition.

Further, article 604 of the Code of Criminal Procedure, provides:

1. Extradition is inadmissible if:

(1) The person to whom such a motion refers is a Polish citizen or has been granted the right of asylum in the Republic of Poland;

(2) The act does not have the features of a prohibited act, or if the law stipulates that the act does constitute an offence, or that the perpetrator of the act does not commit an offence or is not subject to penalty;

(3) The period of limitation has lapsed;

(4) The criminal proceedings have been validly concluded concerning the same act committed by the same person;

(5) The extradition would contravene Polish law;

(6) There is a justifiable concern that the prosecuted person may be sentenced to the death penalty or that the death penalty may be executed in the State requesting the extradition;

(7) There is a justifiable concern that rights and freedoms of the prosecuted person may be infringed in the State requesting the extradition;

(8) It concerns the person prosecuted for offences committed without violence for political reasons.

2. In particular, extradition may be refused, if:

(1) The person to whom such a motion refers has permanent residence in the Republic of Poland;

(2) The criminal offence was committed within the territory of the Republic of Poland, or on board a Polish vessel or aircraft;

(3) Criminal proceedings are pending concerning the same act committed by the same person;

(4) The offence is subject to prosecution on a private charge;

(5) Pursuant to the law of the State which has moved for extradition, the offence committed is subject to the penalty of deprivation of liberty for a term not exceeding one year, or to a lesser penalty or such a penalty has been actually imposed;

(6) The offence with which the motion for extradition is connected is of a military, fiscal or political nature other than that referred to in paragraph 1, subsection (8); or

(7) The State which has moved for extradition does not guarantee reciprocity in this matter.

3. In the event indicated in paragraph 1, subsection (4), and paragraph 2, subsection (3), the resolution of the motion for extradition may be adjourned until the criminal proceedings pending against the same person in the Republic of Poland are concluded, or until he has served the sentence imposed or has been granted remission of the penalty.

QATAR

The Code of Criminal Procedure of Qatar, promulgated by Law No. 23 of 2004, contains a chapter, comprising articles 408–424, which is devoted to the question of accused and convicted persons. The most important provisions are the following:

Article 409

It is a prerequisite for the extradition of persons:

- That the offence for which extradition is requested has been committed within the territory of the State requesting the extradition or has been committed outside the territory of the State of Qatar and the State requesting the extradition, provided that the act is punishable under the laws of the requesting State if committed outside its territory;

- That the offence is a felony or misdemeanour punishable under both Qatari law and the law of the State requesting the extradition by a custodial penalty of at least two years or a more severe penalty, or that the person whose extradition is requested on the grounds of such offence has been sentenced to imprisonment for a term of at least six years;

If the act is not punishable under the laws of the State of Qatar, or the penalty established for the offence in the State requesting the extradition has no equivalent in the State of Qatar, extradition shall not be compulsory unless the person whose extradition is requested is a national of the State requesting the extradition or a national of another State that establishes the same penalty;

If extradition is requested for more than one offence, extradition shall be permissible only with regard to those offences which satisfy the conditions set forth above.

Article 410

Extradition is not permissible in the following cases:

- (1) If the person whose extradition is requested is a Qatari national;

- (2) If the offence for which extradition is requested is a political offence or is connected with a political offence, or the person whose extradition is requested is a beneficiary of political asylum at the time of submission of the request for extradition;

- (3) If the offence for which extradition is requested is limited to breaches of military obligations;

- (4) If there exist serious grounds for believing that the extradition request was submitted for the purpose of trying or punishing the person on the basis of considerations relating to race, religion, nationality or political views, or the existence of any such consideration is likely to be detrimental to the position of the person whose extradition is requested;

- (5) If the person whose extradition is requested has already been tried for the same offence, a judgement has been handed down and he has satisfied his penalty, or the criminal action or the penalty has expired or become null and void owing to the passage of time or the granting of pardon in accordance with Qatari law or the law of the State requesting the extradition;

- (6) If Qatari law permits the trial of the person whose extradition is requested before the judicial authorities in Qatar for the offence for which extradition is requested.

Moreover, some provisions of the 2004 Penal Code of Qatar apply to international terrorist offences. Article (17) provides as follows:

The provisions of this Code apply to anyone present in the State after having committed abroad, whether as principal or accessory, any crime of trafficking in drugs or in persons or any international crime of piracy or terrorism.

And, according to article (18) of the said Penal Code:

Any Qatari who, while outside Qatar, commits an act considered hereunder as a felony or a misdemeanour shall be punished in accordance with the provisions of this Code if he returns to Qatar and the act is punishable under the law of the country in which it was committed.

On the basis of the foregoing, the Code subjects all persons (Qataris, residents and foreigners), if they are present in the State, to the jurisdiction of the Qatari courts with regard to specific offences, including international terrorism, whether committed inside or outside Qatar.

Furthermore, there is also Law No. 28 of 2002 on combating money-laundering, with article 17 providing:

The crime of money-laundering is one of the offences that permit of legal assistance, coordination, mutual cooperation and extradition of offenders under the provisions of agreements concluded or acceded to by the State.

Finally, article 58 of the Permanent Constitution of Qatar provides as follows:

The extradition of political refugees is prohibited, and the law stipulates the conditions governing the granting of political asylum.

SERBIA

The issue of extradition or prosecution in Serbia is also regulated by its internal law.

It should be emphasized in particular that the Criminal Procedure Code regulates in specific sections, *inter alia*, matters related to extradition of accused or convicted persons and other forms of international legal aid (general forms of such assistance, transferring and taking over prosecution, execution of foreign judicial decisions).

In respect of extradition, but also with respect to other forms of international legal assistance in criminal matters, the Criminal Procedure Code gives precedence to international treaties. In fact, its provisions are applicable only in case of non-existence of an international treaty, but in the case when it does apply, the Code will not regulate certain matters.

This disposition is in conformity with the Constitution of Serbia, which stipulates that generally accepted rules of international law and ratified international treaties form an integral part of the legal system of Serbia and that they are implemented directly. Furthermore, international treaties must not contravene the Constitution, whereas the laws and other general legal acts adopted by Serbia must not be contrary to the ratified international instruments and generally accepted rules of international law.

The Constitution of Serbia does not contain any provision relating to the extradition of accused or sentenced persons.

Neither the extradition of accused or sentenced persons nor their possible prosecution in Serbia is made conditional on the existence of an international treaty. Consequently, if there is no international treaty, then in matters of extradition or prosecution in international legal relations, provisions of a domestic law will apply.

The Criminal Procedure Code, which establishes requirements for the extradition of accused or sentenced persons and considerations to be taken into account in

refusing extradition of such persons, as well as the procedure for determining these considerations, does not specifically provide for the obligation or duty to extradite or prosecute (*aut dedere aut judicare*).

However, regarding extradition or prosecution, the Criminal Procedure Code does not allow extradition to another country of a national of Serbia. Nor does it provide for the extradition of a foreigner for an offence against Serbia or its nationals irrespective of whether the offence was committed in the territory of Serbia or outside it. Accordingly, the Code provides for the jurisdictional competence of Serbia in regard to prosecution, i.e. prosecution will be undertaken in Serbia.

Under the Criminal Procedure Code, a foreigner may be extradited if criminal proceedings against him or her have not been instituted in Serbia for an offence against Serbia or its national, or in case criminal proceedings have been initiated, if a security bond has been posted to ensure the claim of the injured party.

Of particular relevance for the obligation to extradite or prosecute in national legislation are the solutions contained in the provisions of the Penal Code of Serbia relating to the geographic scope of criminal legislation in Serbia (applicability of criminal legislation as regards where the offence has been committed). These provisions regulate the enforcement of criminal legislation of Serbia if an offence has been committed in its territory. However, these provisions may also apply if the offence has been committed outside the territory of Serbia. This is particularly true in cases when a foreign country, where the offence has been committed, has not requested extradition of an alleged offender, or if extradition has been requested but refused for some reason.

When an offence has been committed in the territory of Serbia, under its Penal Code, the main principle to be applied is the territorial one, meaning that the criminal legislation of Serbia will apply to all offences committed on its territory, whatever the nationality of the alleged offender. This principle has been expanded to include the nationality of a vessel or an aircraft. The Code provides for the possibility to transfer prosecution to another country, in particular if the offence concerned carries a sentence of up to 10 years in prison, or if it is an offence against the safety of public transport, regardless of the sentence it carries. If a foreign country has either instituted or completed proceedings for an offence committed in the territory of Serbia, prosecution in Serbia for the same offence may only be pursued upon approval of the public prosecutor. Exemptions from the application of the territorial principle are those envisaged by public international law (e.g. persons enjoying full diplomatic immunity), in which case national legislation will apply.

The criminal legislation of Serbia also applies to everyone (national or foreigner) who commits an offence abroad to the detriment of Serbia. Such offences are those against the constitutional system and security of Serbia, except for the criminal incitement of national, racial or religious hatred, division or intolerance, as well as money counterfeiting, if national currency has been counterfeited. In all the above cases the principle of an absolute application of the law of Serbia is applicable.

The criminal legislation of Serbia also applies to its national when he or she has committed any other offence abroad, or if found in the territory of Serbia or if he or she has been extradited to Serbia. The reason for the application of this active personality principle is that a national of Serbia, by coming to his or her own country, should not escape criminal responsibility for any offence he or she committed abroad, in the light of the fact that he or she cannot be handed over to another country. According to this principle, the criminal legislation of Serbia will be applicable even to an offender who becomes its national after he or she has committed the offence in question. Such a provision was necessary to ensure prosecution of offenders who may not be extradited to another country because they were foreigners at the time of commission of the offence. These cases may be prosecuted in Serbia only if foreign criminal law has not been applied or if such an offence is also made punishable under the laws of the country where the offence occurred. If not, in order to proceed to prosecution in Serbia, it will be necessary to obtain the approval of the public prosecutor.

The criminal legislation of Serbia will also apply to a foreigner outside its territory who has committed any offence against it or its national, if he or she is found in its territory or if surrendered to it. Such an individual may be prosecuted only on condition that the offence committed is also punishable under the law of the country where it was committed. If this is not the case, the public prosecutor must consent to such prosecution.

Similarly, the criminal legislation of Serbia is further applicable to a foreigner who commits against a foreign country or another foreigner abroad an offence punishable under the criminal law of the country where it was committed by an imprisonment of not less than five years or by a harsher sentence (universal principle). In addition, the requirements for the application of this principle include that the foreigner is found in its territory but is not extradited, and that the offence is also punishable under the laws of the country where it has been committed. As regards the requirement that the offence concerned is also considered as an offence under a foreign law, there is one exception: the offence is to be considered as such under the principles of law recognized by the international community. Prosecution may then, pursuant to the Penal Code of Serbia, be pursued once the public prosecutor has approved it. In the case of application of national legislation, the accused person may not be condemned to a more severe sentence than that provided for under the criminal legislation of the country where the offence occurred.

In view of the foregoing, the criminal legislation of Serbia and the universal principle will be applied only if no foreign country has requested the extradition of a foreigner or if the extradition request has been refused.

In the case when the request for extradition has been refused, there is both the need and justification to apply the criminal legislation of Serbia, i.e. to prosecute in Serbia so that the foreigner in question be held criminally liable or face punishment. In this context, the application of domestic law (i.e. the trial) may also be seen as the obligation of the country refusing the extradition. Hence, it is in such cases that the application of the *aut dedere aut judicare* principle is fully reflected.

As a rule, the judicial practice in Serbia allows the extradition of foreigners provided all requirements for it have been met. For this reason, application of the universal principle is very uncommon. However, this does not diminish the importance of the principle ensuring that an alleged offender may be prosecuted at all times to avoid escaping criminal liability.

Furthermore, concerning the active nationality principle and the universality principle, prosecution in Serbia will not be pursued: (a) if the offender has served full term of the sentence he or she has received in a foreign country; (b) if the offender has been cleared by a legally valid judicial decision or if his or her sentence has been barred by the lapse of time or if he or she has been pardoned; (c) if an appropriate security measure has been imposed on the mentally ill offender in a foreign country; or (d) if prosecution of the offence under a foreign law requires a request by the injured party and if such a request has not been made.

SLOVENIA

Article 8 of the Constitution of Slovenia stipulates that laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly.

Article 47 of the Constitution of Slovenia determines that no citizen of Slovenia may be extradited or surrendered unless such obligation to extradite or surrender arises from a treaty by which, in accordance with the provisions of the first paragraph of article 3a of the Constitution, Slovenia has transferred the exercise of part of its sovereign rights to an international organization.

Article 122 of the Penal Code of Slovenia determines that it shall be applicable to any citizen of Slovenia who commits any criminal offence abroad and who has been apprehended in or extradited to Slovenia.

Article 123 of the Penal Code of Slovenia determines that it shall also be applicable to any foreign citizen who has, in a foreign country, committed a criminal offence against it or any of its citizens and has been apprehended in Slovenia and is not extradited to a foreign country. In such cases, the court shall not impose a sentence on the perpetrator heavier than the sentence prescribed by the law of the country in which the offence was committed.

The request for extradition to the authorities of Slovenia goes through the channels agreed upon in the relevant multilateral or bilateral treaties. The request for the extradition is forwarded to the investigative judge of the district court on whose territory the person claimed resides or is in pre-trial detention. The investigative judge must hear the person claimed and take into account the views expressed by his defence counsel and the prosecutor. He may also perform some other inquiries in the case. After that, the file is sent to a panel of three judges which decides on the question of whether legal conditions for extradition are fulfilled, according to the Criminal Procedure Act.

In the event that legal conditions for extradition are fulfilled, the panel issues a decision against which the person has the right to appeal. The court's final decision on the legal grounds for extradition, together with the court file, is sent to the Ministry of Justice and the Minister issues a ruling whereby extradition is granted, rejected or postponed (arts. 521–537 of the Criminal Procedure Act).

In cases where legal conditions for extradition are not fulfilled, the panel issues the decision on refusing extradition which is obligatorily reviewed (annulled or modified) by the appeal court.

Article 522 of the Criminal Procedure Act stipulates that the preconditions for extradition are: (a) that the person whose extradition is requested is not a citizen of Slovenia; (b) that the act which prompted the request for extradition was not committed in the territory of Slovenia against Slovenia or a Slovenian citizen; (c) that the act which prompted the request for extradition is a criminal offence within the meaning of domestic and foreign law alike; (d) that under domestic law, criminal prosecution or the execution of punishment was not barred by statute before the alien was detained or interrogated as the accused; (e) that the alien whose extradition is requested has not been convicted of the same offence by the domestic court or has not been acquitted under a final decision of the domestic court, or criminal proceedings against him have been suspended by a final decision, or the charge against him has been rejected by a final decision, or that in Slovenia criminal proceedings have not been instituted against the alien for the same offence committed against Slovenia and, in the event that criminal proceedings have been instituted for an offence committed against a citizen of Slovenia, that the indemnification claim of the injured party has been secured; (f) that the identity of the person whose extradition is requested has been established; and (g) that there is sufficient evidence to suspect that the alien whose extradition is requested has committed a criminal offence, or that a finally binding judgement exists thereon.

The second paragraph of article 530 of the Criminal Procedure Act determines that the Minister for Justice shall decline extradition of an alien if the latter enjoys the right of asylum in Slovenia, if a political or military offence is involved or if an international treaty with the country demanding the extradition does not exist. He may decline extradition if a criminal offence punishable by up to three years' imprisonment is involved, or if a foreign court had imposed a sentence of a prison term of up to one year.

The second paragraph of article 521 of the Criminal Procedure Act stipulates that an alien may only be extradited in instances provided for by the international agreements binding on Slovenia.

SRI LANKA

The Extradition Law, No. 8 of 1977, provides the basic legal regime to deal with requests for extradition of fugitive offenders received from designated Commonwealth countries or treaty States.

Furthermore, the enabling legislations introduced to give effect to international treaties relating to the suppression of serious international crimes which contain the obligation to extradite or prosecute, include necessary provisions to amend the Extradition Law; *inter alia*, they provide that offences under the said convention are to be treated as extraditable offences and to treat the convention as the basis for extradition in the absence of an extradition treaty with a foreign State. These enabling laws are the following: the Offences against Aircraft Act, No. 24 of 1982; the SAARC Regional Convention on Suppression of Terrorism Act, No. 70 of 1988; the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation Act, No. 31 of 1996; the Suppression of Terrorist Bombings Act, No. 11 of 1999; the Prevention of Hostage Taking Act, No. 41 of 2000; the Suppression of Unlawful Acts against the Safety of Maritime Navigation Act, No. 42 of 2000; and the Convention on the Suppression of Terrorist Financing Act, No. 25 of 2005.

SWEDEN

Sweden has different regimes regarding extradition, depending on the country to which a person is subject to extradition (or surrender): the Act on Extradition for Criminal Offences to Denmark, Finland, Iceland and Norway deals with extradition between Nordic countries; the Act on surrender from Sweden according to the European arrest warrant provides for conditions for surrender between member States of the European Union; and finally, the Extradition for Criminal Offences Act deals with extradition to all other countries.

In all cases, a request for extradition (or surrender) is dealt with by the Swedish Prosecution Authority. A prosecutor handles a request and investigates if there are reasons to extradite (or surrender) a person. If the request is from a Nordic country, the prosecutor decides if the person should be extradited (with a few exceptions). If a person should be surrendered to a member State of the European Union, the court takes the final decision. In all other cases, the decision is delivered by the Government of Sweden after the Supreme Court has examined the case and delivered a written opinion on whether extradition can be legally granted or not. If the Court is of the opinion that the extradition should not be granted, the Government is bound by that opinion. Depending on the country to which a person is subject to extradition (or surrender), different conditions or grounds for refusal apply. Very few grounds for refusal are applicable on extradition to the Nordic countries. The opposite is the case when it comes to extradition requests to countries outside the European Union. For instance, Swedish nationals can be extradited (or surrendered) to the Nordic countries and within the European Union but not to other countries. The requirement of dual criminality applies in all cases if the request was received from a country outside the Nordic States and the European Union. That requirement is limited if the person is subject to a European arrest warrant and not applicable at all if the request comes from a Nordic country (except for Swedish nationals).

The provisions on jurisdiction in criminal matters are mainly found in chapter 2 of the Swedish Penal Code.

Crimes committed outside Swedish territory shall be adjudged according to Swedish law and by a Swedish court if the crime has been committed (chap. 2, sect. 2):

(a) By a Swedish citizen or an alien domiciled in Sweden;

(b) By an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in Sweden; or who is a Danish, Finnish, Icelandic or Norwegian citizen and is present in Sweden;

(c) By any other alien, who is present in Sweden, and under Swedish law if the crime can result in imprisonment for more than six months.

A further condition required is that the act is criminalized in the State where it is committed (double criminality) or, if it is committed within an area not belonging to any State, that the prescribed punishment under Swedish law is more severe than a fine.

For the situations mentioned above, it is prescribed that no sanction exceeding the most severe sanction in the other State may be imposed.

Thus, Swedish courts have very far-reaching jurisdiction when the alleged perpetrator is present in Sweden. In order to be “present” in Sweden, in the sense of the Penal Code, the person in question has to have come to Sweden on a voluntary basis.

There are additional situations where crimes committed outside Swedish territory shall be adjudged according to Swedish law and by a Swedish court. In contrast to the situations referred to above, the law does not impose any requirement of double criminality, for example, in the following situations (chap. 2, sect. 3):

(a) If the crime is hijacking, maritime or aircraft sabotage, airport sabotage, counterfeiting currency, an attempt to commit such crimes, crimes against international law, unlawful dealings with chemical weapons, unlawful dealings with mines, false or careless statement before an international court, terrorist crime according to the law on terrorist crimes or an attempt to commit such a crime;

(b) If the least severe punishment prescribed for the crime in Swedish law is imprisonment for four years or more.

The specific crimes for which Sweden has extraterritorial jurisdiction (i.e. jurisdiction based only on the crime itself) are thus mentioned under those provisions of the Penal Code.

According to Swedish law, a preliminary investigation shall be initiated by the police or prosecution authority as soon as there is reason to believe that a criminal offence subject to public prosecution has been committed. The main purposes of the investigation are to find out who could be reasonably suspected of having committed the crime and if there are sufficient grounds to prosecute him or her.

The Swedish public prosecutor is, as a matter of general principle, obliged to prosecute offences falling within the domain of public prosecution when there is enough evidence to expect the court to find the suspect guilty. There are, however, a few exceptions. Under certain circumstances, the prosecutor may decide to limit the preliminary investigation or to waive prosecution provided no compelling public or private interest is disregarded.

Those general rules apply, on the condition that the Swedish provisions on jurisdiction, as described above, are applicable, irrespective of where the crime has been committed.

In conclusion, a prosecutor is always involved in the extradition or surrender procedures and will be informed if a request for extradition or surrender is refused. In such a case, the provisions in the Swedish legislation on jurisdiction and preliminary investigation and prosecution could be applicable in order to fulfil the obligation of the principle of *aut dedere aut judicare*.

THAILAND

The 1991 Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics was enacted to implement the conventions relating to narcotic drug offences to obligate Thailand to grant extradition upon the basis of these multilateral treaties where the obligation to prosecute or extradite (*aut dedere aut judicare*) is operated.

TUNISIA

Tunisian legislation regulates the extradition of foreign criminals under articles 308–335 of the Code of Criminal Procedure under the heading “Extradition of foreign criminals”, which covers the conditions, procedures and effects of extradition without explicitly recognizing the principle of “extradite or prosecute”. However, it recognizes the active personality principle in its treatment of the bases of international jurisdiction in criminal matters and in the text of article 305 of the Code, which allows for the prosecution by the Tunisian courts of a Tunisian citizen who has committed a crime or misdemeanour punishable by Tunisian law outside Tunisia. It also recognizes the passive personality principle under article 307 *bis* of the Code, which grants authority to prosecute anyone who commits, as principal or accessory, a crime or misdemeanour outside Tunisia when the victim is of Tunisian nationality. It also recognizes, under article 307 of the Code, the objective territoriality principle, which grants authority to prosecute a foreigner who commits, as principal or accessory, a crime or misdemeanour outside the soil of Tunisia which harms the security of the State, or who engages in counterfeiting the national currency.

Therefore, although the Code of Criminal Procedure does not explicitly recognize the principle of extradite or prosecute, the net result of its adoption of such a wide-ranging basis for international jurisdiction is a *de facto* recognition of that principle.

That trend was reinforced by the adoption of the principle of universal jurisdiction in article 55 of Act No. 2003–75 of 10 December 2003 in support of international efforts to combat terrorism and prevent money-laundering. It gives the Tunisian courts jurisdiction over terrorist crimes when they are committed by a Tunisian national, when they are committed against Tunisian parties or interests or when they are committed by a foreigner or stateless person whose habitual place of residence is on Tunisian soil, or by a foreigner or stateless person present on Tunisian soil whose legal extradition the competent foreign authorities did not request prior to the issuance by the competent Tunisian courts of a final judgement against him. Article 60 of the Act requires extradition if terrorist crimes are committed outside Tunisia, by a person not bearing Tunisian citizenship, against a foreigner, foreign interests or a stateless person, if the perpetrator is present on Tunisian soil.

Tunisian legislation follows internationally accepted practice in its application of the principle of not permitting the extradition of Tunisian citizens. On the other hand, Tunisia is obligated under the previously noted international judicial conventions to initiate criminal prosecution in Tunisia against a person whose extradition and prosecution are requested in accordance with the principle of extradite or prosecute.

With respect to non-Tunisians, legislation allows the extradition of a person to a foreign State only if that person is being prosecuted for a crime punishable by Tunisian law as a crime or misdemeanour, if the penalty required by the law of the requesting State is that of imprisonment for a period of six months or more for all crimes for which extradition is being requested. In case of trial, the penalty imposed by the court of the requesting State must be imprisonment for two months or more.

Extradition can be granted only when the crime for which extradition is being requested was committed on the soil of the requesting State by one of its citizens or by a foreigner, or if it was committed outside such State by one of its citizens or a foreigner if the crime is one of the crimes the prosecution of which is authorized in Tunisia by Tunisian law even when committed abroad by a foreigner.

Extradition is not permitted when the crimes were committed in Tunisia or when, despite their having been committed outside Tunisia, the prosecution of the perpetrators has been concluded, the statute of limitations on the public proceedings or the punishment has run out under Tunisian law or the law of the requesting State, the crime is of a political nature, it is clear that the request is for political purposes, or the crime consists of failure to discharge a military obligation.

Article 59 of Act No. 2003–75, in support of international efforts to combat terrorism and prevent money-laundering, under no condition allows terrorist crimes to be considered political crimes. Article 56 of the Act authorizes the initiation of public proceedings for terrorist crimes independent of the criminality of the acts under prosecution under the law of the State in which the crime was committed.

UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

The United Kingdom does not have any specific legal regulations concerning the obligation to extradite or prosecute. Section 193 of the Extradition Act 2003 allows the United Kingdom to extradite for trial when requested by another party to an international convention and where the conduct in question is covered by the provisions of that convention.

The United Kingdom has several statutory provisions establishing jurisdiction for specified crimes, thus enabling the relevant national authorities to prosecute offences. Implementing legislation for the international treaties by which the United Kingdom is bound includes: Geneva Conventions Act, 1957; part I of the Aviation and Security Act 1982; Internationally Protected Persons Act 1978; Suppression of Terrorism Act 1978; Taking of Hostages Act 1982; Nuclear Material (Offences) Act 1983; sect. 134 of the Criminal Justice Act 1988; sect. 21 of the Criminal Justice (International Co-operation) Act 1990; parts I–II of the Aviation and Maritime Security Act 1990; United Nations Personnel Act 1997; part VI of the Terrorism Act 2000; chap. 15 of the Serious Organised Crime and Police Act 2005.

UNITED STATES OF AMERICA

The United States has no domestic legal provisions concerning the obligation to extradite or prosecute. Indeed, as noted above, United States extradition law is clear in setting forth that it shall continue in force only during the existence of any treaty of extradition with a foreign Government (18 U.S.C. §3181(a)).

D. Judicial practice of a State reflecting the application of the *aut dedere aut judicare* obligation

AUSTRIA

The *aut dedere aut judicare* principle plays a crucial role in Austrian practice. According to section 65, paragraph 1.2, of the Austrian Penal Code, the Public Prosecutor has to examine the institution of proceedings in Austria if the extradition of a suspect cannot be granted for reasons other than the nature or characteristics of the offence.¹ However, the court decisions instituting proceedings in Austria following the refusal of extradition do not explicitly refer to the above-mentioned provisions. For this reason, no court decisions referring explicitly to section 65 of the Code or comparable provisions can be provided. The lack of court decisions therefore does not reflect the great importance of the *aut dedere aut judicare* principle in Austrian judicial practice.

¹ See also section 17, paragraph 3, of the Federal Law on judicial cooperation in penal matters with the member States of the European Union, *Federal Law Gazette*, No. 36/2004, implementing Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *Official Journal of the European Communities*, L190 of 18 July 2002, p. 1.

CHILE

Recent judicial practice in 2006 reflecting the application of the *aut dedere aut judicare* obligation, includes

(a) the judgement of first instance dated 7 February 2006 handed down by Alberto Chaigneau del Campo, Examining Magistrate of the Supreme Court, approved by the Court by decision of 21 March 2006, concerning the request by Argentina for the extradition of Chilean national Rafael Washington Jara Macías, which rejected the request and stated that the person in question should be tried in Chile for the offence of which he was accused; and (b) the judgement of first instance dated 21 August 2006 handed down by Alberto Chaigneau del Campo, approved by the Supreme Court by decision of 9 November 2006, concerning the request by Argentina for the extradition of Chilean national Juan León Lira Tobar, which rejected the request and stated that the person in question should be tried in Chile for the offence of which he was accused.

CROATIA

In the criminal prosecution taken over from another State, the accused is tried as if the offence had been committed in Croatia. However, foreign law is applicable when it is more lenient on the accused, to honour the principle that the transfer of prosecution between States must not aggravate the position of the accused. Every investigative action undertaken by a foreign judicial body under the law of the requesting State will engender a corresponding investigative action under the law of Croatia, unless it runs contrary to the principles of the national legal order, the principles of the Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights.

IRELAND

It would appear that no Irish judicial practice reflecting the application of the obligation exists.

LATVIA

There is not much judicial practice of Latvia reflecting the application of the *aut dedere aut judicare* obligation. In 2006, Latvia received three requests for legal assistance concerning the extradition of persons for criminal prosecution. Two of them are still in process. One of them has been fulfilled.

LEBANON

With regard to judicial application of the principle of extradition, the Public Prosecutor at the Court of Cassation is competent to prepare the docket on the extradition of offenders and forward it, together with his report, to the Minister for Justice (art. 17 of the Code of Criminal Procedure).

MEXICO

There are no jurisprudential criteria relating to extradition in the judicial practice of Mexico which explicitly demonstrate the obligation to extradite or prosecute.

MONACO

Monaco courts are rigorously applying the rules contained in its law on extradition No. 1.222. Monaco is

committed to fight against transnational crimes in an efficient manner, and to promote the largest and the most effective international cooperation, as exemplified by the judgement of the Appeal Court, dated 12 April 2001.¹ In this judgement, the Court allowed the extradition of a Russian national requested by the Russian Federation for drug trafficking. In order to do so, the Court carefully applied the provisions contained in law No. 1222, the bilateral convention between Monaco and Russia of 5 September 1883, and the provisions on extradition contained in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which Monaco and the Russian Federation are both parties. It concluded that the extradition request by the Russian Federation fully complied with the procedural and substantive requirements provided in those instruments, namely, the request had been transmitted through diplomatic channels, the judge had ascertained the identity of the person arrested and notified to him the extradition procedure, an interpreter was present during the hearing, all relevant documents had been duly translated, and his arrest had been made lawfully. Furthermore, the grounds for the request of extradition were contained in the United Nations Convention and therefore were deemed included in the 1883 extradition convention between Monaco and Russia. Moreover, there was no other basis to refuse such an extradition as the offence did not have any military, fiscal, or political nature, it was not prosecuted in Monaco courts; it was not covered by any statute of limitations. Finally, the asylum request made by the suspect could not become a ground to refuse extradition in the view of the gravity of the alleged offence.

Meanwhile, no specific judgement concerning the direct application of the *aut dedere aut judicare* principle has been identified.

¹ This judgement in its original French version is available for consultation at the Codification Division, Office of Legal Affairs. See also *Revue de droit monégasque*, vol. 4 (2002), p. 52.

POLAND

Pursuant to the Code of Criminal Procedure, applications of foreign States for the extradition of prosecuted or convicted persons are subject to court rulings. In deciding on the admissibility of extradition, the court is guided by the aforementioned provisions of the Constitution and the Code of Criminal Procedure. The court ruling on extradition is subject to appeal by the prosecuted person and the prosecutor. During the years from 2004 to 2007, the courts usually determined inadmissibility of extradition on the basis of the provisions of article 604, paragraph 1, subsections (5) and (7) of the Code, namely, incompatibility of extradition with Polish law, or justified concern that the freedoms and rights of the extradited person would be violated in the State seeking extradition.

The final decision on the application of a foreign State for extradition is taken by the Minister for Justice of Poland. Only a ruling in which the court determines inadmissibility of extradition is binding on the Minister. On the other hand, the Minister is entitled to deny extradition even if the court finds that it is admissible. In taking the final decision, the Minister is guided by criminal policy

considerations. However, pursuant to the resolution of the Supreme Court of 17 October 1996, the Minister cannot refuse extradition by making an independent ascertainment of facts that differs from the ascertainment made by the court in its ruling on the admissibility of extradition. The Minister's decisions on extradition are not subject to appeal. In practice, during the period from 2004 to 2007 there have been no instances of the Minister refusing extradition despite a court ruling allowing extradition.

In 2004, four extradition requests have been refused out of 63; in 2005, 10 extradition requests were refused out of 27; in 2006, four were refused out of 24; and in 2007, so far, there have been three requests for extraditions.

An analysis of extradition proceedings conducted during the years from 2004 to 2007 indicates that the complete procedure, from the lodging of the application by a foreign State until the decision of the Minister for Justice, lasts on average seven months.

SERBIA

In practice, Serbia allows, as a rule, extradition of a foreigner to a foreign country for offences committed in that foreign country. Hence, for example, in the last 10 years extradition requests have been denied only in very few instances, primarily because nationals of Serbia were involved. The said individuals have not been proceeded against in Serbia since their offences have not fulfilled the conditions required to consider them as offences under international instruments providing for the obligation to extradite or prosecute. In all the instances concerned, Serbia has not been requested by any country to try these individuals, nor has it been provided with evidential material supporting the institution of criminal proceedings against them.

There are many more instances in practice where foreign countries have declined the extradition requests made by Serbia. As a matter of fact, such individuals are neither prosecuted nor stand trial in the countries which have refused to extradite them. Instead, they are released and sometimes, later on, extradited by other countries where they happen to be found and arrested on an international search warrant.

SLOVENIA

One of the fundamental principles of Slovenian criminal procedure is the principle of legality, which determines that the prosecutor is bound to institute criminal prosecution if there is reasonable suspicion that a criminal offence liable to prosecution *ex officio* has been committed. Accordingly, Slovenian law enforcement authorities must prosecute Slovenian citizens or persons having permanent residence in Slovenia for a criminal offence committed abroad, if extradition is declined. They must also prosecute foreign citizens who have, in a foreign country, committed a criminal offence against that country or any of its citizens and have been apprehended in Slovenia and have not been extradited to a foreign country. But it should be pointed out that Slovenia generally grants extradition of aliens, if all legal conditions are fulfilled. Upon the request of a foreign country, Slovenia

can also prosecute Slovenian or foreign citizens for a criminal offence committed abroad. The request for prosecution must be transmitted, together with the files, to the competent prosecutor in whose territory that person has permanent residence. Refusal to prosecute can only be based on the same grounds as for an offence perpetrated in Slovenia. Jurisdiction in Slovenia for institution of criminal proceedings lies in the hands of the district prosecutors (in Slovenia there are 11 offices of district prosecutors). There are no special centralized records or gathering of information with regard to individual cases where prosecutors initiated criminal proceedings or took over prosecution from a foreign country as a consequence of application of the *aut dedere aut judicare* principle; therefore Slovenia has not provided numerical data with regard to the application of the principle in practice.

SRI LANKA

In the Supreme Court judgement on *Ekanayake v. Attorney General* (SLR 1988 (1), p. 46), the following international conventions which contain the obligation to extradite or prosecute were taken into consideration: (a) the Convention on offences and certain other acts committed on board aircraft; (b) the Convention for the suppression of unlawful seizure of aircraft; and (c) the Convention for the suppression of unlawful acts against the safety of civil aviation. The case involved the hijacking of an Alitalia aircraft to Bangkok by a Sri Lankan national. The offender was prosecuted before the High Court of Colombo, under the Offences against Aircraft Act, No. 24 of 1982, and convicted.

THAILAND

Thailand indicated “no” in response to the question regarding judicial practice.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The nature of the obligation to extradite or prosecute was discussed in the litigation surrounding the extradition of Augusto Pinochet: see *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [2000] 1 AC 61; *ibid.* (No. 3) [2000] 1 AC 147; and in *T. v. Immigration Officer* [1996] AC 742 (per Lord Mustill).

The United Kingdom extradites individuals (including British nationals) where there is a request for extradition and provided that the extradition is not barred for other reasons (for example, human rights considerations). Most recent cases have concerned terrorism offences.

The United Kingdom has recently prosecuted an individual for alleged instances of torture and hostage-taking occurring in Afghanistan in *R. v. Zardad*. Certain aspects of the decision are currently subject to appeal.

UNITED STATES OF AMERICA

Judicial practice in the United States is consistent with the understanding that the obligation to extradite or prosecute is tethered firmly to international conventions. So,

for example, in *United States v. Yousef* (327 F.3d 56 (2d Cir. 2003)), a United States court of appeals held that the Convention for the suppression of unlawful acts against the safety of civil aviation created “a jurisdictional agreement among contracting States to extradite or prosecute offenders who commit the acts proscribed by the treaty” (*ibid.*, p. 96). The United States is not aware of any judicial decisions in the United States that apply the obligation except as set forth in conventions to which the United States is a party.

E. Crimes or offences to which the principle of the *aut dedere aut judicare* obligation is applied in the legislation or practice of a State

AUSTRIA

With regard to the *aut dedere aut judicare* obligation, Austrian legislation does not distinguish between certain categories of crimes or offences. Therefore, all crimes and offences punishable under the Austrian Penal Code are subject to this obligation as laid down in sections 64–65 of the Code.¹

¹ See *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, para. 44.

CHILE

It should be noted that there are no limitations in national legislation and practice that would prevent its application to certain crimes or offences.

CROATIA

The *dedere* obligation only applies to the so-called extraditable offences, determined or determinable as such in an international agreement. If there is no such agreement between the requesting State and Croatia, the Croatian Act on Mutual Legal Assistance in Criminal Matters is applied. The Act provides that extradition for criminal prosecution may be granted for criminal offences that are punishable under Croatian law by a prison term or a security measure including deprivation of liberty of a minimum period of one year, or by a more severe punishment. Should the extradition not be permissible for this reason, it shall not prevent a takeover of the prosecution (*aut judicare*). Therefore, the *aut dedere aut judicare* obligation is applicable to all criminal offences.

IRELAND

In its reply, Ireland made a cross-reference to information contained in the present report (see section B above).

JAPAN

In the Japanese judicial system, the obligation to extradite or prosecute stipulated by the treaties listed in section B above, is implemented on the basis of the Act of Extradition, the Penal Code¹ and other related laws and regulations.

¹ Unofficial translations of the Penal Code and the Act of Extradition provided by Japan are available for consultation at the Codification Division, Office of Legal Affairs.

MEXICO

In Mexico, individuals who commit a federal crime can be extradited. According to article 50, paragraph I (a), of the Judicial Authority Organization Act, crimes provided for in international treaties are federal crimes and such crimes are heard by federal criminal judges. Such crimes are therefore duly incorporated into Mexico's criminal system. Paragraph II of the same article establishes that federal criminal judges also hear extradition requests. The article in question reads as follows:

Federal criminal judges shall hear the following:

I. Federal crimes

The following crimes constitute federal crimes:

- (a) Those provided for in federal laws and international treaties;
- (b) Those mentioned in articles 2 to 5 of the Penal Code for the Federal District for ordinary crimes and for the whole Republic for federal crimes;
- (c) Those committed abroad by diplomatic agents, official staff of legations of the Republic and Mexican consuls;
- (d) Those committed in foreign embassies and legations;
- (e) Those in which the Federation is a passive subject;
- (f) Those committed by a public servant or federal employee, during or in connection with the exercise of their functions;
- (g) Those committed against a public servant or federal employee, during or in connection with the exercise of their functions;
- (h) Those committed on the occasion of the operation of a federal public service, even when that service has been decentralized or contracted out;
- (i) Those committed against the operation of a federal public service or against the property provided for carrying out that service, even when that service has been decentralized or contracted out;
- (j) All those which attack, hinder or prevent the exercise of any specific power or authority of the Federation;
- (k) Those mentioned in article 389 of the Penal Code, in the event that a contract is promised or awarded to an office, decentralized body or State-owned company of the Federal Government;
- (l) Those committed by or against federal electoral officials or party officials under the terms of article 401, paragraph II, of the Penal Code.

II. Extradition proceedings, notwithstanding the provisions of international treaties.

III. Requests for authorization to intercept private communications.

MONACO

Following articles 7–10 of the Code of Penal Procedure, the *aut dedere aut judicare* principle may be implemented in various cases, including crimes against State security, counterfeiting, crimes or offences against diplomatic, consular or national premises, and torture.

POLAND

Prosecuted or convicted persons may be extradited upon the application of a foreign State in connection with the commission of any crimes or offences covered by international treaties binding on Poland. During the period from 2004 to 2007, the extradition applications of foreign States usually referred to offences against property and life and health, and those involving forgeries.

SLOVENIA

The *aut dedere aut judicare* principle applies to all crimes proscribed in the Penal Code of Slovenia, including crimes which derive from international humanitarian law and international treaties referred to above (sect. B): genocide; crimes against the civilian population; crimes against the wounded and sick; war crimes against prisoners of war; war crimes of use of unlawful weapons; unlawful slaughtering and wounding of the enemy; maltreatment of the sick and wounded and of prisoners of war; abuse of international symbols; trafficking in persons; international terrorism; endangering persons under international protection; taking of hostages; unlawful manufacture of and trade in narcotic drugs; enabling opportunity for consumption of narcotic drugs and others.

UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

The United Kingdom applies the “extradite or prosecute” principle to the following crimes: torture, hostage-taking, certain offences against civil aviation and maritime safety, and specified terrorist offences.

EXPULSION OF ALIENS

[Agenda item 7]

DOCUMENT A/CN.4/581

Third report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur

[Original: French]
[19 April 2007]

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
Multilateral instruments cited in the present report		110
Works cited in the present report		110
GENERAL PRINCIPLES	1–135	112
A. Right of expulsion	6–23	113
1. An inherent right	8–14	113
2. A non-absolute right	15–22	114
(a) Factual background	15–18	114
(b) Limits inherent in the international legal order	19–22	115
Draft article 3. Right of expulsion	23	116
B. A right to be exercised subject to respect for the fundamental rules of international law	24–135	116
1. Limits relating to the person to be expelled	28–135	116
(a) Principle of non-expulsion of nationals	28–57	116
(i) The principle	34–49	117
(ii) Exceptions	50–56	120
Draft article 4. Non-expulsion by a State of its nationals	57	121
(b) Principle of non-expulsion of refugees	58–81	121
(i) The principle	61–74	121
(ii) Derogations	75–80	124
Draft article 5. Non-expulsion of refugees	81	124
(c) Principle of non-expulsion of stateless persons	82–96	125
Draft article 6. Non-expulsion of stateless persons	96	127
(d) Principle of prohibition of collective expulsion	97–135	127
(i) In time of peace	98–115	127
(ii) In time of war	116–134	129
Draft article 7. Prohibition of collective expulsion	135	132

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Source

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Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto (Strasbourg, 16 September 1963)	<i>Ibid.</i> , vol. 1496, No. 2889, p. 263.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
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General principles

1. In his second report on the expulsion of aliens,¹ after reviewing recent developments in both national and international practice (paras. 15–35), the Special Rapporteur attempted to define the scope of the topic (paras. 36–41). In the study on general rules for the expulsion of aliens (paras. 45–122), he focused on determining the main “scope” or even stumbling block of the debate within both the International Law Commission and the Sixth Committee of the General Assembly. He then tried to define more precisely than in his preliminary report² the concepts relating to the topic. Taking into account the comments made by a number of members of the Commission during the consideration of the second report, the Special Rapporteur has decided to use the terms “*ressortissant*” and “national” of a State as synonyms in this and subsequent reports.

2. This report focuses on the general principles of international law governing the expulsion of aliens. The debate over whether or not the expulsion of aliens relates to international law³ is a thing of the past: the right of expulsion forms part of the principle of territorial sovereignty. A State’s existence depends not only on the existence of a population which recognizes its sovereignty but also, especially, on the existence of a territory in which this sovereignty is exercised exclusively, *de facto* and *de jure*. As Rolin-Jaequemys showed in his report on the right of expulsion of aliens, submitted to the Institute of International Law during its Lausanne session in 1888, this sovereignty would be compromised if it were possible for persons having no political ties to the receiving State—whose home country, in short, was elsewhere—to enter the territory, reside there and defy the local authorities,

who would deem this stay to be dangerous or harmful to the country.⁴ He drew the following conclusion:

From the perspective of international law, any Government of a sovereign State as a general rule, if it deems necessary in its own interest, has the right to admit or not admit, and to expel or not expel aliens who wish to enter or who reside in its territory, as well as to impose conditions on their entry or residence if it deems it necessary in the interest of its tranquillity or domestic or international security, or of the health of its inhabitants.⁵

3. Such a view was in accordance with the prevailing doctrine of the period. Thus, for Darut, the notion of State sovereignty underpins the “rationale for the right of expulsion”,⁶ a right which had been universally recognized during that period.⁷

4. Expulsion involves, on the one hand, the fundamental principle of State sovereignty in the international order, which gives the State the power to issue domestic regulations in accordance with its territorial jurisdiction, and, on the other, the fundamental principles underpinning the international legal order and basic human rights which all present-day States must respect. The preamble to the International Rules on the Admission and Expulsion of Aliens, adopted by the Institute of International Law on 9 September 1892, thus postulates the following:

Whereas for each State, the right to admit or not admit aliens to its territory, or to admit them only conditionally, or to expel them is a logical and necessary consequence of its sovereignty and independence;

Whereas, however, humanity and justice oblige States to exercise this right while respecting, to the extent compatible with their own security, the rights and freedom of foreigners who wish to enter their territory or who are already in it;

¹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

² *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554.

³ See especially the long discussion on this issue at the Institute of International Law meeting of 8 September 1891, *Annuaire de l’Institut de droit international*, vol. XI, pp. 273–320.

⁴ *Ibid.*, vol. X, p. 230.

⁵ *Ibid.*, p. 235.

⁶ Darut, *De l’Expulsion des Étrangers—Principe général: Applications en France*, pp. 16 and 20.

⁷ Martini, *L’expulsion des étrangers: étude de droit comparé*, p. 16.

Whereas, from this international point of view, it may be useful to draft, in general and for the future, some consistent principles, the acceptance of which would not in any case involve any assessment of actions carried out in the past.⁸

5. The following sections will therefore consider the linkage between the fact that, on the one hand, the right of expulsion is an established principle of international law and that, on the other hand, such a right must be exercised in accordance with the fundamental rules of international law. This involves building a structure that strikes a balance between the two notions by linking the right of the expelling State with the rights of the expelled person so that the State's sovereign right is exercised in a manner consistent with human dignity.

A. Right of expulsion

6. The right of expulsion provoked lively debate in the late nineteenth century, as the work of the Institute of International Law on the topic demonstrates in particular. Although the question of the foundation of the right to expel was not explicitly raised during this debate, it was nevertheless addressed directly or indirectly, since the assertion of such a right requires a reference to its legal basis in international law or, as appropriate, in domestic law. Such a permissive rule establishing the State's authority or freedom to remove an alien from its territory might at first glance appear to be drawn from general international law in the narrow, traditional sense, i.e. from customary law.

7. Analysis does not bear this out, however. The right to expel is not granted to the State by any external rule; it is a natural right of the State emanating from its own status as a sovereign legal entity with full authority over its territory, which may be restricted under international law only by the State's voluntary commitments or specific *erga omnes* norms. What is involved in this case is only a restriction rather than a condition for the existence of the rule. In other words, the right to expel is a right inherent in the (territorial) sovereignty of the State; but it is not an absolute right, as it must be exercised within the limits established by international law.

1. AN INHERENT RIGHT

8. The existence of a State's right to expel an alien from its territory is uncontested in international law,⁹ and it does not appear to have ever raised serious doubt in the literature.¹⁰ This is confirmed by State practice.¹¹ More-

over, it is enshrined in ample international arbitral case law, particularly in the late nineteenth and early twentieth century, as well as by more recent decisions and case law of human rights commissions and regional courts. Thus, in the *Boffolo* case, the umpire made the following statement: "That a general power to expel foreigners, at least for cause, exists in governments can not be doubted".¹² The Belgian-Venezuelan Mixed Claims Commission reasoned along the same lines in the *Paquet* case, saying "that the right to expel foreigners from or prohibit their entry into the national territory is generally recognized".¹³

9. The decisions of human rights commissions and the case law of regional human rights courts also recognize the right of expulsion of aliens for the maintenance of public order as an established rule of international law.¹⁴ In this regard, the European Court of Human Rights consistently refers in its case law to

[T]he Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens.¹⁵

Indeed, it has always recognized the right of States,

as a matter of well-established international law ... to control the entry of non-nationals into its territory.¹⁶

10. Considering the merits of the communication jointly submitted by four non-governmental organizations against Angola following the massive expulsions of nationals from various African States from that country in 1996, the African Commission on Human and Peoples' Rights referred to the right of expulsion as follows:

The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide.¹⁷

aliens considered dangerous to its security and would not intervene in such a case"; the statement made 10 years later by the British Minister of State, McNeil, as follows: "[...] It is, of course, within the rights of the Hungarian Government to expel any foreigner from their country and there seems, therefore, to be no legal ground for an official protest"; a letter from United States Assistant Secretary of State Dutton addressed to a congressman in 1961 in which he writes, "[...] it may be pointed out that under generally accepted principles of international law a state may expel an alien whenever it wishes, provided it does not carry out the expulsion in an arbitrary manner."

¹² *Boffolo* case (Italian-Venezuelan Mixed Claims Commission, 1903), UNRIIA, vol. X, (United Nations publication, Sales No. 60.V.4), pp. 531–532.

¹³ *Paquet* case (Belgian-Venezuelan Mixed Claims Commission, 1903), *ibid.*, vol. IX, (Sales No. 59.V.5), p. 325.

¹⁴ See the memorandum by the Secretariat on the expulsion of aliens (A/CN.4/565), para. 190, available on the website of the Commission.

¹⁵ *Moustaquim v. Belgium* [1991] ECHR 3, para. 43. See also *Vilvarajah and others v. The United Kingdom* [1991] ECHR 47, para. 102; *Chahal v. The United Kingdom* [1996] ECHR 54, para. 73; *Ahmed v. Austria* [1996] ECHR 63, para. 38; *Boughanemi v. France* [1996] ECHR 19, para. 41; *Bouchelkia v. France* [1997] ECHR 1, para. 48; and *H.L.R. v. France* [1997] ECHR 23, para. 33.

¹⁶ *Abdulaziz, Cabales and Balkandali v. The United Kingdom* [1985] ECHR 7, para. 67.

¹⁷ *Union interafricaine des droits de l'homme, Fédération internationale des ligues des droits de l'homme and others v. Angola*, African Commission on Human and Peoples' Rights, Communication No. 159/96 (1997), para. 20.

⁸ *Annuaire de l'Institut de droit international*, vol. 12, p. 219.

⁹ See Gaja, "Expulsion of aliens: some old and new issues in international law", p. 295.

¹⁰ Several writers in the late nineteenth century, including Lord Coke, Sapey, Pinheiro-Ferreira, Fiore and Hugues, believed, in line with the idealistic humanism in vogue during that period, that nothing should encroach on human freedom, and they described the right of expulsion as a gross violation of imprescriptible human rights (Darut, *op. cit.*, pp. 8–9). Several writers, however, showed during the same period that such a concept was neither legally nor politically tenable (*ibid.*, pp. 10 *et seq.*).

¹¹ Gaja (*loc. cit.*, p. 295) provides three interesting examples of such practice drawn from Whiteman, *Digest of International Law*, pp. 851, 854 and 861: United States Secretary of State Hull's reiteration in 1939 of his instructions to the United States Consul-General in France to the effect that the United States "recognised the right of a State to expel

11. Moreover, this universally recognized right¹⁸ has been enshrined in the legislation of older countries.¹⁹ One author noted at the beginning of the twentieth century that it had been incorporated into the legislation of most of the countries of Europe and the Americas and into many international treaties,²⁰ and there is no doubt, in the light of the current scale of migration, that this right is part of the legislation of all modern-day States.²¹

12. The right of expulsion exists, however, irrespective of any special provision in domestic or treaty law granting the right to the expelling State, as it derives from international law itself.²² The Institute of International Law has thus stated, as noted earlier (see paragraph 4), that the right is a “logical and necessary consequence” of State sovereignty, of which it is an attribute, or of the State’s independence. Around the same period, Griffin noted as self-evident that “[t]he right to exclude being a mere incident of the sovereignty of each State over its own territory, is of course fully recognized by international law”.²³ In the conclusion of an early 1940s study on the practice of excluding and expelling aliens in Latin America, another author stated: “There is nothing in the law of nations which forbids the expulsion of the ‘domiciled’ or ‘resident’ alien”.²⁴ Concerning, in particular, the practice in Latin America, he wrote: “Latin American countries, exercising inherent powers of sovereignty, will, if there is a law, and if not, as a measure of high police, exclude or expel aliens for reasons connected with the defense of the state, the social tranquillity, individual security, or the public order.”²⁵

13. This concept of the right to expel is set forth in several international arbitral awards. Thus, the sole arbitrator in the *Ben Tillett* case, Arthur Desjardins, wrote

in section (A) of his award entitled “On the right of expulsion from the point of view of principle”:

Whereas, the right of a State to exclude from its territory foreigners when their dealings or presence appears to compromise its security cannot be contested;

Whereas, moreover, the State in the plenitude of its sovereignty judges the scope of the acts which lead to this prohibition.²⁶

In the award rendered in 1903 in the *Maal* case, Plumley, the arbitrator, expressed more explicitly the idea that the right to expel is an inherent right. Reviewing the issue in relation to the exercise of this right by the Government of Venezuela, he wrote:

There is no question in the mind of the umpire that the Government of Venezuela in a proper and lawful manner may exclude, or if need be, expel persons dangerous to the welfare of the country, and may exercise large discretionary powers in this regard. Countries differ in their methods and means by which these matters are accomplished, but the right is inherent in all sovereign powers and is one of the attributes of sovereignty, since it exercises it rightfully only in a proper defense of the country from some danger anticipated or actual.²⁷

Similarly, the arbitration in the *Boffolo* case stated:

The right to expel foreigners is fully held by every State and is deduced from its very sovereignty.²⁸

14. The question as it was raised in the late nineteenth century was whether it was possible to substitute precise rules on expulsion for the arbitrary ones which prevailed in many States.²⁹ From the perspective of contemporary international law, it seems that the right to expel, although it is a sovereign right of the State, is not conceived as an absolute right which confers discretionary power on the expelling State.

2. A NON-ABSOLUTE RIGHT

(a) *Factual background*

15. The right of expulsion has sometimes been considered an absolute right. This view arose particularly in the nineteenth century at the time when the debate on the right of expulsion as a right of the State based on international law began. In its 1893 decision, the Supreme Court of the United States considered “[t]he right of a nation to expel or deport foreigners ... as absolute and unqualified as the right to prohibit and prevent their entrance into the country”,³⁰ “being an inherent and inalienable right”.³¹ This position reflected, consciously or unconsciously, the traditional theory that the power of expulsion, a logical and necessary consequence of sovereignty, is absolutely discretionary and is not subject to any limits or controls.³²

¹⁸ See footnote 7 above.

¹⁹ In the United Kingdom, for example, prior to the Aliens Act of 11 August 1905, see in particular Craies, “Le droit d’expulsion des étrangers en Angleterre”, pp. 357 *et seq.*, cited in Martini, *op. cit.*, p. 16, footnote (1); in France the right of expulsion was granted in 1849 to the Government, but it was not new: the law of 28 vendémiaire, year VI, had already included it in its article 7, which stated: “Any alien travelling within the Republic or residing there without having a mission of neutral or friendly Powers recognized by the French Government, or without having acquired citizenship, shall be placed under the special surveillance of the executive, which may withdraw their passports and require them to leave French territory, if it deems their presence might disturb the public order and peace.” (Desjardins, *Questions sociales et politiques*, pp. 120–121); see also, for example, the law of 21 April 1832, which gave the Government of France the same right concerning foreign refugees (*ibid.*, p. 121).

²⁰ See Boeck, “L’expulsion et les difficultés internationales qu’en soulève la pratique”, p. 480, and the many examples of legislation from the period and international treaties which he cites on pages 480–481.

²¹ It would be tiresome to recapitulate here the relevant provisions of the legislation of every country in this respect. For European countries, a summary may be found in the following works: Nascimbene, *Expulsion and Detention of Aliens in the European Union Countries*; Guild and Minderhoud, *Security of Residence and Expulsion: Protection of Aliens in Europe*. For the United States, see in particular Sohn and Buerghenthal, *The Movement of Persons across Borders*. For a more general perspective, see Goodwin-Gill, *International Law and the Movement of Persons between States*.

²² See Boeck, “L’expulsion ...”, p. 479.

²³ Griffin, “Colonial expulsion of aliens”, p. 90.

²⁴ Irizarry y Puente, “Exclusion and expulsion of aliens in Latin America”, p. 270.

²⁵ *Ibid.*

²⁶ Award of 26 December 1898, reproduced in Fenwick, *Cases on International Law*, p. 181.

²⁷ *Maal* case, Mixed Claims Commission (Netherlands-Venezuela), UNRIAA, vol. X, (see footnote 12 above), p. 731.

²⁸ *Boffolo* case, *ibid.*, p. 528.

²⁹ See extract of minutes of the meetings of the Institute of International Law, held on 8–9 September 1892 and chaired by Albéric Rolin, Vice-President, *Annuaire de l’Institut de droit international*, vol. 12, p. 185.

³⁰ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), p. 707.

³¹ *Ibid.*, p. 711.

³² See Boeck, “L’expulsion ...”, p. 472.

The intense debate about the power of the State to expel aliens arose precisely because this absolutist understanding of the right of expulsion was such that it placed those subject to expulsion at the mercy of governments.

16. This debate is now in the past, since the traditional view has been completely abandoned. Moreover, international practice overtook the literature on this point, and it has now been clearly acknowledged for almost two centuries “that the freedom to expel is not absolute, that it is subject to limits”.³³ In fact, from the time of its first work on the expulsion of aliens, the Institute of International Law has stated that the exercise of the right of expulsion is subject to certain restrictions, including the principle that “expulsion must be carried out with full consideration, in accordance with the requirements of humanity and respect for acquired rights”.³⁴ On this point, it shared the views of Féraud-Giraud who, in his paper on the subject, stated that, in exercising its right of expulsion, a State must always, as far as possible, try to reconcile its duty to maintain order in its territory and to safeguard its own internal and external security with the need “to respect the laws of humanity, the human rights of every individual and the principle of freedom of relations between nations”.³⁵ In the same vein, the Institute’s rapporteur on the subject, de Bar, while recognizing that the sovereign right of States was unquestionable in that regard, nonetheless expressed the view, “no matter how far this sovereign right extends, it may not extend to abolishing all the individual rights of aliens”.³⁶

17. The danger of affirming that the right of expulsion was absolute and discretionary was well understood, but the legal response was not well articulated. Although the area of human rights is not the only one affected, both the literature and case law suggest that the right of expulsion is limited only by considerations of humanity and is therefore limited to the rights of the individual and his or her property rights. It is true that, by invoking the human rights of every individual and the principle of freedom of relations between nations (see preceding paragraph), the Institute of International Law seemed, in 1891, to be hinting at something new—but what? The early literature is not precise. Admittedly, it sets aside the theory adopted in the Middle Ages according to which State sovereignty was absolute and ownership of the territory was attributed to the State. However, in place of that theory, it proposes the rather vague idea that “it does not follow that the rights of aliens are at the mercy of the State’s whim”.³⁷

18. In order to determine the scope of the rule establishing the power or authority to expel, the following question should be asked: what limits should be imposed on the right of expulsion? The answer to this key question has two distinct components. The first is linked to the very nature of the international legal order, which requires that every rule or principle of international law be compatible with the underlying tenets of that legal order; these are constraints that are intrinsic to or inherent in the legal

order itself. The second component relates to the principles which must be respected when the right of expulsion is exercised; they constitute a set of rules derived from, or essentially produced by, the legal order in the form of objective and general rules or in the form of rules created by the subjects of international law. This second category of limits will be dealt with separately in section B below.

(b) *Limits inherent in the international legal order*

19. Since international law applies to equal, sovereign entities “with the same claims to the exercise of absolute sovereignty”,³⁸ it constitutes a vital means of regulating the coexistence of these sovereign entities while also being the necessary corollary thereof. In fact, in modern international law, State sovereignty cannot be understood in the absolute sense; it means only that no State is subordinate to any other State, but that each must respect the minimum rules that guarantee, on the one hand, the same privileges to all other States and, on the other hand, the very survival of the legal order. In this regard, State sovereignty is limited by a number of underlying tenets that are inherent in the legal order and without respect for which the very existence of international law would be compromised and the international community doomed to total anarchy.

20. The discretionary power of expulsion is limited by the general principles governing State actions in the international order. In fact, as a right inherent in State sovereignty, the right of expulsion is naturally subject to these limits, a set of underlying tenets that form the basis of the international legal system. These limits exist independently of other constraints relating to special areas of international law such as international human rights law, international refugee law and the law on migrant workers. They are inherent in the international legal order in the same way as the right of expulsion is inherent in sovereignty. Since the sovereign right of expulsion is not, therefore, an absolute right, its validity is “determined in the light of the State’s obligations, whether they derive from custom, treaty, or general principles of law”.³⁹ As has been noted, the term “discretionary”, which qualifies the power of the State with regard to expulsion, is generally coupled with the idea that such a power is not “arbitrary” and, consequently, that the State should not abuse the discretion accorded to it in such matters. “The rules thus define both the powers of a State and the limits of its authority, and provide protection to an individual against the abuse of that authority.”⁴⁰

21. The Special Rapporteur believes, however, that the limits inherent in the international legal order, insofar as they make that legal order possible, should be distinguished from the limits arising from specific areas of international law which form part of the conditions for the exercise of the right of expulsion.

³³ *Ibid.*, p. 473.

³⁴ *Annuaire de l’Institut de droit international*, vol. 10, p. 236.

³⁵ *Ibid.*, vol. 11, p. 276.

³⁶ *Ibid.*, p. 316.

³⁷ Darut, *op. cit.*, p. 19.

³⁸ Daillier and Pellet, *Droit international public*, p. 83.

³⁹ Goodwin-Gill, *op. cit.*, p. 21; see also Iluyomade, “The scope and content of a complaint of abuse of right in international law”, pp. 82–83; and A/CN.4/565 (footnote 14 above), paras. 198–200.

⁴⁰ Sohn and Buergethal, *op. cit.*, pp. ix–x; see also A/CN.4/565 (footnote 14 above), paras. 201–239.

22. The intrinsic principles that qualify the right of expulsion are *pacta sunt servanda*, good faith and the requirement of respect for *jus cogens*, which implies a principle of non-conflict between a given rule of international law and a peremptory norm. These are the principles on the basis of which the right of expulsion is said to be unquestionable, without, however, being an absolute rule; they are the reverse side of the rule. The principles are well known and do not require particular elaboration in the context of this report.

23. In the light of the points set out above, draft article 3 should read as follows:

“Draft article 3. Right of expulsion

“1. A State has the right to expel an alien from its territory.

“2. However, expulsion must be carried out in compliance with the fundamental principles of international law. In particular, the State must act in good faith and in compliance with its international obligations.”

B. A right to be exercised subject to respect for the fundamental rules of international law

24. The principles which are intrinsic to and inherent in the international legal order and which represent the other side of the coin of the right of expulsion must be distinguished from the principles governing the exercise of the right of expulsion. The latter principles are external to the international legal order and determine the relevant legal regime. The well-known distinction made by Hart between “primary rules” and “secondary rules”⁴¹ could usefully be applied in this instance. While the right of expulsion and its intrinsic limits constitute primary rules, the principles that form the basis for the exercise of that right constitute secondary rules; for that reason, they are part of the relevant codification work of the Commission.

25. The rules of international law governing the right of a State to expel aliens include both the substantive rules and the procedural rules which must be observed if the expulsion is to be lawful. As one author has written:

In all these respects the power of expulsion is typical of the competences possessed by States with respect to the entry and residence of aliens. Formerly characterised as aspects of the State’s absolute discretion, these powers are regulated and controlled, both as to their substance and as to their form, by a system of rules now sufficiently advanced and cohesive to be described as the international law of migration.⁴²

26. Some of these rules are of domestic origin but acquire the status of norms of international law, either as “general principles of law recognized by civilized nations” (Article 38 of the ICJ Statute), or as norms generated by State practice which are the subject of a court ruling.

27. The study of treaty practice and case law, both national and international, in particular that of regional

human rights courts, reveals the following general principles, which are widely recognized as applicable to the expulsion of aliens: the principle of non-expulsion of nationals, the principle of non-expulsion of refugees, the principle of non-expulsion of stateless persons, the principle of prohibition of collective expulsion, the principle of non-discrimination, the principle of respect for the fundamental rights of the expelled person, the principle of prohibition of arbitrary expulsion, the duty to inform and the duty of the expelling State to respect its own law (*patere legem quam fecisti*) and the procedure prescribed by the law in force. Taking these three principles together, three distinct categories of limits emerge: limits relating to the person to be expelled (*ratione personae*), limits relating to the fundamental rights of the person to be expelled (*ratione materiae*) and limits relating to the procedure to be followed with regard to expulsion (*ratione procedi*).

1. LIMITS RELATING TO THE PERSON TO BE EXPELLED

(a) *Principle of non-expulsion of nationals*

28. The term “national of a State” means a person who is connected with the State in question by a link of nationality. Such a person has a current right of nationality of that State: he or she has the nationality of the State in question, which is therefore his or her national State or State of nationality. In that sense, the term “national” is contrasted with the term “alien”, which, as indicated in the Special Rapporteur’s second report, means “a *ressortissant* of a State other than the territorial or expelling State” in the present context.⁴³

29. As indicated in his second report,⁴⁴ the Special Rapporteur continues to believe that it is prudent not to embark on a study of the question of nationality, not only because the conditions for access to nationality are strictly a matter for the legislation of each State, but also because nationality is a restrictive and inadequate criterion against which to define the concept “alien”.

30. Nonetheless, determination of a person’s nationality is a question of international law. This is particularly true when the laws of two or more States attribute different nationalities to the same person. In the *Arata* case, Ramiro Gil de Uríbarri, who was the arbitrator pursuant to the Italian-Peruvian agreement of 25 November 1899, stated in this regard: “Doubtless, when the laws of two States each attribute a different nationality to the same person, the courts of each State apply the laws of that State; however, if the question is brought before an arbitral tribunal, that tribunal rules in accordance with the principles of international law.”⁴⁵

31. This is what the arbitral tribunal presided over by Louis Renault did in the *Canevaro* case. The case related to Count Raffaele Canevaro, who was a native of Peru but was of Italian descent; at the time of his birth he was Peruvian under Peruvian law *jure soli* and Italian under Italian

⁴¹ *The Concept of Law*.

⁴² Plender, *International Migration Law*, p. 477.

⁴³ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573, para. 194.

⁴⁴ *Ibid.*, paras. 128–129.

⁴⁵ Descamps and Renault, *Recueil international des traités du XXe siècle*, verdict of 30 September 1901, p. 711; and Boeck, “L’expulsion ...”, p. 458.

law *jure sanguinis*. The tribunal constituted under the Italian-Peruvian agreement of 25 April 1910 was called upon to decide whether Canevaro was entitled to be considered an “Italian claimant”.⁴⁶ The tribunal, while stating its equal respect for the laws of the two States in question, sought evidence of Canevaro’s affiliation with one of the two States. It expressed its preference for what the literature called “*active nationality, de facto and de jure nationality*, the nationality for which the person in question has expressed a clear and consistent preference”.⁴⁷ The tribunal found that Canevaro had in fact repeatedly acted as a Peruvian citizen by running for the Senate, to which only Peruvian citizens are admitted and before which he had presented himself to defend his choice of nationality, and in particular by accepting the position of Consul General for the Netherlands after requesting authorization from the Government of Peru and, subsequently, Congress.

Consequently, the Permanent Court of Arbitration in The Hague found that, in such circumstances, whatever the status of Raffaele Canevaro might be with regard to Italian nationality, the Government of Peru was entitled to consider him a Peruvian citizen and to deny him the status of Italian claimant.⁴⁸

32. Based on arbitral case law and literature, this solution, as is well known, served as a model for PCIJ⁴⁹ and more specifically for the case law of ICJ notably in the *Nottebohm* case.⁵⁰

33. Therefore, it is not for international law to establish conditions of access to nationality—a matter which falls wholly within the competence of the State—but to settle problems relating to conflict of nationality on the basis of criteria specific to international law. These criteria make it possible to determine under international law whether a person has the nationality he or she claims to have, or, on the other hand, whether a State which claims that a person is not a national of that State is in fact that person’s State of nationality.

(i) *The principle*

34. Since international law can thus determine a person’s nationality in the event of a conflict, it establishes conditions for the application of the prohibition of expulsion by a State of its own nationals. The question is whether a rule exists in this regard in international law. The memorandum by the Secretariat provides a synthesis of the relevant elements of an answer to this question:

Although international law does not appear to prohibit the expulsion of nationals in general, the ability of a State to take such action may be limited by international human rights law. First, some human rights treaties expressly prohibit the expulsion of a person from the territory of the State of which he or she is a national. Secondly, the right of a national to reside or remain in his or her own country may implicitly limit the expulsion of nationals. Thirdly, the duty of other States to receive individuals is limited to their own nationals. Thus, the expulsion of nationals can only be carried out with the consent of a receiving

State. The limitation on the expulsion of nationals may extend to aliens who have acquired a status similar to nationals under the national law of the territorial State. Fourthly, the national law of a number of States prohibits the expulsion of nationals.⁵¹

35. With regard to international human rights instruments, it is worth mentioning, in particular, the American Convention on Human Rights: “Pact of San José, Costa Rica”, article 22, paragraph 5, of which provides as follows:

No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.

The Inter-American Commission on Human Rights found a violation of this provision in the case of the expulsion of a number of Haitians from the Dominican Republic: the persons in question, sugar-cane cutters, were rounded up and expelled in an indiscriminate manner, even though they included several individuals born in the Dominican Republic who therefore had the nationality of that country.⁵²

36. With regard to the rights of nationals, it is worth noting that, in addition to the numerous examples of national laws that prohibit the expulsion of nationals cited in the memorandum by the Secretariat,⁵³ French law, for example, has long affirmed the principle of the prohibition of the expulsion of French nationals from France. It has been accepted that an expulsion order issued by a prefect against a French national is not binding upon the latter. This principle, based on a person’s having the status of French national, has been examined in many judgements and decisions: when a person claims to be a French national, the onus is on the Public Prosecutor’s Office to prove that the person is an alien.⁵⁴ At the beginning of the twentieth century, Martini wrote:

Needless to say, aliens who have become naturalized French citizens may not be expelled, and, conversely, French nationals who have lost their French nationality may be expelled from France.⁵⁵

37. This opinion drew on a decision of the Court of Chambéry of 21 May 1908 in the *Solari* case amending a decision of the Saint-Julien Correctional Court of 30 January 1908. The case involved a French citizen who had deserted from the French army before the end of his seven-year voluntary tour of duty. He had left France to reside in Geneva, where he became a naturalized Swiss citizen on 8 February 1861. He then returned to France, where he claimed that he had never lost his French nationality as a

⁵¹ A/CN.4/565 (see footnote 14 above), pp. 34–36, para. 36, and the comprehensive footnotes provided on the same pages, in particular the list of provisions of international human rights conventions expressly prohibiting the expulsion by a State of its own nationals: art. 22, para. 5, of the American Convention on Human Rights: “Pact of San José, Costa Rica”, and art. 3, para. 1, of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁵² See *Annual Report of the Inter-American Commission on Human Rights 1999* (OEA/Ser.L/V/II.106, doc. 6 rev., of 13 April 1999), Progress report of the Office of the Rapporteur on migrant workers and their families in the hemisphere, chap. VI, para. 9.

⁵³ A/CN.4/565 (see footnote 14 above), pp. 36–37, para. 36, footnote 60.

⁵⁴ See Nice Civil Court (6 January 1893), *Dalloz périodique* (1893), p. 345, and the note by Dupuis, cited in Martini, *op. cit.*, p. 156, footnote (1); Court of Cassation (28 May 1903), *Journal du droit international privé et de la jurisprudence comparée* (1904), p. 689; Paris Civil Court (30 June 1905), *ibid.* (1907), p. 730; see also Darut, *op. cit.*, p. 207; and Boeck, “L’expulsion ...”, p. 590.

⁵⁵ Martini, *op. cit.*, p. 26.

⁴⁶ Boeck, “L’expulsion ...”, p. 458.

⁴⁷ *Ibid.*, p. 459 and “La sentence arbitrale de la Cour Permanente de La Haye dans l’affaire Canevaro (3 mai 1912)”, p. 349.

⁴⁸ Boeck, “L’expulsion ...”, p. 459, and “La sentence arbitrale ...”, p. 348.

⁴⁹ See in particular, *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No 4*.

⁵⁰ *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955, p. 4*.

result of his naturalization because, as at 8 February 1861, his second tour of duty—from which he had deserted—was still ongoing. He claimed that the Government of France itself had come to the same conclusion, since, at the time of the amnesty of 14 August 1869, the French Consul General in Switzerland had expressly granted him the status of French national by authorizing him “to return home”⁵⁶ and stating that he could not be prosecuted for desertion. The Court accepted that argument

and said that, since Solari had retained French nationality, the expulsion order issued against him was invalid.⁵⁷

Continuing his consideration of the question of persons who may be expelled, Martini wrote:

Only French nationals may not in fact be expelled. They have a right to remain in France, of which right they may be deprived only by a sentence of banishment.⁵⁸

38. Similarly, but on the basis of the reverse reasoning, one author noted at the beginning of the twentieth century that an individual born on French soil to unknown parents who returns to France and thereby infringes an expulsion order previously issued against him or her, may not be convicted in a criminal court if he or she claims to be a French national, unless evidence is produced that he or she is an alien.⁵⁹ The author concluded his analysis as follows:

Consequently, if one accepts the principle set out by the Institute of International Law, i.e. that the State has the right to expel only those who do not have a current right of nationality, it must be concluded that an individual who, by law, has the capacity to acquire French nationality ceases to be treated as an alien as soon as he or she applies for that status in accordance with the law, that is as soon as that person’s right to apply for French nationality is no longer a potential right but has been exercised.⁶⁰

39. Given the abundant national and international practice mentioned above and doctrinal opinion on the subject, which is long-standing and nearly unanimous, there is cause to be—at the very least—cautious about the statement that “[a] general rule of customary international law forbidding the expulsion of nationals does not exist”.⁶¹ In fact, the *principle* of the prohibition of expulsion by a State of its own nationals is indisputable in international law, even though, like most principles, there are certain exceptions to it, as shall be seen below. Whether it takes the form of a customary rule or a general tenet of law, the principle exists in international law. This seems to have been the view of the Institute of International Law when it considered the “right to admit and expel aliens”, as shown in particular by its work on the subject at its Geneva session in 1892. Article 2 of its International Rules on the Admission and Expulsion of Aliens, adopted at that session, provides as follows:

In principle, a State may not prohibit either its nationals or persons who are no longer nationals of that State but have not acquired the nationality of any other State from entering or remaining in its territory.⁶²

40. The expression “in principle” at the beginning of that article had been suggested by Desjardins in response to the concern expressed by Pradier-Fodéré, who found the wording proposed by de Bar, reproduced below, “a little ambitious”.⁶³

International law is contrary to any act which prohibits nationals from entering or remaining in the territory of the State to which they belong. The same applies to persons who are no longer nationals of that State but have not acquired the nationality of any other State.⁶⁴

41. The wording was somewhat abrupt. It was very difficult indeed to state categorically that international law was “contrary to” something. This same problem was apparent in the case of the right to expel. The formulation was valid for the prohibition of expulsion, including the expulsion of nationals. By that time, however, the laws of some States had extended the principle of non-expulsion by a State of its nationals to certain categories of individuals who were clearly designated as aliens or non-aliens. Thus, according to article 2 *in fine* of the Belgian law on aliens of 12 February 1897—referring to article 9 of the Belgian Civil Code, which was conceived in the same terms as article 9 of the French Civil Code—the following persons could not be expelled:

1. An alien authorized to establish his domicile in the Kingdom;
2. An alien married to a Belgian woman with whom he has had one or more children born in Belgium during his residence in the country;
3. An alien who is married to a Belgian woman and who has resided in Belgium for more than five years and continues to reside there permanently;
4. An individual, born in Belgium of foreign parentage, who has resided there for the time period stipulated in article 9 of the Civil Code.⁶⁵

42. Likewise, the law of Luxembourg of 30 December 1893 provided that a child who has the option to choose his nationality “cannot be expelled before the expiry of the allowable time period”.⁶⁶ The law of the Netherlands at that time also provided that “an alien who, having established residency in the country, has married a Dutch woman with whom he has had several children born in the Kingdom”, may not be expelled.⁶⁷ The Brazilian law of 7 January 1907 “on the expulsion of aliens from the national territory” declared that “an alien cannot be expelled if he has resided in the territory of the Republic for two continuous years, or even less time if he is also: (a) married to a Brazilian woman, or (b) widowed with a Brazilian child”.⁶⁸ These provisions of article 3 of the law were expressly applied in two judgements, that of the Federal High Court of 30 January 1907 and that of the Federal Court of Appeals of 11 February 1907.⁶⁹ In Venezuela, under article 7 of the law of 16 April 1903, not

⁶³ *Ibid.*, p. 188.

⁶⁴ *Ibid.*, p. 187.

⁶⁵ *Annuaire de législation étrangère*, vol. 27 (1898), pp. 514–515.

⁶⁶ Ruppert, *Code pénal et Code d’instruction criminelle suivis des lois spéciales et règlements particuliers en matière répressive en vigueur dans le Grand-Duché de Luxembourg*, p. 467.

⁶⁷ Jitta, “Le droit d’expulsion des étrangers dans la législation des Pays-Bas”, p. 69.

⁶⁸ Darras, *Revue de droit international privé et de droit pénal international*, p. 855. See also *Journal du droit international privé et de la jurisprudence comparée*, vol. 34 (1907), p. 1217.

⁶⁹ Judgements reported in Darras, *op. cit.*, pp. 821 *et seq.*

⁵⁶ *Ibid.*, p. 27.

⁵⁷ Decision reproduced by Martini, *op. cit.*, p. 28.

⁵⁸ *Ibid.*, p. 30; and along the same lines, see footnote (2), citing Garraud, *Traité du droit pénal français*, vol. 1, No. 178, p. 333; and Larcher, note under Algiers (3 December 1903), *Revue algérienne* (1906), p. 17.

⁵⁹ See Darut, *op. cit.*, p. 75.

⁶⁰ *Ibid.*, p. 94.

⁶¹ Doehring, “Aliens, expulsion and deportation”, vol. 1, p. 110.

⁶² *Annuaire de l’Institut de droit international*, vol. 12, p. 219.

only were “domiciled aliens” and “temporary aliens” not subject to expulsion, but they lost their status as aliens and were, “*ipso facto*, subject to the same responsibilities, duties and obligations as nationals in respect of potential political risks”.⁷⁰ More recent examples include the current Italian law stipulating that the following categories of aliens cannot be expelled from national territory, their status being assimilated to that of Italian nationals: minors, with few exceptions; pregnant women; persecuted persons, refugees or asylum-seekers; foreigners living with relatives up to the fourth degree; and holders of a residence permit.⁷¹ It could be concluded from these laws that certain States do not permit the expulsion of aliens who have been granted citizenship status by law, such as aliens who, having been born in the country of foreign parents, have been legally naturalized.⁷²

43. The principle of non-expulsion of nationals should thus be understood broadly as applying to “*ressortissants*” of a State as defined by the Special Rapporteur in his second report,⁷³ i.e. not only to persons who, like nationals, have the nationality of a State, but also to certain “aliens” who have a similar status to that of nationals under the laws of the receiving State or who have ties with that State. The Human Rights Committee expressed a similar view in the *Stewart v. Canada* case.⁷⁴ In his analysis of this case, Gaja writes:

Article 12(4) of the UN Covenant states that “[n]o one shall be arbitrarily deprived of the right to enter his own country”. In *Stewart v. Canada* the Human Rights Committee held, with regard to a British national who was expelled from Canada, that “if article 12, paragraph 4, were to apply to the author, the State party would be precluded from deporting him”. Reading Article 12(4) in conjunction with Article 13, which refers to the expulsion of aliens “lawfully in the territory of a State party”, the Committee maintained that “his own country” as a concept applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not “aliens” within the meaning of Article 13. This would depend on “special ties to or claims in relation to a given country”. The Committee referred to “nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them”. The Committee also mentioned “other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence”. On the contrary, foreign immigrants were excluded with one possible exception, which did not apply to the case in hand: “were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants”.⁷⁵

44. The author considers the issue to be controversial, however; the difficulty is as follows:

Article 12(4) assumes that a person can consider as his or her own only one country, while the foreign immigrants to whom the Committee referred were likely to have retained their nationality of origin and thus could have used the rights to enter and not to be expelled with regard to two different States: their State of nationality and the State of residence.⁷⁶

45. The cases listed in the Human Rights Committee’s decision are fairly specific, however, and do not imply that every migrant alien could successfully claim the benefit of the Committee’s broad interpretation of the notion of “his own country”.⁷⁷

46. In any case, it is also acknowledged, in the literature and in practice, that some categories of persons who are not strictly speaking nationals of a State are not aliens either, in the sense of draft article 1 as proposed in the second report,⁷⁸ and can therefore avoid expulsion. In this connection, the authors of *Oppenheim’s International Law* write: “It [a State] may assimilate certain aliens to its own nationals, so affecting its powers under its own laws to expel them.”⁷⁹ Thus, in the *Italian South Tyrol Terrorism* case, the Supreme Court of Austria decided that Italian nationals born in the South Tyrol could not be expelled from Austria, being subject to an Austrian law which required that they be treated as nationals for administrative purposes.⁸⁰

47. The current laws of a number of States enshrine this principle of non-expulsion by a State of its nationals. The same is true of the provisions of some international treaties, in particular the regional human rights conventions. Thus, article 22, paragraph 5, of the American Convention on Human Rights: “Pact of San José, Costa Rica” provides unequivocally as follows: “No one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it.” In an expanded but equally explicit wording, article 3, paragraph 1, of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto stipulates that “[n]o one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national”. The same prohibition may also be deduced, *a contrario*, from article 12, paragraph 4, of the International Covenant on Civil and Political Rights⁸¹ and article 12, paragraph 2, of the African Charter on Human and Peoples’ Rights.

48. The right of a national to live in his or her own country is commonly considered an essential element of the relationship between a State and its nationals.⁸² Moreover, given that an alien would presumably be expelled to his or her State of nationality, to what State would a national be expelled?⁸³ It is thus reasonable to assert that “[a] state

⁷⁷ A/52/40 (see footnote 74 above), para. 12.3.

⁷⁸ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

⁷⁹ Jennings and Watts, *Oppenheim’s International Law*, p. 940, footnote 1.

⁸⁰ See Austria, Supreme Court (8 October 1968), ILR, vol. 71, pp. 235–238.

⁸¹ Article 12, paragraph 4, of the Covenant provides as follows: “No one shall be arbitrarily deprived of the right to enter his own country.”

⁸² See footnote 61 above.

⁸³ According to Gaja (*loc. cit.*, p. 292): “The rationale of this prohibition and of the correlative obligation of the national State to admit its nationals is first to give individuals a fundamental right that allows them to avoid the risk of sharing the fate of the captain of the ‘Flying Dutchman’. Moreover, the prohibition to expel nationals and the obligation to admit them give States other than the State of nationality the opportunity to proceed with an expulsion.”

⁷⁰ *Annuaire de législation étrangère* (1904), p. 740.

⁷¹ See Bonetti, “Italy”, p. 339.

⁷² See Martini, *op. cit.*, p. 49.

⁷³ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

⁷⁴ See *Official Records of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), vol. II, annex VI.G, p. 58, paras. 12.3–12.5.

⁷⁵ Gaja, *loc. cit.*, pp. 292–293.

⁷⁶ *Ibid.*, p. 293.

is usually unable to expel its own nationals since no other state will be obliged to receive them".⁸⁴

49. In this case, international law affirms or recognizes the principle, but it does not necessarily preclude the possibility of derogating from it.

(ii) Exceptions

50. As stipulated in article 3, paragraph 1, of the above-mentioned Protocol No. 4 to the European Convention on Human Rights, the rule of non-expulsion of nationals is categorical and does not seem to allow of any exceptions. The account of the reasoning behind the Protocol shows that the drafters of this text chose the wording deliberately because they thought it was possible, in the framework of the Council of Europe, to give the prohibition against the expulsion of a national by a State an absolute character which was difficult to impose in the framework of the United Nations.⁸⁵

51. The absolute principle that seems to emerge from the letter of this provision does not, however, accurately reflect what the drafters had in mind. The explanatory report of the committee of experts that drafted Protocol No. 4 to the European Convention on Human Rights indicates that a person's right to enter the territory of the State of which he is a national cannot be interpreted as giving him an absolute right to remain in that territory; the report suggests the hypothetical example of an offender who, having been extradited by the State of which he is a national and then escaped from prison in the requesting State, could not claim an unconditional right to asylum in his own country.⁸⁶

52. It is obvious, moreover, that the principle of non-expulsion of nationals by a State has seen some exceptions in the past, particularly in the late nineteenth and early twentieth century, mainly owing to specific political situations in certain States.

53. Thus, in France, under articles 2–3 of the law of 14 March 1872 (later abrogated by the law of 1 July 1901) establishing certain penalties against members of the International Working Men's Association, the authority

to expel could be used against French nationals, who were sentenced for being members of the Association.⁸⁷ Similarly, the law of 22 June 1886, known as the "law of princes", banned from French territory the heads of former rulers of France and their direct descendants, and authorized the Government to ban other members of these families, pursuant to a decree handed down by a council of ministers. Although this law applied only to a specific and fairly small number of French nationals, it is nonetheless true that French citizens belonging to this category were expelled from France.⁸⁸ The French could also be expelled from "non-Christian protectorates".⁸⁹ They could likewise be expelled from the colonies until the edicts authorizing such action were lifted: the decrees of 7 and 15 November 1879 and 26 February 1880, among others, took away the authority of the colonial governors that had been granted to them by earlier edicts.⁹⁰

54. Historical examples of the expulsion of nationals, in general concerning fallen royal families and other cases of banishment, are very rarely replicated today.⁹¹ Nonetheless, the wording of article 12, paragraph 2, of the African Charter on Human and Peoples' Rights, which seems to apply to both aliens and nationals, implies that in some cases the latter may be refused admission or return to their country (non-admission) and, by extension, be expelled from it if necessary. This article provides as follows: "Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality."

55. It is admittedly possible that the drafters of the African Charter on Human and Peoples' Rights intended these restrictions to apply only to aliens. The lack of information on the preparation of this text, with the exception of some fragments, makes it impossible to determine with any

⁸⁷ See Martini, *op. cit.*, p. 38.

⁸⁸ *Ibid.*, pp. 38–39.

⁸⁹ *Ibid.*, p. 40. Article 82 of the edict of June 1778 provides as follows: "In all cases concerning policy or the security of trade of our subjects ... our consuls may arrest and send back to France, on national vessels, any French national who, because of his misconduct or involvement in plots, could represent a danger to the public." This right of expulsion was confirmed by the law of 28 May 1836. Thus, French nationals could be expelled from Bulgaria, Egypt and Turkey, because of the capitulations, from China and the Sultanate of Muscat under a law of 8 July 1852, and from Korea and Siam. They could also be expelled from Morocco under treaties signed between Morocco and the Western Powers (*ibid.*, pp. 40 and 42).

⁹⁰ *Ibid.*, p. 42.

⁹¹ It was no doubt with these historical examples in mind that the drafters of article 3, paragraph 1, of Protocol No. 4 to the European Convention on Human Rights used the term "exiled" (instead of "expelled") in the first draft of this provision, which was worded as follows: "No one shall be exiled from the territory of the State of which he is a national. Everyone shall be free to enter the State of which he is a national." (See Lochak, "Article 3", p. 1053) Basically, it does not matter which term is used; as the Special Rapporteur has already explained in his second report, the word "expulsion" was broadly used to denote a set of measures or actions carried out with the aim or having the effect of compelling an individual to leave the territory of a State, irrespective of the legality of his or her status (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573, para. 153). The European Commission on Human Rights understood the term the same way in the *Henning Becker v. Denmark* case (application No. 7011/75, decision of 3 October 1975, *Decisions and Reports* 4, p. 215) (see Lochak, "Article 4", p. 1058).

⁸⁴ See footnote 79 above; see also Gaja (*loc. cit.*, p. 292), who writes: "It could well be said that expulsion of nationals is prohibited by international law."

⁸⁵ See Lochak, "Article 3", p. 1054.

⁸⁶ *Ibid.* The violation of article 3, paragraph 1, of the Protocol was alleged in a number of failed petitions to the European Commission on Human Rights: see, in particular, the petition against the Federal Republic of Germany and Austria submitted by a German citizen who had been sentenced to four years' imprisonment in Austria and provisionally expelled to Germany in the context of a criminal proceeding, and who alleged that his forced return to Austria to serve his sentence was a violation of article 3, paragraph 1 (application No. 6189/73, *Decisions and Reports* 46, p. 214); petition lodged by a Turkish national and his French wife against France, alleging that the expulsion of the husband after he had been permanently banned from French territory for violating the law on drugs had directly led to the expulsion of his French spouse from her own country (application No. 11939/86, *Kilicarslan v. France*, decision of 13 October 1987); petition from an individual being sought by the French police in a homicide case, who, having dual French and Israeli nationality, had taken refuge in Israel, where he considered that his extradition to France was a breach of article 3, paragraph 1 (application No. 113287/87, *Nakache v. France*, decision of 15 October 1987) (*ibid.*).

certainly the drafters' intentions. In any case, the possibility can be envisioned that a State may, in some circumstances and for reasons of high-level policy or national security, expel its nationals, even in addition to the fairly frequent cases where the behaviour of State authorities forces certain nationals to flee into exile or become political refugees. The negotiated expulsion to Nigeria of Charles Taylor, former warlord turned Head of State of Liberia, who was accused of committing many atrocities in his country, is one illustration. Admittedly, Taylor's departure from Liberia was negotiated between Taylor himself, the receiving State and several Western Powers that had a special interest in the Liberian situation; this was therefore not a unilateral decision on the part of the Liberian authorities. Still, in the particular case of that country, any new Government would have readily taken the decision to expel Taylor, provided there was a country willing to receive him. Indeed, the only absolute prerequisite to the expulsion of a national is the existence of a receiving State. In other words, a State cannot expel its nationals without the express consent of a receiving State.⁹²

56. Of course, the expelled person has the right to return to his own country. The expelling State has the obligation, in this regard, to welcome the person back at any time at the request of the State that agreed to accept him or her. The expelling State cannot violate this right of return without placing its national in the same situation as that of a stateless person.

57. In view of the foregoing considerations, the following draft article is proposed:

"Draft article 4. Non-expulsion by a State of its nationals"

"1. A State may not expel its own nationals.

"2. However, if, for exceptional reasons it must take such action, it may do so only with the consent of a receiving State.

"3. A national expelled from his or her own country shall have the right to return to it at any time at the request of the receiving State."

(b) Principle of non-expulsion of refugees

58. First, from the legal standpoint, the notions of "refugee" and "asylum-seeker" need to be more clearly differentiated. Following current usage, especially the language of administration, some national laws or even the Convention implementing the Schengen Agreement now include applicants for refugee status in the category of "asylum-seekers".⁹³ For example, article 1 of the Convention defines application for asylum as any application submitted by an alien with a view to obtaining recognition as a refugee in accordance with the Convention relating to the Status of Refugees and as such obtaining the right of residence. Indeed, a seeker of refuge, by his application, is requesting nothing other than that the territorial State offer him protection by allowing him to stay in its territory, which is no different from territorial asylum.

59. The two ideas of refuge and territorial asylum are, however, different and dissociated in legal terms. Under the heading "Asylum", article II of the OAU Convention governing the specific aspects of refugee problems in Africa makes this distinction apparent. It provides that States members of OAU "shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality". This provision means that: (a) not all refugees are destined to become asylees; and (b) asylee status is determined by the national legislation of each State, unlike that of refugees, which is governed by international law. In other words, refugee status depends on international law, whereas territorial asylum is based solely on domestic law.⁹⁴ Consequently, the rules applicable to expulsion of the two categories of persons should be analysed separately, especially since there does not seem to be a rule for non-expulsion of asylees in international law.

60. With regard to the non-expulsion of refugees, an attempt will be made to construct the principle, before considering the derogations authorized by international rules and practice.

(i) The principle

61. As discussed in the second report on the expulsion of aliens,⁹⁵ the definition of a refugee given by the Convention relating to the Status of Refugees is restrictive and liable to exclude various categories of persons who are considered refugees under regional international law and in contemporary literature and practice. In view of the definition contained in the Convention, which has been called Eurocentric in origin,⁹⁶—in that its purpose was to protect political refugees who feared persecution in their countries of origin—and fundamentally "individualistic" because, under its authority, refugee status was granted only to individual persons, several authors have proposed even broader definitions of the concept of refugee.⁹⁷ Regional agreements have made it possible to fill the gaps in the Convention and the Protocol thereto and to deal with the massive flows of refugees produced in the 1960s and 1970s, in particular in Africa and Central America.

⁹⁴ In France, for example, territorial asylum is based on the preamble to the 1946 Constitution and the laws dealing with immigration control and the requirements for admission, reception and residency of aliens in France, in particular the law of 24 August 1993 (see *Journal officiel de la République française*, 29 August 1993, p. 12196).

⁹⁵ *Yearbook ... 2006* vol. II (Part One), document A/CN.4/573, paras. 57–71.

⁹⁶ Casanovas, "La protection internationale des réfugiés et des personnes déplacées dans les conflits armés", p. 35.

⁹⁷ Some have argued that the definition should include persons who have carried out acts of resistance against oppressive regimes that deny the enjoyment of basic freedoms (see Grahl-Madsen, *The Status of Refugees in International Law*, pp. 220–225); or, more broadly, that the definition should cover persons who are fleeing countries where generally recognized human rights are being systematically violated (see Aleinikoff, "The meaning of 'persecution' in United States asylum law", pp. 12–13; Hathaway, *The Law of Refugee Status*, pp. 106–112). A much more inclusive interpretation has been that, in cases where many refugees are fleeing from situations of internal conflict and civil disorder, proof of persecution should not be required, and that a presumption of persecution should suffice for the Convention to be applicable to the candidate for refugee status (see Steinbock, "The refugee definition as law: issues of interpretation", pp. 34–35).

⁹² See A/CN.4/565 (footnote 14 above), para. 36, and the unequivocal passages of the works cited in footnote 58 of that document.

⁹³ See Teitgen-Colly, "Le droit d'asile: la fin des illusions", p. 99.

62. Whether or not to grant refugee status to members of the refugee's family depends on individual States: some laws are generous⁹⁸ while others are more restrictive.⁹⁹ In any case, once a person has been granted refugee status, his family members receive legal protection in the form of provisions stipulating that they may be expelled only for specific and limited reasons.

63. The principle of the non-expulsion of refugees is, however, worded in a negative way, which limits its scope by preventing it from being an absolute prohibition. Thus, article 32, paragraph 1, of the Convention relating to the Status of Refugees provides as follows:

The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

64. This provision demonstrates that the principle of non-expulsion of refugees may be established, but only by deduction. Indeed, in the structure of this provision, the word "save" introduces an extreme limit to the rule that the refugee cannot be expelled. In other words, refugees cannot, in principle, be subject to expulsion measures; they cannot be expelled except—if absolutely necessary, so to speak—for two, non-cumulative reasons, namely, national security or public order.

65. The OAU Convention governing the specific aspects of refugee problems in Africa, for its part, introduces the idea of "voluntary repatriation", which does not appear in the Convention relating to the Status of Refugees nor the Protocol thereto. Strictly on the basis of the idea as embodied in article V of the OAU Convention, it might be concluded that there is an absolute principle of non-expulsion of refugees—in the broad sense in which the concept of expulsion was defined in the second report.¹⁰⁰ Article V, paragraph 1, of that Convention reads as follows:

⁹⁸ In Cameroon, for example, article 5 of Act No. 2005/006 of 27 July 2005 on the status of refugees provides as follows:

"(1) The family members of a person considered as a refugee within the meaning of articles 2, 3 and 4 above who accompany or rejoin him are also considered as refugees, unless their nationality is other than that of the refugee and they enjoy the protection of their country of origin.

"(2) If, after the head of family has been granted the status of refugee, family cohesion breaks down as a result of divorce, separation or death, the family members who have been granted refugee status under paragraph 1 above shall continue to enjoy such status, subject to the provisions of article 4.

"(3) For the purposes of paragraphs (1) and (2) above, the family members of a person having refugee status shall consist of the refugee's spouse or spouses, minor children and other dependent family members.

"(4) Any decision taken pursuant to articles 3 and 4 of this Act shall not automatically affect the other family members as defined in paragraph (3) above."

The last paragraph of the article means, among other things, that the loss of refugee status or expulsion of the head of family does not automatically entail the loss of refugee status or the expulsion of the refugee's family.

⁹⁹ Thus, in France, whereas the law of 2 August 1989 extended the benefit of the residence permit to members of the refugee's family (his spouse and minor children), the law of 24 August 1993 on immigration control and conditions of admission, reception and residency of aliens in France and subsequent amendments thereto have marked a setback in that regard, in that they require the members of the refugee's family to meet the same conditions for a regular residence permit as do other aliens (art. 15, para. 1, of the latter law) (see footnote 94 above).

¹⁰⁰ Yearbook ... 2006, vol. II (Part One), document A/CN.4/573.

The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.

However, not only should the OAU Convention—like the Cartagena Declaration on Refugees adopted by the States of Central America¹⁰¹—be seen as complementary to the Convention relating to the Status of Refugees, but "expulsion" and "repatriation" should be viewed as different concepts, subject to different procedures set in motion by causes that are not identical.

66. Article 33 of the Convention relating to the Status of Refugees also seems to set forth a principle of non-expulsion, but it is immediately attenuated by the fact that, on the one hand, it refers to a special case where there would be risks of violating certain fundamental rights of refugees and that, on the other, expulsion may be permitted for certain specific reasons. Under the somewhat misleading heading of "Prohibition of expulsion or return ('refoulement')", the above-mentioned article provides as follows:

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

67. A comparison between articles 32 and 33, in particular with regard to their titles, implies, *prima facie*, that article 32 sets forth a permissive rule, whereas article 33 stipulates a prohibitive norm. In fact, this is not the case. Each provision contains both a prohibition and an authorization. Article 33, paragraph 2, expands the range of reasons for the expulsion of refugees as set out in article 32, paragraph 1. Thus, whereas the latter provides only for grounds of "national security or public order", article 33, paragraph 2, instead uses the wording "danger to the security of the country", and adds "a final judgment of a particularly serious crime, constitut[ing] a danger to the community of that country". This last-mentioned reason is especially vague, in that it fails to specify the nature and seriousness of the "danger" in question. Moreover, how does such a reason differ from "grounds of public order"? At any rate, it strengthens the expelling State's discretionary power in the case of the expulsion of a refugee, and thereby demolishes the strict limits established in article 32, paragraph 1. Unlike article 33, paragraph 2, paragraph 1 reinforces the principle of non-expulsion by stating the circumstances that would produce the "prohibition"—although not absolute, because of the stipulations contained in paragraph 2—of the expulsion or return of the refugee.

68. The Special Rapporteur holds the view that the principle is therefore not a matter of expulsion, but of non-expulsion, since expulsion is merely an exception which is, moreover, only permitted on certain very limited grounds.

¹⁰¹ Cartagena Declaration on Refugees (22 November 1984), *Annual Report of the Inter-American Commission on Human Rights* (OAS document OEA/Ser.L/V/II.66, doc.10, rev.1).

69. One tendency today is to consider that a State which receives refugees—not refugees in the strict sense, but persons who are forced to flee their country because they are victims of armed conflicts or of events that have disturbed the public order, in whole or in part, of their country of origin, nationality or habitual residence¹⁰²—should admit them to its territory and scrupulously observe the fundamental principle of non-refoulement, including non-rejection at the frontier.¹⁰³ Underlying this idea is a presumption that any member of a group of persons who has fled their country for the reasons indicated above is considered, *prima facie*, as a refugee, barring any evidence to the contrary. Along these same lines, one author has recently written that States have a “customary legal obligation”¹⁰⁴ of non-refoulement of persons fleeing armed conflicts or generalized violence. This goes well beyond the relevant treaty obligations. If such an obligation exists, it carries the correlative obligation not to expel the type of “refugees” in question, namely, those who have not yet been granted refugee status and who might therefore find themselves in the receiving territory illegally—at least before their situation has been considered by the competent national authorities.

70. This doctrinal trend derives from article 31 of the Convention relating to the Status of Refugees, entitled “Refugees unlawfully in the country of refuge”, which provides as follows:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

71. This principle also finds significant support in the recent work of the Global Commission on International Migration, which was launched in December 2003 on the initiative of the Secretary-General of the United Nations, acting at the request of the General Assembly. The Assembly, in its resolution 58/208 of 23 December 2003, had decided to devote a high-level dialogue to international migration and development during its sixty-first session in 2006 (see the report of the Secretary-General on international migration and development (A/60/205)). The Global Commission declares that, in their efforts to stem irregular migration, States must respect their existing obligations under international law towards the human rights of migrants, the institution of asylum and the principles of refugee protection.¹⁰⁵ In that regard, the Global Commission bases itself on the principle set forth in the Agenda

for Protection established by UNHCR, pursuant to which the institution of asylum should not be undermined by the efforts of States to stem clandestine or illegal immigration. The Global Commission urges all States to establish fast, fair and efficient refugee status determination procedures, so that asylum-seekers are quickly informed of the outcome of their case. In particular, it recommends that:

In situations of mass influx, states should consider offering the new arrivals *prima facie* refugee status, a practice used to good effect for many years in Africa and developing countries in other regions.¹⁰⁶

72. Non-expulsion of the persons concerned while their status is being determined is similar to “temporary protection”, which in turn differs from “subsidiary protection”. In the report prepared for the Global Consultations on International Protection sponsored by UNHCR, it is considered that “[t]emporary protection, which is a specific provisional protection response to situations of mass influx providing immediate emergency protection from *refoulement*, should be clearly distinguished from forms of complementary protection which are offered after a status determination and which provide a definitive status”.¹⁰⁷ Such protection is granted to persons belonging to a specific group, on the basis of a political decision. On the other hand, “subsidiary protection”,¹⁰⁸ which is found in the legislation of European Union countries, among others, is a legally established status granted in individual cases.

73. Some national laws apply temporary protection to applicants for refugee status. The French practice is quite interesting in that regard. Thus, unlike the Convention relating to the Status of Refugees, which simply prohibits the Contracting Parties from returning or expelling a refugee “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened” (art. 33, para. 1), the fourth preambular paragraph of the French Constitution of 27 October 1946, to which the current Constitution of 4 October 1958 refers, implies, according to the French Constitutional Council, “in general that an alien who claims this right should be permitted to remain temporarily in the territory until a decision has been taken on his claim”.¹⁰⁹ This solution is directly based on the one accepted by the Assembly of the French Council of State, which, in two cases, has recognized that an asylum-seeker claiming refugee status should be allowed to remain provisionally in French territory until the French Office for the Protection of Refugees and Stateless Persons or, where applicable, the Refugee Appeals Commission, has ruled on his or her application.¹¹⁰

¹⁰² See the declaration adopted in Seville, Spain, in February 1994 during a workshop on “Refugees: law and solidarity”, cited by Casanovas, *loc. cit.*, p. 82.

¹⁰³ UNHCR, Conclusions adopted by the Executive Committee on the international protection of refugees (December 2009), No. 22 (XXXII), “Protection of asylum-seekers in situations of large-scale influx” (1981), para. II A.1; and No. 19 (XXXI), “Temporary refuge” (1980), para. (b) (i). Contra, Hailbronner, “Non-refoulement and ‘humanitarian’ refugees: customary international law or wishful legal thinking”, p. 857.

¹⁰⁴ Eggli, *Mass Refugee Influx and the Limits of Public International Law*, p. 165.

¹⁰⁵ See *Migration in an Interconnected world: New Directions for Action*, Report of the Global Commission on International Migration (October 2005), chap. III, p. 40. The report is available at the following address: www.gcim.org.

¹⁰⁶ *Ibid.*, p. 41, para. 44.

¹⁰⁷ Global Consultations on International Protection, 3rd meeting, “Complementary forms of protection”, (EC/GC/01/18 of 4 September 2001), para. 11 (g).

¹⁰⁸ Casanovas, *loc. cit.*, p. 127. See also Chetail, “Le droit des réfugiés à l’épreuve des droits de l’homme: bilan de la jurisprudence de la Cour européenne des droits de l’homme sur l’interdiction du renvoi des étrangers menacés de torture et de traitements inhumains et dégradants”, p. 208.

¹⁰⁹ Constitutional Council, decision No. 93–325 DC of 13 August 1993, *Journal officiel de la République française*, 18 August 1993, p. 11727.

¹¹⁰ See Abraham, “La reconduite à la frontière des demandeurs d’asile: conclusions sur Conseil d’État, Assemblée, 13 décembre 1991 (2 espèces) 1) M. Nkodia (Alfonso) 2) Préfet de l’Hérault c/ M. Dakoury”, pp. 93–94.

74. The basis of this “principle”—to use the term proposed by one author¹¹¹—as applied by the Council of State is different from that used by the Constitutional Council: for the latter, the basis is the preamble to the Constitution, whereas for the former it consists of both article 31, paragraph 2, of the Convention relating to the Status of Refugees and the law of 25 July 1952 establishing the French Office for the Protection of Refugees and Stateless Persons. In any case, its acceptance in case law has been accompanied by restrictions. In its decrees, the Council of State accepts that in cases where the sole purpose of such a claim is to thwart a deportation order against an alien who is already present in the country in an irregular situation, the administration is exempted from issuing the documents authorizing asylum-seekers to remain in France pending the decision of the Office or, on appeal, the judgement of the Refugee Appeals Commission.¹¹²

(ii) *Derogations*

75. A refugee cannot be expelled from the territory of the receiving State except for reasons of security and public order. As noted above, these derogations, which are internationally enshrined in article 31 of the Convention relating to the Status of Refugees, have long been recognized and practised in domestic law. There is consequently no need to dwell upon whether or not they exist. Nonetheless, it is worth analysing the exact content and meaning of the notions of endangerment of security and threat to or endangerment of public order. This is not an easy issue to deal with, since the determination of how to characterize a given situation may vary, depending on the State, epoch and context. There is no doubt that the authority to evaluate such endangerment or threats rests with each State, and that both international and national laws recognize this fact.

76. Terrorism, a phenomenon which has seen an unprecedented spread in recent times and become a source of concern to States, could be included in the notions of security and public order, in particular that of security. But its blind and indiscriminate violence and devastating effects single it out for special treatment. This has been the approach taken by the international community in dealing with acts of terrorism, which are not considered ordinary crimes.

77. Security Council resolution 1373 (2001) can be taken to imply that a refugee may be expelled for the commission of terrorist acts or acts relating to terrorism. In paragraph 2 of this resolution, the Council

Decides ... that all States shall:

...

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.

In paragraphs 3 (f)–(g), the Council

Calls upon all States to:

...

¹¹¹ Fabre-Alibert, “Réflexions sur le nouveau régime juridique des étrangers en France”, p. 1184.

¹¹² *Ibid.*

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.

78. In the light of these provisions, an actual refugee alien, that is, a person who, fearing for his life, has fled his State of origin but has not yet legally acquired refugee status, could be expelled on grounds of being involved in terrorist activities or facilitating the commission of terrorist acts. The resulting obligation to refuse refuge or asylum implies the right of expulsion if the receiving State is faced with the situations described in the relevant paragraphs of Security Council resolution 1373 (2001).

79. At the level of State legislative practice, section 22 of the Tanzanian Prevention of Terrorism Act, 2002 offers an example of legislation designed to prevent a country’s territory from being used as a safe haven from which attacks can be launched against other States;¹¹³ it may, where appropriate, serve as a legal basis for the expulsion of aliens, including refugees.

80. The special case of terrorism and its recognition as one of the criteria for derogation from the principle of non-expulsion of refugees has more to do with the progressive development, rather than the codification, of a well-established customary rule. Nonetheless, the adoption of such a criterion would not be without its support, in respect of both the comprehensive body of international law and in State legislative practice. The fact that such a criterion may be based on a Security Council resolution is also relevant, given the principle of legality which underlies the Council’s decisions.

81. On the basis of the foregoing, the following draft article is proposed:

“Draft article 5. Non-expulsion of refugees

“1. A State may not expel a refugee lawfully in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a final judgement of a particularly serious crime or offence, constitutes a danger to the community of that State.

“2. The provisions of paragraph 1 of this article shall also apply to any person who, being in an unlawful situation in the territory of the receiving State, has applied for refugee status, unless the sole manifest purpose of such application is to thwart an expulsion order likely to be handed down against him or her [against such person].”

¹¹³ Section 22 of this Act punishes recruitment for or association with a terrorist group and training in the United Republic of Tanzania for acts prohibited by paragraph (a) of the section. The prohibition in paragraph (a) extends to acts in that country intended to promote or facilitate violent acts in a foreign State and whether or not their objective is achieved (United Nations Office on Drugs and Crime, Preventing terrorist acts: a criminal justice strategy integrating rule of law standards in implementation of United Nations anti-terrorism instruments, p. 26).

(c) *Principle of non-expulsion of stateless persons*

82. Although the stateless person and the refugee differ in legal status, the two situations often have the same cause, namely, that the person concerned is fleeing from armed conflict or persecution on racial or political grounds. In its resolution adopted at its 1936 session in Brussels on the legal status of stateless persons and refugees, the Institute of International Law affirmed that “the term stateless person refers to any person who is not considered by any State to hold its nationality”.¹¹⁴ Nationality was thus, following the thinking of the nineteenth century—the “century of nationalities”—the essential element and benchmark for determining whether or not a person was considered a stateless person. In a more modern and open approach, in line with that proposed by the Special Rapporteur in his second report,¹¹⁵ the Convention relating to the Status of Stateless Persons replaced the nationality criterion with the term “a national”, which, as has been seen, is much more comprehensive. Article 1, paragraph 1, of that Convention specifically states:

For the purpose of this Convention, the term “stateless person” means a person who is not considered *as a national* by any State under the operation of its law.^{*}

83. The principle of non-expulsion of stateless persons was already an underpinning of one of the articles of the International Rules on the Admission and Expulsion of Aliens, which reads as follows:

In principle, a State shall not prohibit access into or a stay in its territory either to its subjects or to those who, having lost their nationality in that State, have acquired no other nationality.¹¹⁶

84. The explicit wording and codification of the rule came much later. Referring back to the framework of the 1951 Convention relating to the Status of Refugees, the 1954 Convention relating to the Status of Stateless Persons confirms the similarity between the status of stateless persons and that of refugees. With regard to expulsion, in particular, the two conventions set forth the same rules governing the subject in both cases. Using the same wording, *mutatis mutandis*, as the three paragraphs of article 32 of the 1951 Convention, article 31 of the 1954 Convention provides as follows:

1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

85. The comments made with regard to article 32, paragraph 1, of the Convention relating to the Status of Refugees (para. 64 above) also apply to article 31, paragraph 1, cited above.¹¹⁷

86. It should be noted that, as with refugees, only documented stateless persons are covered. Of course, the issue of stateless persons residing unlawfully in the territory of the host country is sensitive, as some undocumented migrants may fraudulently claim that they are stateless. What is to become, however, of the genuinely stateless persons who nevertheless reside unlawfully in the territory of a State? Could the State expel them? To which country could they be sent? To their last country of residence? Under what conditions? Those provided for in article 31, paragraph 3, for stateless persons residing unlawfully in the territory of the State? These questions could call into doubt the relevance of the distinction between documented stateless persons and undocumented stateless persons in the light of article 31, paragraph 1. Furthermore, aside from persons who become stateless while they are already in the territory of the host State, most others can enter such a State only by unlawful means, as they do not generally possess the official State documents required for admission into another country.

87. Article 31, paragraph 2, cited above deals with the conditions and procedures for expulsion. This issue will be referred to at a later date.

88. Concerning paragraph 3, the first sentence raises some questions. Specifically, how can stateless persons in the process of being expelled seek admission into a new host country? Must their efforts be limited to countries with diplomatic missions in the expelling State? Will not their chances of succeeding in their efforts be limited if this host State has only a few foreign diplomatic missions? Moreover, even assuming that the expelling State is particularly generous in its interpretation of the notion of “reasonable period” and grants the stateless person a sufficient length of time, what will happen during this period if the efforts of the stateless person lead nowhere? May the State expel the person nevertheless? If so, to which country?

89. These questions, particularly the last one, do not merely reflect theoretical concerns. The *John K. Modise v. Botswana* case before the African Commission on Human and Peoples’ Rights¹¹⁸ shows that these questions may be raised in practice. The complainant argued that he was unjustly deprived of his Botswana citizenship. He claimed the right to citizenship under the following circumstances: his father, Samuel Remaphoi Modise, a citizen of Botswana as a former “British Protected person” of Bechuanaland (present-day Botswana), immigrated to South Africa for work. During his stay, he married Elisa-

¹¹⁴ *Annuaire de l’Institut de droit international*, vol. II, p. 294.

¹¹⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

¹¹⁶ Institute of International Law, *Annuaire de l’Institut de droit international*, vol. 12, p. 219.

¹¹⁷ Pursuant to article 9 of the Convention relating to the Status of Stateless Persons, a particular person may be expelled as a provisional measure in time of war or other grave and exceptional circumstances pending a determination by the contracting State that that person is in fact a stateless person and that the continuance of such measures is necessary in his case in the interests of national security.

¹¹⁸ See Communication 97/93, *John K. Modise v. Botswana*, presented at the twenty-eighth ordinary session of the Commission in November 2000 in Cotonou (Benin), decision of 6 November 2000.

both Ikaneng Modise, and John Modise was born of this marriage. His mother died when he was three months old and his father took him to the Bechuanaland Protectorate to ensure that he would be cared for by his relatives. The complainant consequently grew up in the Protectorate and lawfully returned there after trips abroad.

90. In 1978, John Modise was one of the founders and leaders of an opposition party called the Botswana National Front. He believes that it is because of his political activities that he was declared an “undesirable immigrant” by the Government of Botswana. On 17 October 1978, he was arrested and deported to South Africa, where he was handed over to the police without being brought before a tribunal. Having returned to Botswana, he was once again arrested and deported without trial to the same country. After his third attempt at returning, he was charged, convicted of illegal entry and declared an undesirable immigrant. He was serving a 10-month prison term and had filed an appeal when he was deported for the fourth time to South Africa, before the case was concluded. The African Commission on Human and Peoples’ Rights noted that “[s]ince the Complainant did not have South African nationality, he was obliged to settle in the homeland of Bophutatswana”. He lived there for seven years until the government of this “Bantustan” issued a deportation order against him and he found himself in the no-man’s land between Bophutatswana and Botswana, where he remained for five weeks before being admitted into Botswana on a humanitarian basis. He obtained a three-month entry permit, renewable at the entire discretion of the competent ministry, until June 1995.¹¹⁹

91. Here is not the place to enter into a discussion on the main point of contention raised by the respondent State, namely, whether John Modise could not or had not become a citizen of Botswana by descent in accordance with the former Constitution of that country, given that he was neither a British subject nor a citizen of the United Kingdom and its colonies when Botswana attained independence in 1966. The African Commission on Human and Peoples’ Rights resolved the question: John Modise is indeed a citizen of Botswana by descent, as he is the son of his father, himself a citizen of Botswana, and the Government of Botswana must take appropriate measures to recognize this nationality and compensate him adequately for all the damages which he had sustained as a result of the violation of his rights.

92. The main interest of this case with respect to the issue of the expulsion of stateless persons is that Botswana had continued to deport John Modise even though it was found that he had the nationality of neither South Africa nor Bophutatswana and, moreover, not having the nationality of Botswana, which the authorities of this country had denied him, he found himself in a situation of statelessness. It should be noted that in this case none of the grounds for expulsion of a stateless person provided for under article 31 of the Convention relating to the Status of Stateless Persons—either national security or public order—had been invoked by the expelling State; a host country was not found by the expelled person and

the expelling State had never made a request for him to do so. In short, Botswana did not act within the context of expelling a stateless person, although such a context clearly applied.

93. It seems that the rules for the expulsion of stateless persons too easily reproduced the wording of the rules for the expulsion of refugees, given that—it bears repeating— asylum and statelessness are entirely different situations. Refugees possess a known nationality. They are generally in a situation of distress caused by an irresistible force for which they are not generally responsible. For this reason, their situation as victims elicits some compassion or simple understanding which could pave the way for entry into a host State. The same does not go for stateless persons. Deprived of their nationality, stateless persons cannot travel abroad unless the host State considers them as having the rights and obligations related to the possession of nationality of that State and consequently issues them a passport. Otherwise, any host State party to the Convention relating to the Status of Stateless Persons is required only to “accord to stateless persons the same treatment as is accorded to aliens generally”.¹²⁰ It can well be imagined how a person without any nationality, who in principle enjoys only the rights granted to foreigners in the country of residence, might have serious difficulties in finding a host State; furthermore, if the person is expelled, it is either because he or she has committed offences against the national security of the expelling State or constituted a threat to national security or because he or she is said to have committed an offence against the public order or constituted a serious threat to it.

94. Unless a person has relations with a foreign Power which would be willing in principle to host him or her, it would not be practical for such a person “to seek legal admission into another country”.¹²¹ According to the Special Rapporteur, the intervention of the expelling State in the search for a host State for the expelled stateless person may be deemed necessary. Such an intervention could be envisaged if the steps taken by the stateless person to obtain legal admission into another host State prove unsuccessful. The protection of the rights of expelled persons requires, however, that they consent to the country to which they would thus be deported.

95. Nevertheless, given that the practice of States with respect to the expulsion of stateless persons is woefully inadequate, such an idea can only be drawn from an analysis of the provisions of the aforementioned article 31, paragraph 3 (see paragraph 84). At best, the idea may be put forward as part of the progressive development of international law.

96. The following draft article is being proposed in the light of the foregoing considerations. It includes in the first paragraph the core of article 31, paragraph 1, of the Convention relating to the Status of Stateless Persons, with some stylistic changes, and in paragraph 2 a new version of the first sentence of paragraph 3, enhanced by the above-mentioned suggestions:

¹²⁰ Art. 7, para. 1, of the Convention.

¹²¹ *Ibid.*, art. 31, para. 3.

¹¹⁹ *Ibid.*

“Draft article 6. Non-expulsion of stateless persons

“1. A State may not expel a stateless person [lawfully] in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a final judgement of a particularly serious crime or offence, constitutes a danger to the community of that State.

“2. A State which expels a stateless person under the conditions set forth in these draft articles shall allow such person a reasonable period within which to seek legal admission into another country. [However, if after this period it appears that the stateless person has not been able to obtain admission into a host country, the State may [, in agreement with the person,] expel the person to any State which agrees to host him or her].”

(d) *Principle of prohibition of collective expulsion*

97. The practice of collective expulsion is not a recent phenomenon. In the past, it was often closely related to situations of armed conflict or serious crises between two States; nevertheless, collective expulsions have been carried out in time of peace as well as in time of war.

(i) *In time of peace*

98. Indeed, apart from cases of war, collective expulsion was carried out by the United States in the nineteenth century.¹²² Having granted subjects of the Celestial Empire, in an 1863 treaty, treatment equal to that enjoyed by United States citizens, the United States, faced with the steadily increasing influx of what was derogatorily called the “yellow immigration” or “yellow peril”, ceased to fulfil the terms of the treaty and then negotiated with China a new treaty, the Treaty of 17 November 1880, granting the United States the right to suspend or limit the immigration of labourers “whenever it deems it necessary for the protection of its interests”.¹²³ Two years later, a United States law suspended immigration for a period of 10 years. But before the expiry of that period, the United States obtained, on 12 March 1888, the signature of the “Chinese Minister to Washington” to a treaty prohibiting the entry into United States territory of “any labourers of the yellow race” for 20 years. The Government of China refused to ratify a treaty which it deemed not only unfavourable to the interests of its nationals, but also vexatious and overly restrictive in its provisions. In the light of this refusal, the United States enacted a law on 1 October 1888, which prohibited *de facto* immigration of Chinese workers into United States territory, and later a second law called the Chinese Exclusion Act, which imposed very strict conditions of stay on Chinese labourers,¹²⁴ thus leading to a collective expulsion by virtue of the State’s conduct.

99. In Europe, there have been cases of collective expulsion dating back to the eighteenth century. Thus, in Spain, in strict violation of the prevailing principles of international law, a 1703 law, which long remained in force, ordered the mass expulsion of all British and Dutch subjects who were

not Catholic; in Russia, a 1793 law enacted by Emperor Paul I ordered French nationals residing in Russia, under penalty of expulsion, to renounce the atheistic and seditious doctrines of their countries of origin.¹²⁵

100. Later, in the twentieth century, following numerous, serious and persistent difficulties between Germany and Poland subsequent to the demarcation of borders between these two countries in accordance with the Treaty of Versailles, Germany expelled “en masse”,¹²⁶ as was said at the time, Polish workers residing in its territory: it had expelled 25,000 such workers by late 1922. As a means of retaliation, Poland expelled in turn a number of German nationals in April 1923 and undertook new retaliatory measures in January 1924 by expelling 14 German families, as the Government of Bavaria had expelled 14 Jewish families of Polish nationality. In addition, as other mass expulsions of Polish citizens had taken place in Mecklenburg-Schwerin, Germany, despite protests from the Polish minister in Berlin, Poland took the retaliatory measure of expelling 150 Germans residing in the Poznan and Pomerania districts.¹²⁷

101. Other than by the political protests of governments whose nationals have been victims of these mass expulsions, such expulsions have not been contested on the basis of international law. The literature of the period saw nothing but the exercise by the expelling States of the “right to expel aliens” recognized by international law.¹²⁸ This emerges clearly from the opinion of some authors of the period. Thus, following the annexations and de-annexations enshrined in the peace treaties which ended the First World War and which occasioned the frequent exercise of the right of expulsion, France was faced with the question, as a result of the reintegration of Alsace and the part of Lorraine annexed to Germany by the Treaty of Versailles, of whether it should limit the change of nationality to former French nationals. About 500,000 Germans representing 28 per cent of the population lived in these recuperated *départements*. There was a vague notion that to keep them would have represented “a danger” to France. The question was whether to expel them en masse or absorb them. Two prominent French authors of the period, Pillet and Niboyet, responded:

Mass expulsion would have been by far the better alternative, if we could have ensured that Alsace and Lorraine would have the same population. However, our population level was too low for this goal to be envisaged.¹²⁹

102. In other words, the collective expulsion of aliens, even in time of peace, was not prohibited; it had been ruled out in this case only for the sake of expediency.

103. The prohibition of such expulsions came much later in the form of a remedy to a regional human rights instrument which was silent on the issue: Protocol No. 4 to the European Convention on Human Rights, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto. Article 4

¹²² Darut, *op. cit.*, p. 46.

¹²³ *Ibid.*, p. 47.

¹²⁴ *Ibid.*, pp. 47–48.

¹²⁵ *Ibid.*, p. 37, footnote 1.

¹²⁶ Fauchille, *Traité de droit international public*, p. 688.

¹²⁷ *Ibid.*, pp. 688–689.

¹²⁸ See Boeck, “L’expulsion ...”, p. 471.

¹²⁹ Pillet and Niboyet, *Manuel de droit international privé*, p. 213.

of Protocol No. 4, in force since 1968, states concisely that “[c]ollective expulsion of aliens is prohibited”. There is a similar provision—with a stylistic difference relating to the use of the singular—in the American Convention on Human Rights: “Pact of San José, Costa Rica”, which in article 22, paragraph 9, specifies that “[t]he collective expulsion of aliens is prohibited”. The African Charter on Human and Peoples’ Rights contains the nearly identical provision in article 12, paragraph 5: “The mass expulsion of non-nationals shall be prohibited.”

104. According to the committee of experts responsible for preparing draft Protocol No. 4 to the European Convention on Human Rights, it was necessary to include this provision, which did not appear in the initial draft, so as to prevent the recurrence of “collective expulsions of the kind which was a matter of recent history”, as noted in a memorandum by the Directorate of Human Rights of the Council of Europe.¹³⁰

105. Several applications filed with the European Commission on Human Rights to punish States parties to Protocol No. 4 for violating article 4 thereof have been unsuccessful for various reasons, as set out by the European Commission in its relevant decisions.¹³¹ The European Court of Human Rights declared that article 4 had been violated in the case of *Čonka v. Belgium*. The applicants were Ján Čonka and his wife and two children. As Slovaks residing in Belgium, where they requested asylum, they were subject to deportation orders issued by the Ministry of Internal Affairs on 18 June 1999 denying their request for asylum and requiring them to leave the territory within five days. The Court noted the following with respect to the deportation orders:

[T]he only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months. In particular, the document made no reference to their application for asylum or to the decisions of 3 March and 18 June 1999 ... In those circumstances and in view of the large number of persons of the same origin who suffered the same fate as the applicants, the Court considers that the procedure followed does not enable it to eliminate all doubt that the expulsion might have been collective.¹³²

¹³⁰ Council of Europe, *Collected Edition of the “Travaux préparatoires” of Protocol No. 4* (DH/Exp. (61) 35 Final of 7 October 1961), p. 446.

¹³¹ Lochak (“Article 4”, p. 1058) notes that these clarifications led the European Commission to dismiss several applications, including: the application of persons from Suriname who sought asylum in the Netherlands after the coup d’état of 1982 and whose presence the Government of the Netherlands had tolerated, without, however, granting them a residence permit until 1988, at which time, given that Suriname was on the path towards democracy, it notified them of individual decisions requiring them to leave the Netherlands, from which they were ultimately expelled (application No. 14209/88, *Alibaks and Others v. The Netherlands*, decision of 16 December 1988; application No. 14457/88, *B. and Others v. The Netherlands*, decision of 16 December 1988); application of seventeen members of the Church of Scientology with Swiss nationality residing in Copenhagen who had been expelled following the denial of a renewal of their residence permits. The Commission did not have to express an opinion on the merits, on the grounds that the applicants had not exhausted local remedies and that their application was inadmissible (application No. 12097/86, *Künzi-Brenzikofer and Others v. Denmark*, decision of 13 July 1987) (*ibid.*, pp. 1058–1059). There is no doubt, however, that such an application could not have succeeded on the merits, given that the residence permit is individual and its date of expiry affects its holder individually so that the expulsion at the same time of several persons in this situation could not be considered as a collective expulsion.

¹³² Council of Europe, European Court of Human Rights, *Čonka v. Belgium*, Judgment (Strasbourg, 5 February 2002), *Reports of Judgments and Decisions 2002-I*, para. 61.

106. The doubt expressed by the European Court of Human Rights was reinforced by a series of factors: first, prior to the deportation of the persons concerned, the Belgian political authorities had announced that there would be operations to detain aliens and had given instructions to the relevant authorities for the implementation of these operations; secondly, the Court had required all the aliens concerned to report to the police station at the same time; thirdly, the orders requiring them to leave the territory were couched in identical terms; fourthly, it was very difficult for the aliens concerned to contact their lawyers; lastly, the asylum procedure had not been completed. In short, at no stage in the period between the service of the notice to the aliens to report to the police station and their expulsion did the procedure afford sufficient guarantees “demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account. In conclusion, there has been a violation of Article 4 of Protocol No. 4” to the Convention.¹³³

107. Collective expulsion is based on the sole fact that expelled persons are aliens,¹³⁴ and for that reason it is intellectually and morally difficult to accept. The European Commission on Human Rights provided an interesting definition when it considered the application against the plan of the Government of Denmark to repatriate 199 Vietnamese children sheltered in Denmark. According to the Commission,

“Collective expulsion” is to be understood as any measure by the competent authorities compelling aliens, as a group, to leave a country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.¹³⁵

108. The second sentence of article 12, paragraph 5, of the African Charter on Human and Peoples’ Rights makes a clarification by indicating the groups concerned:

Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

This clarification, however, has a restrictive meaning of the notion of a group. In fact, collective expulsion may involve a group of persons who are not part of any of the groups mentioned. For example, it is common to speak of “Africans” to refer to nationals of various countries of Africa and consequently to “illegal African immigrants”, as if Africa constituted a single State or nation. It is perfectly conceivable that a group of Africans might be subjected to a collective expulsion measure even though they do not constitute a national group, much less an ethnic group, and without there being any religious grounds for such action. It is better, therefore, to maintain the open approach to the notion of group contained in the definition of the European Commission on Human Rights.

109. The idea of examining the individual case of each member of a group of persons subject to expulsion has already been implemented in some mass expulsions in the early twentieth century. For example, when the Government of France decided to use its right of expulsion against German nationals after the First World War:

¹³³ *Ibid.*, pp. 20–21, para. 63.

¹³⁴ See Lochak, “Article 4”, p. 1057.

¹³⁵ Quoted by Lochak, *ibid.*, p. 1058.

“On 12 August 1922, 500 Germans designated by decree were expelled from Alsace and Lorraine.”¹³⁶ Nevertheless, in the light of the considerations of the aforementioned *Čonka v. Belgium* case before the European Court of Human Rights, can it really be said that it was not a matter of collective expulsion? This is open to doubt, as it is unlikely that the French authorities had considered in a thorough and sufficiently objective manner the individual case of each of the 500 expelled persons.

110. It should be noted, however, that the need for separate consideration of the various cases and individual measures for each of them does not necessarily mean that the competent authorities must reach decisions which vary in substance. The fact that deportation orders are identically worded is not in itself sufficient for them to be regarded as constituting collective expulsion in accordance with relevant international legal instruments, as long as every order is preceded by specific consideration of the situation of each member of the group of persons concerned.¹³⁷

111. This rule on separate consideration of the situation of each person to be expelled, which was not contained in the aforementioned article 4 of Protocol No. 4 to the European Convention on Human Rights, but was clearly set forth by the case law of the European Commission on Human Rights, as discussed above, was formally enshrined within the framework of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.¹³⁸ Article 22, paragraph 1, of this Convention reads as follows:

Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

112. As can be seen, the principle of prohibition of collective expulsion of aliens is enshrined in European, inter-American and African positive regional law; at the international level, it seems to be limited to migrant workers and their families.

113. Does this mean that it is not (yet) a universal rule, deriving from either treaty-based or customary law? The question is worth considering, especially since State practice in this matter seems to vary. The responses of certain States members of OAS to the questionnaire prepared by the Office of the Rapporteur on migrant workers and their families in the hemisphere is telling in this regard. In answer to the first question, namely “Can any determined group of immigrant workers and their family members be expelled as a group from your country?”, some States said “no” outright¹³⁹ while the response of others was an outright¹⁴⁰ or tacit¹⁴¹ “yes”.

¹³⁶ Boeck, “L’expulsion ...”, p. 469.

¹³⁷ See Lochak, “Article 4”, p. 1058.

¹³⁸ Adopted by the General Assembly in its resolution 45/158 of 18 December 1990. The Convention entered into force on 1 July 2003.

¹³⁹ Canada, Dominica, Grenada and Mexico said “no” outright (OEA/Ser.L/V/II.106), sect. IV (b) (5)) (see footnote 52 above).

¹⁴⁰ Colombia, Ecuador, Guatemala and Honduras said “yes” outright (*ibid.*).

¹⁴¹ Brazil gave a rather lengthy reply in order to obscure the fact that, under its legislation, it is possible to practise collective expulsion:

114. In fact, many States still practise collective expulsion to this day, including in parts of the world where countries are bound by a legal instrument prohibiting it. This is the case in Africa,¹⁴² and in South America¹⁴³ as well; and who is to say that this does not happen in Europe?¹⁴⁴

115. Apart from the (*de facto*) organized repatriation of refugees living in UNHCR “refugee camps”, there is no doubt that such collective expulsions are contrary to the three regional human rights conventions referred to above. Furthermore, it seems reasonable to suggest that there is a general principle of international law on this matter that is “recognized by civilized nations” and prohibits collective expulsion. First of all, it would follow from the fact that if the admission of an alien is an individual right, the loss or denial of this right can only be by an individual act. Secondly, this rule against collective expulsion is enshrined in three regional human rights conventions that, among them, cover most States members of the international community. After all, Article 38 of the ICJ Statute does not require that general principles be recognized by *all* “civilized nations”.

(ii) *In time of war*

116. The question is whether such a principle can be applied in a situation of armed conflict. In past centuries, the practice of collective expulsion of aliens in time of war was not unusual. In the eighteenth century, under the 1713 Treaty of Utrecht and an Anglo-Russian treaty of 1760, enemy subjects residing in the territory of belligerent Powers were ordered to leave within a certain time limit. Similarly, in 1798, Congress authorized the

“To determine the expulsion of an alien who is lawfully or unlawfully in the country. It is applied to an alien who in any manner poses a threat to national security, political or social order, public morals or the national economy, or whose actions are contrary to the national interest. It is also applied to those who used fraud to enter or remain in Brazil, or who entered the national territory in violation of the law, if they have not left within the prescribed time and their deportation is not desirable; and to those who are engaged in vagrancy or begging or disregard the prohibition established expressly in the Law Governing Foreigners (Article 66 of Law No. 6,815/80, as amended by Law No. 6,965 of December 1981).”

(*Ibid.*).

¹⁴² See the examples given in the preliminary report on the expulsion of aliens, by the Special Rapporteur in *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554, para. 4, footnote 6, and para. 24, footnote 34.

¹⁴³ For example, the expulsion, between June and September 1991, of 60,000 Haitians from the Dominican Republic (OEA/Ser.L/V/II.106 (see footnote 52 above).

¹⁴⁴ In his second report, the Special Rapporteur indicated that the Minister of the Interior of France had set a goal of removing a minimum of 23,000 aliens in 2005 and noted that 12,849 aliens had been expelled in eight months (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573, para. 20), that on 17 February 2005, the Netherlands parliament had approved by a large majority the Government’s decision to expel 26,000 foreigners whose status was irregular, and that Belgium had expelled 14,110 people in 2003 (*ibid.*, para. 22). These figures raise the question of whether such mass expulsions were consistent with article 4 of Protocol No. 4 to the European Convention on Human Rights and with the case law of the European Commission on Human Rights and the European Court of Human Rights cited above. Even assuming that each of the persons concerned was individually expelled, is this not collective expulsion in disguise? For it is doubtful that every single case was given the benefit of a fair and objective examination, as required by the above-mentioned case law.

President of the United States to expel nationals of enemy States under the same conditions.¹⁴⁵

117. In France, the National Convention, which came into power soon after the 1789 revolution and found itself at war with all the European nations except Denmark, Sweden and Switzerland, sought to guarantee domestic security in the midst of agitation by a “foreign faction” supported by “outside enemies”.¹⁴⁶ Thus, immediately after the outbreak of hostilities, it decided, by decree of 1 August 1793, to arrest all foreigners from countries at war with France who had been residing there prior to 14 July 1789. The law of 11 July 1795 (23 Messidor, Year III) decreed the expulsion of all aliens who were nationals of enemy Powers and the arrest of those who did not obey the expulsion order or whose itinerary differed from that indicated in the passports issued to them (art. 4). In addition, a law of 2 August 1795 (15 Thermidor) declared that the treatment of aliens was too lenient, and thus that “any foreigner who does not comply with the articles of the said law shall be prosecuted and punished for espionage”, which, at the time, meant sentenced to death. These could be called “laws of anger”—attributable to “the state of anxiety of a government that had banished moderation from its agenda”¹⁴⁷—as they were contrary to the humanitarian principles championed by the National Convention.

118. The tendency towards collective expulsion of nationals of enemy countries in time of armed conflict diminished in the following century. As Darut wrote:

In the nineteenth century, most States which had known the horrors of war, while not overlooking their domestic security requirements, were, to the extent possible, less rigorous about expelling all nationals of the enemy State from their territory.¹⁴⁸

119. Thus, in 1854, during the Crimean war, Russia decreed that English and French nationals present on Russian territory could continue to reside there, just as they had before the war, and guaranteed them the same security of person and property they had previously enjoyed, provided that they continued to obey the law and carry on their business peacefully.¹⁴⁹ In that same vein, on 4 May 1859, during the war with Italy, the Government of France authorized Austrians residing in France to remain there “as long as their conduct did not give rise to any cause for complaint”.¹⁵⁰ On 21 May 1870, a similar statement was issued in the French *Journal Officiel* with regard to the Germans.¹⁵¹ And in 1894, during the Sino-Japanese war, the Government of Japan allowed Chinese nationals residing in Japan to remain there during the period of hostilities, leading their lives as they had in the past; China followed the example of its enemy.¹⁵² Similarly, in 1897, during the war between Greece and the Ottoman Empire over the independence of Crete, the Government

of Greece did not impose any expulsion measures on the Turks settled in Greece, recognizing their right to continue to live in Greece as long as their conduct did not give rise to complaints; however, Turkey did not have the same attitude: in declaring war, it notified Greece, on 18 April 1897, of an *irade* of the Sultan decreeing expulsion, within 15 days, of all Greeks residing throughout the Ottoman territory.¹⁵³ It should also be noted that during the Second Boer War, from 1899 to 1902, English residents of the Transvaal and the Orange Free State were expelled within 48 hours.¹⁵⁴

120. Do these examples, particularly the attitude of the Government of Turkey, imply, however, that the prevailing tendency in State practice at the time was being called into question? Martini writes that:

Turkey’s failure to uphold the law of nations, in 1897, drew protests from the embassies of the major Powers.¹⁵⁵

121. No one knows whether, in this particular case, the rule in question was the prohibition of collective expulsion, or reciprocity in refraining from the collective expulsion of the nationals of a State at war with the host State for, in this instance, it would seem that Greece honoured that principle but Turkey did not. In any case, it should be noted that during a period where the collective expulsion of aliens who were nationals of a country with which the host country was at war was the order of the day, particularly in France, there was an outcry against a measure perceived as “taking revenge on innocent persons who could not be faulted on any grounds other than being vaguely suspected of spying”.¹⁵⁶

122. It should also be taken into account that during the Russo-Japanese war, fought in 1904–1905—thus later than all the others mentioned above—Japan accorded the Chinese the same treatment it had during the war of 1894, and, on 10 February 1904, the Minister of the Interior of Japan instructed the authorities in charge of the territorial administrative units to refrain from showing hostility towards Russians, who were authorized to continue residing in the territory of the Empire, and to enter and leave it at will. As for Russia, by order of 14 and 27 February 1904, it, too, allowed the Japanese to continue living there peacefully, under the protection of the law, and to carry on their activities in Russian territory, “with the exception, however, of the Far East territories”.¹⁵⁷

123. It should be noted, however, that even as this tolerance was being practised by States, the quasi-unanimous

¹⁴⁵ See Darut, *op. cit.*, p. 37, footnote 1.

¹⁴⁶ *Ibid.*, p. 38.

¹⁴⁷ Darut, *op. cit.*, p. 40; see also Martini, *op. cit.*, pp. 88–89.

¹⁴⁸ Darut, *op. cit.*, p. 43.

¹⁴⁹ *Ibid.*; and Martini, *op. cit.*, p. 89.

¹⁵⁰ Martini, *op. cit.*, p. 89.

¹⁵¹ Darut, *op. cit.*, p. 43; and Martini, *op. cit.*, p. 89.

¹⁵² Martini, *op. cit.*, p. 92. On these cases relating to the Sino-Japanese conflict in the nineteenth century, see the information provided by Politis in RGDIP, vol. IV (1897), pp. 525 *et seq.*

¹⁵³ See Darut, *op. cit.*, pp. 44–45; and Martini, *op. cit.*, p. 93. Greeks who did not wish to be expelled could remain in Turkey, provided that they permanently gave up their Greek nationality and became Turkish (*ibid.* and Darut, *op. cit.*, p. 45).

¹⁵⁴ See Martini, *op. cit.*, p. 94. The author believes, with regard to this case, that it “would be ill-advised to put this small country—which no longer exists and fought so heroically that it even won the admiration of its adversaries—on trial”. Despagne defended the conduct of the Boers in this war in RGDIP (1900), p. 698 (*ibid.*, footnote 1).

¹⁵⁵ Martini, *op. cit.*, p. 93.

¹⁵⁶ Martini, *op. cit.*, p. 90, footnote 1, citing Fiore, *Nouveau droit international public*, vol. 3, No. 129.

¹⁵⁷ Martini, *op. cit.*, p. 92. On the Russo-Japanese war, see, in particular, Rey, *La guerre russo-japonaise au point de vue du droit international*, pp. 230–232; Bonfils and Fauchille, *Manuel de droit international public (droit des gens)*, para. 1055.

literature of the day regarded the collective expulsion of foreign nationals of an enemy State as justified and consistent with the law of nations. As Martini wrote:

The vast majority of authors on public international law have no difficulty in recognizing the mass expulsion of aliens belonging to an enemy nation as a natural effect of the declaration of war.¹⁵⁸

It was, in fact, at this time that, in the same vein as Pillet and Niboyet, whose expertise was, admittedly, more in the area of private international law, two eminent internationalists, Bonfils and Fauchille, taught that:

Mass expulsion ... in time of war, is an act of defence and a perfectly lawful and unquestionably appropriate measure. Steps to avoid the risk of aliens staying in the country, prevent the provocations and unrest among the population that their presence could incite and thwart the possibility of dangerous and easily managed espionage, are obviously security measures that a State must be able to take ... Each State should be allowed to carry out mass expulsions of nationals of an enemy country, even if they are legitimately settled in the territory.¹⁵⁹

Agreeing wholeheartedly, Pillet declared in 1891–1892, in a series of lectures on the law of war that he delivered to officers in Grenoble, France, that a State that offers hospitality “to a considerable number of aliens”¹⁶⁰ is acting “in accordance with a genuine need by expelling these aliens if it goes to war against their homeland. Their mere presence is a grave danger in and of itself”.¹⁶¹

124. British legal theorists also took a clear-cut position on this matter, as the Special Rapporteur indicated in his second report.¹⁶²

125. The world has recently witnessed the practice of collective expulsion of nationals of an enemy State in the 1998 war between Eritrea and Ethiopia. As also indicated in the second report,¹⁶³ the Eritrea Ethiopia Claims Commission, citing *Oppenheim’s International Law*, noted that international humanitarian law gives belligerents broad powers to expel nationals of the enemy State from their territory during a conflict. The Commission’s decision, which could not be appealed, was as follows:

Ethiopia could lawfully expel these persons as nationals of an enemy belligerent, although it was bound to ensure them the protections required by Geneva Convention IV and other applicable international humanitarian law.¹⁶⁴

¹⁵⁸ Martini, *op. cit.*, p. 87.

¹⁵⁹ *Ibid.*, pp. 87–88, quoting Bonfils and Fauchille, *op. cit.*, p. 748. In this connection, see Bry, *Précis élémentaire de droit international public mis au courant des progrès de la science et du droit positif contemporain à l’usage des étudiants des facultés de droit et des aspirants aux fonctions diplomatiques et consulaires*, p. 515; Piédelièvre, *Précis de droit international public ou droit des gens*, p. 150, para. 830; Moore, *A Digest of International Law*, vol. IV, p. 68; and Mérignhac, *Les lois et coutumes de la guerre sur terre d’après le droit international moderne et la codification de la Conférence de La Haye de 1899*, pp. 46–47, para. 25.

¹⁶⁰ Pillet, *Le droit de la guerre*, p. 99. Here the author makes an exception. In his view, it would be different if a very small number of foreigners were involved: “A State that has only a negligible number of foreigners would do well to refrain from subjecting them to an expulsion that cannot be justified on any grounds. And as it is not at any risk, the State should not even flaunt its generosity.” (*Ibid.*)

¹⁶¹ *Ibid.*, pp. 99–100.

¹⁶² *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573, para. 112.

¹⁶³ *Ibid.*, para. 114.

¹⁶⁴ Eritrea Ethiopia Claims Commission, *Partial Award—Civilian Claims: Eritrea’s Claims 15, 16, 23 and 27–32*, decision of 17 December 2004, para. 82.

126. It should be noted that this “rule” has no clear support in customary international law. Contrary to the view that cites, with unjustified assurance, “the customary right of a State to expel all enemy aliens at the onset of a conflict”,¹⁶⁵ it is evident that the practice in the matter is rather different. Nor is there any basis for this thinking, whatever may have been implied, in international humanitarian law. Quite the reverse, the relevant provisions of the Geneva Convention relative to the protection of civilian persons in time of war, tend to support the opposite meaning.

127. In the first place, part III, section I, entitled “Provisions common to the territories of the Parties to the conflict and to occupied territories”, article 27, first paragraph, reads as follows:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Alien civilians are considered protected persons under the Geneva Convention relative to the protection of civilian persons in time of war.

128. Secondly, in section II, entitled “Aliens in the territory of a Party to the conflict”, article 38 provides as follows: “[T]he situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace.” Article 40 further stipulates that, if “protected persons are of enemy nationality, they may only be compelled to do” certain types of work—specified in the article—which are “not directly related to the conduct of military operations”. Since they can be compelled to work “only to the same extent as nationals of the Party to the conflict in whose territory they are”, like all other protected persons, they “shall have the benefit of the same working conditions and of the same safeguards as national workers”.

129. These provisions imply that the legal regime governing civilian persons protected in time of war should be applied generally and without distinction to national and foreign civilians alike, even if the latter are nationals of an enemy State or of a third party to the armed conflict. Thus, in analysing the provisions of article 41, relating to assigned residence or internment, one author wrote that “Just being a national of the enemy state is not sufficient reason justifying internment”.¹⁶⁶

130. It is also significant that the monumental research work on customary international humanitarian law¹⁶⁷ carried out under the auspices of ICRC does not contain a single rule, among the 161 rules identified, on the collective expulsion of foreign nationals of an enemy State in time of war. At most, one rule (rule 103) can be found, stipulating

¹⁶⁵ Whiteman, *op. cit.*, vol. 10, p. 274, quoting Draper, *The Red Cross Conventions*, pp. 36–37, cited by the Eritrea Ethiopia Claims Commission, *Partial Award*, para. 81, footnote 27 (see footnote 164 above).

¹⁶⁶ Umozurike, “Protection of the victims of armed conflicts”, p. 191.

¹⁶⁷ See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I: Rules.

that “[c]ollective punishments are prohibited”.¹⁶⁸ Assimilating, *quod non*, expulsion to a “punishment”, or more precisely to a sanction, it can be inferred from this provision a rule prohibiting the collective expulsion of the type of aliens being considered here.

131. Of course, the distinction between expulsion in time of peace and expulsion in time of war seems to be well founded and, in any case, established in both theory and practice, as the authors of *Oppenheim's International Law* assert. But these authors refer more specifically to a State's right “to expel all hostile nationals residing, or temporarily staying, within its territory”.¹⁶⁹ It is difficult to say whether the Eritrea Ethiopia Claims Commission let itself be influenced by this consideration. This idea, however, fits in well with the condition attached—in the aforementioned historical State practice with regard to the collective expulsion of foreign nationals of an enemy State—to the measure or declaration of non-expulsion, namely, that the foreign nationals in question could continue to reside in the State at war with their country and enjoy the necessary protection, provided that they lived there peaceably and did not give rise to any cause for complaint.

132. Given the entrenched positions and qualified formulations described above, one lesson could be drawn from this debate, which has been going on at least since the eighteenth century: that the matter should be tackled prudently, in the light of the progressive development of international law and its main contemporary principles. A number of questions may be raised. Which should prevail: the interest of the State or that of individual persons, even if they are nationals of an enemy State? The collective security interest of the belligerent State or the individual but nonetheless fundamental interest of the alien who is the presumed “enemy” of that State? Is it possible to reconcile these two apparently opposite requirements?

133. These are the questions that must now be answered, given the Special Rapporteur's belief that the right to expel nationals of an enemy State can be examined today only in the light of the progressive development of international law and the fundamental principles of human rights. In fact, the philosophy of human rights and contemporary international law do not allow a State to collectively subject a group of aliens *as such*, whatever its nature and even if it is composed of nationals of an enemy State, to the regrettable consequences of a situation for which they are not responsible, on the sole grounds that they are nationals of that State. Expulsion cannot be used as a preventive weapon against an enemy State or as a means of retaliation against peaceful aliens for a war in

which they are not involved and for which they may have no sympathy.

134. In brief, it appears that: (a) there is no rule of international law that requires a belligerent State to allow nationals of an enemy State to remain in its territory,¹⁷⁰ but there is also no rule that requires such State to expel them; (b) the collective expulsion of foreign nationals of an enemy State is practised by some States, to varying degrees, and finds support in most of the literature, both historically and in modern times; (c) this State practice and the literature seem to consider that such expulsion must be allowed only in the case of aliens who are hostile to a receiving State at war with their country. It follows, *a contrario*, that foreign nationals of an enemy State who are living peaceably in the host State and causing no trouble to that State may not be collectively expelled; their expulsion must obey the ordinary law on expulsion in time of peace, for the lack of hostility on their part removes them from the exceptional situation created by the war with the State of which they are nationals. In this case, it is difficult to agree fully with the view that “a State may nonetheless be justified in expelling such a group without regard to the individual behaviour of its members, if the security and the existence of the expelling State would otherwise be seriously endangered, for example ... during a state of war”.¹⁷¹ Such a position appears unacceptable, in view of the requirement of respect for the individual rights of the human person in all circumstances, unless the aliens in question, taken together as a group, carry out activities or display behaviours which are hostile or dangerous to the receiving State.

135. In the light of the foregoing, the following draft article is proposed:

“Draft article 7. *Prohibition of collective expulsion*”

“1. The collective expulsion of aliens, including migrant workers and members of their family, is prohibited. However, a State may expel concomitantly the members of a group of aliens, provided that the expulsion measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.

“2. Collective expulsion means an act or behaviour by which a State compels a group of aliens to leave its territory.

“3. Foreign nationals of a State engaged in armed conflict shall not be subject to measures of collective expulsion unless, taken together as a group, they have demonstrated hostility towards the receiving State.”

¹⁶⁸ *Ibid.*, p. 374.

¹⁶⁹ Jennings and Watts, *op. cit.*, p. 941, para. 413.

¹⁷⁰ See McNair and Watts, *The Legal Effects of War*, p. 76.

¹⁷¹ Doebling, *loc. cit.*, vol. 8, p. 16.

CHECKLIST OF DOCUMENTS OF THE FIFTY-NINTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/576	Provisional agenda	Mimeographed. For agenda as adopted, see <i>Yearbook ... 2007</i> , vol. II (Part Two).
A/CN.4/577 and Add.1–2	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat	Mimeographed.
A/CN.4/578 [and Corr.1]	Third report on the effects of armed conflicts on treaties, by Mr. Ian Brownlie, Special Rapporteur	Reproduced in the present volume.
A/CN.4/579 and Add.1–4	The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>): comments and information received from Governments	<i>Idem.</i>
A/CN.4/580	Fourth report on shared natural resources: transboundary groundwaters, by Mr. Chusei Yamada, Special Rapporteur	<i>Idem.</i>
A/CN.4/581	Third report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur	<i>Idem.</i>
A/CN.4/582	Responsibility of international organizations: comments and observations received from international organizations	<i>Idem.</i>
A/CN.4/583	Fifth report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur	<i>Idem.</i>
A/CN.4/584 [and Corr.1]	Twelfth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/585 [and Corr.1]	Second report on the obligation to extradite or prosecute (<i>aut dedere aut judicare</i>), by Mr. Zdzislaw Galicki, Special Rapporteur	<i>Idem.</i>
A/CN.4/586	Reservations to treaties: Note by the Special Rapporteur on draft guideline 2.1.9 (Statement of reasons for reservations)	<i>Idem.</i>
A/CN.4/L.705	Reservations to treaties: report of the Drafting Committee	Text reproduced in <i>Yearbook ... 2007</i> , vol. I.
A/CN.4/L.706 and Add.1–3	Draft report of the Commission on the work of its fifty-ninth session: chapter IV	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)</i> . The final text appears in <i>Yearbook ... 2007</i> , vol. II (Part Two).
A/CN.4/L.707/Rev.1	<i>Idem</i> : chapter VI	<i>Idem.</i>
A/CN.4/L.708 and Add.1 [and Corr.1]	<i>Idem</i> : chapter VII	<i>Idem.</i>
A/CN.4/L.709 and Add.1	<i>Idem</i> : chapter V	<i>Idem.</i>
A/CN.4/L.710	<i>Idem</i> : chapter I	<i>Idem.</i>
A/CN.4/L.711	<i>Idem</i> : chapter II	<i>Idem.</i>
A/CN.4/L.712	<i>Idem</i> : chapter III	<i>Idem.</i>
A/CN.4/L.713 and Add.1–3	<i>Idem</i> : chapter VIII	<i>Idem.</i>
A/CN.4/L.714 and Add.1	<i>Idem</i> : chapter IX	<i>Idem.</i>
A/CN.4/L.715 and Add.1	<i>Idem</i> : chapter X	<i>Idem.</i>
A/CN.4/L.716	Programme, procedures and working methods of the Commission, and its documentation: report of the Planning Group	Mimeographed.
A/CN.4/L.717	Shared natural resources: report of the Working Group	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.718	Effects of armed conflicts on treaties: report of the Working Group	<i>Idem.</i>
A/CN.4/L.719	Most-favoured-nation clause: report of the Working Group	<i>Idem.</i>
A/CN.4/L.720	Responsibility of international organizations: report of the Drafting Committee	<i>Idem.</i>
ILC(LIX)/RT/CRP.1	Summary of discussions, held in 2007, with United Nations and other experts in the field of human rights, including representatives from various human rights treaty bodies, prepared by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/SR.2914–A/CN.4/SR.2955	Provisional summary records of the 2914th to 2955th meetings	<i>Idem.</i> The final text appears in <i>Yearbook ... 2007</i> , vol. 1.

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