STATE RESPONSIBILITY

[Agenda item 2]

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

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Hague Convention concerning the Laws and Customs of War on Land (Convention IV) (The Hague, 18 October 1907)	*The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., J. B. Scott, ed. (New York, Oxford University Press, 1918), p. 100.
Treaty of Peace with Italy (Paris, 10 February 1947)	United Nations, *Treaty Series*, vol. 49, p. 3.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	Ibid., vol. 78, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	Ibid., vol. 75, p. 31.
Geneva Convention relative to the Treatment of Prisoners of War	Ibid., p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	Ibid., p. 287.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977)	Ibid., vol. 1125, pp. 3 and 609.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	Ibid., vol. 500, p. 95.
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Introduction

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

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

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

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

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

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

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

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

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

B. Scope of the present report

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

C. Comments received so far on the draft articles

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

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

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

[3] Ibid.

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

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

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

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

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

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

D. Some general issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Issues excluded or insufficiently developed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Inclusion of detailed provisions on countermeasures and dispute settlement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Eventual form of the draft articles

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

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

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

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

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

Chapter I

The distinction between "criminal" and "delictual" responsibility

Introduction

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

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

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

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

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

A. The treatment of State crimes in the draft articles

46. Article 19, paragraph 1, provides that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Comments of Governments on State crimes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[44] See footnote 16 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Existing international law on the criminal responsibility of States

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

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

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

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

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

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

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

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

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[55] See footnote 16 above.

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

[57] Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279), arts. 9–10, at p. 290. Such a declaration could only be made after a trial of a member of the organization "in connection with any act of which the individual may be convicted", and there were certain procedural safeguards for other members. The Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, Tokyo, 19 January 1946 (*Documents on American Foreign Relations* (Princeton University Press, vol. VIII, 1948), pp. 354 et seq.), contained no such provisions. See also the *Touvier* case (*International Law Reports*, vol. 100 (1995), p. 337; and *La Semaine juridique: jurisclasseur périodique (JCP)*, 1993, No. 1, 21977, pp. 4–6).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[67] Ibid., p. 616.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Individual criminal responsibility under international law

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

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

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

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

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

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

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

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

3. Obligations *erga omnes*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[94] Ibid., p. 617.

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

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

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

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

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

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

E. Possible approaches to international crimes of States

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

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

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

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

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

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

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

[97] Ibid.

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

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

[100] Ibid.

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

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

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

[104] See paragraph 67 above.

[105] See paragraph 51 above.

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

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

1. Two preliminary issues

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

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

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

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

2. Consideration of the alternatives

(a) *The status quo*

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

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

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

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

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

[110] See paragraph 68 above.

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

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

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

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

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

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

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

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

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

[113] See paragraph 67 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) *Criminalizing State responsibility*

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

[118] See paragraph 67 above.

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

[120] See paragraph 51 above.

[121] See paragraphs 62–65 above.

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

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

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

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

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

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

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

(d) *Excluding the possibility of State crimes*

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

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

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

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

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

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

[128] See paragraphs 51 and 77 above.

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

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

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

(e) *Decriminalizing State responsibility*

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

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

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

3. Recommendation

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

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

[129] See paragraph 52 above.

[130] See footnote 117 above.

[131] See paragraphs 44 and 53 above.

CHAPTER II

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

A. Preliminary issues

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

1. QUESTIONS OF TERMINOLOGY

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

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

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

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

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

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

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

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

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

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

Table 1
KEY TERMS IN THE DRAFT ARTICLES ON STATE RESPONSIBILITY

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

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

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

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

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

2. General and savings clauses

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

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

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

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

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

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

[137] See paragraphs 108–116 below.

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

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

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

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

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

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

(a) *General observations*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[153] Ibid., pp. 266–267.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[159] See footnote 152 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) *Recommendation*

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

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

(a) *Observations*

127. Article 2 provides that:

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

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

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

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

(b) *Recommendation*

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

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

(a) *Observations*

131. According to article 3:

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

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

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

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

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

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

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

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

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

(b) *Recommendation*

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

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

(a) *Observations*

136. Article 4 provides:

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

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

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

(b) *Recommendation*

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

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

1. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

(a) *Questions of terminology*

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

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

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

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

149. Germany doubts whether this chapter

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

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

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

151. Mongolia also expresses:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[185] Ibid.

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

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

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

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

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

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

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

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

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

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

2. Review of specific articles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comments of Governments on article 5

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

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

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

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

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

It also notes that:

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

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

The term "organ"

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

The reference to "internal law"

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

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

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

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

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

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

[201] Ibid.

[202] See paragraphs 235–240 below.

[203] See paragraphs 195–213 below.

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

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

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

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

[208] See paragraphs 232–240 below.

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

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

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

166. Article 6 provides:

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

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

Comments of Governments on article 6

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

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

Substantive issues raised by article 6

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Placement of article 6

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

Conclusions on articles 5 and 6

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

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

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

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

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

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

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

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

[218] See paragraph 164 above.

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

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

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

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

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

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

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

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

Comments of Governments on article 7

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

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

"Territorial governmental entities"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Parastatals" exercising government functions

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

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

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

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

[238] See paragraph 185 above.

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

[240] See paragraph 164 above.

Conclusion as to article 7

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

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

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

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

Comments of Governments on article 8

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

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

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

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

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

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

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

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

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

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

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

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

The relevance of State control

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[247] See paragraph 155 above.

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

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

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

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

[252] Ibid., pp. 188–189, para. 16.

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

The Tadić *case*

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

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

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

It concluded that:

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

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

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

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

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

The jurisprudence of the Iran-United States Claims Tribunal

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

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

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

The Loizidou *case*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conduct by State-owned corporations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The question for the Commission

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

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

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

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

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

Comments of Governments

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

The underlying principle

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

[272] See paragraph 199 above.

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

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

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

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

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

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

The formulation of the principle

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

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

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

219. Article 9 provides that:

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

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

Comments of Governments on article 9

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Organs of international organizations as organs of States?

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

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

Provisional conclusion

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

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

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

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

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

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

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

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

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

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

[301] See paragraphs 253–259 below.

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

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

Comments of Governments on article 10

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[305] Ibid., pp. 145–150.

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

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

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

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

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

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

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

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

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

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

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

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

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

Comments of Governments on article 11

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

The difficulty with article 11

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

Tentative conclusion

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

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[313] See paragraph 163 above.

[314] See paragraph 142 above.

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

[316] Ibid., p. 71, paras. (3)–(5).

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

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

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

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

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

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

246. Article 12 provides that:

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

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

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

Comments of Governments on article 12

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

The context of article 12

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

Territory and responsibility

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

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

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

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

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

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

[321] See paragraph 283 below.

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

[323] See footnote 134 above.

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

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

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

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

[328] Ibid., p. 22.

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

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

Recommendation

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

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

253. Article 13 provides that:

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

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

Comments of Government on article 13

255. As noted, a number of Governments raised issues about attribution of acts of international organizations in the context of article 9. No comments related specifically to article 13.

Responsibility of States for the conduct of international organizations

256. Over and above the problem of the "negative attribution" clauses, already discussed, article 13 raises several difficulties:

a. *The irrelevance of location*

257. A similar comment applies here to the issue of the location of conduct as it does in relation to article 12, but the problem of the *a contrario* implication which might appear to flow from the language of article 13 is greater. As has been seen, the fact of a State acting on the territory of another State is legally relevant, although it is by no means sufficient of itself to attract the responsibility of the latter.[335] But international organizations always act, as it were, on the territory of a "foreign" State. Even in relation to the host State, with which it has a special relationship, an international organization is still legally an entirely distinct entity, and the host State cannot be expected to assume any special responsibility for its conduct or its debts. Moreover, as the commentary notes, there is a principle of the independence of international organizations, different and quite possibly stronger than the position that arises when one State acts on the territory of another.[336] For these reasons, the fact that an international organiza-

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[329] Nor is it a *necessary* basis: a State can be responsible for its conduct in the de facto occupation or administration of territory not its own. As ICJ said in the *Namibia* case: "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States." *(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54.) Earlier in the same paragraph the Court had been discussing issues of State responsibility; the reference to "liability" in the English version may have been a slip. The European Court of Human Rights has strongly affirmed the same principle in *Loizidou* v. *Turkey, judgment of 23 March 1995 (Preliminary Objections), Series A No. 310*, para. 62; and ibid., *judgment of 18 December 1996 (Merits), Reports of Judgments and Decisions* 1996–VI, para. 52. Thus, even since article 12 was proposed, the link between territoriality and responsibility has been further attenuated.

[330] It is significant that the two precedents for article 12 cited in the commentary (*Yearbook … 1975*, vol. II, document A/10010/Rev.1, p. 85, para. (8)), are both primary rules, not rules of attribution.

[331] Ibid., p. 87, para. (2) of the commentary to article 13.

[332] Ibid., pp. 87–88, paras. (3)–(4).

[333] Ibid., pp. 89–90, paras. (8)–(9).

[334] Ibid., p. 91, para. (13).

[335] See paragraph 250 above for the analysis of the *Corfu Channel* case.

[336] For example, the principle of the immunity of an international organization from the jurisdiction of the courts of a territorial State is more extensive than the immunity of a foreign State would be. In part, this may be a historical accident, but in part at least it reflects a functional difference between States and international organizations.

tion has acted on the territory of a State would appear to be entirely neutral, so far as concerns the responsibility of that State under international law for the acts of the organization. But if so, for article 13 to single out that neutral factor as a basis for non-attribution is extremely odd.

b. *The problem of substance*

258. There is a broader question of attribution to a State of the conduct of international organizations, which has acquired much greater significance since the adoption of article 13, given the controversies, *inter alia*, over the International Tin Council[337] and the Arab Organization for Industrialization.[338] The most detailed study of that problem which takes these developments into account is that of the Institute of International Law, which produced a carefully considered resolution in 1995.[339] That resolution does not mention the location of the organization or of its activities as a relevant factor in determining State responsibility for its acts. Indeed, article 6 of the resolution, which lists a number of factors which are not to be taken into account for that purpose, does not mention territorial location. Evidently it was thought completely irrelevant.

Recommendation

259. The responsibility of States for the acts of international organizations needs to be treated in its own right, in the context of the broader range of issues relating to responsibility for the acts of international organizations. As a statement of the law of attribution, article 13 raises awkward *a contrario* issues without resolving them in any way. It should be deleted. Instead, a savings clause should be inserted, reserving any question of the responsibility under international law of an international organization or of any State for the acts of an international organization.[340] Elements of the commentary to article 13 can be included in the commentary to that savings clause.

(j) *Article 14 (Conduct of organs of an insurrectional movement)/Article 15 (Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State)*

260. The position of "insurrectional movements" is dealt with in two articles, which reflects the substantial historical importance of the problem and the considerable bulk of earlier arbitral jurisprudence. Article 14 is the "negative" attribution clause, article 15 the affirmative one. It is convenient to deal with them together.

261. Article 14 provides that:

> 1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.
>
> 2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.
>
> 3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

262. Article 15 provides that:

> 1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.
>
> 2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

263. In its commentary to article 14, the Commission notes that, once an organized insurrectional movement comes into existence as a matter of fact, it will rarely if ever be possible to impute responsibility to the State, since the movement will by then be "entirely beyond its control".[341] After analysing the extensive arbitral jurisprudence,[342] diplomatic practice,[343] and the literature,[344] it affirms strongly that the State on whose territory the insurrectional movement is located is not responsible for the latter's conduct, unless in very special circumstances where the State should have acted to prevent the harm. That rule is stated in categorical terms; in particular it is denied that the State is responsible for or is bound to respect "routine administrative acts performed by the organs of the insurrectional movement in that part of the State territory which is under their control".[345] On the other hand, the insurrectional movement itself may be held responsible for its own acts.[346]

264. The commentary explains the two rules set out in article 15 on the basis of the organizational continuity of an insurrectional movement which succeeds in displacing the previous government of the State or even in forming

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[337] *J. H. Rayner Ltd.* v. *Dept. of Trade and Industry*, case 2 AC 418 (1990) (United Kingdom, House of Lords), and *International Law Reports*, vol. 81, p. 670; *Maclaine Watson & Company Limited* v. *Council and Commission of the European Communities*, Court of Justice of the European Communities, case C–241/87, *Reports of Cases before the Court of Justice and the Court of First Instance* 1990–5, p. I–1797.

[338] *Westland Helicopters Ltd* v. *Arab Organization for Industrialization*, *International Law Reports*, vol. 80 (1985), p. 595 (International Chamber of Commerce, Court of Arbitration); *Arab Organization for Industrialization and Others* v. *Westland Helicopters Ltd*, ibid. (1988), p. 622 (Switzerland, Federal Supreme Court); and *Westland Helicopters Ltd* v. *Arab Organization for Industrialization*, ibid., vol. 108 (1994), p. 564 (England, High Court).

[339] Institute of International Law, *Yearbook*, vol. 66, part II (Session of Lisbon, 1995), p. 445. For the *travaux préparatoires*, see part I (ibid.), p. 251.

[340] For the parallel recommendation to delete references to international organizations in article 9, see paragraph 231 above.

[341] *Yearbook … 1975*, vol. II, document A/10010/Rev.1, p. 92, para. (4) of the commentary to article 14.

[342] Ibid., pp. 93–95, paras. (12)–(18).

[343] Ibid., pp. 95–97, paras. (19)–(23).

[344] Ibid., pp. 97–98, paras. (24)–(27).

[345] Ibid., p. 98, para. (26).

[346] Ibid., pp. 98–99, para. (28), with reference to some older precedents.

a new State on part of its territory.[347] This has nothing to do with State succession; in the former case there is no succession of States, and in the latter the rule of continuity applies whether or not the predecessor State was responsible for the conduct itself (under article 14, it will almost always not be).[348] Thus it is not clear what the systematic or structural basis for responsibility is, but the earlier jurisprudence and doctrine, at least, firmly support the two rules set out in article 15.[349]

265. In formulating both the "negative attribution" rule in article 14 and the positive rule in article 15, the Commission made "no distinction ... between different categories of insurrectional movements on the basis of any international 'legitimacy' or any illegality in respect of their establishment as the government, despite the possible importance of such distinctions in other contexts".[350]

Comments of Governments on articles 14 and 15

266. Austria remarks that:

> The issue of the conduct of organs of an insurrectional movement contained in draft articles 14 and 15 leaves considerable doubt and requires further consideration. This pertains in particular to draft articles 14, paragraph 2, and 15, paragraph 1 … The relationship between the first and the second sentence of draft article 15, paragraph 1, should for instance be re-examined in the light of the experience gained in Eastern Europe following the breakdown of the Iron Curtain and other instances of civil unrest.[351]

In an earlier comment, Austria had noted that article 14 did not expressly deal with "the case of an insurrectional movement, *recognized by foreign States as a local* de facto *government*, which in the end does not establish itself in any of the modes covered by article 15 but is defeated by the central authorities", and had called for clarification.[352]

267. France proposes new wording for article 14, establishing a presumption of responsibility subject to exoneration in the event of *force majeure* etc., combined with the deletion of paragraphs 2 and 3 whose scope is "singularly unclear". It thus proposes an entirely new formulation in the following terms:

> The conduct of an organ or agent of an insurrectional movement in the territory of a State or in any other territory under its jurisdiction shall not be considered as an act of that State if:
>
> (*a*) The State in question establishes that the act is attributable to the insurrectional movement; and
>
> (*b*) The State in question establishes that it exercised the functions pertaining to its territorial jurisdiction over the territories concerned in a lawful manner.[353]

268. The United Kingdom notes that:

> It is desirable that a new Government should not be able to escape international responsibility for the acts that brought it to power, especially as there is a particular likelihood of injury to foreign States and nationals during an insurrection. On the other hand, to entitle ... successful insurrectionists to consent to departures from legal obligations owed to their national State might be thought to promote the non-observance of such obligations at a critical juncture for the State, and even to encourage intervention by third States in its internal affairs. It might therefore be thought preferable, in the interest of stability, to adopt the position that only the incumbent Government may consent to departures from legal obligations.[354]

This comment goes not so much to article 15 as to the question of whether or in what circumstances the consent given by an insurrectional movement may bind the State for the purpose of article 30. It will accordingly be considered when discussing that article.

The definition of "insurrectional movement"

269. The commentary declines to attempt any definition of an "insurrectional movement", on the ground that this is a matter for the international law of personality rather than of responsibility.[355] It does, however, note that insurrectional movements are intended to be covered whether they are based on the territory of the "target" State or on the territory of a third State.[356] This calls for several remarks.

270. First of all, the insurrectional movements considered in the earlier cases were by no means all at a level which might have entailed their having international personality as belligerents, and subsequent developments have done little to confirm the concept of the legal personality of belligerent forces in general. For example, recognition of belligerency in internal armed conflict is in virtual desuetude. Instead the threshold for the application of the laws of armed conflict contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) may be taken as a guide. Article 1, paragraph 1, refers to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and it contrasts such groups with "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (art. 1, para. 2). This definition of "dissident armed forces" would appear to reflect, in the context of the Protocols, the essential idea of an

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[347] Ibid., pp. 100–101, paras. (2)–(6) of the commentary to article 15. Although organizational continuity is given as the justification, it is also said that the rule extends "to the case of a coalition government formed following an agreement between the 'legitimate' authorities and the leaders of the revolutionary movement" (ibid., p. 104, para. (17)). It is doubtful how far this principle should be pressed in cases of governments of national reconciliation. A State should not be made responsible for the acts of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government. In this respect, the commentary needs some qualification.

[348] Ibid., p. 101, para. (8).

[349] Ibid., pp. 102–104, paras. (9)–(16). Only one case of practice is cited subsequent to 1930. For an analysis of doctrine and codification attempts, see pages 104–105, paras. (18)–(19).

[350] Ibid., p. 105, para. (20).

[351] A/CN.4/488 and Add.1–3 (reproduced in the present volume), comments by Austria on articles 14 and 15.

[352] *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 92, para. 38.

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

[354] Ibid., comments by the United Kingdom on article 29, para. 1.

[355] *Yearbook … 1975*, vol. II, document A/10010/Rev.1, p. 92, para. (5) of the commentary to article 14.

[356] Ibid., p. 99, para. (29).

"insurrectional movement", but even a movement which clearly possessed all the characteristics listed in article 1, paragraph 2, would not necessarily be regarded as having international legal personality. Moreover, if the rationale for the rule of attribution in article 15 is one of institutional continuity and of the continuing responsibility of the entities concerned for their own acts while they were in armed opposition, there is no reason why it should be limited to situations where the insurrectional movement is recognized as having legal personality.

271. Secondly, these Protocols make a sharp distinction between "dissident" groups covered by Protocol II and national liberation movements covered by Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts). The latter are defined by article 1, paragraph 4, as engaged in a legitimate struggle for self-determination.[357] It has been objected that articles 14 and 15 fail to distinguish between the two cases, but for the purposes of the law of attribution it is not clear that such a distinction should be made.[358] Whether particular conduct is attributable to a State or other entity, and whether there has been a breach of an obligation are different questions, and the distinctions between Protocols I and II may be relevant to the latter.[359] But that provides no rationale for the differential treatment of different categories of insurrectional movement for the purposes of chapter II. For these reasons, it should be irrelevant to the application of the rules stated in articles 14 and 15 whether and to what extent the insurrectional movement has international legal personality.

The substantive rules reflected in articles 14 and 15

272. Turning to the substance of the rules stated in the two articles, the first point to note is that article 14, paragraph 3, deals with the international responsibility of liberation movements which are, *ex hypothesi*, not States. It therefore falls outside the scope of the draft articles and should be omitted. The responsibility of such movements, for example, for breaches of international humanitarian law, can certainly be envisaged, but this can be dealt with in the commentary.

273. The basic principle stated in article 14 is well established, as the authorities cited in the commentary show. It is true that the possibility of the State being held responsible independently for the acts of insurrectional movements remains, but this would of course be true in any event, since the "positive attribution" articles are cumulative in their effect; there is no need to state this specifically in article 14, paragraph 2.[360] That leaves article 14, paragraph 1, as an isolated "negative attribution" clause. For the reasons already given, such provisions are unnecessary and undesirable within the framework of article 3 and chapter II.[361]

274. The few judicial decisions on the issues presented by article 15 are inconsistent. In *Minister of Defence, Namibia* v. *Mwandinghi*, the High Court of Namibia had to interpret a provision of the new Constitution accepting responsibility for "anything done" by the predecessor administration of South Africa. The question was whether this made Namibia responsible for delicts committed by the South African armed forces. The Court held that it did, on the basis of a presumption that the acquired right of the claimant to damages in pending proceedings, a right which existed immediately prior to independence, should not be negated, especially having regard to the new State's policy of general continuity. In the course of a decision essentially founded on the interpretation of the Namibian Constitution, the Court nonetheless expressed the view that, under article 15, "the new government inherits responsibility for the acts committed by the previous organs of the State".[362] With all due respect, this confuses the situations covered by paragraphs 1 and 2. Namibia, as a new State created as the result, *inter alia*, of the actions of the South West Africa People's Organization, a recognized national liberation movement, was not responsible for the conduct of South Africa in respect of its territory. That it assumed such a responsibility attests to its concern for individual rights, but it was not required by the principles of article 15.

275. At the other extreme is a decision of the High Court of Uganda in *44123 Ontario Ltd* v. *Crispus Kiyonga and Others*. That case concerned a contract made by a Canadian company with the National Resistance Movement at a time when the latter was an "insurrectional movement"; it later became the Government, but denied its liability to perform the remainder of the contract, although a substantial performance bond was returned to the company. Without any reference to international law or to article 15, the Court rejected the claim. It said, *inter alia*, that "at the time of the contract the Republic of Uganda had a well established government and therefore there cannot have been two governments contending for power whose acts must be recognized as valid".[363]

Conclusion

276. Despite inconsistencies such as these, it should be noted that the two positive attribution rules in article 15 seem to be accepted, and to strike a fair balance *at the level of attribution* in terms of the conflicting interests involved. It is true that there are continuing difficulties of rationalization, but there has so far been no suggestion in government comments or in the literature that the substantive rules should be deleted: if anything the proposals are

[357] See generally Wilson, *International Law and the Use of Force by National Liberation Movements*.

[358] See Atlam, "National liberation movements and international responsibility", p. 35.

[359] Under article 1, paragraph 4, of Protocol I, national liberation movements are subject to higher standards of conduct and responsibility than are dissident armed forces covered by article 1, paragraph 1, of Protocol II.

[360] France's proposed version of article 14 (para. 267 above) fails to take account of the distinction between attribution and breach of obligation, and appears to specify a primary rule. As will be seen, however, the structure proposed by France is partly adopted in article 15 (see paragraph 277 below).

[361] See paragraphs 142 and 153 above.

[362] *The South African Law Reports* (1992 (2)), pp. 359–360; and *International Law Reports*, vol. 91 (1993), p. 361.

[363] *Kampala Law Reports* (1992), vol. 11, p. 20; and *International Law Reports*, vol. 103 (1966), p. 266. It should be noted that the Government had relied on a number of other legal defences potentially available under the proper law of the contract.

for reinforcement. It should be stressed, however, that the rules of attribution in the law of State responsibility have a limited function, and are without prejudice to questions of the validity and novation of contracts under their proper law, or to any question of State succession.[364]

277. It is suggested, therefore, that the essential principles stated in articles 14, paragraph 1, and 15, paragraphs 1–2, should be restated in a single article. Despite the difficulties with negative attribution clauses standing alone, it seems desirable to specify article 15 in the form of a negative rule subject to certain exceptions: this avoids the problem of circularity and will provide some assurance to Governments that they will not be held generally responsible for the acts of insurrectional groups.[365]

(k) *Subsequent adoption of conduct by a State*

278. All the bases for attribution covered in chapter II (with the exception of the conduct of insurrectional movements under article 15) assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the allegedly wrongful conduct. But that is not a necessary prerequisite to responsibility. A State might subsequently adopt or ratify conduct not otherwise attributable to it; if so, there is no reason why it should not be treated as responsible for the conduct. Adoption or ratification might be expressed or might be inferred from the conduct of the State in question. This additional possibility needs to be considered.

The Lighthouses *Arbitration*

279. There were, in fact, examples of this in judicial decisions and State practice before the adoption of chapter II. For example in the *Lighthouses* Arbitration, an arbitral tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when it was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction ... and eventually continued by her, even after the acquisition of territorial sovereignty over the island".[366] It is no accident that this was a case of State succession. There is a widely held view that a new State does not, in general, succeed to any State responsibility of the predecessor State with respect to its territory.[367] But if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for the wrongful act.

The United States Diplomatic and Consular Staff in Tehran *case*

280. This was also found to be the case, outside the context of State succession, in *United States Diplomatic and Consular Staff in Tehran*.[368] There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States Embassy and its personnel by the militants, and that created by a decree of the Islamic Republic of Iran which expressly approved and maintained the situation they had created. In the words of the Court:

> The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible. On 6 May 1980, the Minister for Foreign Affairs, Mr. Ghotbzadeh, is reported to have said in a television interview that the occupation of the United States Embassy had been "done by our nation".[369]

It is not clear from this passage whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the State of the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. In fact, it made little difference which position was taken, since the Islamic Republic of Iran was held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.[370] But circumstances can be envisaged in which no such prior responsibility could have existed, for example, where the State in question adopted the wrongful conduct as soon as it became aware of it, or as soon as it assumed control over the territory concerned. If the adoption is unequivocal and unqualified (as was the statement of the Minister for Foreign Affairs of the Islamic Republic of Iran, quoted by the Court in the passage above), there is good reason to give it retroactive effect, and this is what the Tribunal did in the *Lighthouses* Arbitration.[371] This has the desirable consequence of allowing the injured State to obtain reparation in respect of the whole transaction or event. It is also consistent with the position established by article 15 for insurrectional movements.

Recommendation

281. For these reasons, the draft articles should contain a provision stating that conduct not otherwise attributable to a State is so attributable if and to the extent that the conduct is subsequently adopted by that State. In formulating such a provision, it is necessary to draw a distinction between the mere approval of a situation and its actual

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[364] Questions of State succession may be raised by the ICJ reservation with respect to the routine administrative acts of South Africa in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (footnote 329 above), p. 56, para. 125.

[365] For the proposed formulation, see paragraph 284 below and the notes.

[366] UNRIAA, vol. XII (Sales No. 63.V.3), p. 198.

[367] See O'Connell, *State Succession in Municipal Law and International Law*, p. 482.

[368] *Judgment, I.C.J. Reports 1980*, p. 3.

[369] Ibid., p. 35, para. 74.

[370] Ibid., pp. 31–33.

[371] UNRIAA (footnote 366 above), pp. 197–198; and *International Law Reports, 1956*, vol. 23, pp. 91–92.

adoption. In international controversies, States may take positions on the desirability of certain conduct, positions which may amount to "approval" or "endorsement" in some general sense but which clearly do not involve any assumption of responsibility. In the *United States Diplomatic and Consular Staff in Tehran* case, the Court used such phrases as "approval", "endorsement", "the seal of official governmental approval", "the decision to perpetuate [the situation]", and in the context of that case these terms were sufficient for the purpose. As a general criterion, however, the notion of "approval" or "endorsement" is too wide. Thus, for the purposes of article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act), it is clear that mere approval or endorsement by one State of the unlawful conduct of another is not a sufficient basis for the responsibility of the former. It is suggested that the proposed provision use the language of "adoption", which already appears in the literature[372] and which carries the idea that the conduct is acknowledged by the State as, in effect, its own conduct.[373] The commentary should make it clear that adoption or acknowledgement must be unequivocal.[374]

282. It should be stressed that the proposed rule is one of attribution only. In respect of conduct which has been adopted, it will always be necessary to consider whether the conduct contravenes the international obligations of the adopting State at the relevant time. The question of the complicity of one State in the wrongful conduct of another is dealt with in chapter IV of part one. For the purposes of adoption of conduct, the international obligations of the adopting State should be the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct was not directly regulated by international law at all. By the same token, a State which adopts or acknowledges conduct which is lawful in terms of its own international obligations, would not thereby assume responsibility for the unlawful conduct of any other person or entity. In such cases, it would need to go further and clearly assume the responsibility to pay compensation.

283. As to the location of the proposed article, since it is a supplementary basis of responsibility, it is suggested that it be included as article 15 *bis*. The proposed article can make it clear that, except in the case of adoption or other cases covered by the preceding articles, conduct is not attributable to the State, and this can be suitably reinforced in the commentary. In this way the proposed article 15 *bis* can also perform the function of the former article 11.[375]

[372] See, for example, Brownlie, op. cit., pp. 157–158 and 161.

[373] Although the term "ratification" is sometimes used in this context, it should be avoided because of its formal connotations in the law of treaties and in the constitutional law of many States. In the context of State responsibility, adoption of conduct may be informal and inferred from conduct.

[374] Thus in the *Lighthouses* Arbitration, Greece was held not to be responsible for a completed violation of the claimant's rights, attributable to the autonomous Government of Crete, even though it had previously indicated that it was disposed to pay some compensation (UNRIAA (footnote 366 above), p. 196; and *International Law Reports, 1956*, p. 89).

[375] See paragraphs 241–245 above, where the deletion of article 11 is proposed.

3. Summary of recommendations in relation to chapter II

284. For the reasons given, the Special Rapporteur proposes the following articles in chapter II of part one. The notes appended to each article explain very briefly the changes that are proposed. They are merely for the purposes of explanation at this stage and are not intended to substitute for the formal commentary.

Chapter II

ATTRIBUTION OF CONDUCT TO THE STATE UNDER INTERNATIONAL LAW

Article 5. Attribution to the State of the conduct of its organs

For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises constituent, legislative, executive, judicial or any other functions, and whatever the position that it holds in the organization of the State.

Note

1. Article 5 combines into a single article the substance of former articles 5, 6 and 7, paragraph 1. The reference to a "State organ" includes an organ of any territorial governmental entity within the State, on the same basis as the central governmental organs of that State: this is made clear by the final phrase, "whatever the position that it holds in the organization of the State".

2. Chapter II deals with attribution for the purposes of the law of State responsibility, hence the phrase "For the purposes of the present articles" in article 5.

3. The requirement that an organ should have "that status under the internal law of that State" is deleted, for the reasons explained in paragraph 163 above. The status and powers that a body has under the law of the State in question are obviously relevant in determining whether that body is an "organ" of the State. But a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.

4. The requirement that the organ in question should have acted in its capacity as such is retained, but it is no longer formulated as a proviso, thereby avoiding any inference that the claimant has any special burden of showing that the act of a State organ was not carried out in a private capacity.

5. The words "whether the organ exercises constituent, legislative, executive, judicial or any other functions" are words of extension and not limitation. Any conduct of a State organ, in its capacity as such, is attributable to the State, irrespective of the classification of the function performed or power exercised. In particular, no distinction is drawn for the purposes of attribution in the law of State responsibility between *acta jure imperii* and *acta jure gestionis*. It is sufficient that the conduct is that of an organ of the State acting in that capacity.

6. The phrase "whether it holds a superior or a subordinate position" might imply that organs which are independent and which cannot be classified as either "superior" or "subordinate" are excluded, whereas the intention is to cover all organs whatever their position within the State. The language proposed in article 5 is intended to make that clear.

~~*Article 6. Irrelevance of the position of the organ in the organization of the State*~~

Note

Article 6 as adopted on first reading was not a rule of attribution but rather an explanation as to the content and effect of article 5. It is convenient and economical to include the qualification in article 5 itself, with minor drafting amendments. On that basis, article 6 can be deleted without any loss of content to chapter II as a whole.

Article 7. Attribution to the State of the conduct of separate entities empowered to exercise elements of the governmental authority

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

Note

1. Article 7, paragraph 1, as adopted on first reading, dealt with bodies which should be considered as part of the State in the general sense. As explained in paragraph 188 above, for the purposes of State responsibility, all governmental entities which constitute "organs" are treated as part of the State, and this was made clear by the general language of what was article 6 and is now proposed as part of article 5. Paragraph 1 is accordingly deleted.

2. The remaining paragraph (formerly paragraph 2) deals with the important problem of "parastatals" or "separate entities", which are not part of the formal structure of the State in the sense of article 5 but which exercise elements of the governmental authority of that State.

3. In contrast to State organs in the sense of article 5, the normal situation will be that these "separate entities" do not act on behalf of the State; but if they are empowered to exercise elements of governmental authority, their conduct may, nonetheless, be attributed to the State. It is appropriate to make the distinction between the two cases by retaining the proviso in article 7 ("provided the entity was acting in that capacity in the case in question").

4. The reference to internal law was deleted from article 5 for reasons explained above, and there is a case for doing the same in relation to article 7. On balance, however, the reference to internal law has been maintained. By definition, these entities are not part of the formal structure of the State, but they exercise governmental authority in some respect; the usual and obvious basis for that exercise will be a delegation or authorization by or under the law of the State. The position of separate entities acting in fact on behalf of the State is sufficiently covered by article 8.

5. The earlier reference to "an organ of an entity" has been deleted, on the ground that the entities are very diverse and may not have identifiable "organs". It is sufficient that the conduct is properly regarded as that of the entity in question, but it is impossible to identify in advance when this will be the case.

Article 8. Attribution to the State of conduct in fact carried out on its instructions or under its direction and control

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

(*a*) The person or group of persons was in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct; or

(*b*) The person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which called for the exercise of those elements of authority.

Note

1. Article 8 (*a*) deals with the case of conduct carried out for a State by someone in fact acting on its behalf, for example by virtue of a specific authorization or mandate. The reference to a "person or group of persons" is not limited to natural persons but includes other entities. It does not matter whether or not a group or entity has separate legal personality for this purpose.

2. In addition (and for the reasons given in paragraphs 212–213 above), article 8 (*a*) should cover the situation where a person, group or entity is acting under the direction and control of a State in carrying out particular conduct. In short, article 8 (*a*) should cover cases of agency and cases of direction and control; in both cases, the person who carries out the conduct is acting in fact on behalf of the State. On the other hand, the power or potential of a State to control certain activity (for example, the power inherent in territorial sovereignty, or in the ownership of a corporation) is not of itself sufficient. For the purposes of attribution, the control must actually be exercised so as to produce the desired conduct. This is intended to be conveyed by the requirement that the person should be acting "under the direction and control of the State in carrying out the particular conduct".

3. Subparagraph (*b*) deals with the special case of entities performing governmental functions on the territory of a State in circumstances of governmental collapse or vacuum. It is retained from the text as adopted on first reading, subject only to minor drafting amendments. The most significant of these is the substitution of the phrase "called for" instead of "justified"; as to which, see paragraphs 217-218 above.

Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

Note

1. Article 9 as adopted on first reading dealt both with organs of other States and of international organizations placed at the disposal of a State. For the reasons given in paragraph 231 above, the reference to international organizations has been deleted. Article 9 is, however, retained in its application to organs of States, subject to minor drafting amendments.

2. The situation covered by article 9 is to be distinguished from cases where another State acts on the territory of a State but for its own purposes, with or without the consent of the territorial State. In such cases, the organ in question is not "placed at the disposal" of the territorial State and, unless there is some other basis for attribution, the territorial State is not responsible for its conduct. This "rule of non-attribution" was previously covered by article 12, but for the reasons given in paragraphs 251–252, it is recommended that that article be deleted. The commentary to article 12 should be incorporated in the revised commentary to article 9.

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

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

Note

1. This important principle is retained with minor amendments from the text adopted on first reading. See paragraphs 235–240 above.

2. The minor amendments are as follows: first, the reference to "territorial governmental entities" is deleted, consequential upon the deletion of article 7, paragraph 1. Territorial governmental entities within a State are subsumed as organs of the State in article 5. Secondly, the term "authority" is preferred to the previous term "competence according to internal law" (see paragraph 240 above). In addition, the words "or entity" need to be inserted in the first sentence for the sake of completeness, and in the second sentence it is more elegant to refer to the "exercise" of authority than to an "activity".

~~*Article 11. Conduct of persons not acting on behalf of the State*~~

Note

For the reasons given in paragraphs 241–245 above, it is recommended that article 11 be deleted. However, the substantial point which it seeks to make is covered by the proposed new article 15 *bis*, to which the commentary to article 11 can be attached.

~~*Article 12. Conduct of organs of another State*~~

Note

For the reasons given in paragraphs 246-247 above, it is recommended that article 12 be deleted. Aspects of the commentary to article 12 can be included in the commentary to article 9.

~~*Article 13. Conduct of organs of an international organization*~~

Note

For the reasons given in paragraphs 253–259 above, it is recommended that article 13 be deleted. Instead, there should be a savings clause referring to international responsibility of or for international organizations.[376] Elements of the commentary to article 12 can be included in the commentary to that savings clause.

[376] Such a savings clause might read as follows:

Article A. Responsibility of or for the conduct of an international organization

These draft articles shall not prejudge any question that may arise in regard to the responsibility under international law of an international organization or of any State for the conduct of an international organization.

~~*Article 14. Conduct of organs of an insurrectional movement*~~

Note

For the reasons given in paragraphs 272–273 above, it is recommended that article 14 be deleted. The substance of paragraph 1 and of the commentary to article 14 can be included in the commentary to article 15.

Article 15. Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement, established in opposition to a State or to its government, shall not be considered an act of that State under international law unless:

(*a*) The insurrectional movement succeeds in becoming the new Government of that State; or

(*b*) The conduct is otherwise considered to be an act of that State under articles 5, 7, 8, 9 or 15 *bis*.

2. The conduct of an organ of an insurrectional movement whose action results in the formation of a new State shall be considered an act of the new State under international law.

Note

1. For the reasons given in paragraphs 276–277 above, it is desirable to retain an article dealing with the conduct of insurrectional movements to the extent (but only to the extent) that such conduct may give rise to the responsibility of a State. Article 15 maintains the substance of article 15 as adopted on first reading.

2. Consistently with the scope of the draft articles as a whole, article 15 does not deal with any issue of the responsibility of entities which are not States, nor does it take any position on whether or to what extent "insurrectional movements" may be internationally responsible for their own conduct, or may in other respects have international legal personality.

3. Nor does article 15 define the point at which an opposition group within a State qualifies as an "insurrectional movement" for these purposes: this is a matter which can only be determined on the basis of the facts in each case, in the light of the authorities cited in the commentary. However, a distinction must be drawn between the more or less uncoordinated conduct of the supporters of such a movement and conduct which for whatever reason is attributable to an "organ" of that movement. Thus, the language of article 15 has been changed to refer to "the conduct of an organ of an insurrectional movement".

4. Paragraph 1 is proposed in negative form to meet concerns expressed about the attribution to the State of unsuccessful insurrectional movements. Unless otherwise attributable to the State under other provisions of chapter II, the acts of such unsuccessful movements are not attributable to the State.

Article 15 **bis.** *Conduct of persons not acting on behalf of the State which is subsequently adopted or acknowledged by that State*

Conduct which is not attributable to a State under articles 5, 7, 8, 9 or 15 shall be considered an act of that State if and to the extent that the State subsequently acknowledges or adopts that conduct as its own.

Note

1. This is a new provision, which is proposed for the reasons given in paragraphs 278–279.

2. The phrase "if and to the extent that" is intended to convey the idea: (*a*) that the conduct of, in particular, private persons, groups or entities is not attributable to the State unless it is under some other article of chapter II, or unless it has been adopted or acknowledged; (*b*) that a State might acknowledge responsibility for conduct only to a certain extent; and (*c*) that the act of adoption or acknowledgement, whether it takes the form of words or conduct, must be clear and unequivocal. The phrase "adopts or acknowledges that conduct as its own" is intended to distinguish cases of adoption from cases of mere support or endorsement by third parties. The question of aid or assistance by third States to internationally wrongful conduct is dealt with in chapter IV of part one.

Annex

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