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OF THE
INTERNATIONAL
LAW COMMISSION

2011

Volume II
Part One

Documents of the sixty-third session

UNITED NATIONS
YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2011

Volume II
Part One

Documents of the sixty-third session

United Nations
New York and Geneva, 2018
NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the Yearbook of the International Law Commission are abbreviated to Yearbook ..., followed by the year (for example, Yearbook ... 2010).

The Yearbook for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the Yearbook issued as United Nations publications.

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The reports of the special rapporteurs and other documents considered by the Commission during its sixty-third session, which were originally issued in mimeographed form, are reproduced in the present volume, incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.
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<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
</tr>
<tr>
<td>CTBTO</td>
<td>Comprehensive Nuclear-Test-Ban Treaty Organization</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>EFTA</td>
<td>European Free Trade Association</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>IAEA</td>
<td>International Atomic Energy Agency</td>
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<tr>
<td>IBRD</td>
<td>International Bank for Reconstruction and Development</td>
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<tr>
<td>ICAO</td>
<td>International Civil Aviation Organization</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICPO–INTERPOL</td>
<td>International Criminal Police Organization</td>
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<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>IFAD</td>
<td>International Fund for Agricultural Development</td>
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<tr>
<td>IFRC</td>
<td>International Federation of Red Cross and Red Crescent Societies</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>IMO</td>
<td>International Maritime Organization</td>
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<td>IOM</td>
<td>International Organization for Migration</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>ITU</td>
<td>International Telecommunication Union</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<tr>
<td>NGO</td>
<td>non-governmental organization</td>
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<tr>
<td>OAS</td>
<td>Organization of American States</td>
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<td>OCHA</td>
<td>Office for the Coordination of Humanitarian Affairs</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
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<td>OSCE</td>
<td>Organization for Security and Cooperation in Europe</td>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>UNHCR</td>
<td>Office of the United Nations High Commissioner for Refugees</td>
</tr>
<tr>
<td>UNIDROIT</td>
<td>International Institute for the Unification of Private Law</td>
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<tr>
<td>UNWTO</td>
<td>World Tourism Organization</td>
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<td>WHO</td>
<td>World Health Organization</td>
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<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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<td>WMO</td>
<td>World Meteorological Organization</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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* * *
In the present volume, “International Tribunal for the Former Yugoslavia” refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.


NOTE CONCERNING QUOTATIONS

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

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

The Internet address of the International Law Commission is http://legal.un.org/ilc.
RESERVATIONS TO TREATIES

[Agenda item 2]

DOCUMENT A/CN.4/647 and Add.1

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

[Original: French]

[26 May and 6 June 2011]

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Charter of the Organization of American States (Bogota, 30 April 1948) ................................................................. Ibid., vol. 119, No. 1609, p. 3.
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<tr>
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<tr>
<td>1, 2</td>
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<td>Ibid., vol. 189, No. 2545, p. 137.</td>
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<td>Ibid., vol. 210, No. 2838, p. 131.</td>
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<td>Agreement on the international carriage of perishable foodstuffs and on the special equipment to be used for such carriage (ATP) (Geneva, 1 September 1970)</td>
<td>Ibid., vol. 1028, No. 15121, p. 121.</td>
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<td>210</td>
<td>Convention on wetlands of international importance especially as waterfowl habitat (Ramsar, 2 February 1971)</td>
<td>Ibid., vol. 996, No. 14583, p. 245.</td>
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<td>1, 11</td>
<td>Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)</td>
<td>Ibid., vol. 1946, No. 33356, p. 3.</td>
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<td>10</td>
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<td>Ibid., vol. 1342, No. 22495, p. 137.</td>
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<td>122</td>
<td>Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984)</td>
<td>Ibid., vol. 1465, No. 24841, p. 85.</td>
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Reservations to treaties

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DUPUY, René-Jean

GREIG, D. W.

HAYASHI, Moritaka

LAMMERS, Johan G.

MENDELSOHN, Maurice H.

PELLET, Alain and Daniel MÜLLER

ROSENNE, Shabtai

RUIZ FABIBI, Hélène

SPILOPOULOU ÅKERMARK, Sia

TYAGI, Yogesh

WIEBRENGHAUS, Hans
Introduction

1. The present report comprises three chapters. The first is devoted to the reservations dialogue and concludes with a draft annex to the Guide to Practice on Reservations to Treaties, which could take the form of “conclusions” or of a recommendation of the International Law Commission on this important topic. The second deals with dispute settlement and traces the broad outline of a consultative mechanism designed to help States settle any differences in assessment that may arise with regard to reservations. If the Commission approves the principle of such a mechanism, the outline could be submitted to the General Assembly as a second annex to the Guide. Lastly, the third chapter attempts to clarify a number of points concerning the purpose and legal scope of the Guide to Practice and could lead to the adoption of an explanatory note that would be placed at the end or, preferably, the beginning, of the Guide to Practice.

Chapter I

The reservations dialogue

2. The reservations regime instituted by the Vienna Convention on the Law of Treaties (hereinafter the “1969 Vienna Convention”) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the “1986 Vienna Convention”) does not impose static solutions on contracting States or contracting organizations; rather, it leaves room for dialogue among the key players, namely, the author of the reservation, on the one hand, and the other contracting States or contracting organizations and any monitoring bodies established by the treaty, on the other. The possibility of this “reservations dialogue” is confirmed by the travaux préparatoires of the 1969 Vienna Convention and is reflected in the treaty practice of States (see chap. I, sect. A, below).

3. Nonetheless, no provision of the Vienna Conventions overtly concerns—or prohibits—the reservations dialogue, much less establishes a legal framework for it. For this reason, the present report includes a few reflections that may result in the adoption of flexible normative suggestions that would help guide the practice of States and international organizations on the topic (see chap. I, sect. B, below).

A. The reservations dialogue in practice

1. Forms of the reservations dialogue under the unanimity regime

4. While it might appear that the traditional regime of unanimous acceptance of reservations by all contracting States left no room for dialogue with the author of a reservation, that was not the case; the latter still had to convince the other contracting States that the reservation was in keeping with the spirit of the treaty and to convince them to accept it. However, dialogue among the key players was limited to the establishment or ultimate rejection of the reservation. If a State had doubts in that regard, it could block the entry into force of the treaty for the author of the reservation.

5. This “upstream” dialogue is, moreover, reflected in practice in the context of the Vienna regime, particularly where the unanimous or collective acceptance of the contracting States or contracting international organizations is needed for the establishment of a reservation (art. 20, paras. 2 and 3, of the Vienna Conventions).1 Where a State purports to formulate a reservation to a constituent instrument of an international organization, some dialogue must take place within the framework of the competent organ upstream of the acceptance, or refusal of acceptance, of the reservation.2 The sometimes lively and confrontational nature of this dialogue was particularly clear in the case of the reservation that India sought to formulate when acceding to the Convention on the Inter-Governmental Maritime Consultative Organization (IMCO) (now IMO).3 Although the problem raised by India’s reservation had more to do with procedure than with the content of the reservation, it is nonetheless interesting to note that it was resolved after India assured the Sixth Committee of the United Nations General Assembly that the Indian declaration was not a reservation, but merely a declaration of policy.4 It

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1 See, in particular, guidelines 4.1.2 (Establishment of a reservation to a treaty which has to be applied in its entirety) and 4.1.3 (Establishment of a reservation to a constituent instrument of an international organization), Yearbook ... 2010, vol. II (Part Two), para. 105. The complete text of the set of guidelines provisionally adopted by the Commission is reproduced in paragraph 105, in which reference is also made, in footnotes, to the relevant sections of the reports of the Commission reproducing the text of the commentaries to the various guidelines constituting the Guide to Practice.

2 See, for example, Switzerland’s reservation to the Covenant of the League of Nations, which was accepted by the Council, whereas comparable reservations made by Liechtenstein and Germany were not accepted and had to be withdrawn (Mendelson, “Reservations to the constitutions of international organizations”, pp. 140–141). See also Argentina’s efforts to justify the reservation formulated in its instrument of accession to IAEA (ibid., p. 160).

3 Ibid., pp. 163–165.

4 In its resolution 1452 (XIV), adopted on 7 December 1959, the General Assembly took note of “the statement made on behalf of India at the 614th meeting of the Sixth Committee on 19 October 1959, explaining that the Indian declaration was a declaration of policy and that it does not constitute a reservation” and “express[ed] the hope that, in the light of the above-mentioned statement of India, an appropriate solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India”.

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was only following this declaration, and referring to it expressly, that the IMCO Council, in a resolution adopted on 1 March 1960, stated that it considered India a member of the Organization.5

6. Today, such upstream dialogue is still commonplace and fruitful, particularly in the context of regional organizations. The introduction of a more flexible reservations regime that makes it possible to break down a treaty into a multitude of different treaty relationships has made this dialogue among contracting States and the author of a reservation necessary, as seen quite remarkably in the context of the Pan American Union. In resolution XXIX, “Methods of Preparation of Multilateral Treaties”, the Eighth International Conference of American States (1938) resolved:

2. In the event of adherence or ratification with reservations, the adhering or ratifying State shall transmit to the Pan American Union, prior to the deposit of the respective instrument, the text of the reservation which it proposes to formulate, so that the Pan American Union may inform the signatory States thereof and ascertain whether they accept it or not. The State which proposes to adhere to or ratify the treaty may do it or not, taking into account the observations which may be made with regard to its reservations by the signatory States.6

For example, Guatemala clarified the scope of the reservations that it intended to formulate in respect of the Inter-American Treaty of Reciprocal Assistance and the Charter of the Organization of American States when it saw that a number of States were not prepared to accept them.

7. Such forms of dialogue are ongoing in other forums, such as the Council of Europe.8

5 Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009 (United Nations publication, Sales No. E.09.V.3), document ST/LEG/SER.E/26, chap. XII.1.

6 Eighth International Conference of American States, Final Act, Lima, 1938, p. 52, reproduced in Yearbook ... 1965, vol. II, p. 80, Deputatory practice in relation to reservations: Report by the Secretary-General, A/5687. See also the comments made by OAS, ibid., p. 81–82.

* * *

7 With respect to [Guatemala’s] reservation, the Pan American Union consulted the signatory governments, in accordance with the procedure established by paragraph 2 of Resolution XXIX of the Eighth International Conference of American States, to ascertain whether they found it acceptable or not. A number of replies being unfavourable, a second consultation was made accompanied, at the request of the Government of Guatemala, by a formal declaration of that Government to the effect that its reservation did not imply any alteration in the Inter-American Treaty of Reciprocal Assistance, and that Guatemala was ready to act at all times within the bounds of international agreements to which it was a party. In view of this declaration, the States that previously had not found the reservation acceptable now expressed their acceptance" (www.oas.org/juridico/english/sigs/b-29.html, accessed 1 September 2016).

8 *With respect to [Guatemala’s] reservation, the General Secretariat consulted the signatory governments, in accordance with the procedure established by paragraph 2 of Resolution XXIX of the Eighth International Conference of American States, to ascertain whether they found it acceptable or not. At the request of the Government of Guatemala, this consultation was accompanied by a formal declaration of that Government to the effect that its reservation did not imply any alteration in the Charter of the Organization of American States, and that Guatemala is ready to act at all times within the bounds of international agreements to which it is a party. In view of this declaration, the States that previously did not find the reservation acceptable expressed their acceptance*" (www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS_signatories.asp, accessed 1 September 2016).

9 See Spiliopoulou Åkermark, “Reservations: Breaking new ground in the Council of Europe”.

2. THE RESERVATIONS DIALOGUE IN THE CONTEXT OF AND THROUGH THE VIENNA REGIME

8 In the context of the Vienna regime, the dialogue between the author of a reservation and the other States or international organizations entitled to become parties to the treaty in question is conducted primarily through the two reactions to reservations envisaged in the Vienna Conventions: acceptance and objection.9 In this regard, the Vienna regime is clearly different from the traditional regime of unanimity, in which an objection, in itself, puts an end to the dialogue.10

9 The consequences of objections—and, to a lesser extent, acceptances—are not necessarily limited to the legal effects which they produce in respect of permissible reservations and which are more or less clearly established by the Vienna Conventions. They do not necessarily constitute the end of a process; rather, they may mark the beginning of cooperation between the key players. More and more frequently, the author of an objection not only draws the reserving State’s attention to its reasons for considering the reservation as formulated to be impermissible, but also suggests that the author of the reservation should reconsider it. Thus, Finland made an objection to the reservation formulated by Malaysia when acceding to the Convention on the Rights of the Child by pointing out that the reservation is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations.

Continuing, Finland declared the following:

In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland objects to such reservation. The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.

The Government of Finland recommends the Government of Malaysia to reconsider its reservation to the [said Convention].11

10 See, inter alia, the commentaries to guidelines 2.6.1 (Definition of objections to reservations), Yearbook ... 2005, vol. II (Part Two), pp. 77–82; 2.8 (Forms of acceptance of reservations), Yearbook ... 2008, vol. II (Part Two), p. 103; and 4.3 (Effect of an objection to a valid reservation), Yearbook ... 2010, vol. II (Part Two), p. 87, para. (2).

11 See paragraph 4 above. See also Tyagi, “The conflict of law and policy on reservations to human rights treaties”, p. 216.

Multilateral Treaties ..., (footnote 5 above), chap. IV.11. See also Finland’s identical objection to the reservation formulated by Qatar upon ratification (ibid.); Denmark’s objections to the reservations formulated by Mauritania and the United Arab Emirates (footnote 21) in respect of the Convention on the Elimination of All Forms of Discrimination against Women; and the (late) objections formulated by Denmark in respect of the reservations formulated by Djibouti, the Islamic Republic of Iran, Pakistan and the Syrian Arab Republic, on the one hand, and by Botswana and Qatar, on the other, to the Convention on the Rights of the Child (ibid., chap. IV.11, footnote 25). By contrast, Denmark also suggested to Brunei Darussalam, Saudi Arabia and Malaysia that they should reconsider their reservations to the Convention on the Rights of the Child, although its declarations could not be considered true objections (ibid.). In that regard, see also paragraph 32 below.
Although the link cannot be clearly established, it is interesting to note that in 1999, the Malaysian Government informed the Secretary-General of its decision to partially withdraw its reservations. 15

10. Under the flexible system, even an objection—whether it has minimum, intermediate 14 or maximum effect 15 —does not exclude any form of dialogue between the author of the reservation and the author of the objection. On the contrary, a dialogue between the parties is necessary, if only to determine the content of their treaty relationship in accordance with article 21, paragraph 3, of the Vienna Conventions, the wording of which leaves the reader “rather puzzled” and the application of which remains difficult in practice. 16

11. Furthermore, ICJ, in its 1951 advisory opinion Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, pointed out on the issue of reservations with minimum effect that such dialogue was inherent in the flexible system and was the corollary of the very principle of consensus:

It may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between the State and the reserving State 17 will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation. 18

12. Furthermore, practice shows that an objection with maximum effect, too, does not simply constitute refusal within the framework of the flexible system; it leaves open the possibility of a dialogue between the key players. The response of the United States—termed an objection by the Secretary-General of the United Nations—to the objections made by France and Italy in respect of the international carriage of perishable foodstuffs and on the special equipment to be used for such carriage (ATP) provides a particularly telling example. France and Italy, which considered that only European States could make a declaration such as that formulated by the United States, made objections with maximum effect by declaring that they would “not be bound by the ATP Agreement in [their] relations with the United States of America”. The United States, in turn, stated:

Under the clear language of article 10 [of the Agreement], as confirmed by the negotiating history, any State party to the Agreement may file a declaration under that article. The United States therefore considers that the objections of Italy and France and the declarations that those nations will not be bound by the Agreement in their relations with the United States are unwarranted and regrettable. The United States reserves its rights with regard to this matter and proposes that the parties continue to attempt cooperatively to resolve the issue. 19

This United States reaction clearly shows that despite the maximum-effect objections of France and Italy, the reserving State may endeavour to pursue dialogue—an attitude which is, moreover, highly desirable.

13. This dialogue—which is framed and, in fact, encouraged by the Vienna rules through the reactions, whether acceptances or objections, that are regulated by the 1969 and 1986 Conventions—must not conceal the development, in the margins of those instruments, of modalities for a reservations dialogue which, while borrowing the system set out in articles 19 to 23, is not envisaged by them.

14. This is true for, inter alia, some categories of reactions that resemble objections but do not produce all their effects. These include:

- Objections formulated by non-contracting States (or organizations): while meeting the definition of objections contained in guideline 2.6.1, 20 they do not immediately produce the legal effects envisaged in articles 20 and 21 of the Vienna Conventions. 21 Nonetheless, in this manner, “the reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before [ratification by the author of the reservation], have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation”. 22

- Conditional objections 22 to specified, but potential or future reservations 23 that are formulated in advance for preventive purposes; while guideline 2.6.14 specifies that such an objection “does not produce the legal effects of an objection”, 24 it nevertheless constitutes its author’s warning that it will not accept certain reservations; thus, it plays the same warning function as an objection formulated by a non-contracting State or organization: 25

- Late objections formulated after the end of the time period set out in guideline 2.6.13; 26 these objections also correspond to the definition contained in guideline 2.6.1 27 since they purport “to exclude or to modify the legal

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15 Multilateral Treaties ... (footnote 5 above), chap. IV:11.

16 The Commission has, moreover, insisted on the need for some dialogue between the author of the reservation and the author of an objection with intermediate effect in guideline 4.3.6 (Effect of an objection on provisions other than those to which the reservation relates), Yearbook ... 2010, vol. II (Part Two).

17 See paragraph 12 below.

18 Commentary to guideline 4.3.5 (Effect of an objection on treaty relations), Yearbook ... 2010, vol. II (Part Two), p. 95, para. (23).

19 I.C.J. Reports 1951, p. 27. See also the wording of article 21, paragraph 3, proposed by Sir Humphrey Waldock in 1965: “Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States” (Yearbook ... 1965, vol. II, A/CN.4/177 and Add.1–2, p. 55).

20 Multilateral Treaties ... (footnote 5 above), chap. XI.B.22.

21 Yearbook ... 2005, vol. II (Part Two), pp. 77–82.

22 See the commentary to guideline 2.6.5 (Author), Yearbook ... 2008, vol. II (Part Two), pp. 83–84, paras. (4)–(10).


24 Concerning the language adopted by the Commission to designate these objections, see the commentary to guideline 2.6.14 (Conditional objections), Yearbook ... 2008, vol. II (Part Two), p. 95, para. (7).

25 For an overview of State practice concerning conditional objections, see ibid., p. 94, paras. (2)–(5).

26 See ibid., p. 94, para. (6).

27 See ibid.

28 See guideline 2.6.15 (Late objections) and the commentary thereto, ibid., pp. 95–96.

29 See footnote 19 above.
effects of the reservation or to exclude the application of the treaty as a whole; however, owing to their lateness, they can no longer produce the legal effects of an objection as envisaged in the Vienna Conventions even though they retain their primary purpose of notifying the author of the reservation of the author of the objection’s disagreement.  

15. Also noteworthy in that connection are objections to an invalid reservation, which constitute the vast majority of objections in State practice. Guideline 4.5.3 [4.5.4] (Reactions to an invalid reservation) stresses:

The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization. Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible.  

An objection to an invalid reservation does not, in itself, produce any of the legal effects envisaged in the Vienna Conventions, which deal only with reservations that meet the criteria for permissibility and validity established therein. Under the Conventions, in such situations, acceptances and objections have a very specific function: determining the opposability of the reservation. They are also very important in determining the validity of a reservation.

16. All these objections—and they are indeed objections, even though they cannot produce all the legal effects envisaged in the Vienna Conventions—draw the attention of the author of the reservation to the latter’s invalidity, or at least to the disagreement of the author of the objection with the proposed reservation. As such, they are part of a dialogue concerning the validity or appropriateness of the reservation. Even though, or precisely because, the Vienna Conventions did not establish mechanisms for assessing the validity of a reservation—that is, whether a reservation meets the criteria for permissibility set out in article 19 and the conditions for validity—each State and each international organization, individually and from its own standpoint, is responsible for assessing the validity of a reservation.

17. An excellent example is provided by the (frequent) objections made by some States with respect to the general nature or imprecision of a given reservation, explaining that these objections have been made in the absence of further clarification of the scope of the reservation in question. For example, Sweden made the following objection to a declaration made by Turkey in respect of the International Covenant on Economic, Social and Cultural Rights:

The Government of Sweden has examined the declarations and reservation made by the Republic of Turkey upon ratifying the International Covenant on Economic, Social and Cultural Rights.

The Republic of Turkey declares that it will implement the provisions of the Covenant only to the State Parties with which it has diplomatic relations. This statement in fact amounts, in the view of the Government of Sweden, to a reservation. The reservation of the Republic of Turkey makes it unclear to what extent the Republic of Turkey considers itself bound by the obligations of the Covenant. In absence of further clarification, therefore, the reservation raises doubts as to the commitment of the Republic of Turkey to the object and purpose of the Covenant.

The Government of Sweden notes that the interpretation and application of paragraphs 3 and 4 of article 13 of the Covenant is being made subject to a reservation referring to certain provisions of the Constitution of the Republic of Turkey without specifying their contents. The Government of Sweden is of the view that in the absence of further clarification, this reservation, which does not clearly specify the extent of the Republic of Turkey’s derogation from the provisions in question, raises serious doubts as to the commitment of the Republic of Turkey to the object and purpose of the Covenant.

According to established customary law as codified by the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of all States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservations made by the Republic of Turkey to the International Covenant on Economic, Social and Cultural Rights.

This objection shall not preclude the entry into force of the Covenant between the Republic of Turkey and Sweden. The Covenant enters into force in its entirety between the two States, without the Republic of Turkey benefiting from its reservations.

Similarly, Denmark expressed its doubts regarding the interpretation of the reservation formulated by the United States when consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Consequently, Denmark made an objection while expressly proposing the initiation of a dialogue:

The Kingdom of Denmark notes the reservation made by the United States of America upon its consent to be bound by Protocol III. The reservation appears—with its broad and general formulation—to be contrary to the object and purpose of the Protocol. On this basis, the Kingdom of Denmark objects to the reservation.

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28 See also the commentary to guideline 2.6.15 (Late objections), Yearbook ... 2008, vol. II (Part Two), pp. 95–96, para. (3).
29 For the text of the guideline and the commentary thereto, see Yearbook ... 2010, vol. II (Part Two), para. (106).
30 See ibid., paras. (10) and (11) of the commentary. See also Tyagi (footnote 11 above), p. 216.
32 Multilateral Treaties ... (footnote 5 above), chap. IV.3. For other examples, see Sweden’s objections to Turkey’s declaration in respect of the International Convention on the Elimination of All Forms of Racial Discrimination (ibid., chap. IV.2); Bangladesh’s declaration in respect of the International Covenant on Economic, Social and Cultural Rights (ibid., chap. IV.3); Botswana’s and Turkey’s reservations to the International Covenant on Civil and Political Rights (ibid., chap. IV.4); Bangladesh’s declaration in respect of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (ibid., chap. IV.9); San Marino’s declaration in respect of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotrophic Substances (ibid., chap. VI.19); Bangladesh’s declaration in respect of the Convention on the Political Rights of Women (ibid., chap. XVI.1); Turkey’s and Israel’s reservations to the International Convention for the Suppression of Terrorist Bombings (ibid., chap. XVIII.9); and Israel’s declaration in respect of the International Convention for the Suppression of the Financing of Terrorism (ibid., chap. XVIII.11). See also Austria’s objection to the reservation formulated by Botswana in respect of the International Covenant on Civil and Political Rights (ibid., chap. IV.4); Estonia’s objection to the Syrian Arab Republic’s reservation to the Convention on the Elimination of All Forms of Discrimination against Women (ibid., chap. XVIII.8) and the objections of the Netherlands and Sweden to the reservation formulated by Peru in respect of the 1969 Vienna Convention (ibid., chap. XXIII.1).
The United States has represented that the reservation is intended to only address the highly specific circumstances such as where the use of incendiary weapons is a necessary and proportionate means of destroying counter-proliferation targets, such as biological weapons facilities requiring high heat to eliminate biotoxins, and where the use of incendiary weapons would provide greater protection for the civilian population than the use of other types of weapons.

The Kingdom of Denmark welcomes this narrowing of the scope of the reservation and the humanitarian considerations underlying the reservation of the United States of America. The Kingdom of Denmark further expresses its willingness to engage in any further dialogue, which may serve to settle differences in interpretation.

While these reactions do indeed constitute objections, they clearly invite the author of the reservation to modify or clarify its reservation in order to bring it into line with what the author of the objection considers to be the requirements of treaty law.

18. Of course, such dialogue does not always ensue and is often prevented by silence on the part of the author of the reservation. State practice shows, however, that initiation of the reservations dialogue in cases where States or international organizations deem a reservation to be invalid can be useful and that the author of the reservation often takes the warnings of other contracting States or contracting organizations into account.

19. For example, in ratifying the Convention against torture and other cruel, inhuman or degrading treatment or punishment, Chile formulated a reservation to article 2, paragraph 3, of the Convention. Austria, Australia, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, Greece, Italy, Luxembourg, the Netherlands, Norway, New Zealand, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom objected to Chile’s reservation; all these objections were made on the grounds that the reservation was “impermissible” with respect to the object and purpose of the Convention. On 7 September 1990, less than two years after ratification with the disputed reservation, Chile notified the depositary of its decision to withdraw the reservation. While the many objections to the reservation are certainly not the only reason for its withdrawal, they certainly drew the reserving State’s attention to the impermissibility of the reservation and thus played a significant role in the reservations dialogue and in restoration of the integrity of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

20. The interpretative declaration made by Uruguay when acceding to the Rome Statute of the International Criminal Court, for its part, was the subject of objections by Denmark, Finland, Germany, Ireland, Norway, the Netherlands, Sweden and the United Kingdom. All these States stressed that the objection was, in reality, a reservation prohibited under article 120 of the Rome Statute. Uruguay, in turn, justified its position in a communication sent to the Secretary-General:

The Eastern Republic of Uruguay, by Act No. 17.510 of 27 June 2002, ratified by the legislative branch, gave its approval to the Rome Statute in terms fully compatible with Uruguay’s constitutional order. While the Constitution is a law of higher rank to which all other laws are subject, this does not in any way constitute a reservation to any of the provisions of that international instrument.

It is noted for all necessary effects that the Rome Statute has unequivocally preserved the normal functioning of national jurisdictions and that the jurisdiction of the International Criminal Court is exercised only in the absence of the exercise of national jurisdiction.

Accordingly, it is very clear that the above-mentioned Act imposes no limits or conditions on the application of the Statute, fully authorizing the functioning of the national legal system without detriment to the Statute.

The interpretative declaration made by Uruguay upon ratifying the Statute does not, therefore, constitute a reservation of any kind.

Lastly, mention should be made of the significance that Uruguay attaches to the Rome Statute as a notable expression of the progressive development of international law on a highly sensitive issue.

Uruguay withdrew this interpretative declaration in 2008, having taken the necessary legislative steps.

21. Other reservations have also given rise to numerous objections and have ultimately—often much later—been withdrawn or modified by their authors. Such is the case, for example, of several reservations to the Convention on the Elimination of All Forms of Discrimination against...
Women. One such reservation, made by the Libyan Arab Jamahiriya, was the subject of seven objections owing to its general and imprecise nature. On 5 July 1995, five years after that country’s accession to the Convention, its Government informed the Secretary-General that it had decided “to modify, making it more specific, the general reservation it had made upon accession”. While this “new” reservation is not above reproach, it is nevertheless true that Libyan Arab Jamahiriya obviously took the criticisms expressed by other States parties with regard to the wording of the initial reservation into account. Similarly, it is probable that Bangladesh, Egypt, Malaysia, the Maldives and Mauritania modified, or even withdrew in whole or in part, their initially formulated reservations in the light of the objections made by other States parties.45

22. While an objection might in itself be deemed to constitute one aspect of the reservations dialogue, the number and consistency of the objections also play a significant role: the author of the reservation, any other interested State and any interpreter whatsoever certainly pay more attention to a large number of objections than to an isolated objection. The more consistent the practice of objections to certain reservations, the greater their impact on assessment and determination of the validity of these reservations and of any other comparable reservation, including in the future. In 1996, China, having formulated two reservations when acceding to the Convention against torture and other cruel, inhuman or degrading treatment or punishment without giving rise to any objection, informed the Committee against Torture that several government departments were currently undertaking a comprehensive review of the issue, with particular attention to the views of the other States parties concerning reservations and the impact of reservations on the Committee’s work.46

41 The reservation formulated by the Libyan Arab Jamahiriya upon accession read: “[Accession] is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Shariah” (ibid., chap. IV.8, footnote 33).

42 Objections were made by Denmark, Finland, Germany, Mexico, the Netherlands, Norway and Sweden (ibid., chap. IV.8). On the question of vague or general reservations, see guideline 3.1.7 and the commentary thereto, Yearbook ... 2007, vol. II (Part Two), p. 39.

43 The Libyan Arab Jamahiriya’s “new” reservation reads: “1. Article 2 of the Convention shall be implemented with due regard for the peremptory norms of the Islamic Shariah relating to determination of the inheritance portions of the estate of a deceased person, whether female or male.

2. The implementation of paragraph 16 (c) and (d) of the Convention shall be without prejudice to any of the rights guaranteed to women by the Islamic Shariah.” (Multilateral Treaties ... (footnote 5 above), chap. IV.8)

44 Finland made an objection to the reservation modified by the Libyan Arab Jamahiriya: “A reservation which consists of a general reference to religious law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfill its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle of the observance of treaties according to which a Party may not invoke the provisions of its internal law as justification for failure to perform a treaty” (ibid.).

45 Ibid.

46 See Tyagi (footnote 11 above), p. 216.

47 Committee against Torture, CAT/C/SR.252/Add.1, 8 May 1996, para. 12. To date, however, China has neither withdrawn nor modified its reservations.

23. In the same spirit, in Loizidou v. Turkey, the European Court of Human Rights noted: The subsequent reaction of various Contracting Parties to the Turkish declarations... lends convincing support to the above observation concerning Turkey’s awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46) — the latter subsequent to the statements by the Contracting Parties referred to above—indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.49

24. It has also been suggested that, in the light of the history of the objections already made in the context of a given treaty, some States refrain from acceding to the instrument owing to the high risk that the reservations they consider necessary will give rise to numerous objections.50

25. Furthermore, even if the objection is a unilateral statement, there is nothing to prevent several States or international organizations from making their objections collectively or, at least, in a concerted manner in order to give them greater weight. There has not, of course, been a great deal of practice in this area as yet. Nonetheless, efforts made within the framework of European regional organizations, including the EU and the Council of Europe, are beginning to bear fruit and the States members of these organizations are coordinating their reactions to reservations with increasing frequency.53

26. Within the framework of the EU, cooperation on reservations has emerged within the Council of the European Union Working Party on Public International Law (COJUR), which is composed of the legal counsels of member States and meets periodically. The purpose of this cooperation is, inter alia, to establish a forum for a pragmatic exchange of views concerning reservations that present legal or political problems. The goal of COJUR activity is to coordinate the national positions of States members of the EU and, if necessary, to take a common position so that these States can act in the same manner and make

48 Turkey’s first declaration, made on 28 January 1987 in respect of article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms, had been the subject of an exchange of views between Turkey and the Secretary General of the Council of Europe in its capacity as depositary (see Loizidou v. Turkey, Preliminary Objections, 23 March 1995, Series A, No. 310, paras. 16–17) of an objection made by Greece and of a reaction highlighting various issues of a legal nature concerning the scope of Turkey’s recognition, made by Sweden, Luxembourg, Denmark, Norway and Belgium (ibid., paras. 18–24). For its part, Turkey stated, in a letter addressed to the Secretary General of the Council of Europe that its declaration was not to be considered a reservation.

49 Ibid., para. 95. See also ibid., para. 81.

50 Tyagi believes that the Islamic Republic of Iran has yet to accede to the Convention on the Elimination of All Forms of Discrimination Against Women because it fears that the large number of reservations needed in order to bring the Convention into line with domestic and Islamic law would prompt a particularly negative response from the international community (footnote 11 above), p. 199, footnote 65.

51 See guideline 2.6.1 (Definition of objections to reservations), Yearbook ... 2003, vol. II (Part Two), p. 77, para. (5) of the commentary.

52 See guideline 2.6.6 (Joint formulation) and the commentary thereto, Yearbook ... 2008, vol. II (Part Two), pp. 84–85.

53 For a recent example, see the objections made by the Czech Republic, Estonia, France, Hungary, Ireland, Italy, Latvia, Slovakia, Spain and the United Kingdom in respect of the reservation formulated by Yemen when according to the International Convention for the Suppression of the Financing of Terrorism (Multilateral Treaties ... (footnote 5 above), chap. XVIII.11).
concerted diplomatic efforts to convince the author of the reservation to reconsider it. More often, however, the exchange of views leads to a harmonization of the objections that the States members remain free to make in respect of a reservation that is considered impermissible.

27. With respect to the Council of Europe, the Special Rapporteur has, on several occasions, drawn the Commission’s attention to the initiatives taken and results achieved within the framework of this regional organization in cooperation on reservations-related matters. In its recommendation No. R (99) 13 on responses to inadmissible reservations to international treaties, of 18 May 1999, the Committee of Ministers stated that it was “concerned by the increasing number of inadmissible reservations to international treaties, especially reservations of a general character” and “aware that … a common approach on the part of the member States as regards such reservations may be a means to improve that situation”. In order to assist member States and encourage them to exchange views concerning reservations formulated in respect of multilateral treaties drafted within the Council of Europe, a European Observatory of Reservations to International Treaties was established by the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI). Since 2002, the Observatory’s functions have been expanded to include multilateral counter-terrorism treaties concluded outside the Council of Europe. In its work, the Observatory attempts, inter alia, to draw member States’ attention to reservations that are likely to give rise to objections, a list of which is prepared by its secretariat, and to encourage exchanges of views among member States in order to examine the possibility of making objections in a concerted manner. In that regard, it is interesting to note that the Observatory considers not only reservations formulated by third States, but also those made by Council of Europe member States. In many cases, the latter do not hesitate to provide the necessary explanation or justification so that their reservations can be removed from the list.

54 See also paragraph 51 below.
58 See, for example, Monaco’s explanation of the interpretative declaration that the country had formulated when acceding to the Convention on the Rights of Persons with Disabilities, provided at the 59th meeting of CAHDI, held in Strasbourg on 18 and 19 March 2010 (CAHDI (2010) 14, para. 87), as well as the explanation provided by the observer for Israel when ratifying the Additional Protocol to the Geneva Conventions of 1949 and relating to the adoption of an additional distinctive emblem (Protocol III), and the reaction by the representative of Switzerland at the 35th meeting of CAHDI, held in Strasbourg on 6 and 7 March 2008 (CAHDI (2008) 15, paras. 93–94). See also paragraph 49 below.

3. The reservations dialogue outside the Vienna system

28. In his eighth report, which is devoted to the definition of objections to reservations, the Special Rapporteur has already noted the diversity of States’ reactions to a reservation formulated by a State or another international organization. In many cases, States do not simply purport to “exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in [their] relations with the reserving State or organization”, where their reactions cannot be considered equivalent to either an acceptance or an objection stricto sensu. These reactions nevertheless purport to establish a reservations dialogue (see subsection (a) below).

29. Moreover, the reservations dialogue is not limited to exchanges between the States and international organizations that are parties to the treaty in question or have the right to accede to it. Of course, the Vienna Conventions deal only with acceptances and objections by contracting States or contracting organizations (or, in the very specific context of article 20, paragraph 3, of the competent organ of the international organization). But the circle of participants in the reservations dialogue is wider and includes all the monitoring bodies of the treaty in question and international organizations that are not entitled to become parties to the treaty (see subsection (b) below).

(a) Reactions, other than objections and acceptances, of contracting States and contracting organizations

30. In the Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic, the arbitral tribunal noted, concerning article 12 of the Convention on the Continental Shelf:

Article 12, as the practice of a number of States... confirms, leaves contracting States free to react in any way they think fit to a reservation made in conformity with its provisions, including refusal to accept the reservation. Whether any such action amounts to a mere comment, a mere reservation of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned.

States and international organizations are thus free to comment on, and even criticize, a reservation formulated by another State or another international organization without making objections within the meaning of the Vienna Conventions. Since these reactions, however well founded, are not objections, they cannot rebut the presumption established in article 20, paragraph 5, of the Vienna Conventions: in the absence of an objection per se made within the specified time limit, the author of a reaction, even a critical one, shall be deemed to have accepted the reservation even though the majority of its reactions express doubt as to its validity. It is true that if
the reservation is impermissible, the presumption established in article 20, paragraph 5, has no practical effect.

31. Undefined reactions that do not reveal their purpose and complaints about reservations serve little purpose. For example, the legal regime of a reservation was not specified when the Netherlands “reserve[d] all rights regarding the reservations made by Venezuela on ratifying” the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the Continental Shelf. It is doubtful that such a reaction, which purports to be neither an objection nor an acceptance, would lead the author of the reservation to reconsider, withdraw or modify it. But State practice has changed a great deal in recent years and reactions other than acceptances or objections have a real place in the reservations dialogue without, however, producing a legal effect as such.

32. A particularly telling example is Mexico’s declaration in respect of the reservation to the Convention on the Elimination of All Forms of Discrimination against Women formulated by Malawi:

The Government of the United Mexican States hopes that the process of eradication of traditional customs and practices referred to in the first reservation of the Republic of Malawi will not be so protracted as to impair fulfilment of the purpose and intent of the Convention.

Mexico’s declaration does not constitute an objection to Malawi’s reservation; on the contrary, it demonstrates an understanding of it. It nevertheless focuses on the necessarily transitory nature of the reservation and on the need to reconsider and withdraw it in a timely manner. This is an excellent example of “soft diplomacy”; moreover, Malawi withdrew its reservation in 1991, slightly more than four years after acceding to the Convention.

33. Full or partial withdrawal of a reservation that is considered invalid is unquestionably the primary purpose of the reservations dialogue. Some States do not hesitate to draw the author of the reservation’s attention, through declarations that are often well reasoned, to the legal problems that the reservation raises in order to request the author to take the necessary steps. Denmark’s reaction to the reservations to the Convention on the Rights of the Child formulated by Brunei Darussalam, Malaysia and Saudi Arabia are examples of this:

The Government of Denmark finds that the general reservation with reference to the Constitution of Brunei Darussalam and to the beliefs and principles of Islamic law is of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservation as being incompatible with the object and purposes of the Convention and accordingly inadmissible and without effect under international law. Furthermore, it is a general principle of international law that national law may not be invoked as justification for failure to perform treaty obligations.

The Convention remains in force in its entirety between Brunei Darussalam and Denmark.

The Government of Denmark recommends the Government of Brunei Darussalam to reconsider its reservation to the Convention.

34. Austria reacted to the same reservations and to those formulated by Kiribati and the Islamic Republic of Iran. While these reactions cannot be termed objections within the meaning of the Vienna Conventions, they cast doubt on the admissibility of the reservations in question without claiming to have any particular legal effect:

Under article 19 of the Vienna Convention on the Law of Treaties, which is reflected in article 51 of the [Convention on the Rights of the Child], a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with the object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.

The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations a final assessment as to its admissibility under international law cannot be made without further clarification.

Until the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].

Austria, however, objects to the admissibility of the reservations in question if the application of this reservation negatively affects the compliance of Malaysia … with its obligations under the [Convention] essential for the fulfilment of its object and purpose.

Austria could not consider the reservation made by Malaysia … as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties unless Malaysia …, by providing additional information or through subsequent practice, ensure[s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention].

Austria’s reaction might conceivably be considered an objection or a conditional acceptance subject to the condition that the reservation be withdrawn, modified or, at a minimum, interpreted in a certain manner. However, in the absence of the information needed to determine the permissibility of the reservations, Austria did not make a formal objection; it chose to give the reserving States the option of reassuring it as to the permissibility of their reservations.

35. Of course, some States do not hesitate to propose an interpretation of the reservation that, in their view, would make it acceptable. The United Kingdom’s position concerning the reservation formulated by the United States upon consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects is an example; the interpretation of the reservation seems potentially to change the objection into an acceptance:

[footnotes]

62 Multilateral Treaties ... (footnote 5 above), chap. XXI.1 and 4.
63 The reservation stated: “Owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices” (ibid., chap. IV.5, footnote 34).
64 Ibid.
65 Ibid.
This reservation appears to be contrary to the object and purpose of the Protocol insofar as the object and purpose of the Protocol is to prohibit/restrict the use of incendiary weapons per se. On this reading, the United Kingdom objects to the reservation as contrary to the object and purpose of the Protocol.

The United States has, however, publicly represented that the reservation is necessary because incendiary weapons are the only weapons that can effectively destroy certain counter-proliferation targets, such as biological weapons facilities, which require high heat to eliminate the biotoxins. The United States has also publicly represented that the reservation is not incompatible with the object and purpose of the Protocol, which is to protect civilians from the collateral damage associated with the use of incendiary weapons. The United States has additionally stated publicly that the reservation is consistent with a key underlying principle of international humanitarian law, which is to reduce risk to the civilian population and civilian objects from harms flowing from armed conflict.

On the basis that (a) the United States reservation is correctly interpreted as a narrow reservation focused on the use of incendiary weapons against biological weapons, or similar counter-proliferation, facilities that require high heat to eliminate the biotoxins, the interests of preventing potentially disastrous consequences for the civilian population, (b) the United States reservation is not otherwise intended to detract from the obligation to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising incidental loss of civilian life, injury to civilians and damage to civilian objects, and (c) the object and purpose of the Protocol can properly be said to be to protect civilians from the collateral damage associated with the use of incendiary weapons, the United Kingdom would not object to the reservation as contrary to the object and purpose of the Protocol.

36. While recorded practice provides few examples, a genuine dialogue can indeed develop between the author of a reservation and the author of such a conditional objection/acceptance. Such a dialogue took place between the Netherlands and Yemen with respect to the reservation made by the latter State when accessioning to the Vienna Convention on Consular Relations. The reservation states (para. 2):

The Yemen Arab Republic understands the words “members of their families forming part of their households” in article 46, paragraph 1, and article 49 as being restricted to members of the consular posts and their wives and minor children for the purpose of the privileges and immunities enjoyed by them.

The Netherlands formulated what appears to be a conditional acceptance in the following language:

The Kingdom of the Netherlands accepts the reservation made by the Yemen Arab Republic concerning the articles 46, paragraph 1, and 49 of the Convention only in so far as it does not purport to exclude the husbands of female members of the consular posts, as was suggested in the Netherlands interpretation, since it is natural that husbands should in such cases enjoy the same privileges and immunities.

Thus, this dialogue allowed Yemen to explain the scope of its reservation and allowed the two other States to find common ground concerning the application of articles 46 and 49 of the 1963 Vienna Convention.

37. In much the same manner, the Netherlands formulated conditional acceptances of the reservations made by Bahrain and Qatar in respect of article 27, paragraph 3, to the Vienna Convention on Diplomatic Relations concerning the inviolability of the diplomatic bag. The Netherlands’ reaction to Bahrain’s reservation reads (para. 2):

The Kingdom of the Netherlands does not accept the declaration by the State of Bahrain concerning article 27, paragraph 3 of the Convention. It takes the view that this provision remains in force in relations between it and the State of Bahrain in accordance with international customary law. The Kingdom of the Netherlands is nevertheless prepared to agree to the following arrangement on a basis of reciprocity: If the authorities of the receiving State have serious grounds for supposing that the diplomatic bag contains something which pursuant to article 27, paragraph 4 of the Convention may not be sent in the diplomatic bag, they may demand that the bag be opened in the presence of the representative of the diplomatic mission concerned. If the authorities of the sending State refuse to comply with such a request, the diplomatic bag shall be sent back to the place of origin.

While neither Bahrain nor Qatar appears to have reacted to the proposal made by the Netherlands, the latter’s approach is clearly based on the desire to engage in dialogue regarding the content of the treaty relations between the States parties to the Vienna Convention on Diplomatic Relations. It must, however, be stressed that the Netherlands’ reaction goes beyond a mere interpretation of Bahrain’s reservation and—to a lesser extent—of Qatar’s; it is, rather, a counterproposal. Regardless of the consequences of such a counterproposal (and of its potential acceptance by

70 Ibid., chap. XXVI.2.
71 Ibid., chap. III.6.
72 Ibid. See also the well-argued objection/acceptance made by the United States in respect of the same reservation (ibid.).
the other party), these effects occur outside the reservations regime as established by the Vienna Conventions. Such a dialogue can, however, lead to a solution which is mutually acceptable to the key players and which, like the entire Vienna regime, makes it possible to find a balance between the goal of universality and the integrity of the treaty.

38. The Special Rapporteur is, moreover, convinced that the examples given constitute only a small part of this reservations dialogue, which extends beyond the formality of the Vienna regime and is conducted bilaterally through the diplomatic channel rather than through the intermediary of the depository.

(b) The reservations dialogue with treaty monitoring bodies and within international organizations

39. The essential role played by monitoring bodies in assessing the permissibility of reservations has already been examined and confirmed by the Commission.78 While not parties to treaties, they play an important role not only in assessing the permissibility of reservations, but also in fostering dialogue with the authors of reservations on the permissibility and appropriateness of their reservations.

40. Human rights treaty monitoring bodies have played a leading role in this regard and one that is growing over time.79 Even though—or perhaps because—they do not have decision-making powers in that area, monitoring bodies do not hesitate to draw the attention of States to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them.80

In particular, the Conference emphasized the role of the Committee on the Elimination of Discrimination against Women in this regard.81

42. In recent years, the various human rights treaty monitoring bodies have largely harmonized their practices, notably by better coordinating their activities. The need for dialogue between States parties and monitoring bodies was stressed by the Working Group on Reservations to Treaties, established by the fourth inter-committee meeting and the seventeenth meeting of chairpersons of the human rights treaty monitoring bodies in order to examine the report on the practice of human rights treaty bodies with respect to reservations to such treaties. To that end, the Working Group noted in 2006 that States must include in their periodic reports information on reservations to the instruments in question in order to allow the monitoring bodies to take a position and initiate a dialogue with the States parties.82 In order to enable States to benefit fully from this exchange with regard to concluding observations and comments, members of the working group agreed on a certain number of recommendations which broadly reflect the current practice of all treaty bodies. Members of the working group felt that treaty bodies should explain to reserving States the nature of their concerns with respect to the effects of the reservations on the treaty. In particular, it is important for States to understand how treaty bodies read the provisions of the treaty concerned and the reasons why some reservations are incompatible with its object and purpose. So far, the practice of treaty bodies has been to recommend the withdrawal of reservations without necessarily providing reasons for such recommendations. There was disagreement as to whether the...
justifications for recommending the withdrawal of reservations should be provided in the concluding observations. Several members of the working group felt that this process did not have to be so formalised as long as treaty bodies explain their recommendations during the dialogue with the State. While all treaty bodies should encourage the complete withdrawal of reservations, the review of the need for them or the progressive narrowing of scope through partial withdrawals of reservations, it was not felt necessary to set a precise deadline for States to implement such recommendations since treaty bodies had different practices in this regard.87

43. In 2006, the Working Group adopted the following recommendation:

(a) Treaty bodies should request in their lists of issues information, especially when it is provided neither in the common core document (where available), nor in the treaty-specific report, about:

(i) The nature and scope of reservations or interpretative declarations;
(ii) The reason why such reservations were considered to be necessary and have been maintained;
(iii) The precise effects of each reservation in terms of national law and policy;
(iv) Any plans to limit the effects of reservations and ultimately withdraw them within a specific time frame.

(b) Treaty bodies should clarify to States parties their reasons for concern over particular reservations in light of the provisions of the treaty concerned and, as relevant, its object and purpose.

(c) Treaty bodies should in their concluding observations:

(i) Welcome the withdrawal, whether total or partial, of a reservation;
(ii) Acknowledge ongoing reviews of reservations or expressions of willingness to review;
(iii) Express concern for the maintenance of reservations;
(iv) Encourage the complete withdrawal of reservations, the review of the need for them or the progressive narrowing of scope through partial withdrawals of reservations.

(d) Treaty bodies should highlight the lack of consistency among reservations formulated to certain provisions protected in more than one treaty and encourage the withdrawal of a reservation on the basis of the availability of better protection in other international conventions resulting from the absence of a reservation to comparable provisions.88

44. Although practice is not necessarily uniform, it shows that monitoring bodies strive to engage in a constructive dialogue with States parties when reviewing periodic reports. The compilation of human rights treaty monitoring bodies’ practices with regard to reservations to these instruments,89 prepared by the Working Group on Reservations to Treaties, provides numerous examples. Monitoring bodies react critically to some reservations, without ever condemning them outright, and recommend that States parties should reconsider or withdraw them. For example, the Human Rights Committee, while welcoming with satisfaction the announcement by Italy that it was withdrawing some of its reservations to the International Covenant on Civil and Political Rights, expressed regret that the reservations to article 14, paragraph 3; article 15, paragraph 1; and article 19, paragraph 3, were not part of that process. The Committee therefore encouraged Italy to “pursue the in-depth review process it started in May 2005 to assess the status of its reservations to the Covenant, with a view to withdrawing them all”.89 For its part, the Committee on Economic, Social and Cultural Rights did not hesitate to recommend that the United Kingdom should withdraw its reservations to ILO Convention (No. 102) concerning minimum standards of social security,89 a treaty other than the one establishing the Committee. However, the idea is not just to criticize, but also to encourage and commend States that have stated their intention to withdraw their reservations or have already done so, as well as those that have acceded to human rights instruments without reservations.

45. At present, this pragmatic and non-confrontational dialogue on human rights instruments is undoubtedly the example par excellence of the reservations dialogue. It is interesting to note that here again, the dialogue is conducted outside the Vienna system. Rather than being “judged” by their peers, States report on their efforts and on the difficulties they face in withdrawing certain reservations. Rather than “condemning” reservations as impermissible and setting them aside, monitoring bodies try to better understand the reservations and the reasons for their formulation, and to convince their authors to modify or withdraw them.

46. The reservations dialogue concerning human rights instruments was, moreover, strengthened with the establishment of the Human Rights Council; its role is to “serve as a forum for dialogue on thematic issues on all human rights” and one of its tasks is to “promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits”.89 Apart from appeals by the Council89 and the

87 Human Rights Committee, Eighty-fifth Session, Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations, Italy, CCPR/C/ITA/CO/5, 24 April 2006, para. 6.
88 E/C.12/GBR/CO/5, para. 43.
89 General Assembly resolution 60/251 of 15 March 2006, paras. 5 (b) and (d).
General Assembly\textsuperscript{94} for States to withdraw reservations that are incompatible with the object and purpose of these instruments, the reservations dialogue has been established primarily through the universal periodic review, “an intergovernmental process, United Nations Member-driven and action-oriented”.\textsuperscript{95}

47. As a case in point, the report of the Working Group on the Universal Periodic Review on France refers to several requests for information concerning reservations formulated by France in respect of various international instruments, as well as the following recommendations addressed to France during the discussion:\textsuperscript{96}

- To remove reservations and interpretative statements to the International Covenant on Civil and Political Rights (Russian Federation);
- To consider the possibility of withdrawing its reservations to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (Cuba);
- To withdraw the declaration under article 124 of the Rome Statute of the International Criminal Court (Mexico).\textsuperscript{97}

The report also mentions the following voluntary commitment:

- To examine the possibility of withdrawing or modifying reservations made by the Government to article 14, paragraph 2 (c) of the Convention on the Elimination of All Forms of Discrimination against Women.\textsuperscript{98}

48. In their replies, the Governments of States under review respond quite scrupulously to these recommendations. For example, France replied to Cuba’s recommendation concerning its reservations to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination as follows:

The Government agrees to review its interpretative statement concerning article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

Comments: This statement will be reviewed in the context of the current preparation of France’s seventeenth and nineteenth periodic

49. This informal dialogue concerning reservations is not limited to human rights treaty monitoring bodies and to the Human Rights Council. Within the framework of COJUR and CAHDI, States strive not only to exchange views on the permissibility of certain reservations, but also to harmonize their objections thereto,\textsuperscript{100} these bodies also encourage constructive dialogue with authors of reservations.

50. With regard to reservations formulated by States represented in CAHDI,\textsuperscript{101} for example, there is real discussion of the difficulties that some delegations have with the interpretation or permissibility of a reservation. Often, a solution can be found once the author of the reservations provides explanations and clarifications.\textsuperscript{102} For example, at the 26th meeting of CAHDI, Austria and Switzerland asked about the admissibility of the United Kingdom’s declaration in respect of the Optional Protocol to the Convention on the rights of the child on the involvement of children in armed conflict.\textsuperscript{103} The United Kingdom provided explanations and emphasized the admissibility and legitimacy of its declaration. At the 27th meeting of CAHDI:

The delegation of Austria expressed reservations concerning the interpretative declaration of the United Kingdom..., although it had no objection. It understood the reasons, stated in explicit detail at the previous meeting, which had prompted the United Kingdom to make the declaration, but had not been convinced and thus considered the situation problematic. On this point, the delegation of Switzerland notified that it had been convinced by the arguments which the United Kingdom had adduced at the previous meeting.\textsuperscript{104}

\textsuperscript{94} A/HRC/8/47/Add.1, paras. 15–16. To date, France has not withdrawn its declaration in respect of article 4 of the Convention.

\textsuperscript{95} See paragraphs 25–27 above.

\textsuperscript{96} This does not mean that the Ad Hoc Committee of Legal Advisers on Public International Law, through its members, does not engage in dialogue with non-member States.

\textsuperscript{97} This is, moreover, one of the reasons that CAHDI decided to fulfill its responsibilities concerning the European Observatory on its own and to stop discussing reservations only within the group of experts on reservations. The absence of certain delegations from the group made discussion much more difficult. See CAHDI, 19th meeting, held in Berlin on 13 and 14 March 2000 (CAHDI (2000) 12 rev., paras. 73–76 and 82; and 20th meeting, held in Strasbourg on 12 and 13 September 2000 (CAHDI (2000) 21, para. 27). At the 27th meeting, the Chair of CAHDI drew the attention of delegations to the importance of this exercise and the need to participate in it: “Moving to a more general matter, the Chair asked the Ad Hoc Committee of Legal Advisers on Public International Law members what they considered the most appropriate way to increase the effectiveness of the Committee’s work as a European observatory. He drew attention to a number of States to the importance of going through the whole document prepared by the Secretariat and of not restricting their discussion to reservations or declarations against which an objection might be raised. The delegations might change their approach and their policy with regard to treaties as a result of the Ad Hoc Committee of Legal Advisers on Public International Law’s discussions. Failure to respond should therefore not be interpreted as a lack of interest” (CAHDI, 27th meeting, held in Strasbourg on 18 and 19 March 2004 (CAHDI (2004) 11, para. 42)).

\textsuperscript{100} CAHDI, 26th meeting, held in Strasbourg on 18 and 19 September 2003 (CAHDI (2003) 14, paras. 26–28).

\textsuperscript{101} CAHDI, 27th meeting, held in Strasbourg on 18 and 19 March 2004 (CAHDI (2004) 11, para. 21). For another example, see the discussion on the reservation to the Convention on the transfer of sentenced persons, CAHDI, 22nd meeting, held in Strasbourg on 11 and 12 September 2001 (CAHDI (2001) 10, paras. 51–54); and 23rd meeting, held in Strasbourg on 4 and 5 March 2002 (CAHDI (2002) 8, para. 27).
The European States do not hesitate to explain the reasons for formulating a given reservation and, where applicable, to withdraw reservations.106

51. Through its members, CAHDI also pursues dialogue with third States. For example, the report on the 38th meeting indicates that CAHDI was engaged in a dialogue with the Bahamas regarding its reservation to the International Covenant on Civil and Political Rights.107

52. Within COJUR, the member States of the EU also endeavour not only to coordinate any objections that they make but, above all, to enter into a dialogue with the author of a reservation, including through the traditional diplomatic channels, in order to obtain additional information on the reservation.108

53. The Vienna Conventions—with their well-known gaps that the Guide to Practice has endeavoured to fill—are only the tip of the iceberg of the reservations dialogue; it has become an undisputed practical reality and an integral part of the reservations regime, to which it brings a degree of flexibility while increasing its effectiveness.

B. A legal framework for the reservations dialogue?

54. Articles 19 to 23 of the Vienna Conventions establish the conditions for the validity of reservations and their legal effects on treaties by seeking to strike a satisfactory balance between the capacity of States to formulate reservations to a treaty, on the one hand, and the possibility of other States to accept or reject the proposed modification of the effects of the treaty in their relations with the author of the reservation. In this specific legal context, acceptances and objections do not appear to be elements of a dialogue between the authors of the acceptance or objection and the author of the reservation.

55. Furthermore, the Vienna Conventions completely ignore all other forms of the reservations dialogue, as is logical in a treaty that is binding on States and international organizations.

56. The reservations dialogue, for its part, does not purport to produce a legal effect in the strict sense of the word. It does not seek to modify, as such, the content of the treaty relationship that has—or has not—been established between the author of a reservation and the author of an objection. On the contrary, although it is designed to encourage States to formulate only permissible reservations and to reconsider and withdraw reservations (and even objections) that are impermissible or that have simply become useless or inappropriate, the reservations dialogue in itself never produces these results. In order for these results to be achieved, the reserving State must formally withdraw its reservation or modify it in accordance with the rules of the Vienna Convention, and the author of an objection must withdraw its objection according to the procedures prescribed by the Vienna rules. The reservations dialogue accompanies implementation of the legal regime of reservations, without being a part of it and operates largely outside the Vienna law.

57. The reservations dialogue can nonetheless contribute to the smooth functioning of the Vienna regime, which is itself based on the principle of dialogue and discussion.109 Moreover, the Commission has confirmed this on many occasions in its work on the Guide to Practice and has established the consequences thereof in several guidelines that recommend to States and international organizations certain practices that are not required under the Vienna regime but are very useful in ensuring harmonious application of the rules relating to reservations. These are, in fact, part of the reservations dialogue.

58. One example is guideline 2.1.9:

2.1.9 Statement of reasons110

A reservation should to the extent possible indicate the reasons why it is being made.

No provision of the Vienna Conventions requires States to indicate the reasons for their reservation. Nonetheless, in order to allow other States to determine whether a reservation is valid and whether they are prepared to accept it, it is essential for them to know the reasons why the author formulated it. Moreover, practice shows that a reservations dialogue with the author of a reservation is often pursued precisely in order to clarify the meaning of a reservation and to understand the reasons why the reservation is, in the eyes of its author, necessary.

59. Similarly, guideline 2.6.10 concerning the reasons for objections is an important element of a properly functioning reservations dialogue, even though it cannot be considered a mandatory legal rule for States and organizations:

2.6.10 Statement of reasons112

An objection should to the extent possible indicate the reasons why it is being made.

Although an objection that is not reasoned is perfectly capable of producing the legal effect ascribed to it by
the Vienna Conventions, without a statement of reasons it loses its impact as an element of the reservations dialogue. If the reasons are not given, it is difficult for the author of a reservation, the other contracting States and contracting organizations or the judge who has to rule on the reservation to benefit from the assessment made by the author of the objection. It is practically impossible to know whether the author of an objection considers the reservation incompatible with the object and purpose of the treaty, or whether it simply deems the reservation inappropriate. If the reasons are not given, the author of an objection has no basis for urging the author of the reservation to withdraw or modify it.\(^{114}\)

60. Guideline 4.5.3 shows even more clearly the relationship between the legal regime of reservations and the reservations dialogue:

4.5.3 Reactions to an invalid reservation\(^ {115}\)

1. The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

2. Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible.

Although an objection to a valid reservation is, as such, not covered in the Vienna regime, which ascribes no concrete legal effect to it, it nevertheless has an important role to play in implementation of the Vienna rules, including in assessment of the validity of a reservation, and is therefore part of the reservations dialogue. The fact that the Vienna Conventions are silent on the subject does not mean that States should not make such objections, which are still relevant.

61. Lastly, guideline 2.5.3 captures perfectly the ultimate goal of the reservations dialogue:

2.5.3 Periodic review of the usefulness of reservations\(^ {116}\)

1. States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

2. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

62. However, the Special Rapporteur does not believe that the Commission should endeavour to establish a specific legal regime for the reservations dialogue, even as part of a non-binding legal instrument such as the Guide to Practice. Any attempt to systematize practice in this field—which while quite abundant, is extremely diverse—is bound to fail and will undermine the flexibility of the modalities of the reservations dialogue. It does not appear desirable to favour one form of dialogue over another or to shut the door on new practices that might develop over time and might produce results beneficial to implementation of the Vienna rules. The Commission should encourage all forms of reservations dialogue.

63. One of the major advantages of the reservations dialogue is precisely its highly pragmatic nature. It is intended to influence the decisions and actions of players in the field of reservations without hamstringing them. Thus, the practice will clearly not be enhanced by being locked into procedural rules that would reduce its effectiveness by making it more cumbersome.

64. It is nonetheless useful to recommend that States and international organizations should, to the extent possible, not only engage in some form of dialogue with the authors of reservations and, more generally, with all the key players and stakeholders, but also adopt certain practices and attempt to follow certain basic principles which, without constituting legal obligations under the Vienna regime, are factors in making the dialogue useful and effective. To that end, the Special Rapporteur suggests not only that the Commission should establish guidelines—even if they are merely recommendations (as it has already done)—but that it should also adopt a recommendation or general conclusions on the reservations dialogue.

65. The draft proposed by the Special Rapporteur and reproduced in paragraph 68, below, of the present report stems in part from the recommendations of the Working Group on Reservations to Treaties established to examine the report on the practice of human rights treaty bodies, adopted in 2006, while supplementing them in order to reflect other forms of reservations dialogue found in State practice. Although this instrument concerns a specific form of the reservations dialogue, the principles that it establishes can easily be applied to the phenomenon as a whole, regardless of the context in which the dialogue unfolds.

66. Those recommendations, which are intended to increase the effectiveness and transparency of the reservations dialogue during the review of periodic reports, nonetheless pertain to the reservations dialogue conducted directly with the author of a reservation, as practised by human rights treaty bodies. They do not cover the fruitful practices of exchange of views, cooperation and coordination that may develop between other contracting States and contracting organizations in order to make reactions to problematic reservations more consistent and more effective. It is therefore appropriate to supplement the recommendations in order to encourage States and international organizations to adopt these practices.

67. The Special Rapporteur also proposes to incorporate into the draft recommendation or conclusions other elements of the reservations dialogue which, although originally developed in order to address an issue that was wrongly depicted as specific to reservations to human rights treaties, are useful and relevant to all other categories of reservations to all types of treaties. This is the case, for example, of the 1993 World Conference on

\(^{115}\) See also paragraphs 42 and 43 above, and particularly subparagraph (b) of the recommendation quoted in paragraph 43.

\(^{116}\) See also guideline 2.9.6 (Statement of reasons for approval, opposition and recharacterization), Yearbook ... 2009, vol. II (Part Two), p. 92.

\(^{113}\) For the commentary to this guideline, see Yearbook ... 2010, vol. II (Part Two), pp. 121–123.

\(^{114}\) For the commentary to this guideline, see Yearbook ... 2003, vol. II (Part Two), p. 76.
Human Rights appeal for States to make reasonable and reasoned use of reservations.\textsuperscript{117}

68. In the light of these observations, the draft recommendation or conclusions that the Commission is invited to adopt might be worded as follows:

“Draft recommendation or conclusions of the International Law Commission on the reservations dialogue

“The International Law Commission,

“Recalling the provisions on reservations to treaties contained in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,

“Bearing in mind the need to safeguard the integrity of multilateral treaties while ensuring the universality of those for which universal accession is envisaged,

“Recognizing the usefulness of reservations to treaties formulated within the limits imposed by the law of treaties, including article 19 of the Vienna Conventions and concerned at the large number of reservations that appear incompatible with these requirements,

“Aware of the difficulties that States and international organizations face in assessing the validity of reservations,

“Convinced of the usefulness of a pragmatic dialogue with the author of a reservation and of cooperation among all reservations stakeholders,

“Welcoming the efforts made in recent years, including within the framework of human rights treaty bodies and certain regional organizations,

“1. Calls upon States and international organizations wishing to formulate reservations to ensure that they are not incompatible with the object and purpose of the treaty to which they relate, to consider limiting their scope, to formulate them as clearly and concisely as possible, and to review them periodically with a view to withdraw them if appropriate;

“2. Recommends that in formulating a reservation, States and international organizations should indicate, to the extent possible, the nature and scope of the reservation, why the reservation is deemed necessary, the effects of the reservation on fulfilment by the author of the reservation of its treaty obligations arising from the instrument in question, and whether it plans to limit the reservation’s effects, modify it or withdraw it according to a specific schedule and modalities;

“3. Recommends also that States and international organizations should state the reason for any modification or withdrawal of a reservation;

“4. Recalls that States, international organizations and monitoring bodies may express their concerns about a reservation and stresses the usefulness of such reactions for assessment of the validity of a reservation by all the key players;

“5. Encourages States, international organizations and monitoring bodies to explain to the author of a reservation the reasons for their concerns about the reservation and, where appropriate, to request any clarification that they deem useful;

“6. Recommends that States, international organizations and monitoring bodies should, if they deem it useful, call for the full withdrawal of reservations, reconsideration of the need for a reservation and gradual reduction of the scope of a reservation through partial withdrawals, and should encourage States and international organizations that formulate reservations to do so;

“7. Encourages States and international organizations to welcome the concerns and reactions of other States, international organizations and monitoring bodies and to address those concerns and take them duly into account, to the extent possible, with a view to reconsidering, modifying or withdrawing a reservation;

“8. Calls on all States, international organizations and monitoring bodies to cooperate as closely as possible in order to exchange views on problematic reservations and to coordinate the measures to be taken; and

“9. Expresses the hope that States, international organizations and monitoring bodies will initiate, undertake and pursue such dialogue in a pragmatic and transparent manner.”

\textsuperscript{117} See paragraph 41 above.

\textbf{Chapter II}

\textbf{Dispute settlement in the context of reservations}

69. The 1969 and 1986 Vienna Conventions contain no general dispute settlement clause\textsuperscript{118} and part V, section 4, of those instruments provides only for the “procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty”.\textsuperscript{119} These


\textsuperscript{119} This is the title of article 65. Article 66, which is worded differently in the two Conventions in order to take into account the fact that international organizations cannot submit applications to ICJ, concerns the compulsory procedures for judicial settlement, arbitration (for disputes concerning the application or interpretation of articles 53 or 64.
provisions do not deal with disputes concerning the validity or the effects of reservations. They are therefore subject to the "common law" of dispute settlement and the parties must seek a solution primarily through one of the means set out in Article 33 of the Charter of the United Nations.

70. It nevertheless remains to be determined whether, in light of the frequency with which States (and, to a lesser extent, international organizations) are faced with reservations-related problems and the complexity of some of those problems, it would be appropriate to consider the manner in which differences of opinion that arise between the States (and international organizations) concerned should or could be resolved (see section A below). In the light of the key principle of consent that governs such matters and the role that States wish to retain in that regard, such a mechanism should be as flexible and as easy to use as possible and should help them find a solution rather than offering an additional dispute settlement mechanism (see section B below). Final adoption of the Guide to Practice might provide an opportunity to make recommendations along those lines to States and international organizations, either directly or through the General Assembly.120

A. The issue

71. Although the Commission is not in the habit of providing the draft articles that it elaborates with clauses relating to the settlement of disputes and although, in the Special Rapporteur’s opinion, this is usually undesirable and might appear incompatible with the non-compulsory nature of the Guide to Practice, specific reasons seem to justify an exception in the present case; however, this should be only a flexible, optional mechanism.

1. DISADVANTAGES OF A RIGID, COMPELLARY DISPUTE SETTLEMENT MECHANISM

72. The recent note by the Secretariat on the settlement of dispute clauses122 shows that the Commission’s practice regarding the inclusion in its draft articles of proposals regarding the settlement of potential disputes arising from their application has varied.123 In the Special Rapporteur’s view, the question is, for the most part, improperly framed, asking not whether the inclusion of such clauses in a potential future convention would be likely to increase its effectiveness, but whether it is the Commission’s role to consider, for each set of draft articles, the final clauses that might accompany it;124 it is clear that such provisions are not, stricto sensu, codification and while the practice in the peaceful settlement of disputes doubtless contributes to the progressive development of international law, it is difficult to see how their inclusion in the Commission’s drafts facilitates this. Furthermore, as a general rule, the General Assembly has not adopted or followed the Commission’s proposals when the latter, usually after long and repeated discussions, has included settlement clauses in drafts adopted on first or second reading.125

73. Also worthy of mention are the specific objections to the inclusion of dispute settlement provisions in a document such as the Guide to Practice, since it was decided at the outset that it would not be compulsory in nature.126 It might initially seem strange to accompany such an instrument with dispute settlement clauses; since it is not binding on States and international organizations, it might be assumed that it could not provide a basis for a compulsory solution where a dispute on its implementation arises.

74. It is true that there is nothing to prevent States or international organizations, if they so desire, from undertaking unilaterally to apply the provisions of the Guide to Practice, either generally or for purposes of settlement of a specific dispute concerning reservations. The technique of referring to “soft” instruments included in binding instruments has become more common in the context of procedural norms (for example, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules127 or the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States128 or substantive rules (see, for example, the Financial Action Task Force (FATF), recommendations 124

120 On this point, see paragraph 100 below.

121 In his second report on reservations to treaties, the Special Rapporteur said that in his view, “the discussion of a regime for the settlement of disputes [in the draft articles prepared by the Commission] diverts attention from the topic under consideration strictly speaking, gives rise to useless debates and is detrimental to efforts to complete the work of the Commission within a reasonable period. It seems to him that, if States deem it necessary, the Commission would be better advised to draw up draft articles which are general in scope and could be incorporated, in the form of an optional protocol, for example, in the body of codification conventions” (Yearbook ... 1996, vol. II (Part One), document A/CN.4/477 and Add.1, p. 50, para. 47).


123 The note by the Secretariat mentions nine drafts in which the Commission included one or more dispute settlement clauses and eight drafts for which such inclusion was discussed but ultimately rejected; to these should be added a number of other drafts not mentioned in the note, for which the question does not appear to have arisen (such as the draft articles on consular relations and the draft articles on special missions).
on money-laundering and the financing of terrorism.

This technique met a need and, in any event, is available to interested States and international organizations, which are free to employ it, as needed, by mutual consent. There is no particular reason to provide for it expressly in the Guide to Practice or in an annex thereto.

75. Moreover, generally speaking, any “compulsory” mechanism—in the two meanings of the word: either the parties to the dispute are required to use it, or a solution that is legally binding on the parties can be adopted—appears, a priori, to be inconsistent with the reservations regime as adopted in Vienna and, in any event, as interpreted by the majority of States. While the essential function of reservations is to find a balance between the universality requirements of open treaties and the integrity of their content, it is clear that States wish to retain broad discretionary power to assess the permissibility of reservations and even, while this appears more debatable, to determine the effects of a reservation, regardless of whether it is permissible. The Sixth Committee’s discussion of guideline 4.5.2 [4.5.3] (Status of the author of an invalid reservation in relation to the treaty) at the sixty-fifth session of the General Assembly is a particularly telling example of the reluctance of many States to agree that an invalid reservation could produce objective effects in the name of a rigid—and debatable—concept of consensus.


131 For consideration of objections with intermediate effect, see para. (23) of the commentary to guideline 2.6.1 (Definition of objections to reservations) in Yearbook ... 2005, vol. II (Part Two), p. 81; guideline 3.4.2 (Permissibility of an objection to a reservation) and the commentary thereto in Yearbook ... 2010, vol. II (Part Two), para. 106; and guideline 4.3.6 [4.3.7] (Effect of an objection on provisions other than those to which the reservation relates) and the commentary thereto (ibid. and, above all, objections with “maximum” effect (see Yearbook ... 2005, vol. II (Part Two), p. 81, para. (22) of the commentary to guideline 2.6.1 (Definition of objections to reservations)); and guideline 4.3.4 [4.3.5] (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect) and the commentary thereto in Yearbook ... 2010, vol. II (Part Two), para. 106. On objections with “super-maximum” effect, see para. (24) of the commentary to guideline 2.6.1 (Definition of objections to reservations) in Yearbook ... 2005, vol. II (Part Two), p. 81; guideline 4.3.7 [4.3.8] (Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation) and the commentary thereto in Yearbook ... 2010, vol. II (Part Two), para. 106; para. (23) of the commentary to guideline 4.5.1 (Nullity of an invalid reservation) (ibid.); and paras. (3)–(5) and (49) of the commentary to guideline 4.5.2 [4.5.3] (Status of the author of an invalid reservation in relation to the treaty) (ibid.).

132 The numbers (and, in some cases, the titles) in brackets refer to the numbers and titles of the guidelines adopted by the Working Group on Reservations to Treaties during the first part of the sixty-third session of the Commission, in 2011. For the commentary to guideline 4.5.2 [4.5.3], see Yearbook ... 2010, vol. II (Part Two), para. 106.


134 See “Report of the General Assembly of the Sixtieth Session, Sixth Committee,” 19th meeting (A/C.6/65/SR.19), 20th meeting (A/C.6/65/SR.20) and 21st meeting (A/C.6/65/SR.21). It is true that, conversely, a similar number of delegations expressed support for a more objective approach.

135 See Yearbook ... 2010, vol. II (Part Two), para. (8) of the commentary to guideline 2.6.3 [2.6.2] (Freedom to formulate objections) [Right to formulate objections]; para. (2) of the commentary to guideline 4.3 (Effect of an objection to a valid reservation); and para. (3) of the commentary to guideline 5.1.7 [5.1.6] (Territorial scope of reservations of the successor State in cases of succession involving part of a territory).

136 And, within the limits of their competence, see guideline 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations) and the commentary thereto in Yearbook ... 2009, vol. II (Part Two), para. 84.

137 See guideline 3.2.5 (Competence of dispute settlement bodies to assess the permissibility of reservations) and the commentary thereto in ibid.

138 See the advisory opinion of ICJ of 28 May 1951, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, p. 24: “[E]ach State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint.” See also paragraph 6 of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties: “The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the provisions of the Vienna Conventions of 1969 and 1986 [on reservations] and, where appropriate, by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties” (Yearbook ... 1997, vol. II (Part Two), p. 57, para. 157).

139 In para. 30 of his second report on reservations to treaties, the Special Rapporteur, after expressing his reluctance, on principle, to include dispute settlement clauses in the Commission’s drafts (see footnote 121 above), nevertheless stated that the problem arose in a particular manner with regard to the topic of reservations: “Under these conditions, it may be useful to consider the establishment of mechanisms for the settlement of disputes in this specific area since, in the view of the Special Rapporteur, these mechanisms could be provided for, either in standard clauses that States could insert in future treaties to be concluded by them, or in an additional optional protocol that could be added to the 1969 Vienna Convention” (Yearbook ... 1996, vol. II (Part One), document A/CN.4/477 and Add.1, p. 51, para. 50). He now believes that such a solution would be inappropriate as it would be too cumbersome and formal.

76. It must, moreover, be recognized that, like treaty law as a whole, reservations law is heavily influenced by the principle of consensus. And clearly, in the absence of treaty monitoring bodies or dispute settlement bodies with competence to assess the permissibility of reservations, according to a general principle of international law, each State (or international organization)—including the authors of reservations and objections to reservations—is responsible for assessing, from its own perspective, the permissibility (and, to some extent, the effects) of a reservation. Many States remain committed to this interactive system (which, while it may be regrettable, is not, in the Special Rapporteur’s view, incompatible with the “Vienna regime” for reservations).

77. It therefore seems fruitless to develop a sophisticated, compulsory dispute settlement regime for reservations. Of course, such a regime might please a few “virtuous” States that have long preferred this form of settlement, but there is every reason to believe that it would target many other States that might view it as a veiled attempt to give the Guide to Practice a legally binding value that it is not intended to have.

2. ADVANTAGES OF A FLEXIBLE ASSISTANCE MECHANISM FOR THE RESOLUTION OF DISPUTES CONCERNING RESERVATIONS

78. It is true that there are various mechanisms for the peaceful settlement of international disputes and that they...
do not necessarily result in legally binding solutions. Those set out in Article 33 of the Charter of the United Nations—negotiation, enquiry, mediation and conciliation—are not contrary to the will of the parties, even though the latter undertake in advance to have recourse to them, since the resulting solutions are not legally binding.

79. International conventions and General Assembly and Security Council resolutions frequently recommend that States have recourse to one or another of these forms of settlement. On the basis of these precedents, the Commission may wish to recommend that States and international organizations should settle disputes concerning reservations by one of these means (and, moreover, through the “compulsory” settlement mechanisms: arbitration and judicial settlement).

80. However timely such a recommendation might appear, it must be acknowledged that it does not meet any need specific to disputes concerning reservations that arise between States. While such disputes almost always have underlying political or even ideological motives, they nevertheless have certain overall characteristics:

- They are highly technical, as seen by the technical nature of the entire Guide to Practice;
- They imply a balance—always difficult to assess—between the contradictory requirements of opening the treaty to the broadest possible participation and preserving its integrity; and
- For this reason, they often call for nuanced solutions that do not imply a total rejection of the position of either party (or of any of the parties), but a balance or, in any event, a middle ground that specifically involves making adjustments to challenged reservations rather than simply abandoning or maintaining them.143

81. The reservations dialogue is a response that is adapted to these nuanced requirements. It is, in a sense, a specific manifestation of negotiations on reservations. However, it is far from capable of producing a satisfactory solution in every case.145 Just as a stalemate in direct negotiations between the parties to a dispute, whatever its nature, calls for recourse to an impartial third party, so an impasse in the reservations dialogue should lead States and international organizations that disagree as to the interpretation, the permissibility or the effects of a reservation or an objection (or acceptance) to seek the assistance of a third party.

82. In the light of the highly technical nature of most such problems,

- The third party in question should have the necessary technical competence to resolve them (or to contribute to their resolution);
- Its intervention would be particularly useful for small States with administrations that are ill-equipped to consider the often-complex questions raised by the formulation of reservations or reactions thereto and cannot devote the necessary time to the matter;

This means that in addition to its role of assisting with the resolution of disputes arising in connection with reservations, it might be useful for a third-party mechanism to have a joint function: the provision of assistance with the settlement of disputes concerning reservations, and of technical assistance to States that felt the need to refer to it questions relating to the drafting of reservations that they planned to formulate or to the position that they should take with respect to the reservations made by other States or international organizations;

- These functions do not necessarily preclude other, more classic, dispute resolution functions stricto sensu, such as compulsory judicial settlement, at the request and with the consent of all parties concerned.

140 See, inter alia, article 65, paragraph 3, of the 1969 Vienna Convention, which refers to Article 33 of the Charter of the United Nations.

141 The charters of some international organizations envisage non-compulsory dispute settlement mechanisms: for example, article 10 of the Charter of the Association of Southeast Asian Nations, article 26 of the Constitutive Act of the African Union, and the Charter of the Islamic Conference. For recent examples of conventions with more limited subject matter, see article 10 of the Convention on Cluster Munitions; article 66 of the United Nations Convention against Corruption and article 16 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which allow States to choose among several proposed forms of settlement.

142 See, inter alia, the General Assembly’s recommendations on the criminal accountability of United Nations officials and experts on mission (resolutions 63/119 of 11 December 2008 and 64/110 of 16 December 2009); on sustainable fisheries, including through the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments (resolution 63/112 of 5 December 2008); on follow-up to the advisory opinion of ICJ on the Legality of the Threat or Use of Nuclear Weapons (resolution 60/76 of 1 December 1986; and in the 2005 World Summit Outcome document (resolution 60/1 of 16 September 2005). The Security Council has had occasion to recall these obligations in general terms in its resolution on the maintenance of international peace and security: nuclear non-proliferation and nuclear disarmament of 24 September 2009 (Security Council resolution 1887 (2009)) and in considering specific situations (Security Council resolutions 1862 (2009) and 1907 (2009) of 14 January and 23 December 2009, respectively, on peace and security in Africa). See also the Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session (Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17), annex II). Within the framework of the Council of Europe, a series of recommendations have been made on the subject of the uniform interpretation of Council of Europe conventions. Initially, they referred only to non-binding mechanisms (see Parliamentary Assembly recommendation 454 (1966) of 27 January 1966, cited by Wiebich-Haus, “L’interprétation uniforme des Conventions du Conseil de l’Europe”, p. 456; more recently, the establishment of a judicial mechanism has been proposed (see Parliamentary Assembly recommendation 1458 (2000) of 6 April 2000 (Towards a uniform interpretation of Council of Europe conventions: creation of a general judicial authority)).

143 Unless the Commission prefers to make its recommendations to the General Assembly so that the latter can “relay” them to States and international organizations; see paragraph 100 below.
B. The proposed mechanism

83. In the light of the foregoing considerations, it appears possible to outline the elements of a reservations and objections to reservations assistance mechanism (subsect. 2, below) by referring to existing precedents and, specifically, to the one established by CAHDI (subsect. 1, below).

1. The precedent set by the Council of Europe

84. Many bodies, as part of their mandate to monitor the treaty (usually a human rights treaty) under which they were established, are called upon to rule on the question of the permissibility of reservations formulated by States parties and on the consequences of the potential impermissibility thereof when considering either the periodic reports submitted by States parties or complaints submitted by individuals. As a general rule, these bodies’ views are not binding on the States in question. This is not the case with the binding decisions of international courts, particularly the European Courts and the Inter-American Court of Human Rights. But these judgments (a) do not, generally speaking, resolve disputes between States and (b) are binding on the State in question; therefore, they do not fall within the scope of this section.

85. Only the provisions for the systematic consideration of certain reservations that exist within the framework of the Council of Europe (under the auspices of CAHDI) and the EU (COJUR) constitute useful precedents for the establishment of a flexible, specialized mechanism.

146 See guideline 3.2 (Assessment of the permissibility of a reservation) and the commentary thereto (Yearbook ... 2009, vol. II (Part Two), para. 84).

147 See guideline 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations): “1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization. 2. The conclusions formulated by such a body in the exercise of this competence shall have the same legal effect as that deriving from the performance of its monitoring role.” See also the commentary to this guideline (ibid.).

148 International courts may also issue advisory opinions on legal problems relating to reservations, as seen from several famous cases: advisory opinion of ICI of 28 May 1951, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, p. 15; Inter-American Court of Human Rights, advisory opinion OC-2/82 of 24 September 1982, The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (arts. 74 and 75) and advisory opinion OC-3/83 of 8 September 1983, Restrictions to the death penalty (arts. 4(2) and 4(4) of the American Convention on Human Rights), Series A, No. 3.


150 Inter-American Court of Human Rights, Hilaire v. Trinidad and Tobago, Preliminary Objections, judgment of 1 September 2001, Series C, No. 80, para. 98. See also Benjamin et al. v. Trinidad and Tobago, Preliminary Objections, judgment of 1 September 2001, Series C, No. 81; and Radilla Pacheco v. United Mexican States, judgment of 23 November 2009, Series C, No. 209.

151 On the basis of drafts prepared by the Inter-American Judicial Committee, the General Assembly of OAS adopted resolution AG/RES. 888 (XVII-O/87) of 14 November 1987 on standards on reservations to the Inter-American multilateral treaties and rules for the General Secretariat as depositary of treaties, available online from www.oas.org/DIL/resolutionsgeneralassembly_AG-RES888.htm; see also the report of the Committee on Juridical and Political Affairs on Standards on Reservations to Inter-American Multilateral Treaties and Rules for the General Secretariat as Depositary of Treaties, OAS Permanent Council, 19 August 1987 (OAS Ser. G, CP/Doc. 1830/87). This resolution has two parts; one reproduces, mutatis mutandis, the Vienna Conventions’ rules on reservations while the other sets out rules (based on those contained in article 78 of the 1986 Vienna Convention, which corresponds to article 77 of the 1969 Vienna Convention) to be followed by the secretariat in fulfilling its functions as a depositary; it does not establish a mechanism for considering issues raised by reservations. In this resolution, article II of the Rules for the General Secretariat as Depositary of Treaties, which is a slightly adapted version of article 78, paragraph 2, of the 1986 Vienna Convention, reads: “In the event of any difference appearing between a State and the depositary as to the performance of the latter’s functions, the depositary shall bring the question to the attention of the signatory States and the contracting States, or, where appropriate, of the competent organ of the Organization or of the Inter-American Specialized Organization concerned” (the italics indicate the wording that differs from that of article 78).

152 Cede (footnote 55 above), p. 25.

153 These exchanges of views do not lead to published documents that can be consulted; it is a little-known mechanism. See, however, the “insider” description provided by Cede (footnote 55 above), pp. 28–30; and Jean-Paul Jacqué in his presentation to the Group of Specialists on Reservations to International Treaties on the subject of COJUR (D-S-RIT (98) 1, Strasbourg, 2 February 1998), “Consideration of reservations to international treaties in the context of the EU: the COJUR”, paras. 137-147; see also Spiliopoulos Åkermark, “Reservations Issues in the Mixed Agreements of the European Community”, p. 387; and Lammers, “The Role of the Legal Adviser of the Ministry of Foreign Affairs: The Dutch Approach and Experience”, pp. 193–194.

154 The Group’s mandate, established at the 14th meeting of CAHDI (resolution (97) 4, September 1997) was approved by the Committee of Ministers of the Council of Europe on 16 December 1997. The title “Group of Specialists” (DE-RIT) was replaced by “Group of Experts” (DI-E-RITST) in 1998.

86. Cede, who played a key role in the establishment of these mechanisms, gave the following explanation:

Pending the final conclusions to be drawn from the work of the ILC it is noteworthy how greatly the consideration and study of the law and practice on reservations by the ILC has already influenced the worldwide discussion of this matter. Against the backdrop of increased sensitivity about reservations to human rights treaties and the heightened interest in the legal complexities of reservations, the international community now devotes considerable attention to the problem and to the issue of how to respond to questionable reservations, in particular to those which give rise to doubts as to their compatibility with the object and purpose of the relevant treaty. This coordination may result in model objections that participating States are encouraged to make on their own behalf.

87. Little is known of the work of COJUR in this area, which consists primarily of periodic exchanges of information and in-depth exchanges of views among members of the EU in order to coordinate their reactions to reservations that are deemed to be impermissible. This coordination may result in model objections that participating States are encouraged to make on their own behalf.

88. The functions and activities of CAHDI in its capacity as the European Observatory of Reservations to International Treaties, which publishes most of its records, are better known.

89. This special mandate of CAHDI was preceded, at the initiative of Austria, by the December 1997 establishment of the Group of Specialists on Reservations to International Treaties, which was called upon to:

(a) Examine and propose ways and means and, possibly, guidelines to assist member States in developing their practice regarding their response to reservations and interpretative declarations actually or potentially inadmissible under international law; and

(b) Consider the possible role of the CAHDI as an “observatory” of reservations to multilateral treaties of significant importance to the international community raising issues as to their admissibility under international law.
international law, and as an observatory of reactions by Council of Europe member States Parties to these instruments.

90. In accordance with the recommendations of the Group of Experts, CAHDI has acted since 1998 as the European observatory of reservations to multilateral treaties that play an important role in the international community, and of the reactions of States parties that are members of the Council of Europe.\(^{156}\)

91. Since then, the agenda of every meeting of CAHDI has included an item entitled “Law and practice relating to reservations and interpretative declarations concerning international treaties: European Observatory of Reservations to International Treaties”, and a “List of outstanding reservations and declarations to international treaties” and a “Table of objections” are prepared by the secretariat for consideration.\(^{157}\) During those meetings, the participants (Council of Europe member States and a number of observer States and international organizations) exchange views concerning the permissibility of problematic reservations and, where appropriate, coordinate their reactions and even their actions. It should be noted that CAHDI functions as an observatory both of reservations and objections to treaties concluded under Council of Europe auspices and of global treaties.

92. In its 2010 report, CAHDI stated:

As regards the issue of reducing the use of reservations, derogations and restrictive declarations, the CAHDI has conducted two specific recent activities in its capacity as European Observatory of reservations to international treaties. Since 1998, the CAHDI regularly considers a list of outstanding reservations to international treaties, concluded within and outside the Council of Europe. Members of the CAHDI are therefore regularly called upon to consider outstanding reservations and declarations and to exchange views on national positions. A table of objections to these clauses is regularly presented to the Committee of Ministers together with abridged reports of the CAHDI meetings. This activity constitutes one of the core activities of the CAHDI.\(^{158}\)

93. It is certain that this mechanism, which appears fruitful, offers an interesting precedent. For the following reasons, however, it could not simply be universalized:

- The Council of Europe is a regional organization with 47 member States, whereas the United Nations has 192 Member States; coordination on technical issues of this type is doubtless more difficult in a global context;

- Alliances among Council of Europe member States, their many cultural similarities and their representatives’ habit of meeting and working together constitute a coordination framework that is, \(a\ priori\), more effective than what could be anticipated at the global level;

- Generally speaking, the Council’s members are rich countries with legal bodies that have the necessary technical competence, whereas one of the primary arguments for establishing a reservations assistance mechanism is to compensate for the lack of resources and competence that handicaps many United Nations Member States;

- Lastly, and perhaps most importantly, whereas the objective of the (European) Observatory of Reservations to International Treaties is to present as united a “front” as possible with respect to reservations formulated by other States, this would obviously not be the function of the assistance mechanism envisaged here; it will be clear from the preceding section that its purpose would be rather to provide technical assistance to States that wished to receive it; to help States (and international organizations) with differing views concerning reservations to resolve their differences by finding common ground; and to provide those countries or international organizations with specific information on the applicable legal rules.

94. The Council of Europe’s experience can nevertheless offer a rich source of inspiration, particularly on the following points:

- From an external perspective,\(^{159}\) it appears that CAHDI, in its capacity as the European Observatory of Reservations to International Treaties, combines technical rigor with political realism;

- This satisfactory situation is doubtless a consequence of the fact that the members of CAHDI are both highly qualified technicians, and practitioners with an understanding of the political and administrative constraints that States may face in implementing the treaties by which they are bound;\(^{160}\) and

- This precedent suggests that a cooperation mechanism that does not culminate in a binding or even formal decision may produce satisfactory and effective results.

2. The Reservations and Objections to Reservations Assistance Mechanism

95. In the light of the foregoing considerations, the Commission might recommend the establishment of a reservations and objections to reservations assistance mechanism with the following characteristics.

96. First, it should be a flexible mechanism; referral to it and recommendations made by it should not, in principle, be compulsory (on the understanding, however, that States and international organizations with a dispute concerning the interpretation, permissibility or effects of a reservation to a treaty should be free to resort to it and, if appropriate, agree to consider the guidelines contained in the Guide to Practice as compulsory in resolving their dispute).

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\(^{155}\) It was also pursuant to a proposal of the Group of Experts that the Committee of Ministers adopted recommendation R (99) 13 of 18 May 1999 on responses to inadmissible reservations to international treaties.

\(^{156}\) The work of CAHDI in its capacity as the European Observatory of Reservations to International Treaties is discussed in footnote 56–57 above. See also the description of the Observatory by the Observer for CAHDI in paragraph 3 of his statement to the Commission on 16 July 1999 at its 2604th meeting (Yearbook ... 1999, vol. I, pp. 268–269).

\(^{157}\) For the most recent session of CAHDI (41st meeting, Strasbourg, 17–18 March 2011), see CAHDI (2011) 3 and Add. prov.

\(^{158}\) CAHDI, abridged report on the 40th meeting, held in Tromsø on 16–17 September 2010 (CM (2010) 139, 21 October 2010), annex 4, para. 5.

\(^{159}\) See Cede (footnote 55 above), pp. 30–34.

\(^{160}\) According to Cede, “Whereas judicial decisions or ‘views’ taken by supervisory treaty bodies generally do not attach great significance to the political circumstances of a concrete treaty obligation, the examination of the problems which a particular reservation may raise is regularly placed in a comprehensive context by legal advisers who are representing their respective governments” (ibid., p. 34).
97. Second, such a mechanism should have a dual function: it should both assist in the resolution of differences of opinion on reservations and provide technical advice on matters relating to reservations and reactions thereto.

98. Third, such assistance should be provided by government experts selected on the basis of their technical competence and their practical experience in international law and, specifically, treaty law. The mechanism should be a small body (no more than 10 members who serve only at need) with a very small secretariat.

99. Fourth, there should be no question of requiring the mechanism simply to impose either the Vienna Conventions rules on States that are not parties to the Convention, or the non-compulsory guidelines in the Guide to Practice. It should, however, be understood that it will give due consideration to these provisions and guidelines.

100. It might, however, be asked whether the Commission should make such a recommendation to States and international organizations directly, or to the General Assembly. Whereas the Special Rapporteur opted for the first solution in the case of the reservations dialogue, it appears to him that in the case of this recommendation, there is no need to choose between the two; neutral wording could be used and it could be left to the General Assembly to decide how to proceed.

101. Thus, the draft recommendation that the Commission is invited to adopt might read as follows:

“Draft recommendation of the International Law Commission on technical assistance and assistance in the settlement of disputes concerning reservations

“The International Law Commission,

“Having completed preparation of the Guide to Practice on Reservations to Treaties,

“Aware of the difficulties faced by States and international organizations in the interpretation, assessment of the permissibility, and implementation of reservations and objections thereto,

“Attaching great importance to the principle that States should resolve their international disputes by peaceful means,

“Convinced that adoption of the Guide to Practice should be supplemented by the establishment of a

flexible assistance mechanism for States and international organizations that face difficulties in implementation of the legal rules applicable to reservations,

“1. Recalls that States and international organizations that disagree as to the interpretation, permissibility or effects of a reservation or an objection to a reservation must, first of all, as with any international dispute, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice;

“2. Recommends that reservations and objections to reservations assistance mechanism should be established; and

“3. Suggests that this mechanism should take the form described in the annex to this recommendation.

“Annex

“1. A reservations and objections to reservations assistance mechanism is hereby established.

“2. The mechanism shall consist of 10 government experts, who shall be selected on the basis of their technical competence and their practical experience in international law and, specifically, treaty law.

“3. The mechanism shall meet, as needed, to consider problems related to the interpretation, permissibility and effects of reservations, or objections to and acceptances of reservations, that are submitted to it by concerned States and international organizations. To that end, it may suggest that States trust it to find solutions for the resolution of their disputes. States or international organizations that are parties to a dispute concerning a reservation may undertake to accept the mechanism’s proposals for its resolution as compulsory.

“4. The mechanism may also provide a State or international organization with technical assistance in formulating reservations to a treaty or objections to reservations formulated by other States or international organizations.

“5. In making such proposals, the mechanism shall take into account the provisions on reservations contained in the 1969, 1978 and 1986 Vienna Conventions on the Law of Treaties and the guidelines contained in the Guide to Practice.”

Chapter III

Guide to Practice—Instructions

102. In his first report, the Special Rapporteur noted that it was not inevitable for the Commission’s work to culminate in draft articles that were intended to become true conventions; he stated his preference for a more flexible instrument that would be easier to coordinate with the existing provisions of the Vienna Conventions. See Yearbook... 1995, vol. II (Part One), document A/CN.4/470, pp. 154–155, paras. 170–182.
that approach and endorsed the Special Rapporteur’s conclusions on the matter:

487. At the end of his statement, the Special Rapporteur summarized as follows the conclusions he had drawn from the Commission’s discussion of the topic under consideration:

…

(b) The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission’s statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses.

(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.

3. General Conclusions

488. These conclusions constitute, in the view of the Commission, the result of the preliminary study requested by General Assembly resolutions 48/31 and 49/51.

These conclusions have never been called into question by the ILC and have been approved by virtually all delegations to the Sixth Committee of the General Assembly.

103. However, the Sixth Committee’s discussions on the topic of reservations to treaties have often shown that representatives of States did not have a clear idea of the Commission’s goal or of the exact purpose of the Guide to Practice. And in the Commission itself, it has sometimes appeared that certain members, without ever calling into question the initial decisions on the form and purpose of the Guide, did not understand the general concept in the same way as the majority of the members and the Special Rapporteur.

104. In an attempt to dispel such misunderstandings, it is proposed that the following explanation of form, purpose and use should be added at the beginning of the Guide to Practice.

105. It is proposed that an introduction should be added to the Guide to Practice in order to provide an overview and to facilitate its use. This introduction, which would resemble the commentaries to guidelines or the introductions to the various parts or sections of the Guide, might read:

“Introduction

“1. The Guide to Practice on Reservations to Treaties consists of guidelines that have been adopted by the International Law Commission and are reproduced below, accompanied by commentaries. The commentaries are an integral part of the Guide and an indispensable supplement to the guidelines, which they expand and explain. No summary, however long, could cover all the questions that may arise on this highly technical and complex subject or provide all useful explanations for practitioners.”

“2. As its name indicates, the purpose of the Guide to Practice is to provide assistance to practitioners of international law—decision-makers, diplomats and lawyers (including those who plead cases before national courts and tribunals), who are often faced with sensitive problems concerning the possibility and effects of reservations to treaties, a matter on which the rules contained in the 1969, 1986 and 1978 Vienna Conventions have gaps and are often unclear, and, to a lesser extent, interpretative declarations in respect of treaty provisions, of which these Conventions make no mention whatsoever. Despite frequent assumptions to the contrary, its purpose is not—or, in any case, not only—to offer the reader a guide to past (and often uncertain) practice in this area, but rather to direct the user towards solutions that are consistent with existing rules (where they exist) or to the solutions that seem the most likely to result in the progressive development of such rules.

3. In that connection, it should be stressed that while the Guide to Practice, as an instrument—or “official source”—is by no means binding, the extent to which the various norms set out in the guidelines and the various legal norms embodied therein are compulsory in nature varies widely:...

… Some of them simply reproduce provisions of the Vienna Conventions which set out norms that were either uncontroversial at the time of their inclusion in the Conventions or have since become so; as such, while not compulsory in nature, they are nevertheless required of all States or international organizations, whether or not they are parties to the Conventions;

165 Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session (A/CN.4/472/Add.1), para. 147; and General Assembly resolution 50/45 of 11 December 1995, para. 4.
166 If the Commission deems it necessary, this draft introduction could be referred to the Working Group on Reservations to Treaties, established by the Commission at its sixth-third session, in 2011; if not, it will be included in the report of the Commission on the work of its sixty-third session and considered by the plenary when the report is adopted.

168 This range is too great, and the distribution of guidelines among the various categories is too imprecise, to make it possible to follow a frequent suggestion—made, inter alia, during discussions in the Sixth Committee of the General Assembly—that a distinction should be made between guidelines reflecting lex lata and those based on lege ferenda.
169 This is the case, for example, of the fundamental rule that a State or international organization may not formulate a reservation that is contrary to the initial decisions on the form and purpose of the Guide, did not understand the general concept in the same way as the majority of the members and the Special Rapporteur.
170 At the end of his statement, the Special Rapporteur summarized as follows the conclusions he had drawn from the Commission’s discussion of the topic under consideration:

…”

171 The rule set out in guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty), which reproduces,
“– Other rules contained in the Vienna Conventions are binding on the parties thereto, but their customary nature is open to question;172 reproducing them in the Guide to Practice should help establish them as customary rules;

“– In some cases, guidelines included in the Guide supplement Convention provisions that are silent on modalities for their implementation but these rules are, in themselves, indisputably customary in nature173 or are required for obvious logical reasons;174

“– In other cases, the guidelines address issues on which the Conventions are silent but set out rules that are clearly customary in nature;175

“– At times, the rules contained in the guidelines are clearly set out de lege ferenda176 and, in some cases, are based on practices that have developed in the margins of the Vienna Conventions;177

“– Other rules are simply recommendations and are meant only to encourage.”178

“4. This last category of the guidelines highlights one of the key characteristics of the Guide to Practice. Such provisions would not have been included in a traditional set of draft articles intended to be transformed, if appropriate, into a treaty: treaties are not drafted in the conditional tense.179 But the problem here is somewhat different: as the title and the word “guidelines” indicate, it is not a binding instrument but a vade mecum, a “toolbox” in which the negotiators of treaties and those responsible for implementing them should find answers to the practical questions raised by reservations, reactions to reservations and interpretative declarations on the understanding that under positive law, these answers may be more or less correct, depending on the question, and that the commentaries indicate doubts that may exist as to the correctness or appropriateness of a solution.

“5. In light of these characteristics, it goes without saying that the rules set out in the Guide to Practice in no way prevent States and international organizations from setting aside, by mutual agreement, those that they consider inappropriate to the purposes of a given treaty. Like the Vienna rules themselves, those set out in the Guide are, at best, residual and voluntary. In any event, since none of them has a binding or jus cogens nature, a derogation to which all interested States (or international organizations) consent is always an option.

“6. In a consensus decision reached in 1995 and never subsequently challenged, the Commission considered that there was no reason to modify or depart from the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions180 in drafting the Guide to Practice, which incorporates all of them. But this also had implications for the very concept of the Guide and, in particular, for the commentaries to the guidelines.

“7. Insofar as the intent is to preserve and apply the Vienna rules, it was necessary to clarify them. For this reason, the commentaries reproduce extensively the travaux préparatoires to the three Conventions, which help clarify their meaning and explain the gaps contained therein.

“8. Generally speaking, the commentaries are long and detailed. In addition to an analysis of the travaux préparatoires to the Vienna Conventions, they include a description of the relevant jurisprudence, practice and doctrine181 and explanations of the wording that was ultimately adopted; these commentaries provide numerous examples. Their length, which has often been criticized, appears necessary in light of the highly technical and complex nature of the issues raised. The Commission hopes that practitioners will indeed find answers to any questions that arise.182

“9. However, reading the commentaries will be useful only where the answer to a question is not provided in the text of the guidelines (or where, in a specific case, the guideline is difficult to interpret). For this reason, the guidelines appear, without commentary, at the beginning of the Guide to Practice and the user should refer first to their titles, which are designed to give as clear as possible an idea of their content.183

172 This is largely true of guidelines 2.1.3 [Formulation of a reservation (Representation for the purpose of formulating a reservation at the international level)]; 2.1.5 (Communication of reservations), which reproduces, mutatis mutandis, the wording of articles 7 and 23 of the 1986 Vienna Convention; or 2.6.13 [2.6.12] (Time period for formulating an objection).

173 The definition of reservations “specified” by guideline 3.1.2 may be said to have acquired customary status. See also guideline 3.1.13 [3.1.5.7] (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty).

174 See, for example, guideline 2.8.2 [2.8.7] (Unanimous acceptance of reservations), which draws the obvious conclusion from article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions.

175 See, for example, guideline 4.4.2 (Absence of effect on rights and obligations under customary international law).

176 See, for example, guidelines 1.2.2 [1.2.1] (Interpretative declarations formulated jointly) or 3.4.2 (Permissibility of an objection to a reservation).

177 See, for example, guidelines 4.2.2 (Effect of the establishment of a reservation on the entry into force of the treaty) or 4.3.6 [4.3.7] (Effects of an objection on provisions other than those to which the reservation relates—objections with intermediate effect).

178 These are always drafted in the conditional tense; see, for example, guidelines 2.1.9 [2.1.2] (Statement of reasons) [Statement of reasons for reservations] or 2.5.3 (Periodic review of the usefulness of reservations).

179 There may be exceptions to this; see article 7 of the Convention on wetlands of international importance especially as waterfowl habitat, concluded in Ramsar (Islamic Republic of Iran), and article 16 of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; they are rarely justified.


181 As considerable time had passed between the inclusion of the topic in the Commission’s agenda and the final adoption of the Guide to Practice, the commentaries were reviewed and, to the extent possible, updated as at 31 December 2010.

182 It is also for this reason that the Commission did not hesitate to allow a certain amount of repetition to remain in the commentaries in order to facilitate consultation and use of the Guide to Practice.

183 The Working Group on Reservations to Treaties, which met during the first part of the sixty-third session of the Commission in 2011, paid particular attention to this matter.
10. The Guide to Practice is divided into five parts (numbered 1 to 5), which follow a logical order:

“– Part 1 is devoted to the definition of reservations and interpretative declarations and to the distinction between these two types of unilateral statement; it also includes an overview of various unilateral statements, made in connection with a treaty, that are neither reservations nor interpretative declarations and possible alternatives to both; as expressly stated in guideline 1.6 [1.8], “The[se] definitions … are without prejudice to the validity and [legal] effects” of the statements covered by Part 1;

“– Part 2 sets out the form and procedure to be used in formulating reservations and interpretative declarations and reactions thereto (objections to and acceptances of reservations and approval or recharacterization of, or opposition to, interpretative declarations);

“– Part 3 concerns the permissibility of reservations and interpretative declarations and reactions thereto and sets out the criteria for the assessment of permissibility; these are illustrated by examples, with commentary, of the types of reservations that most often give rise to differences of opinion among States regarding their permissibility. Some guidelines also specify the modalities for assessing the permissibility of reservations and the consequences of their impermissibility;

“– Part 4 is devoted to the legal effects produced by reservations and interpretative declarations, depending on whether they are valid (in which case a reservation is “established” if it has been accepted) or not; this part also analyses the effects of objections to and acceptances of reservations;

“– Part 5 supplements the only provision of the 1978 Vienna Convention on Succession of States in respect of Treaties that deals with reservations—article 20 on the fate of reservations in the case of succession of States by a newly independent State—and extrapolates and adapts solutions for cases of uniting or separation of States; this last part also covers the issues raised by objections to or acceptances of reservations and by interpretative declarations in relation to succession of States;

“– Lastly, two annexes reproduce the text of the recommendations adopted by the Commission on the subject of, on the one hand, the reservations dialogue and, on the other, technical assistance and assistance with the settlement of disputes concerning reservations.”

11. Within each part, the guidelines are divided into sections (introduced by a two-digit number where the first represents the part and the second the section within that part). In principle, the guidelines carry a three-digit number within each section.184

184 For example, section 3.4 deals with the “Permissibility of reactions to reservations”; the number 3 indicates that it falls under part 3 and the number 4 refers to section 4 of that part. Where a section is introduced by a guideline of a very general nature that covers its entire content, that guideline has the same title and the same number as the section itself (this is true, for example, of guideline 3.5 (Permissibility of an interpretative declaration).

185 In the rare case of the guidelines designed to illustrate, through examples, the manner of determining a reservation’s compatibility with the object and purpose of the treaty (the subject of guideline 3.1.6 [3.1.5]), these illustrative guidelines have a four-digit number. Thus, in the case of guideline 3.1.6.1 [3.1.5.2] (Vague and general reservations), the number 3 refers to Part 3; the first number 1 refers to section 1 of this part (Permissible reservations); the number 6 [5] refers to the more general guideline 3.1.6 [3.1.5] (Determination of the object and purpose of the treaty) and the second number 1 indicates that this is the first example illustrating that general guideline.
RESERVATIONS TO TREATIES

[Agenda item 2]

DOCUMENT A/CN.4/639 and Add.1

Comments and observations received from Governments

[Original: English/French/Spanish]
[15 February and 29 March 2011]

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Introduction

1. At its sixty-second session, in 2010, the International Law Commission completed the provisional adoption of the set of guidelines constituting the Guide to Practice on Reservations to Treaties. The Commission indicated, in its report to the General Assembly, that it intended to adopt the final version of the Guide to Practice during its sixty-third session, in 2011, and that, in so doing, it would take into consideration the observations made, since the beginning of the examination of the topic, by States, international organizations and the organs with which the Commission operates, together with any further observations received by the secretariat of the Commission before 31 January 2011. Also at its sixty-second session, the Commission indicated in its report that it would particularly welcome comments from States and international organizations on the guidelines adopted that year, and drew their attention in particular to the guidelines in sections 4.2 (Effects of an established reservation) and 4.5 (Consequences of an invalid reservation) of the Guide to Practice.2

2. In paragraph 3 of its resolution 65/26 of 6 December 2010, the General Assembly drew the attention of Governments to the importance for the Commission of having their views on the various aspects of, inter alia, the topic “Reservations to treaties”, in particular on all the specific issues identified, with regard to that topic, in chapter III of the Commission’s report on its sixty-second session. Furthermore, in paragraph 4 of the same resolution, the Assembly invited Governments to submit to the secretariat of the Commission, by 31 January 2011, any further observations on the entire set of guidelines constituting the Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission at its sixty-second session, with a view to finalizing the Guide at the sixty-third session.

3. The present report reproduces comments and observations that were received by the secretariat of the Commission from the Governments of the following States: Australia (31 January 2011); Austria (9 February 2011); Bangladesh (17 January 2011); El Salvador (6 January 2011); Finland (31 January 2011); France (4 March 2011); Germany (31 January 2011); Malaysia (17 March 2011); New Zealand (23 March 2011); Norway (1 February 2011); Portugal (6 January 2011); Republic of Korea (15 February 2011); Switzerland (1 February 2011); United Kingdom (23 February 2011); and the United States (14 February 2011).

4. The comments and observations reproduced below are organized thematically, starting with general comments and observations, and continuing with comments and observations on specific sections of the Guide to Practice and on specific guidelines.3

Comments and observations received from Governments

A. General comments and observations

AUSTRALIA

1. Australia welcomes the Commission’s guidelines constituting the Guide to Practice on Reservations to Treaties, which were provisionally adopted at its sixty-second session, in 2010. Australia would like to express its gratitude to the Commission for the work undertaken in producing the guidelines as reflected in the report of the Commission. Australia is of the view that the guidelines will have an important and practical role for States in establishing and maintaining treaty relationships by clarifying one of the most difficult issues of treaty law, namely the effects of a reservation and an acceptance or objection thereof. Australia has some concerns with the guidelines in their current form and hope that its comments below will assist in their finalization by the Commission.

2. Australia congratulates the Commission on its achievements to date. It hopes these comments will assist the Commission as it seeks to finalize the guidelines with a view to their adoption at its sixty-third session. The

AUSTRIA

1. Austria’s previous statements during the debates in the Sixth Committee of the General Assembly concerning the work of the Commission on the topic “Reservations to treaties” continue to reflect Austria’s position in detail. The present comments focus on those areas Austria considers especially important, looking at the guidelines as a whole from today’s perspective. In addition, Austria offers observations regarding a number of guidelines on which the Commission specifically requested comments from States.

2. What practitioners in legal offices of foreign ministries and international organizations really need is a concise guide on reservations. As regards the application of the guidelines in practice, Austria wonders whether it might be difficult to work with them, owing to their very comprehensive character and the existence of so many cross-references. The more complex the guidelines, the
less likely their acceptance and application in practice. Austria therefore suggests that further thought be given on how to enhance their user-friendliness and strongly encourages the Commission to streamline the present guidelines. Very generally, Austria suggests defining and distinguishing more clearly the concepts of established, permissible and valid reservations, including their legal effects and the effects on them of reactions thereto. In addition, it would be useful to make very clear which guidelines are interpretative guidelines to clarify provisions of the 1969 Vienna Convention, and which guidelines constitute new recommendations, which go beyond the obligations under the Vienna Convention.

**Bangladesh**

1. The question of reservations is one of the thorny issues of the law of treaties. Although the conditions and consequences of reservations have been fairly well laid down in the 1969 Vienna Convention and the 1986 Vienna Convention, many things have remained ambiguous, as subsequent developments have demonstrated. This especially relates to reactions and objections of the other parties to impermissible and invalid reservations. The Commission has rightly taken up the issue to shed light on these and other problems primarily based on the State’s intention and practices.

2. The guidelines presented in the Commission’s report on its sixty-second session, in 2010, are hugely useful to better understand the provisions of the conventions on reservations.

**Finland**

1. Finland wishes to express its gratitude to the Commission and to the Special Rapporteur, Alain Pellet, for their dedicated work on the subject of reservations to treaties, and thanks the Commission for the opportunity to comment on the guidelines of the Guide to Practice. The subject of impermissible reservations has been of particular interest to Finland, and the following contribution focuses on this important issue.

2. Once more, Finland wants to express its gratitude to the Commission and the Special Rapporteur for their expert work in producing these guidelines. It looks forward to the adoption of the final guidelines later this year.

**France**

1. At the outset, France would like to commend once again the high-quality, in-depth work of the Commission and its Special Rapporteur on this topic. The Guide to Practice on Reservations to Treaties will be an essential practical tool for States and international organizations.

2. France has followed with great interest the Commission’s work on this topic and has made oral comments at meetings of the Sixth Committee of the General Assembly throughout this process. The Secretary-General will find below, in response to the aforementioned request, France’s comments and observations on the set of guidelines constituting the Guide to Practice, provisionally adopted on first reading by the Commission in 2010.

3. After 15 years of work on the topic, France would like to recall its general assessment of the Guide to Practice, as well as its comments at meetings of the Sixth Committee regarding specific guidelines.

4. France, which remains committed to the reservations regime enshrined in the 1969 Vienna Convention, welcomes the Commission’s decision to take that regime as a model and address its shortcomings without calling it into question; indeed, the Vienna regime seems to lend itself to all types of treaties, irrespective of their object or purpose, including human rights treaties. The Guide to Practice will thus provide a valuable addition to the provisions of the Vienna Convention relating to reservations to treaties (arts. 19 to 23).

5. While the purpose of the Guide to Practice is to help States, it is not meant to culminate in an international treaty. France reiterates its strong preference for a document to which States can look for guidance, if they so wish, and to which they can refer if they deem it necessary.

6. As the French delegation has already mentioned in the Sixth Committee, the French term “directive” does not seem the most appropriate one to describe the provisions of a non-binding guide to practice. The term “lignes directives” would be more satisfactory.

7. In addition to these general observations, France would like to recall its more specific comments on a number of guidelines, which were updated in 2011. It nevertheless reserves the right to make further comments on certain guidelines between now and the conclusion of the Commission’s second reading of the Guide to Practice.

**Germany**

Germany expresses great appreciation for the Commission’s tremendous achievements in the complex matter of reservations to treaties. The Commission’s draft guidelines and reports on the subject will be a comprehensive manual to international jurisprudence, State practice and literature for years to come. The in-depth analysis contained in the reports and the Guide to Practice has already contributed to clarifying many legal and academic debates in this area.

**Malaysia**

1. Malaysia recognizes that the 1969 Vienna Convention, the 1978 Vienna Convention and the 1986 Vienna Convention, which set out the core principles concerning reservations to treaties, are silent on the effect of reservations on the entry into force of treaties, problems pertaining to the particular object of some treaties, reservations to codification treaties and problems resulting from particular treaty techniques. Therefore, Malaysia appreciates the work being undertaken by the Commission to clarify and develop further guidance on these matters.

2. In this regard, Malaysia supports the Commission’s work on the Guide to Practice. The crystallizing of the guidelines already shows that the guidelines promise to be useful for assisting States in their formulation and interpretation of reservations to treaties. Malaysia notes
that during its sixty-second session, in 2010, the Commission provisionally adopted the entire set of guidelines of the Guide. Malaysia further recalls the invitations previously made to States to make further observations on the entire set of the provisionally adopted guidelines on this topic in 2010. Malaysia thus appreciates the opportunity given by the Commission for States and international organizations to make further observations and believes that a universally acceptable set of guidelines can only be developed by the Commission if States play their part by providing comments and practical examples of the effects of the guidelines on State practice.

3. Malaysia wishes to reiterate its views, as expressed at the sixty-fourth and sixty-fifth sessions of the General Assembly, in relation to international organizations. In this respect, since the power to make treaties by international organizations largely depends on the terms of the constituent instrument of the international organization and the mandate granted to the international organization, international organizations do not necessarily have authority or responsibility similar to that of States. Thus, Malaysia is of the view that a separate regime for international organizations should be developed to address these entities and should not be made part of the guidelines at this juncture.

4. Malaysia also wishes to draw the attention of the Commission to the fact that, previously, States have only had the benefit of studying the guidelines within the context of what had been provided by the Commission. It is Malaysia’s view that the entire guidelines on the matter should be read in their entirety to ensure that all concerns have been addressed as a whole since they are interrelated. This is especially pertinent, as the work on the guidelines has continued for a period of 12 years and the entire set of provisionally adopted guidelines has only been recently made available for States to study since the sixty-second session of the Commission. However, in view of the limited period of time to really examine the guidelines in their entirety, Malaysia would like to reserve the right to make further statements on all the guidelines.

5. As such, Malaysia would like to take this opportunity to urge all States to share their invaluable inputs in relation to the matter in order to improve the current international regime on reservations to treaties as well as to assist the Commission in completing the guidelines.

NEW ZEALAND

1. New Zealand appreciates the large amount of work that lies behind the Guide to Practice and wishes to express its thanks in particular to the Special Rapporteur, Alain Pellet.

2. The Guide to Practice will be an extremely valuable resource for States in this complex aspect of treaty law. That said, New Zealand understands that it remains a guide to the practical application of the 1969 and 1986 Vienna Conventions and does not purport to modify them.

3. New Zealand appreciates the opportunity to comment on the Commission’s Guide to Practice, and thanks the Commission for its work.

NORWAY

1. Norway considers the quality of the work carried out under the topic “Reservations to treaties” by the Special Rapporteur, Alain Pellet, to be remarkable. Its result will mark the conclusion of a particularly important piece of work of the Commission. Norway is convinced that the guidelines adopted by the Commission and the reports prepared by the Special Rapporteur will prove useful to States and international organizations.

2. Norway finds that the work of the Commission and the Special Rapporteur on this topic, as well as the resulting set of guidelines, are sufficiently clarifying and build on a careful balance. They may therefore help States in their future practice concerning reservations. Norway is of the opinion that the current text provides, with the possibility of minor refinements, a solid basis for consideration and final adoption of the Guide to Practice during the sixty-third session of the Commission in 2011.

PORTUGAL

1. The Commission should be praised for having provisionally adopted the entire set of guidelines of the Guide to Practice on Reservations to Treaties. Portugal would also like to pay tribute to Mr. Pellet for his contribution to the topic and for the quality of the work undertaken. This masterwork will be of the utmost utility for both States and international organizations in dealing with the complex issue of reservations.

2. Portugal greatly supports the Guide to Practice as a whole. In responding to the request by the Commission for States to provide observations on the guidelines, Portugal will offer specific comments on some subjects which, in its view, may deserve a final consideration by the Commission before adopting the Guide to Practice.

REPUBLIC OF KOREA

1. The Republic of Korea has made reservations to about 27 multilateral treaties, 24 of which are still in effect.

2. The reservations can be divided into several categories: special circumstances with regard to the Democratic People’s Republic of Korea; reciprocity with foreign Governments; harmony with domestic legislation; exclusion of privileges or immunities for nationals working for international organizations or foreign Governments inside the country; and alleviation of responsibilities that severely hamper national interests.

SWITZERLAND

1. At the outset, Switzerland would like to express its gratitude to the Commission, as well as its admiration for the enormous amount of work that is being completed. It is convinced that the Guide to Practice will be highly useful for the development of treaty law.

2. Switzerland stresses that its comments should under no circumstances be understood as criticisms of the work of the Commission, but as constructive contributions to the Guide to Practice on the matter, in the hope that it can be completed in the very near future.
**United Kingdom**

1. The United Kingdom thanks and congratulates Professor Pellet and the Drafting Committee for the work that has gone into these guidelines and commentaries. The 16 reports have captured a wealth of material and practice, and sought to chart a practical course through a series of complex issues. The United Kingdom has made various comments over the years at the debates of the Commission. It would ask that the Commission bear these in mind. This note reinforces some of the main observations of the United Kingdom, as well as making new comments on the basis of the entire work taken as a whole.

2. The title “Guide to Practice” is ambiguous and should be clarified; it is a guide to practice to be followed, that is, practices considered desirable, both old and new. This is confirmed by the General Assembly and the Special Rapporteur when they state that the guidelines are intended “for the practice of States and international organizations in respect of reservations”.

3. There should be an introductory section to the commentaries setting out the approach that has been taken and the intended purpose and/or legal status of the guidelines. In particular, there should be a clear statement confirming that the guidelines constitute guidance for States, based on the study of the practice that the Commission has undertaken, but that in themselves they do not constitute normative statements. Such an introductory section could also helpfully include a statement on the relationship of the Guide to the 1969 and 1986 Vienna Conventions. The United Kingdom understands the Guide to Practice as being intended to provide guidance on the operation in practice of the framework of the Vienna Conventions, i.e. to give guidance on the application and interpretation of that framework and, where necessary, to offer guidance to supplement it, but not to propose amendments to it.

4. Furthermore, as is often the case with instruments of the Commission that contain elements of both codification and progressive development, there are aspects of the Guide which constitute a description of existing practice and others in which proposals for new practice are made. The United Kingdom does not consider that this Guide to Practice constitutes the lex lata. To the extent that proposals for new practice are made, there should be an introductory section to include a clear statement that such proposals are intended as guidance for future practice only and are not intended to have any effect on any examples of existing practice that do not accord with such proposals. Moreover, the United Kingdom believes the Commission should include in the commentaries in relation to each of the guidelines a statement on the degree to which they reflect existing practice or constitute proposals for new practice.

5. A further general observation point concerns the expected users of the guidelines. The present guidelines are of considerable complexity and make some fine distinctions in their terminology (for example, “permissibility” and “validity”, “formulation” and “establishment”, “objections”, and “reactions” and “opposition”). While the United Kingdom fully appreciates the complexity of the subject matter, it thinks that to the degree to which the text is over-elaborate it risks losing a general reader and thus risks depriving the work of some of its undoubted practical utility. The United Kingdom therefore urges the Commission, where possible, to seek to simplify the text to ensure its maximum accessibility and utility (for example, see comments below on “conditional interpretative declarations”, and chapter 5 on succession).

6. In line with the practical orientation of the work, the United Kingdom supports the Commission’s approach of including model clauses (with appropriate guidance on their use) alongside some of the guidelines. Indeed, it urges the Commission to seek to provide model clauses more consistently throughout the Guide, as this will enhance the practical utility of the work and contribute to bringing clarity to the practice of States.

7. Finally, the United Kingdom notes that the real crux of the issue in these guidelines, and the topic of reservations to treaties more generally, is the status of invalid reservations dealt with in guideline 4.5.2. The United Kingdom has noted the views expressed by States in the 2010 Commission debate and returns to this topic (see the observations made below in respect of guideline 4.5.2) to expand on its views expressed in the Sixth Committee.

**United States**

1. The United States extends its highest compliments to the Special Rapporteur on the impressive work that has gone into the provisionally adopted guidelines on reservations to treaties. After a closer review of the Guide to Practice provisionally adopted by the Commission, the painstaking efforts undertaken by both Mr. Pellet and the Commission members are clearly evident. The United States very much appreciates the opportunity to provide its further observations on the guidelines and accompanying commentary. The following comments are intended to elaborate on its statement made in the Sixth Committee during the sixty-fifth session of the General Assembly, in particular regarding the issues on which it strongly encourages further deliberation by the Commission, as well as to provide a few technical suggestions to improve the Guide to Practice before final adoption by the Commission.

2. One of the substantive concerns of the United States relates to the treatment of interpretative declarations, and in particular conditional interpretative declarations. Regarding interpretative declarations generally, the United States does not support the creation of a rigid structure along the lines of what has been proposed, as it believes it is likely to undermine the flexibility with which such declarations are currently employed by States.

3. The United States would also like to raise several technical questions and comments about the guidelines. The United States supports the Commission’s efforts in many instances to clarify when its proposed guidelines are intended to reflect existing State practice or, alternatively, are intended to go beyond such State practice. In that vein, the United States continues to encourage the Commission to clarify its approach throughout the guidelines.
4. Although the guidelines have been in development for a substantial period of time, the United States strongly encourages the Commission to undertake appropriate additional consideration of the issues raised by the United States in its comments and by other States before finalizing its work. Lastly, while the United States’ comments highlight several of its main remaining concerns with the guidelines, the United States will continue to review the Commission’s work and offer any additional comments, if appropriate.

B. Comments and observations on specific sections of the Guide to Practice and on specific draft guidelines

Section 1 (Definitions)

FRANCE

1. The definition of reservations and their “permissibility” must not be confused. The definition of a unilateral statement as a reservation is obviously without prejudice to its “permissibility”. It is only after a unilateral statement has been deemed to constitute a reservation that it is possible to assess its “permissibility”. Some unilateral statements are clearly reservations. They are not necessarily permitted under the treaty to which they relate, but that is a separate issue.

2. The Special Rapporteur has pursued the task of defining concepts and France welcomes that approach. Many of the issues raised to date originated in vague definitions which require clarification. The distinction between a “reservation” and an “interpretative declaration” is important, but a useful distinction has also been made between reservations and other types of acts which were previously scarcely or poorly defined. Insofar as the current study focuses on definitions, it seems important that legal terms should be used with the utmost rigour. In particular, the word “reservation” should be used only for statements matching the precise criteria of the definition in guideline 1.1. The ongoing work of definition is especially important and will determine the scope of application of the reservations regime. Nevertheless, it is necessary to stress that any new guidelines adopted must complement articles 19 to 23 of the 1969 Vienna Convention and should not fundamentally alter their spirit.

Guideline 1.1 (Definition of reservations)

FRANCE

1. A reservation is a unilateral act (a unilateral statement) that is formulated in writing when a State or international organization expresses its consent to be bound by a treaty, and that purports to exclude or to modify the legal effect of certain provisions of the treaty. While the first criterion (a unilateral act formulated in writing) does not raise any particular issues, the other two criteria (timing and purpose) are doubtless more problematic. With regard to timing, it seems necessary to prevent States and international organizations from formulating reservations at any time of their choosing, as that might result in considerable legal uncertainty in treaty relations. It is therefore essential to make an exhaustive, rigorous list of the times at which a reservation may be formulated.

The definitions contained in the Vienna Conventions do not provide such a list as various potential scenarios have been omitted. On the issue of purpose, it can be assumed that a reservation purports to limit, modify and sometimes even exclude the legal effect of certain treaty provisions. The definition used by the Special Rapporteur in his report appears to cover all these scenarios. It would, however, be preferable to use the term “restrict” rather than “modify” as modification of the legal effect entails a restriction.

2. It would doubtless be preferable to clearly identify the author of a reservation, specifically, whether it is a State or an international organization, in order to avoid any confusion. Acts of formal confirmation, for instance, concern international organizations, not States, while ratifications concern States, not international organizations. Two paragraphs relating to States and international organizations, respectively, are therefore necessary.

3. The Commission’s definition of reservations appears to be exhaustive and to provide a valuable addition to the relevant treaties.

Guideline 1.1.1 (Object of reservations)

FRANCE

1. France fully agrees with the wording proposed by the Special Rapporteur, namely, that a reservation may relate to one or more provisions of a treaty or, more generally, to the way in which a State or an international organization intends to implement the treaty. A reservation can be referred to as having a general scope if it applies to more than one or several provisions of the treaty to which it relates. This issue concerns the definition of reservations rather than their permissibility. Nevertheless, for a State to make such a reservation inevitably casts doubt on its commitment, good faith and willingness to implement the treaty effectively. In practice, the reservations that pose the greatest problems are not those which concern a single or a few provisions of a treaty, but more general reservations.

2. France is in favour of this guideline. Across-the-board reservations that, on the basis of their wording, cannot be linked to specific treaty provisions and yet do not divest the treaty of its very purpose are thus taken into consideration. The usefulness of these reservations has been demonstrated in practice and it was necessary to distinguish them from general reservations that completely vitiate the commitment made.

3. Guideline 1.1.5, on statements purporting to limit the obligations of their author, and guideline 1.1.6, on statements purporting to discharge an obligation by equivalent means, are satisfactory in terms of their substance. Nevertheless, it might be wondered whether it is really useful to present them as separate guidelines. They clarify the meaning of the word “modify” as used in the guidelines that define reservations (1.1) and specify their object (1.1.1), as do the guidelines on statements purporting to undertake unilateral commitments (1.4.1) and on unilateral statements purporting to add further elements to a treaty (1.4.2). All these provisions confirm that the
word “modify” cannot be understood, in the context of the definition of reservations, as purporting to extend either the reserving State’s treaty obligations or its rights under the treaty. Unless a modification introduced by a reservation establishes an equivalent means of discharging an obligation, it can only serve to restrict the commitment. It would therefore seem that guidelines 1.1.5 and 1.1.6 could become new paragraphs of guideline 1.1.1 on the object of reservations.

Guideline 1.1.3 (Reservations having territorial scope)

France

The Special Rapporteur’s conclusions on what he refers to as “reservations having territorial scope”, a complex and controversial subject if ever there was one, are acceptable. Indeed, if the purpose of a unilateral statement is in fact to exclude or modify the legal effect of certain provisions of a treaty in relation to a particular territory, that statement must be understood as constituting a reservation. Thus, a State that formulates a statement on the application *ratione loci* of a treaty could be considered as having made a reservation to the treaty in question. The 1969 Vienna Convention does not state that reservations must relate solely to the implementation *ratione materiae* of a treaty. Reservations certainly may relate to the implementation *ratione loci* of a treaty. According to the Special Rapporteur, a State consents to application of a treaty as a whole *ratione materiae*, except with regard to one or more territories that are nonetheless under its jurisdiction. Absent such a reservation, a treaty to which a State becomes a party is applicable to the entire territory of that State pursuant to article 29 of the 1969 Vienna Convention, which establishes the principle that a treaty is binding upon each party in respect of its entire territory, unless a different intention appears from the treaty or is otherwise established. On the one hand, this article does not prohibit a State from limiting the territorial scope of its commitment. On the other, the article is without prejudice to the issue of the legal definition of the statement made by the State. “Reservations having territorial scope” do not have to be authorized expressly by the treaty. Article 29 of the Vienna Convention must not be interpreted too narrowly.

New Zealand

1. New Zealand wishes to offer a specific comment on guideline 1.1.3 [1.1.8]. New Zealand does not consider that this guideline accurately reflects established State practice on the extension of treaty obligations to territories.

2. New Zealand has had international responsibilities in respect of a number of territories throughout the twentieth century. The relevant territories are the Cook Islands, Niue, Tokelau and the former Trust Territory of Western Samoa. Since 1 January 1962, Samoa has been a fully independent sovereign State, assuming treaty-making responsibility. The Cook Islands and Niue, following acts of self-determination supervised by the United Nations, are self-governing in free association with New Zealand and have developed a separate treaty-making capacity in their own right. Tokelau remains on the United Nations list of Non-Self-Governing Territories (following two referendums, supervised by the United Nations, which failed to reach the requisite majority in order for Tokelau to become self-governing in free association with New Zealand).

3. New Zealand has on many occasions over the years made declarations regarding the application of treaties to these territories, even when reservations have been expressly prohibited or restricted. New Zealand accepts that a declaration as to the territorial application of a treaty which purports to apply only part of a treaty to a territory may be regarded as a reservation for the purposes of article 2 (d) of the 1969 Vienna Convention. However, New Zealand does not support the proposition that a declaration excluding an entire treaty from application to a territory should be characterized as a reservation. In New Zealand’s view, such a declaration does not concern the legal effect of the treaty in its application to New Zealand. It merely determines how “New Zealand territory” is to be interpreted for the purposes of that treaty. The legal obligations imposed by the treaty are unaltered to the extent that they have been assumed by New Zealand. New Zealand considers that a declaration excluding an entire treaty from application to a territory merely establishes a “different intention” as to the territorial application of the treaty, in accordance with article 29 of the Convention, and excludes entirely the operation of the treaty in the territory in question.

4. If territorial exclusions were to be treated as reservations this would not only be contrary to long-established State practice and United Nations treaty practice, but it would have practical effects that would be at odds with policy objectives supported by the United Nations. For example, in the case of Tokelau, it would mean either (a) that New Zealand would be prevented from becoming party to a treaty unless and until Tokelau was ready to be bound by it, or (b) that New Zealand’s decision would be imposed on Tokelau, which would be contrary to the constitutional and administrative arrangements between Tokelau and New Zealand, on which New Zealand continues to report to the United Nations under Article 73 of the Charter of the United Nations.

5. It is New Zealand’s understanding that the practice of other States which have been responsible for the international affairs of territories (such as Denmark, the Netherlands and the United Kingdom) closely corresponds to that of New Zealand.

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1 By a note of 10 December 1988 to the Secretary-General of the United Nations, New Zealand advised that from that date forward no treaty signed, ratified, accepted, approved or acceded to by New Zealand would extend to the Cook Islands or Niue unless the treaty was signed, ratified, accepted, approved or acceded to expressly on behalf of the Cook Islands or Niue.

United Kingdom

1. The United Kingdom commented extensively on this guideline in 1999 and maintains its strong concerns expressed there. In the view of the United Kingdom, a declaration regarding the extent of the territorial application of a treaty does not constitute a reservation to that treaty. As article 2 (d) of the 1969 Vienna Convention makes
clear, a declaration or statement is capable of constituting a reservation if "it purports to exclude or modify the legal effect of certain provisions* of the treaty in their application" to the State concerned. A declaration or statement which excludes entirely a treaty's application to a given territory would not therefore constitute a reservation, since it does not concern the legal effect of provisions of the treaty. Rather, it is directed towards excluding the "residual rule" on territorial application incorporated in article 29 of the Convention (which falls outside section 2 of part II on reservations), namely:

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

The effect of this provision is clear that, unless a different intention is established, a treaty will be binding upon a party in respect of its non-metropolitan as well as its metropolitan territory.

2. The United Kingdom considers that the procedure whereby, on ratification, a State makes a declaration as to the territorial effect or extent of the act of ratification, which has long been known and accepted in State practice, expressly establishes a "different intention", in the words of article 29 of the Vienna Convention. The essential features of this practice are as follows:

(a) Where a multilateral treaty contains no express provision regarding its territorial application, the practice of the United Kingdom and that of a number of other States with non-metropolitan internally autonomous territories (such as Denmark, the Netherlands and New Zealand) is to name expressly in their instruments of ratification or accompanying declarations, the territories to which the treaty is to apply (or, occasionally, to specify those territories to which the treaty is not to apply);

(b) When a non-metropolitan territory not named at the time of ratification wishes eventually to participate in the treaty, separate notification is thereupon sent to the depositary;

(c) The same practice is followed in cases where the treaty concerned either prohibits reservations or restricts them to specific provisions.

3. Some examples of this practice were cited in the observations of the United Kingdom to the Commission in 1999. The United Kingdom is not aware of any cases in which a State has made a counter-statement or objected to a declaration or form of words in an instrument of ratification put forward by another State concerning the territorial application of a treaty (except where it challenges the inclusion of a particular named territory, by reason of a competing claim to sovereignty over it).

4. It has been the long-standing practice of the United Kingdom (since at least 1967), in relation to multilateral treaties which are silent on territorial application, to specify in the instrument of ratification (or accession) the territories in respect of which the treaty is being ratified (or acceded to). Territories may be included (or excluded) at a later stage by means of a separate notification made by the United Kingdom to the depositary power. It is notable that such "declarations" have also been treated separately from "reservations" by the United Nations in performing depositary functions.

Guidelines 1.1.5  Statements purporting to limit the obligations of their author, 1.1.6 (Statements purporting to discharge an obligation by equivalent means) and 1.1.8 (Reservations made under exclusionary clauses)

MALAYSIA

With respect to guidelines 1.1.5, 1.1.6 and 1.1.8, Malaysia is of the view that the wording of the guidelines seems to provide the instances where a unilateral statement amounts to a reservation. It is Malaysia’s opinion that the definition in these guidelines should not in any way prejudge the nature of the unilateral statement in question in the very beginning itself, as reference must be made to the effects that these unilateral statements might intend to produce in order to determine its status. Furthermore, in order to determine the character/status of such a unilateral statement, Malaysia is of the opinion that States could possibly fall back on guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretative declarations), 1.3.2 (Phrasing and name) and 1.3.3 (Formulation of a unilateral statement when a reservation is prohibited). Thus, these definitions may be inappropriate as they tend to restrict States at the very initial stage by imposing that such unilateral statements are tantamount to reservations even though that may not have been the intention of the States.

Guideline 1.1.5  (Statements purporting to limit the obligations of their author)

FRANCE

1. This guideline is a positive development. A unilateral statement purporting to limit the obligations imposed on a State by a treaty or, similarly, to limit the rights that other States may acquire under the same treaty does, in fact, constitute a reservation.

2. Where a unilateral statement effectively extends the obligations of the declaring State, it would be somewhat difficult to speak of a "reservation". Rather, it is a unilateral commitment by the State to go beyond that which is required of it under the treaty. The unilateral statement in question does not purport to exclude, limit or even modify—not restrictively in any case—certain provisions of the treaty.

3. The problem is somewhat different, however, if the State purports, on the basis of a unilateral statement, to expand its rights, that is, the rights conferred on it by the treaty. This unlikely scenario is obviously not covered by the provisions of the 1969 Vienna Convention. Treaty law must be distinguished from customary law; it is impossible to imagine that a State might modify, in its favour, customary international law as codified in the treaty to which it becomes a party by formulating a reservation to that end. As for treaty law, the scenario is not unrealistic and the Commission should consider it, as well as the ways in which other States parties to the treaty might object to such a situation. Nevertheless, it is difficult to
speak of a “reservation” in this case, especially as such statements, if it was agreed to define them as “reservations”, would have serious consequences for those States which, having remained silent, would be deemed to have accepted them after a certain period of time, as is the case with reservations.

4. The guideline on statements purporting to limit the obligations of their author does not pose any particular difficulties in terms of substance. Article 2, paragraph 1 (d), of the 1969 Vienna Convention states that a reservation “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”, without providing further details on the modification effected by the reservation. The guideline rightly points out that this modification may be a limitation. Such information could certainly be included during the drafting of a Guide to Practice, which allows for further elaboration than a treaty.

5. See the comments on guideline 1.1.1, above.

**Guideline 1.1.6 (Statements purporting to discharge an obligation by equivalent means)**

**FRANCE**

1. In terms of substance, the wording of this guideline is acceptable. A State may be permitted to discharge a treaty obligation by equivalent means only if the other States parties are in a position to agree to those means. The mechanism of reservations and objections offers such an opportunity.

2. See the comments on guideline 1.1.1, above.

**Guideline 1.1.8 (Reservations made under exclusionary clauses)**

**UNITED KINGDOM**

Guideline 1.1.8, in defining all statements made pursuant to so-called exclusionary clauses as reservations, is in the view of the United Kingdom too wide and inconsistent with other guidelines. Where a treaty envisages that some of its provisions may not apply at the choice of a party, this may simply mean that in exercising its right to choose, the State is implementing the treaty in accordance with its terms rather than excluding or modifying their effect. Guideline 1.1.8 at its broadest also appears to be inconsistent with guidelines 1.4.6 and 1.4.7 (exercise of options or choice between two provisions). Furthermore, the commentary suggests that where a statement is made pursuant to an exclusionary clause after the State in question has become bound by the treaty, such a declaration is not to be considered a late reservation. In the view of the United Kingdom, therefore, the definition of reservations in the case of exclusionary clauses should be confined to those treaty provisions which “specify” the exclusion as being by way of reservation.

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1. Unless guideline 1.2.1 is more precisely worded, there would seem to be no criterion for drawing a definite distinction between an interpretative declaration and a conditional interpretative declaration. Nothing is said about the procedure by which authors of conditional interpretative declarations can make their consent to be bound subject to a specific interpretation of the treaty or some of its provisions. That will has to be explicitly expressed. The fact that an interpretative declaration made on signature, or at some previous time during negotiations, is confirmed when consent to be bound is expressed, is not in itself a criterion.
2. The Commission’s definition of conditional interpretative declarations is, in fact, akin to that of reservations. Conditional declarations are considered to be nothing more than reservations formulated in terms that clearly show the indissociable link between the commitment itself and the reservation. The term therefore seems poorly chosen. Moreover, while conditional declarations might constitute a subcategory of reservations, the wisdom of making them a separate category might be disputed. The submission of conditional declarations under the reservations regime is hardly questionable. Furthermore, if the regime of reservations is identical to that of conditional declarations, it would be simpler to liken such declarations to reservations, at least for this part of the draft.

UNITED KINGDOM

The United Kingdom has consistently questioned the utility of the inclusion of separate provisions in the guidelines dealing with conditional interpretative declarations. The United Kingdom notes that in response the Special Rapporteur suggested that it would be worth maintaining their inclusion pending completion of the work, at which point a fully informed view could be taken on the question. With the benefit now of the full set of guidelines and in the light, in particular, of the guidelines which enable the differentiation of interpretative declarations and reservations (guideline 1.3 et seq.) and guideline 2.9.3 on re-characterization, the United Kingdom sees no need for separate guidelines on conditional interpretative declarations. Removal of the separate guidelines in this respect would help to simplify the text in line with our general comments above.

Guideline 1.3 (Distinction between reservations and interpretative declarations)

FRANCE

1. The Commission adopted the legal effect which the statement was intended to produce as the criterion for distinguishing interpretative declarations from reservations. This criterion is acceptable provided it is based on the objective effects of the statement rather than the subjective intentions of the State making it, which are difficult to determine. Specifically, the use of such a criterion should be based on an objective comparison of the meaning of the statement with the meaning of the text to which the statement applies. France welcomes the Commission’s decision to exclude the criterion of timing from its definition of interpretative declarations. However, for the sake of legal certainty it would be desirable for such declarations to be made except under highly unusual circumstances, within a limited period from the date when the State concerned was first bound.

2. See the comments on guideline 2.4.3, below.

Guideline 1.3.2 (Phrasing and name)

FRANCE

France questions the appropriateness of making the phrasing or name given to a unilateral statement a criterion for establishing the intended legal effect of its author. Besides the fact that such phrasing cannot be considered a reliable indicator of the intended legal effect, this criterion introduces a nominalism that has, with good reason, been eschewed elsewhere.

Guideline 1.4.1 (Statements purporting to undertake unilateral commitments)

FRANCE

See the comments on guideline 1.1.1, above.

Guideline 1.4.2 (Unilateral statements purporting to add further elements to a treaty)

MALAYSIA

With regard to guideline 1.4.2, Malaysia understands that under the guideline, a unilateral statement made by a State which purports to add further elements to a treaty merely constitutes a proposal to modify the content of the treaty and therefore is outside the scope of the present Guide to Practice. Thus, Malaysia wishes to emphasize that as long as such statement does not modify the content of the treaty in such a way as to modify or exclude the effects of the treaty or the provisions of the treaty altogether—in which case the statement may be regarded as a reservation—such statement could be effectively excluded from the present Guide to Practice.

Guideline 1.4.3 (Statements of non-recognition)

FRANCE

France is in favour of excluding statements of non-recognition from the scope of application of the Guide to Practice. Specifically, while it is true that a unilateral statement whereby a State expressly excludes application of the treaty as between itself and the entity that it does not recognize, is similar to a reservation in many ways, it nevertheless does not purport to exclude or to modify the legal effect of certain provisions of the treaty as they apply to that State. It purports to deny the entity in question the ability to be bound by the treaty and, consequently, purports to rule out any treaty relationship with that entity. The reservations regime is, moreover, completely unsuited to statements of non-recognition and their assessment on the basis of criteria such as the object and the purpose of the treaty would be meaningless.

Guideline 1.4.4 (General statements of policy)

FRANCE

In the absence of sufficiently close links to the treaty, it is appropriate that general statements of policy should lie outside the scope of the Guide to Practice.

Guideline 1.4.5 (Statements concerning modalities of implementation of a treaty at the internal level)

FRANCE

This guideline, as currently drafted, raises a significant problem. While it has been noted that such a statement
lies outside the scope of the Guide to Practice so long as it “does not purport as such to affect [the] rights and obligations [of its author] towards the other contracting parties” and is purely informative, no such information is provided regarding statements which, without purporting to have such an effect, are nevertheless likely to affect the rights and obligations of the State that formulates them vis-à-vis the other contracting parties. These declarations generally give rise to questions regarding their compatibility with article 27 of the 1969 Vienna Convention, which states that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Practice has shown that it is very difficult to assess the true scope of such statements as they require a solid understanding of the statement and extensive knowledge of both the internal law of the State and the treaty provisions in question. A statement made by a State concerning its implementation of a treaty at the internal level can constitute a genuine reservation even if the desire to modify or exclude the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects as they apply to that State is not immediately clear. To exclude such statements from the Guide to Practice and to consider so categorically that they are not reservations could, moreover, provide an incentive for States to not take the necessary steps in internal law before committing themselves at the international level. It would doubtless be prudent to consider that a statement concerning implementation of the treaty at the internal level is strictly informative if it does not, as such, purport to affect the rights and obligations of the State formulating the statement vis-à-vis the contracting parties and, in addition, is not likely to have such an effect.

**United Kingdom**

Guideline 1.4.5 excludes from the scope of the Guide statements indicating how the maker intends to implement a treaty within its internal legal order. This is intended to cover only a statement given to provide information on implementation. However, the words designed to achieve this are somewhat opaque, namely, “without purporting as such to affect its rights and obligations towards the other Contracting Parties”. If the manner of implementation indicated in the statement showed something manifestly at odds with the treaty’s requirements, the statement might not “purport” to affect the State’s rights and obligations, but it would show an intent to implement a modified form of the treaty. The quoted words should therefore be deleted and at the end (after “outside the scope of the present Guide to Practice”) the following added: “unless such manner of implementation could only conform to the provisions of the treaty by excluding or modifying the legal effect of those provisions”.

**Guideline 1.5.1 ("Reservations" to bilateral treaties)**

**France**

This category of statement is not a reservation since it does not result in modification or exclusion of the legal effect of certain provisions of the treaty, but rather in a modification of these treaty provisions that constitutes a genuine amendment. The title of this guideline should therefore be changed in order to make it clear that the statements in question are those that purport to modify a bilateral treaty.

**Guideline 1.7.1 (Alternatives to reservations)**

**Malaysia**

On the proposed guideline 1.7.1, Malaysia notes that guideline 1.7.1 is restricted to provide for two procedures which are not mentioned elsewhere and are sometimes characterized as “reservations”, although they do not by any means meet the definition contained in guideline 1.1. Malaysia’s concern is that confusion may arise in differentiating these alternative procedures from reservations. Therefore, Malaysia is of the view that the mechanism for the formulation of such alternatives and the means to differentiate them from reservations will need to be clearly specified to avoid confusion.

**Guidelines 1.7.1 (Alternatives to reservations) and 1.7.2 (Alternatives to interpretative declarations)**

**United Kingdom**

The United Kingdom does not consider these guidelines to be useful as they go well beyond the current topic, and therefore suggests their deletion.

**Guideline 2.1.1 (Written form)**

**France**

This guideline reproduces the rule set out in article 23 of the 1969 Vienna Convention. It does not give rise to any special difficulties. The conditions that may be attached to the expression of consent to be bound must be formulated in writing, as this is the only way to ensure the stability and security of contractual relationships.

**Guideline 2.1.2 (Form of formal confirmation)**

**France**

Formal confirmation of a reservation, where needed, must also be made in writing.

**Guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations)**

**France**

The Commission is proposing a guideline that states, on the one hand, that procedure shall be determined by internal law and, on the other, that failure to follow it has no consequences at the international level. France supports this solution because it would be inappropriate to include a guideline, based on article 46 of the 1969 Vienna Convention, which would make it possible, in the event of a clear violation of a fundamental rule of internal law, to invoke conflict with domestic law as grounds for declaring a reservation invalid. Since the State still has the option of withdrawing its reservation, the only practical effect of such a provision would be to allow the State that made the reservation without respecting its own national procedure to retroactively require other States to implement, in its regard, the treaty provision that was the subject of the reservation. It is, to say the least, difficult to find a basis for such a situation in positive law.
Guideline 2.1.5 (Communication of reservations)  
**France**

This guideline is based on article 23 of the Vienna Convention and is a valuable addition thereto since it also refers to reservations made to the constituent instruments of international organizations. The wording proposed by the Special Rapporteur is, on the whole, acceptable. In the second paragraph, however, the precise meaning of “an organ that has the capacity to accept a reservation” should be clarified.

Guideline 2.1.7 (Functions of depositaries)  
**Malaysia**

With regard to guideline 2.1.7, Malaysia notes that this guideline purports to allow the depositaries to examine whether a reservation is in due and proper form. Furthermore, the guideline seems to widen the scope of functions of the depositaries by allowing them to examine whether a reservation is in due or proper form rather than confining them to examine whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form. Malaysia is concerned that this guideline would give the impression that a reservation formulated by a State needs to pass two stages, the depositary and then only the other contracting States, before it is established. This is also in view of Malaysia’s observation on guideline 2.1.8, which recognizes the role of the depositary in determining impermissible reservations. Malaysia is of the view that this guideline could also be viewed as superseding the 1969 Vienna Convention by purporting to give an active role to the depositary in interpreting an impermissible reservation. As such, this guideline does not represent the general practice according to which the States usually decide whether a reservation constitutes an impermissible reservation. In this regard, Malaysia is of the opinion that this guideline would allow the depositary to intervene on the question of compatibility of the reservation, which may cause the State to respond. This situation will prolong the problem and would not be helpful for the resolution of the problem. As such, Malaysia is of the view that the function of depositary should be confined to the ambit of article 19 of the 1969 Vienna Convention. Malaysia considers that, in the event that the contracting party finds a reservation made by a party to be incompatible with that treaty, the right to make objections to such reservation should be demonstrated by the contracting parties themselves and circulated through the depositary. Thus, it is recommended that the guideline 2.1.7 should follow precisely the wording of article 19, paragraphs 1 (d) and 2 of the 1969 Vienna Convention so as to confine the scope of functions of the depositaries to matters involving examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form.

Guideline 2.1.8 (Procedure in case of manifestly impermissible reservations)  
**France**

1. Guidelines 2.1.6 and 2.1.7 focus—in France’s view, correctly—on the purely “administrative” role of the depositary. Guideline 2.1.8 nevertheless purports to grant depositaries a power foreign to their recording function: that of assessing, to some extent, the permissibility of reservations. The Commission’s approach is not without legitimacy. However, at the current stage of international positive law, depositaries are not empowered to conduct even a summary assessment of permissibility. In the exercise of their administrative functions, depositaries must therefore limit themselves to recording and communicating a reservation even if they consider it to be manifestly impermissible.

2. Guideline 2.1.8, the text of which was adopted in 2002, was slightly modified in 2006. However, this new wording does not, in France’s view, reflect current law and practice concerning the functions of the depositary. The guideline purports to grant depositaries the capacity to assess, to some extent, the permissibility of reservations and, where appropriate, to draw to the attention of interested parties reservations that, in their view, pose legal problems. In the absence of an express provision allowing them to perform such functions, depositaries cannot, however, be authorized to conduct even a summary assessment of the permissibility of reservations. In the exercise of their administrative functions, depositaries should therefore limit themselves to recording and communicating a reservation even if, to repeat the language used by the Commission, they consider it to be “manifestly impermissible”.

**Malaysia**

See observations made in respect of guideline 2.1.7, above.

**United Kingdom**

1. There is insufficient clarity as to when a reservation is considered “manifestly impermissible”, particularly as this provision purports to extend to all three categories of impermissible reservations in article 19 of the 1969 Vienna Convention. Does this provide the treaty depositary discretion? It is not evident to the United Kingdom why the depositary, rather than the States parties, is in a position to determine whether a particular reservation is incompatible with the object and purpose of the treaty.

2. The view of the United Kingdom is that, in principle, the function of the depositary is to communicate to the contracting States any act, notification or communication relating to the treaty. However, where a purported reservation is made in the face of a treaty provision prohibiting all reservations, or reservations of that type, there can be no doubt whatsoever as to the invalidity of such a reservation. In that situation it is permissible for the depositary in the first instance to query it with the respecting State. Only if the reserving State is still of the view that the reservation is valid would the depositary communicate it to the contracting States for their views.

3. The guideline also does not consider the possible implications of this change. In the view of many States, the role of the treaty depositary is to transmit the text of reservations to the treaty parties and to remain neutral and impartial. Moreover, there is no reference in the
commentary to the actual practice of treaty depositaries in this context, or any consideration of the practical and/or resource implications for treaty depositaries.

Guideline 2.2.1  (Formal confirmation of reservations formulated when signing a treaty)

FRANCE

This guideline does not give rise to any special difficulties as it is consistent with French practice.

Section 2.3  (Late reservations)

AUSTRIA

1. According to guidelines 2.3.1 and 2.3.2, a “late reservation” (that is, a reservation formulated after the expression of consent to be bound by that treaty) shall in principle be possible on the condition that no other contracting party objects to it within a period of 12 months. Austria remains concerned about guidelines that would render the whole regime of treaty reservations applicable also to so-called “late reservations”. We must be aware of the fact that such late reservations do not fall under the definition of reservations, as it is reflected in article 2, paragraph 1 (d) and article 19 of the 1969 Vienna Convention. The Commission itself has elaborated a definition of reservations in guideline 1.1 with the clear intention not to deviate from the Vienna Convention. According to this definition, a “reservation” means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to them. As this definition contains a clear reference to the point in time when a reservation can be made, it is evident that a so-called “late reservation” is in contrast to this basic definition.

2. Therefore, even if it is called a reservation, a “late reservation” really constitutes a different kind of declaration that should be distinguished from true reservations in order not to blur the quoted definition of reservations. Of course, the States parties to a given treaty have the possibility to agree to the application of the regime of reservations also to “late reservations” made in regard to that treaty, subject, however, to the limits defined in that treaty and in the applicable law of treaties. But, in Austria’s view, declarations that do not meet the requirements of the definition should not be treated as reservations since ominous consequences would ensue that should not be encouraged. It must be pointed out that by accepting “late reservations” and by treating them in basically the same way as reservations, the basic principle of pacta sunt servanda as expressed in article 26 of the Vienna Convention would be undermined since a State could at any time unilaterally reduce the scope of its obligations under a treaty by means of a reservation. Apart from that, the application of the regime on “late reservations” as proposed in the guidelines would result in the creation of a system of treaty amendment that is contrary to the regime established by articles 39 to 41 of the Vienna Convention.

Guideline 2.3.1  (Late formulation of a reservation)

FRANCE

Guidelines 2.3.1 and 2.3.3 purport to establish two complementary rules. These two innovatory proposals contribute to the progressive development of law and do not therefore constitute a mere codification exercise. France welcomes the fact that neither guideline is designed to permit frequent or “normal” recourse to late reservations in the future because, on the one hand, just one objection by a State party to the treaty is enough to render the reservation inapplicable to all the States parties and, on the other, the State raising an objection to the reservation will not be obliged to state the reasons therefor, if it does not wish to do so, other than to note that the reservation was formulated late. Thus, the guidelines do not purport to establish a general derogation from the basic rule, commonly accepted by States, that reservations must be made, at the latest, when consent to be bound by a treaty is expressed; what is at stake is the security of legal undertakings voluntarily given by States, an issue to which France attaches great importance. Apart from the indisputable case where the formulation of reservations after the expression of consent to be bound is explicitly authorized by a treaty, the aim of the guidelines is therefore to cope with particular situations, which are not necessarily hypothetical but might be described as exceptional, where a State, acting in good faith, has no alternative other than to denounce the treaty in question for want of being able to formulate a late reservation.

UNITED KINGDOM

1. The United Kingdom reiterates its opposition in principle to reservations formulated late, because they depart from the definition of “reservations” under the 1969 Vienna Convention and would potentially cause disruption and uncertainty to treaty relations. The United Kingdom therefore believes that the guidelines must emphasize above all the need for proper discipline in the making of reservations. If the guidelines are to address the exceptional circumstances in which the late formulation of reservations is permissible, for example, where the treaty itself so permits, then such circumstances must be clearly set out. The United Kingdom would therefore prefer guideline 2.3.1 to be amended as follows:

“If a State or international organization formulates a reservation after it has expressed its consent to be bound, the reservation shall have no effect unless the treaty provides otherwise or all of the other contracting parties expressly accept the late formulation of the reservation.”

2. Accepting this proposal would entail consequential deletion of guideline 2.3.2.

Guideline 2.3.2  (Acceptance of late formulation of a reservation)

UNITED KINGDOM

See observations made in respect of guideline 2.3.1, above.
Guideline 2.3.3  (Objection to late formulation of a reservation)

France

See the comments on guideline 2.3.1, above.

Guideline 2.3.4  (Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations)

Malaysia

In connection with guideline 2.3.4 concerning subsequent exclusion or modification of the legal effect of a treaty by means other than reservations, it is unclear whose interpretation of a reservation this guideline intends to refer to in subparagraph (a). In the view of Malaysia, subparagraph (a) seems to suggest that the said interpretation may come from the other contracting States, or the reserving State. As such, Malaysia considers that subparagraph (a) needs clarity in terms of to whom it is addressed.

Guideline 2.3.5  (Widening of the scope of a reservation)

France

Widening of the scope of a reservation goes beyond the time limit set for the formulation of a reservation under article 19 of the 1969 and 1986 Vienna Conventions. France does not, however, consider that widening the scope of a reservation necessarily constitutes an abuse of rights that should not be authorized. It is therefore useful that the Guide to Practice mentions the possibility of widening and purports to clarify—in, moreover, a convincing manner—the legal uncertainties surrounding it. On the one hand, although fortunately unusual, attempts to enlarge the scope of a reservation exist in treaty practice. The commentary offers several examples that stem less from the abuse of rights than from a desire to take into consideration technical constraints or specific aspects of internal law. That does not mean, of course, that such enlargement is lawful. Furthermore and above all, the possibility of widening the scope of a reservation is still subject to very strict conditions: an attempt to widen the scope of a reservation will be unsuccessful with respect to all parties to the treaty if even one of them formulates an objection to the modification envisaged. Within this strict legal framework, the article appears to be part of the progressive development of law: it does not encourage this practice but does permit recourse to it, rarely and subject to conditions, in order to give a State acting in good faith an option besides denunciation of the treaty in question. France wonders whether it would be appropriate to move the definition of “widen”, contained in paragraph (7) of the commentary, to an earlier point in the guidelines.

Malaysia

On the proposed guideline 2.3.5, Malaysia notes that the application of this guideline would arise in a situation whereby the reservation made amounts to the formulation of an entirely new reservation. However, Malaysia is of the view that any modification which would widen the scope of a reservation but does not touch on the substance of the commitments of the State to a treaty should not be defeated merely upon a single objection. As such, Malaysia is of the view that there is a need to have a proper mechanism to assess the “widened reservation” as it should not be determined solely by an objection received. In furtherance, Malaysia recommends that the permissibility test should be applied in determining such reservation.

Section 2.4  (Procedure for interpretative declarations)

France

It would be preferable to simplify the procedure by making it clear that the “guidelines” in relation to reservations would apply, mutatis mutandis, to conditional interpretative declarations.

Guideline 2.4.0  (Form of interpretative declarations)

France

This guideline is acceptable. Like reservations, interpretative declarations must be formulated in writing, even when they are “conditional”.

Malaysia

See observations made in respect of guideline 2.4.9, below.

Guideline 2.4.3  (Time at which an interpretative declaration may be formulated)

France

It would be preferable to confine interpretative declarations to a limited period of time, which could be the same as that for formulating a reservation. As the term used is not always sufficient to distinguish between a reservation and an interpretative declaration, allowing States parties to a treaty to formulate interpretative declarations at any time, including after expressing their consent to be bound, might lead some of them to formulate, perhaps long after they had expressed their consent to be bound, interpretative declarations through which they purported to produce, in fact or in law, the same legal effects as reservations. Such a practice, should it emerge, might raise increasing doubts about the conditions under which reservations are formulated at the time of consenting to be bound. Moreover, removing any mention of a limited period of time from the definition of an interpretative declaration could ultimately weaken the time element characteristic of reservations; legal insecurity could result. It therefore seems insufficient for time limits on the formulation of interpretative declarations to be contingent on the will of States. It should be stated, either in the definition (guideline 1.2) or in a specific provision (guideline 2.4.3), that an interpretative declaration must be formulated not later than the time at which the author’s consent to be bound is expressed.
Guideline 2.4.4 (Non-requirement of confirmation of interpretative declarations made when signing a treaty)

FRANCE

1. See the comments on guideline 2.4.3, above.

2. Since France considers it necessary to place time limits on the ability of States to formulate interpretative declarations, there is no reason to set out separate rules applicable to reservations.

[Guideline 2.4.5 (Formal confirmation of conditional interpretative declarations formulated when signing a treaty)]

FRANCE

As the legal regime for conditional interpretative declarations appears to be patterned on the one for reservations, France is in favour of deleting the guidelines on conditional interpretative declarations.

1. The guidelines on conditional interpretative declarations have been placed by the Commission in square brackets, pending a final determination by the Commission on whether the legal regime of such declarations entirely follows that of reservations.

Guideline 2.4.6 (Late formulation of an interpretative declaration)

MALAYSIA

Malaysia understands that the guideline applies in the case where the treaty specifies the time limit for the formulation of interpretative declarations. Malaysia also takes note that reference must be made to guideline 2.4.3 on the general rule relating to the time to formulate interpretative declarations. Malaysia would like to seek clarification on the legal effect that guideline 2.4.6 has on a treaty. Malaysia is of the view that, based on the understanding of how guideline 2.4.6 is to work, the guideline will have the effect of overriding a treaty provision concerning the time limit required to formulate an interpretative declaration. Furthermore, Malaysia would like to request clarification on the application of this guideline in relation to the issue of succession of States. Malaysia understands that the application of the guideline would allow a successor State to formulate a new interpretative declaration when the interpretative declaration receives no opposition as to the late formulation thereof.

[Guideline 2.4.7 (Formulation and communication of conditional interpretative declarations)]

FRANCE

See the comments on guideline 2.4.5, above.

[Guideline 2.4.8 (Late formulation of a conditional interpretative declaration)]

FRANCE

See the comments on guideline 2.4.5, above.

Guideline 2.4.9 (Modification of an interpretative declaration)

MALAYSIA

Malaysia notes that by virtue of guideline 2.4.3, since an interpretative declaration may be formulated at any time, it follows that the modification thereof should also be allowed to be made at any time unless the treaty itself specifies the time for formulation and modification of an interpretative declaration. However, Malaysia is concerned about the application of guideline 2.4.0 in relation to guideline 2.4.9.

[Guideline 2.4.10 (Limitation and widening of the scope of a conditional interpretative declaration)]

FRANCE

See the comments on guideline 2.4.5, above.

Guideline 2.5.3 (Periodic review of the usefulness of reservations)

FRANCE

France has doubts about the usefulness of the proposal contained in this guideline, which seems out of place in a guide that is intended to set out the legal rules governing the identification, regime and effects of reservations.

Guideline 2.5.4 (Formulation of the withdrawal of a reservation at the international level)

FRANCE

This guideline should be revised in the light of guideline 2.1.3. The expression “is competent” should be replaced by “is considered as representing”.

[Guideline 2.5.13 (Withdrawal of a conditional interpretative declaration)]

FRANCE

See the comments on guideline 2.4.5, above.

Guideline 2.6.1 (Definition of objections to reservations)

FINLAND

1. Finland agrees with the Commission on the point that, even though an analytical distinction can be made between the act of opposing a valid reservation and that of opposing an invalid one, both these acts should be referred to as “objections”, since this is the consistent practice of States and there seems to be no real danger of confusion. However, Finland is less convinced by the Commission’s reasoning according to which the definition of “objection” in guideline 2.6.1 is sufficiently wide to cover objections to invalid reservations in addition to those made to valid ones. According to guideline 2.6.1, an objection is
a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to *exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.*

The verb “purport”, of course, would imply a purpose or intention on the part of the objecting State, in this case the specific purpose or intention of modifying or excluding the effects of the reservation. A State could not, however, have any such intention when it considers the reservation to lack any legal effects to begin with; the purpose of objecting is merely to point out the invalidity and consequent lack of legal effects of the reservation.

2. For these reasons, Finland proposes to the Commission that it consider the feasibility of refining the definition in guideline 2.6.1 so that it expressly includes both types of objections, perhaps by adding to it the phrase “or whereby the objecting State or international organization expresses its view that the reservation is invalid and without legal effect”.

**France**

1. The search for a definition of objections addresses the need to fill a gap in the 1969 and 1986 Vienna Conventions, which do not contain such a definition. Nevertheless, it is possible to discern the principal elements of the definition of objections from the objectives pursued, as contemplated in articles 20 and 21 of the two Conventions. An objection is a reaction to a reservation, but it is a specific reaction, one that is intended to make the effects of the reservation inoperative. The intention of the party reacting to the reservation is therefore determinant for the legal characterization of that reaction. The evaluation of the intention of the objecting State takes place within a specific framework. For example, the reaction of a party seeking to modify the content of a reservation cannot be classified as an objection. The objection should be characterized by the declared intention of the State to produce one of the objective effects set out in the Vienna Conventions: it should either make the provision to which it refers inapplicable or prevent the entry into force of the treaty between the parties involved. In that perspective, it is useful to know the intentions of the objecting State. A narrow definition of objections to reservations has several advantages. In terms of form, it responds to the aim of the Guide to Practice, which seeks to supplement the provisions of the Vienna Conventions without fundamentally modifying their spirit. France stands by this approach. In terms of substance, a strict definition of objections leaves more room for what the Special Rapporteur refers to as “reservations dialogue”; in other words, the discussions between the author of a reservation and its partners, intended to encourage the former to withdraw the reservation.

2. France favours a narrow definition of objections to reservations that focuses on the effects of objections as defined in articles 20 and 21 of the 1969 and 1986 Vienna Conventions. However, the Commission appears to be seeking a broader definition, which does not seem satisfactory. The expression “purports to exclude or modify the effects of the reservation in relations between the author of the reservation and the author of the objection” appears to be particularly ambiguous. According to the Commission, the proposed definition would not prejudice the validity or invalidity of an objection, like the definition of reservations, it is neutral. Nonetheless, the problem here is very different depending on whether it involves the definition of a reservation or the definition of an objection. A reservation always has the same effect: it “purports to exclude or modify the legal effect of certain provisions of a treaty” (guideline 1.1.1). The incompatibility of a reservation with the object and purpose of a treaty stems not only from the effect of the reservation but also from the treaty provision(s) to which it relates. By contrast, in the case of an objection, the very effect it seeks to engender might render it invalid. Furthermore, the alleged invalidity of a reservation may be challenged by an objection, while the possibility of reacting to an objection, the effects of which may be considered as exceeding the right to object, appears doubtful. A narrow definition of an objection, specifying its effects, would remove the ambiguities concerning the admissibility of an objection which purports to have other effects.

3. With regard to so-called objections with “super maximum effect”, whereby the objecting State purports to neutralize the effects of the reservation by considering that the treaty in its entirety must apply in full in its relations with the reserving State, such an objection would exceed the limits of the consensual framework underlying the Vienna Conventions and could not produce such an effect without compromising the basic principle of consensus underlying the law of treaties. In practice, recognition of the “super maximum effect” would inevitably discourage States from participating in some of the most important agreements and treaties. It is therefore preferable not to suggest in the definition that an objection could have “super maximum effect”; however, the phrase “exclude or modify the effects of the reservation” allows for this type of objection.

4. France is of the view that a compromise between a broad definition of objections to reservations and a narrow definition, referring expressly to the effects set forth in the Vienna Conventions, may be one that defines an objection as a reaction purporting to make the effects of the reservation non-opposable in relations between the objecting State and the reserving State. Such a definition would be flexible enough to meet the requirements of objections with “intermediate effect”, which, while not preventing the entry into force of the treaty between the parties, seek to render inapplicable between the two parties not only the provision covered by the reservation but other provisions of the treaty as well. As the effect sought by the objection is less than the maximum effect allowed by the Vienna Conventions, the validity of this type of objection does not appear to raise any difficulties. A State may consider that the reservation affects other treaty provisions and, accordingly, decide not to be bound not only by the provision covered to the reservation, but also by these other provisions. A definition limiting the effect of the objection to the non-opposability of the effects of the reservation in respect of the objecting State would, however, exclude the so-called objections with “super maximum effect” mentioned above. Such an objection does not purport to render the effects of a reservation non-opposable, but simply to ignore the existence of the reservation as if it had never been formulated.
Guideline 2.6.2  (Definition of objections to the late formulation or widening of the scope of a reservation)

FRANCE

This guideline is undeniably useful because it clears up the potential ambiguity of the two usages of the term “objection” in the Guide to Practice: either an objection to the late formulation or widening of the scope of a reservation or an objection to the reservation itself. This definition should thus avoid the risk of confusion between the two types of objections, which have separate effects.

Guideline 2.6.3  (Freedom to formulate objections)

AUSTRIA

1. Guidelines 2.6.3 and 2.6.4 concern the freedom to formulate objections and the freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation, respectively. Of course, as is stated in guideline 2.6.3, an objection to any reservation should be possible. However, the effect of such objection remains unclear. What is the effect of an objection in the case of a reservation that is explicitly provided for in the treaty? One cannot assume that an objection to a specified reservation would nullify the reservation, especially since guideline 4.1.1 regulates the establishment of specified reservations without necessitating acceptance. Similarly, according to guideline 2.6.4, a State cannot exclude treaty relations with the reserving State by means of a qualified objection if the reservation is provided for in the treaty. In comparison thereto, guideline 4.3 deals generally with the effect of an objection to a valid reservation which precludes the reservation from having its intended effects as against the objecting State. There seems to be no specific rule concerning the effect of an objection to a specified reservation. Thus, an attempt to determine the effect of an objection to a specified reservation by reference to at least three different guidelines leads only to an ambiguous result.

2. See also the observations made below in respect of guideline 4.1, below.

PORTUGAL

1. In Portugal’s view, guideline 2.6.3 (Freedom to formulate objections) deserves some refinement. First of all, in the title, the word “freedom” does not seem to be the most appropriate one. Portugal shares the view that it should be considered to replace it by the expression “right”. The same applies to guideline 2.6.4.

2. On the other hand, Portugal noted with satisfaction the replacement in due time, in the title of this guideline as well as in other guidelines, of the term “make” by the term “formulate”, thus harmonizing the terminology with that employed in the Guide to Practice.

Guideline 2.6.4  (Freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation)

AUSTRIA

See the observations made in respect of guideline 2.6.3, above.

PORTUGAL

See the observations made in respect of guideline 2.6.3, above.

Guideline 2.6.5  (Author)

PORTUGAL

Portugal maintains its doubts regarding the provision of guideline 2.6.5 conferring capacity to formulate objections on States and international organizations that are entitled to become a party to the treaty. Article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions stipulates that a State or an international organization may formulate an objection by the date on which it expresses its consent to be bound by the treaty. Thus, Portugal feels that it is neither accurate nor necessary to allow a State or an international organization to formulate objections at a moment when it is not yet a party to the treaty, even if it would produce effects only when it has expressed its consent to be bound by the treaty.

Guideline 2.6.10  (Statement of reasons)

PORTUGAL

1. Even if it is not mandatory, it is understood that it would be valuable to let the reasons for the objection be known, for the sake of clarity and certainty.

2. The adoption of the expression “to the extent possible” is progress over the expression “whenever possible”. Nevertheless, Portugal suggests the simple deletion of that expression; the term “should” is enough for the purpose.

Guideline 2.6.14  (Conditional objections)

FRANCE

France doubts that these are objections in the true sense of the word. The risk of such a guideline is that it could encourage States, on the pretext of making pre-emptive objections, to increase the number of their declarations—with uncertain legal effects—when they become parties to a treaty.

PORTUGAL

Portugal fears that this solution could lead beyond the reservations dialogue provided for in the Vienna Conventions. Furthermore, in some cases, when standing before a given reservation, conditional objections may not have a sufficiently well-determined content and uncertainty may arise as to whether an objection was indeed formulated. Nevertheless, it is fair to say that the current version of this guideline was improved, offering additional consistency to the provision when compared with the former “pre-emptive objection” version of the guideline.

Guideline 2.6.15  (Late objections)

PORTUGAL

Since one is dealing with a mitigated concept, it would be prudent to be more certain in clarifying which legal effects a late objection produces, if any at all.
Section 2.8  (Formulation of acceptances of reservations)

PORTUGAL

1. In general, the guidelines on the subject follow the procedural lines traced by the Vienna Conventions and the practice of States. Nevertheless, Portugal would like to comment on some questions that arise.

2. See the observations made in respect of guidelines 2.8.0, 2.8.1, 2.8.7 and 2.8.8, below.

Guideline 2.8.0  (Forms of acceptance of reservations)

PORTUGAL

Portugal favours retaining the expressions “express acceptance” and “tacit acceptance” as enunciated in the twelfth report of the Special Rapporteur. Portugal takes due note of the position of the Commission as reflected in the commentary to this guideline. Nevertheless, Portugal is of the opinion that this distinction may have some relevance in practice since it confers greater conceptual clarity on the subject.

Guideline 2.8.1  (Tacit acceptance of reservations)

FRANCE

France finds it hard to perceive a tacit acceptance, once 12 months have passed following the notification of a reservation, as a “presumption” of acceptance in the legal sense of the term. The texts of guidelines 2.8.1 and 2.8.2, which reflect that of article 20, paragraph 5, of the Vienna Convention, in that it applies to cases in which a reservation is “considered to have been accepted”, do not seem to mean that an acceptance could, in itself, be “reversed”.

PORTUGAL

Portugal welcomes the preference for the guideline 2.8.1 in a similar drafting as proposed in 2007, concurring with the Special Rapporteur in finding guideline 2.8.1 bis superfluous. Portugal also welcomes the retaining of the expression “unless the treaty otherwise provides”, since article 20, paragraph 5, of the Vienna Convention also admits that a treaty can derogate the general rule on tacit acceptance of reservations.

Guideline 2.8.7  (Acceptance of a reservation to the constituent instrument of an international organization)

PORTUGAL

1. It is Portugal’s opinion that acceptance is required not only from the competent organ of an international organization, but also from the members of the organization and therefore parties to the constituent instrument. When article 20, paragraph 3, of the Vienna Conventions states that a reservation requires the acceptance of the competent organ of the organization, it is including the competent organ rather than excluding the parties to the constituent instrument.

2. In 2007, there were two core problems concerning this matter that Portugal felt deserved further consideration by the Commission. Firstly, there was the question concerning the case in which a reservation is formulated before the constituent instrument enters into force and thus before any organ exists with competence to determine whether the reservation is permissible; these are the most frequent cases (article 19 and article 20, paragraph 5, of the Vienna Conventions). Secondly, concerning guideline 2.8.9 as initially proposed by the Special Rapporteur (guideline 2.8.8 in the current version), the competence of an organ may have to be established in its constituent instrument, in accordance with the principle of conferred powers. Both questions seem to find a more adequate answer in the present drafting. Nevertheless, States and international organizations should not be put aside from the reservations dialogue.

Guideline 2.8.8  (Organ competent to accept a reservation to a constituent instrument)

PORTUGAL

See the observations made in respect of guideline 2.8.7, above.

Guideline 2.8.11  (Reaction by a member of an international organization to a reservation to its constituent instrument)

FRANCE

France doubts it is appropriate to include this guideline in the Guide to Practice. Although it concerns the more or less indisputable right of member States of an international organization to take an individual position on the validity of a reservation to the constituent instrument of that organization, there is a risk that such a guideline might, in practice, lead to interference with the exercise of the powers of the competent organ and respect for the proper procedures.

Section 2.9  (Formulation of reactions to interpretative declarations)

FRANCE

The classification of different reactions to interpretative declarations seems quite acceptable and encompasses the various scenarios encountered in practice: silence, approval, opposition and recharacterization. It is important to note that these different forms of reaction give rise to different difficulties, from the point of view of their effects.

PORTUGAL

1. As is clearly stated in the guidelines, reservations and interpretative declarations are two different legal concepts. If a “reservation” is intended to modify or exclude the legal effects of certain provisions of a treaty,
an “interpretative declaration” has the purpose of specifying or clarifying the meaning or the scope attributed by the declarant to a treaty or to certain of its provisions. Therefore, if a reservation has direct legal effects, an interpretative declaration is most of all related with the methodological problem of interpretation, although having associated legal consequences.

2. Since they are two different legal concepts, they should be treated separately except where they interrelate with each other. Recalling that the Vienna Conventions do not deal with interpretative declarations, Portugal has been advocating a cautious approach since the Commission is dealing with issues that fall out of their scope.

Guideline 2.9.1 (Approval of an interpretative declaration)

PORTUGAL

1. Portugal feels that the word “approval” has a strong legal connotation that is not coherent with the matter being dealt with. Portugal would prefer a softer expression like “consent”. This expression would have to be used in a uniform manner in other guidelines, as appropriate.

2. See also the observations made in respect of guideline 3.6, below.

Guideline 2.9.2 (Opposition to an interpretative declaration)

EL SALVADOR

1. The Commission’s stance as set out in this guideline is noteworthy, as it provides for the possibility that States and international organizations might react negatively to the formulation of an interpretative declaration through a statement of “opposition”, which differs from an “objection”, the latter being understood to refer only to reservations. In that light, El Salvador supports guideline 2.9.2 with regard to the definition of opposition.

2. However, El Salvador would like to refer to the last phrase of the guideline, namely, the possibility of “formulating an alternative interpretation”.

3. The stance of the State or international organization in expressing its opposition may vary significantly, as pointed out by the Special Rapporteur:

A negative reaction to an interpretative declaration can take varying forms: it can be a refusal, purely and simply, of the interpretation for -

4. With regard to the specific case of a counterproposal—referred to as an “alternative interpretation” in the Guide to Practice—it is the understanding of El Salvador that such an interpretation can also take different forms, depending on the wording used and the intentions of the State formulating it. Thus, the intention behind an alternative interpretation might be a refusal, accompanied by an interpretation seeking merely to make a recommendation to the State which formulated the initial interpretative declaration; on the other hand, it might be a refusal through which the opposing State or international organization seeks to formulate its own interpretative declaration. El Salvador considers that in the latter case we would be faced with an entirely new declaration formulated by a State other than the State which formulated the initial interpretative declaration, and which therefore should be subject to the entire set of rules on interpretative declarations in general.

5. The potential scenarios referred to above are not covered in the relevant guideline or its commentary. It may be that no reference has been made to them because the issues involved are not relevant to simple statements of opposition, which are a mere rejection of the interpretation formulated. Nevertheless, it would be useful to clarify, in the guideline or its commentary, the way in which alternative declarations and their corresponding effects should be handled, in order to avoid any possible gaps in its practical application.

PORTUGAL

Portugal welcomes the improvement made in comparison with the 2008 version by deleting the expression “excluding or limiting its effect”. This expression could be misleading when trying to make a clear distinction between reservations and interpretative declarations. However, Portugal questions if the proposition of an alternative interpretation would not be in fact a new interpretative declaration with a rejection effect rather than mere opposition.

1 See Yearbook ... 2008, vol. II (Part Two), p. 66, footnote 212.

Guideline 2.9.3 (Recharacterization of an interpretative declaration)

EL SALVADOR

1. El Salvador recognizes the importance of this guideline, which arose primarily out of the need to regulate the fairly common practice of States and international organizations of formulating a unilateral statement the content of which does not conform to the name given it, in other words, to regulate the tendency to label reservations “interpretative declarations” and vice versa.

2. Even more complicated are situations in which a statement is given the name “declaration” without expressing or providing any indication of its true nature. This, as pointed out by the Special Rapporteur in his third report, “focuses attention on the actual content of declarations and on the effect they seek to produce”.

3. With regard to this crucial aspect, El Salvador supports the position of the Special Rapporteur on the establishment of “indifference to the nominalism”2 as an element of the definitions of reservations and interpretative declarations, as set out in guidelines 1.1 and 1.2, respectively. El Salvador understands it to mean the absence of any connection between the name given to a declaration and its actual nature, implying that a declaration retains its nature independently of the name and title under which it is formulated. 4. The guideline as a whole is complemented by guidelines 2.9.4 to 2.9.7, which seek to establish rules on when a recharacterization may be formulated and state that it should preferably be formulated in writing and should, to the extent possible, indicate the reasons why it is being made. However, El Salvador notes with concern the absence of one element which is of great importance, in its view: that of stipulating the practical implementation of the recharacterization once formulated.

5. El Salvador is concerned that no guideline has been drafted on the course of action to follow when a State recharacterizes a declaration; there are no specific provisions on when its status may be considered to have been modified, although it is understood, pursuant to the commentary to this guideline, that “a ‘recharacterization’ does not in and of itself determine the status of the unilateral statement in question”. Accordingly, one might ask what effect can in fact be generated by such an attempt at or proposal for recharacterization, if it clearly “does not bind either the author of the initial declaration or the other contracting or concerned parties”.3

6. It should be noted that the commentaries to this guideline in the relevant report of the Commission as well as the thirteenth report of the Special Rapporteur4 establish that “A divergence of views between the States or international organizations concerned can be resolved only through the intervention of an impartial third party with decision-making authority”.5 While they do therefore provide some indication of how the situation could be resolved, they nevertheless provide too little clarity on the degree to which the arrangements for reservations actually apply in such cases.

Guideline 2.9.4 (Freedom to formulate approval, opposition or recharacterization)

FRANCE

France considers that, for purposes of legal security, it would be preferable for States to have the power to formulate an approval, opposition or recharacterization in respect of an interpretative declaration only within 12 months following the date on which they were notified of the interpretative declaration.

PORTUGAL

Portugal has some concerns regarding the simple statement that an interpretative declaration can be formulated at any time. For instance, a State or international organization should not be able to formulate an interpretative declaration in regard to a treaty or certain of its provisions in a context of a dispute settlement process involving their interpretation. Hence, a reference to the principle of good faith would be a prudent solution.

Guideline 2.9.6 (Statement of reasons for approval, opposition and recharacterization)

MALAYSIA

With regard to guideline 2.9.6, Malaysia understands that the guideline does not require States to give reasons for their responses. It is noted that guideline 4.7.1 provides that an approval of or opposition to an interpretative declaration can be considered in treaty interpretation in order to determine the weight to be given to the said interpretative declaration. Thus, given the fact that such responses will have an effect on States’ interpretative declarations, it is only for the responding States to state their reasons for approval and opposition. Although recharacterization does not affect the permissibility or the effect of an interpretative declaration, it would also be useful for any act of recharacterization to be accompanied by a statement of reasons, which would prevent States from approving, opposing or recharacterizing an interpretation proposed by other States without any valid reasons. Furthermore, Malaysia is of the view that States should be granted the right to know why their interpretative declarations are being approved, opposed or recharacterized. Thus, Malaysia proposes that the requirement to state reasons for approval, opposition and recharacterization be made mandatory.

Guidelines 2.9.8 (Non-presumption of approval or opposition) and 2.9.9 (Silence with respect to an interpretative declaration)

PORTUGAL

1. Portugal agrees that guidelines 2.9.8 and 2.9.9 deal with two different though related questions.

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2 Ibid., p. 269, para. 291.
3 Yearbook ... 2009, vol. II (Part Two), para. (6) of the commentary to guideline 2.9.3.
4 Yearbook ... 2008, vol. II (Part One), document A/CN.4/600, p. 3.
5 See footnote 3 above.
2. There seems to be no doubt that, contrary to what happens with reservations, in this case neither approval nor opposition can be presumed. Furthermore, it is a principle of law that silence cannot be considered as a declaratory means unless it can be clearly inferred otherwise. Regarding interpretative declarations, there is no general rule on the value of silence as a declaratory mean, nor is there a general legitimate expectation of an express reaction to such a declaration. As such, so far as interpretative declarations are concerned, silence should only have a meaning when its value can be clearly inferred from a treaty provision.

3. Having this in mind, Portugal finds the second paragraph of guideline 2.9.9 in need of some refinement in order to clarify what meaning the expression “exceptional cases” could have. Paragraph (5) of the commentary thereto could be further elaborated to provide additional guidance.

Guideline 2.9.9 (Silence with respect to an interpretative declaration)

FRANCE

France considers that there could be circumstances where silence could constitute acquiescence to an interpretative declaration. Nonetheless, the principle adopted must, of course, be that acceptance of an interpretative declaration cannot be presumed and cannot be inferred from mere silence. The key is the circumstances, and even the unique and even exceptional circumstances in which the silence or conduct of a State with a direct and substantial interest in the detail or clarification provided by the interpretative declaration of another contracting State will inevitably be taken into account for the purposes of interpretation of the treaty, for example, in the event of a dispute between two contracting States. When it does not constitute acquiescence to an interpretative declaration, silence does not appear to play a role in the legal effects that the declaration can produce. In any case, the option open to contracting States to clarify or specify the meaning of a treaty or of certain provisions thereof should not be overlooked.

NEW ZEALAND

New Zealand considers that silence should not necessarily mean acquiescence to an interpretative declaration and acquiescence should be determined according to general international law. The second sentence of guideline 2.9.9 appears to alter this by placing an onus on States to respond to an interpretative declaration in order to avoid being bound by it. The possibility of being bound by such declarations, even if limited to exceptional circumstances, would simply place too large an administrative burden on States, especially smaller States, to consider each interpretative declaration and provide a response in order to protect their position. New Zealand therefore does not support the second sentence of guideline 2.9.9.

UNITED KINGDOM

The United Kingdom does not agree that silence as a response to an interpretative declaration necessarily constitutes acquiescence. The second paragraph of guideline 2.9.9 should be deleted, thus leaving the issue of acquiescence to be ascertained by reference to international law. The commentary provides no examples of where exceptionally silence can or has been taken as acquiescence. Given that an interpretative declaration lacks formal legal status, The United Kingdom is doubtful that firm conclusions can be drawn from the silence of existing States parties.

[Guideline 2.9.10 (Reactions to conditional interpretative declarations)]

FRANCE

See the comments on guideline 2.4.5.

PORTUGAL

Portugal shares the view that conditional interpretative declarations cannot be regarded as simple interpretative declarations. However, they also cannot be considered as reservations since they make participation in the treaty conditional on a particular interpretation, whereas reservations are intended to exclude or to modify the legal effects of the treaty. Their unclear legal position can bring uncertainty to the treatment of this subject, thus harming the reservations dialogue, which should be carefully preserved.

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1 The guidelines on conditional interpretative declarations have been placed by the Commission in square brackets, pending a final determination by the Commission on whether the legal regime of such declarations entirely follows that of reservations.

Section 3 (Permissibility of reservations and interpretative declarations)

FRANCE

1. France is of the view that a distinction must be made between two concepts: permissibility and opposability. A permissible legal act is one that meets all the conditions of form and substance needed to produce legal effects. A reservation that does not comply with the provisions of article 19 of the Vienna Conventions would therefore be non-permissible. In international law, the permissibility of a reservation is assessed subjectively by each State for its own benefit. As a consequence of this well-known characteristic of international law, the same reservation may be considered non-permissible by some States and permissible by others. Under these circumstances, nullity, which is the penalty for non-permissibility in domestic law, does not appear to be an appropriate outcome of the non-permissibility of a reservation in international law. “Opposability”, or more precisely “non-opposability”, makes for a more appropriate characterization of the penalty for such non-permissibility, as subjectively assessed. In this regard, a State which deems a reservation to be non-permissible could declare its effects non-opposable to it.

2. France wishes to reiterate its preference for the expression “opposability of reservations”. On the one hand, the concept of “permissibility” does not seem truly neutral; it seems to refer to a form of objective examination that does not square with the well-known practice in international
law of subjective assessments by individual States. On the other hand, and more crucially, the concept of “opposability” seems to better reflect the reality of relations as between the reserving State and the other contracting parties arising from the formulation of a reservation. Much will depend on the latter’s reactions. By focusing too much on the permissibility of reservations, the Commission might encourage the questionable idea that the parties to a treaty could deny the very existence of a reservation which, in their view, is non-permissible. Nevertheless, France welcomes the general thrust of the guidelines dealing with the “permissibility of reservations”.

**Guideline 3.1 (Permissible reservations)**

**FRANCE**

France endorses the Commission’s decision to reproduce the text of article 19 of the Vienna Conventions on the Law of Treaties in guideline 3.1 without attempting to change its wording substantially. Changing the wording of this well-known provision would undoubtedly result in harmful and unnecessary confusion.

**Guideline 3.1.1 (Reservations expressly prohibited by the treaty)**

**FRANCE**

Guidelines 3.1.1 to 3.1.4 seem quite relevant as they bring needed clarity to the issues of interpretation raised by article 19.

**Guidelines 3.1.2 (Definition of specified reservations), 3.1.3 (Permissibility of reservations not prohibited by the treaty) and 3.1.4 (Permissibility of specified reservations)**

**FRANCE**

See the comments on guideline 3.1.1, above.

**UNITED KINGDOM**

1. Guideline 3.1.2 attempts to clarify what is meant by the term “specified reservations”. While the United Kingdom welcomes the flexible approach adopted by the Commission, it remains concerned that the definition may not capture all the circumstances in which a reservation may be “specified”. A key feature of the problem is the lack of precision in the provision over what degree of detail makes a treaty provision one which indicates “specified reservations”. If a treaty provision is precise as to the exact nature of the reservation (see, for example, Additional Protocol No. 2 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955), and a reservation is formulated exactly in line with it, it seems inappropriate to superimpose an assessment of whether the reservation is compatible with the object and purpose of the treaty. If, however, the treaty provision simply authorizes reservations to enumerated articles and excludes other enumerated articles, the content of any reservation formulated with regard to an article in the permitted list may nevertheless be objectionable.

2. The United Kingdom also agrees with guidelines 3.1.3 and 3.1.4, which provide that any reservation that is not prohibited by the treaty, or not a “specified” reservation, must be compatible with the object and purpose of the treaty. However, we query the reference in the commentary concerning the applicability of article 20, paragraphs 2 and 3, of the Vienna Convention; it is the view of the United Kingdom that this article does not apply, or applies only by analogy, to impermissible reservations.

3. The United Kingdom notes, however, that the incompatibility of a reservation with the object and purpose of a treaty may only become apparent, or established, many years from such a reservation being formulated, perhaps only in the context of litigation. It therefore does not accept the suggestion in the commentary to guideline 4.5.2 that declarations made subsequently by the author of a reservation, or in the context of judicial proceedings, should necessarily be “treated with caution”.

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1 See Yearbook ... 2006, vol. II (Part Two), p. 143, para. 159.
2 See Yearbook ... 2010, vol. II (Part Two), para. (43) of the commentary to guideline 4.5.2.

**Guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty)**

**FRANCE**

The definition proposed in this guideline is useful, particularly as it continues to treat the object and the purpose of a treaty as one. It would undoubtedly be possible to make a theoretical distinction between the object of a treaty and its purpose. However, apart from the difficulty of making such distinction in each individual case, this appears inconsistent in practice; contracting parties tend to assess the opposability or, to use the term employed in the Guide, the “permissibility” of a reservation in the light of its object and purpose, taken as one. France welcomes the amendments to this guideline made by the Commission in 2006. The new definition of the “object and purpose of a treaty” is a marked improvement from the original version. The addition of a reference to the “general thrust” of the treaty addresses the concerns raised by France in its 2005 comments. The mere reference to essential elements of the treaty is not sufficient since it may prove difficult to determine indisputably the nature of those elements, which, if affected, could impair the raison d’être of the treaty. For example, some parties to a treaty may, unlike others, consider that the substantive provisions of the treaty are indissociable from the clauses relating to implementation mechanisms and that a reservation to such clauses would remove the raison d’être of the treaty. Furthermore, associating the purpose and object of the treaty with essential elements thereof could make reservations to provisions that, while perhaps less important, contribute fully to the balance of the treaty, less questionable. The final definition chosen associates the key elements of the treaty with its “general thrust”, thereby maintaining the spirit, letter and balance of the treaty.
Guideline 3.1.6  *(Determination of the object and purpose of the treaty)*

**FRANCE**

This guideline is a valuable addition to guideline 3.1.5, which defines “object and purpose of the treaty”. France considers it important for the object and purpose of the treaty to be determined not only by the wording of the treaty, but also by its “general thrust”.

Guideline 3.1.7  *(Vague or general reservations)*

**FRANCE**

France welcomes the Commission’s efforts, in paragraph (4) of the commentary to this guideline,¹ to establish a link between this guideline and the one that deals with reservations relating to internal law (guideline 3.1.11, which states that a reservation by which a State purports to “preserve the integrity of specific norms of the internal law of that State may be formulated only insofar as it is compatible with the object and purpose of the treaty”). In practice, reservations relating to the application of internal law are frequently formulated in vague and general terms. France takes the position that such reservations may give rise to significant problems since they often do not allow the other parties to determine the true extent of the reserving State’s commitment to the treaty and may lead to fear among these parties that, as the internal law of the reserving State develops, its commitment may wane.


Guideline 3.1.8  *(Reservations to a provision reflecting a customary norm)*

**UNITED KINGDOM**

The first paragraph of this guideline provides that the fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation. The United Kingdom is not convinced by this. As the United Kingdom said in its observations on the Human Rights Committee’s general comment No. 24,¹ “there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law”. The United Kingdom does, however, agree with the second paragraph of that guideline, which states that such a reservation does not affect the binding nature of the relevant customary norm, which shall continue to apply.


Guideline 3.1.9  *(Reservations contrary to a rule of jus cogens)*

**FRANCE**

The reference to peremptory norms of general international law (*jus cogens*) raises the issue of the scope of that notion, the content of which remains to be clarified.

Guideline 3.1.11  *(Reservations relating to internal law)*

**FRANCE**

See the comments on guideline 3.1.7, above.

Guideline 3.1.12  *(Reservations to general human rights treaties)*

**EL SALVADOR**

See the observations made in respect of guideline 4.2.5, below.

**UNITED KINGDOM**

With respect to guideline 3.1.12, the United Kingdom does not agree that human rights treaties should be treated any differently from other international agreements. It is the firmly held view of the United Kingdom that reservations to normative treaties, including human rights treaties, should be subject to the same rules as reservations to other types of treaties. The United Kingdom sees no legal or policy reason for treating human rights treaties differently. Any suggestion that special rules on reservations may apply to treaties in different fields, such as human rights, would not be helpful. It is important to remember that the law on reservations to treaties owes its origin to the Advisory Opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime* of 28 May 1951.¹ The United Kingdom therefore suggests that this guideline be deleted. The United Kingdom notes, in fact, that the Special Rapporteur’s second report on the topic of reservations to treaties² is in line with the views expressed above.

¹ *I.C.J. Reports 1951*, p. 15.

Guideline 3.1.13  *(Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty)*

**UNITED KINGDOM**

The United Kingdom observes that this guideline may be redundant. This is because it merely confirms that such reservations as described in the guideline are to be assessed in accordance with their compatibility with the object and purpose of the treaty in question, which should already be apparent from the content of guidelines 3.1.5 and 3.1.6.

**Guideline 3.2  *(Assessment of the permissibility of reservations)*

**AUSTRIA**

1. The multitude of competent actors listed in guideline 3.2 entails the risk of divergent evaluations. All the actors listed in this guideline are, under given conditions, entitled to an assessment of permissibility, but its effects differ from actor to actor. While an assessment by a party to the treaty can take effect only for the party itself, the evaluation of a treaty body may affect all parties, provided...
the body possesses the necessary competence (which, however, may only rarely be beyond doubt). A judgment by a dispute settlement body has effect only for the parties to the dispute. If the various actors disagree in their assessment a rather complicated situation may arise. As already indicated in the commentary, such disagreement is not very conducive to the application of the treaty itself. Obviously, there is still a need for further clarifications in this matter.

2. Regarding the time limit, it must be questioned why a party should be bound by a 12-month rule whereas a dispute settlement body can conduct its assessment at any time. Of course, the need for stabilized treaty relations requires a certain time limit. But does this time limit imply that a party to the treaty is precluded from invoking the impermissibility of a reservation before a dispute settlement body after 12 months have elapsed? It seems that a party can circumvent this time limit by bringing the matter before a dispute settlement body, which it is free to do at any moment. Such proceedings are, however, undoubtedly connected with higher costs.

France

The creation of monitoring bodies by many human rights treaties poses particular problems, notably with regard to assessment of the “permissibility” of reservations formulated by States. Although these problems were not envisaged when the 1969 Vienna Convention was drafted, it does not seem impossible today to set up such bodies, which can, moreover, prove very useful and effective. However, monitoring bodies can only assess the “permissibility” of reservations formulated by States if this was expressly envisaged in the treaty. The common desire of States to endow these bodies with such competence must be expressed in the text of the treaty. The European human rights system clearly illustrates this possibility and this requirement. Absent such mechanisms, the resulting State must determine the consequences of the incompatibility of its reservation with the object and purpose of the treaty, just as the objecting State must determine the consequences of its decision for its continued treaty relations with the reserving State. The monitoring body is a judicial or analogous body which exists solely by virtue of the treaty. It cannot assume competencies other than those endowed to it explicitly by the States parties. If the States wish to confer on the monitoring body certain competencies to assess or determine the “permissibility” of a reservation, it is indispensable that such clauses should be explicitly spelled out in multilateral treaties, particularly those related to human rights. If the treaty is silent on the matter, only the States alone can amend the treaty, supplement it, if necessary, with a protocol in order to set up an appropriate and often useful and effective monitoring body, or react to a reservation they consider incompatible with the object and purpose of the treaty.

Guidelines 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations), 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations), 3.2.3 (Cooperation of States and international organizations with treaty monitoring bodies), 3.2.4 (Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body) and 3.2.5 (Competence of dispute settlement bodies to assess the permissibility of reservations)

United Kingdom

1. In relation to the competence of treaty monitoring bodies, as set out in guidelines 3.2.1 to 3.2.5, the United Kingdom believes that any role performed by a treaty monitoring body to assess the validity of reservations (or any other role) should derive principally from the legally binding provisions of any given treaty, and that these same provisions are the product of free negotiation between States and other subjects of international law. The United Kingdom therefore questions the wisdom of attempting to create a very high-level permissive framework for such activity when it is best left to the negotiating States to decide what powers should be assigned to any treaty monitoring body on a case-by-case basis. Similarly, the legal effect of any assessment of the validity of reservations made by a monitoring body should be determined by reference to the functions it derives under the treaty articles.

2. Absent an express treaty provision, the United Kingdom does not accept that treaty monitoring bodies are “competent to rule on the validity” of reservations. We refer to the observations of the United Kingdom on the Human Rights Committee’s general comment No. 24,1 which sets out the position of the United Kingdom in full. Any comments or recommendations from a treaty monitoring body should be taken into account by a State in the same way as other recommendations and comments on their periodic reports. The United Kingdom does, however, accept that a treaty monitoring body may have to take a view on the status and effect of a reservation where necessary to permit a treaty monitoring body to carry out its substantive functions.

Guideline 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations)

France

Contrary to the suggestion in this guideline, France wishes to point out that in order for a treaty monitoring body to be able to assess the “permissibility” of a reservation, it must be endowed with that competence by the States or international organizations involved. It would therefore be preferable to find a formulation that does not establish such an automatic link between the possibility of monitoring the implementation of a treaty and assessing the permissibility of reservations. The second competence does not flow from the first.

Guideline 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations)

France

France considers that this guideline should establish more clearly the fundamental nature of the clauses in a
treaty or additional protocol that confer on bodies the competence to assess the permissibility of reservations, thereby allowing States and international organizations to spell out the competence that they grant to a treaty monitoring body regarding assessment of the “permissibility” of reservations.

**United Kingdom**

The United Kingdom considers that where there is an express intention on behalf of negotiating States to endow a treaty monitoring body with such a role, they will act appropriately to ensure treaty provisions reflect this. The absence of any specific reference in treaty provisions to powers to assess the validity of reservations should not under any circumstances be interpreted as permitting a legally binding role in this respect.

**Guideline 3.2.3 (Cooperation of States and international organizations with treaty monitoring bodies)**

**United Kingdom**

This guideline is formulated as an obligation to cooperate. This is clearly *de lege ferenda*; while cooperation is desirable, an obligation to cooperate must come from an express treaty obligation. In addition, the requirement to “cooperate” with a treaty monitoring body, and to give “full consideration to that body’s assessment of the permissibility of reservations that they have formulated” does not specify the extent or limits of such cooperation or consideration. It is open to question, therefore, to what extent this requirement could be deemed to be satisfied under this guideline.

**Guideline 3.2.4 (Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body)**

**France**

This guideline assumes a lack of competition among monitoring bodies, but it does not address the scenario of a difference in assessment between the different bodies and parties that can assess the permissibility of a reservation. France considers that this point needs to be clarified.

**Guideline 3.3 (Consequences of the non-permissibility of a reservation)**

**France**

1. This is clearly a difficult question which the Vienna Conventions did not resolve. For that very reason, the Commission should try to clarify the questions of the consequences of “non-permissibility” of a reservation and the effect of an objection to a reservation. If it fails to do so, the Guide to Practice would not fully meet the expectations that it has legitimately aroused. The principle contained in this guideline is entirely acceptable, although its title (“consequences of the non-permissibility of a reservation”) does not truly reflect the content of the guideline, which relates rather to the causes of non-permissibility.

2. The question of the consequences of “non-permissible” reservations is one of the most difficult problems raised by the 1969 Vienna Convention. No provision of the Convention relates to the link between the rules on prohibited reservations and the rules on the mechanism of acceptance of or objections to reservations. France continues to have misgivings about the use of terms such as the “permissibility” or “impermissibility” of reservations, which take no account of the wide range of reactions by States to reservations by other States. Despite the term used, issues relating to the consequences of non-permissible reservations should be resolved primarily through the objections and acceptances communicated by States to the reserving State. A reservation may be found to be non-permissible by a monitoring body, but the consequences of such a finding inevitably depend on the recognized authority of that body. The “opposability” of a reservation between States parties depends on the acceptances or objections by those parties.

**Germany**

See the observations made in respect of guideline 4.5.1, below.

**Guideline 3.3.1 (Non-permissibility of reservations and international responsibility)**

**France**

1. This guideline usefully points out that reservations fall under the law of treaties, not the law of international responsibility.

2. See the comments on section 3, above.

**Guideline 3.3.2 (Effect of individual acceptance of an impermissible reservation)**

**El Salvador**

1. Guidelines 3.3.2 (Effect of individual acceptance of an impermissible reservation) and 3.3.3 (Effect of collective acceptance of an impermissible reservation) are examined together in this paragraph because the comments of El Salvador relate to issues contained in both guidelines.

2. First, it should be noted that the content of both guidelines is fully consistent with the basic principles and underpinnings of reservations. Guideline 3.3.2 is based on the widely recognized premise that acceptance of a reservation cannot cure its impermissibility, because the reasons for that impermissibility—express prohibition of the reservation or its incompatibility with the object and purpose of the treaty—apply *ipso facto* and cannot be reversed by mere acceptance by a State or by an international organization.

3. The situation is different when, as reflected in guideline 3.3.3, all States and international organizations—not just one State or one international organization—accept the reservation. This would constitute unanimous agreement which, following the logic used in the case of an amendment to a treaty by a general agreement between
the parties, would be permitted pursuant to article 39 of
the 1969 Vienna Convention.¹

4. El Salvador now wishes to comment on the difference
which it has noted between the scope of guideline
3.3.2 and that of guideline 3.3.3, and specifically on
the implications of including the concept of “permissibility”
in guideline 3.3.2, for a consistent interpretation of
the Guide to Practice.

5. It should be pointed out that guideline 3.1 establishes
three specific conditions limiting the scope of the “per-
missibility of a reservation”:

(a) The reservation is prohibited by the treaty;

(b) The treaty provides that only specified reservations, which do
not include the reservation in question, may be made; or

(c) In cases not falling under subparagraphs (a) and (b), the reser-
vation is incompatible with the object and purpose of the treaty.

6. The same scope can be inferred from the content of
 guideline 3.3.2, which includes the concept of permi-
sibility, thereby incorporating the three conditions re-
ferred to in guideline 3.1. However, unlike guidelines 3.1
and 3.3.2, which encompass three conditions limiting the
scope of permissibility, guideline 3.3.3 only covers two of
those conditions. This, in the view of El Salvador, limits
the effect and hence the scope of the “collective accept-
ance of an impermissible reservation”.

7. In the light of the foregoing, El Salvador feels that
it is extremely useful to include in the commentaries an
explanation of the difference mentioned above, and, in the
event that this difference is not substantial, proposes that
similar language should be found to show the equivalence
of the concepts.

1 Article 39 of the 1969 Vienna Convention says the following: “A
treaty may be amended by agreement between the parties. The rules
laid down in Part II apply to such an agreement except insofar as the
treaty may otherwise provide.”

GERMANY

See the observations made in respect of guideline 4.5.1,
below.

Guideline 3.3.3  (Effect of collective
acceptance of an impermissible reservation)

AUSTRALIA

1. Guidelines 3.3.3 and 3.4.1 appear to create two sep-
erate regimes regarding the permissibility of acceptance
of an impermissible reservation: one regime for an ex-
press acceptance and another for a tacit acceptance. This
is not found within the existing Vienna Convention regime.
It is unclear why guideline 3.4.1 should prohibit the ex-
press acceptance of impermissible reservations, yet guid-
eline 3.3.3 should allow for a collective tacit acceptance
of impermissible reservations. Guideline 3.3.3 does not spe-
cify a time limit for contracting States to object, but pre-
sumably the 12-month period in guideline 2.6.13 applies.
This could be clarified. Moreover, if collective acceptance
of impermissible reservations is allowed under guide-
line 3.3.3, this should be allowed for in guideline 3.4.1.

2. The underlying premise of guideline 3.3.3 set out in
the Commission’s commentaries is also questionable,
namely that a tacit acceptance of the impermissible res-
ervation could constitute a subsequent agreement among
the parties modifying the original treaty. Australia queries
whether a subsequent agreement could arise among the
contracting parties through mere silence or inaction. Fur-
thermore, it is unlikely that guideline 3.3.3 would ever
operate in practice, given that a State would be unlikely to
ask the depositary to bring the reservation to the attention
of other contracting States and then fail to object to it. Fur-
ther clarification of these provisions would be desirable.

3. The interaction between these provisions regarding
the acceptance of impermissible reservations and sec-
tion 4.5 relating to the consequences of an invalid reserva-
tion is even less clear. The commentary to the guidelines
indicates that section 4.5 establishes an objective regime
for assessing the invalidity of a reservation which is not
dependent upon the reactions of other States. This appears
inconsistent alongside guideline 3.3.3 and makes guide-
line 3.4.1 redundant.

AUSTRIA

1. Austria still has major concerns regarding guide-
line 3.3.3 on the effect of collective acceptance of an
impermissible reservation. This guideline seems to invite
States to make reservations prohibited by a treaty, since
they can formulate the reservation and then wait for the
reaction of other States. Is it really intended that, in the
case of non-objection or silence by other States, the res-
ervation is deemed permissible? Should the contracting
States really have the power to override the object and pur-
pose of a treaty irrespective of the attempt of an objective
definition of object and purpose? This is certainly not in
conformity with the idea of the 1969 Vienna Convention.

2. Also, the question of an evaluation of the effect of
silence is certainly still unanswered. The commentary¹
seems to indicate that silence cannot be equated with
acceptance of the reservation. This conclusion would be
in accordance with guideline 3.3.2, according to which the
nullity cannot be remedied by unilateral acceptance.
However, it remains doubtful whether there exists some-
ting like the collective position of States parties in general
multilateral treaties, in particular in view of the fact that no
moment is indicated when this collective attitude must be
established and that the States parties vary in time. Which
States, therefore, are decisive for silent approval to exist?

3. Moreover, the time element also remains unclear,
since no reference is made to the time limit in guide-
line 2.6.13. Although the commentary explains that the
time period was left open on purpose, practical problems
nevertheless call for it. For instance, what happens if a
State accedes to a treaty 10 years after its entry into force
and, after being informed by the depositary of the exist-
ence of an impermissible reservation, objects to this res-
ervation as the only State party? Should the reservation
be deemed impermissible only after this objection? The
present wording of the guidelines seems to warrant such a
conclusion. This raises another problem: Would the reser-
vation become null and void ex tunc or only ex tunc?

¹ Yearbook... 2010, vol. II (Part Two), p. 52, para. (5) of the commentary.
4. More generally, this guideline seems to contradict guidelines 4.5.1 and 4.5.3 since, according to these guidelines, the nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization. Austria is of the view that, particularly regarding reservations contrary to the object and purpose of a treaty, collective acceptance by silence does not reflect established rules of international treaty relations.

EL SALVADOR

See the observations made in relation to guideline 3.3.2, above.

FRANCE

See the comments made in relation to guideline 3.4.1, below.

NEW ZEALAND

New Zealand has a concern with guideline 3.3.3. New Zealand does not believe that an invalid reservation can become permissible simply because no contracting State or organization has recorded an objection to it.

SWITZERLAND

1. Guideline 3.3.3 provides a procedure whereby an impermissible reservation may be deemed permissible. Switzerland is aware of the advantages of such a proposal, but a basic question arises: would such a text not be in conflict with the provision of article 19 of the 1969 Vienna Convention, which embodies the principle that impermissible reservations should not be formulated to start with (“A State may… formulate a reservation unless: …“)? Proposing such a procedure might risk encouraging the deposit of impermissible reservations, including reservations that would be incompatible with the object and purpose of the treaty as noted under subparagraph (c) of that article.

2. Moreover, the proposed procedure would allow an impermissible reservation to be deemed permissible simply by tacit acceptance. Article 20, paragraph 5, of the Vienna Convention, which provides that a reservation is considered to have been accepted in the absence of an objection to it, does not provide that such a silence should have for effect the acceptance of an impermissible reservation. Does the solution adopted for late reservations, which the Commission drew upon in drafting this directive, apply as well to impermissible reservations? In the case of late reservations, it is only the reservation’s characteristic of lateness that is “cured” by the tacit acceptance of the Parties. Could a late reservation that was materially impermissible also be deemed permissible by such tacit consent?

3. This proposed guideline raises another fundamental question. The proposed procedure would also permit the material alteration of the treaty itself, by means of the treaty reservation mechanism, as recognized in the commentary. Switzerland doubts whether it would be appropriate to create, within a reservation system that is already complex, a new amendment procedure applicable to all treaties. Would it not be preferable, especially for purposes of legal security, for the Parties wishing to modify a treaty to be constrained to follow the paths provided in the final clauses of the treaty itself?

4. Finally, the absence of a deadline for objections raises many questions and could put the depositary in a very difficult position. In addition to increasing the burden on the depositary, the proposed procedure would result in the depositary (and by extension all other Parties) having to wait for a long time, not to say indefinitely, to find out if the reservation had been rendered permissible or not.

5. Switzerland is therefore of the view that there are still several issues to be clarified before committing to the principle that an impermissible reservation can be deemed permissible by tacit acceptance, whether collectively or with the artifices provided under directive 3.3.3. At the very least, the problem of the absence of a deadline for objections must be resolved.

UNITED KINGDOM

This guideline provides for the possibility of an impermissible reservation being deemed permissible if no contracting State objects to it. The United Kingdom does not think that a lack of objections can in fact cure the nullity of an impermissible reservation, and we note that the commentary suggests that in any event such a lack of objection would not prevent the assessment of the permissibility of the reservation by a treaty monitoring body or ICJ. It would seem therefore that this guideline can, at most, only set up a presumption, as a matter of practice, that in the absence of objection by any contracting party to an impermissible reservation, the reserving party should be considered a party to the treaty with the benefit of its reservation. The United Kingdom does not agree with this. The guideline also seems at odds with guideline 3.3.2 which confirms that acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation. Nor does it seem reconcilable with the suggestion noted in the commentary to guideline 4.5.1 that the 12-month period for objections set out in article 20, paragraph 5, of the Vienna Convention is not applicable in relation to invalid reservations. The United Kingdom believes that there needs to be greater consistency in the treatment of nullity of invalid reservations in the guidelines.

1 See, for example, pp. 52–53, paras. (8) and (11) (Yearbook ... 2010, vol. II (Part Two)).

UNITED STATES

1. Proposed guideline 3.3.3 provides that a reservation that is impermissible (prohibited by the treaty or incompatible with its object and purpose), “shall be deemed permissible” if no party objects to it after having been expressly informed of its invalidity by the depositary at the request of a party. The theory behind this guideline, the commentary explains, is that such tacit acceptance of the reservation can constitute a subsequent agreement among the parties modifying the original treaty and enabling the particular reservation to be made.
2. There are two points worth noting regarding the guideline’s approach. First, the practicality of this guideline is questionable. The circumstances under which another State would ask the depositary to bring attention to the fact that the reserving State’s reservation is invalid, but not object to it, are not apparent. The commentary cites as State practice the unanimous acceptance by parties to the Covenant of the League of Nations of a neutrality reservation by Switzerland despite the prohibition on reservations in the Covenant.1 However, the commentary provides no indication that this acceptance occurred according to the process envisioned by guideline 3.3.3.

3. Second, and more importantly, if a subsequent agreement can be made among the parties through a tacit acceptance of the invalid reservation in order to “deem” the reservation permissible, it appears as though this should be true regardless of whether the depositary had separately circulated a second notice at the request of a contracting State indicating that the reservation is invalid. In other words, the logic of this guideline appears to lead to the conclusion that any reservation that is invalid, which has been circulated and not objected to by the parties, has been “collectively accepted” and thus “shall be deemed permissible”. The Commission’s commentary moreover fails to support the distinction it advocates in its guidelines. The commentary rejects the contention that an invalid reservation can be deemed permissible if no parties object to it after an initial depositary notice on the grounds that (a) silence in the first instance does not mean that a State is taking a position on the permissibility of the reservation, and (b) monitoring bodies are still able to assess the permissibility of the reservation.2 Yet in justifying why the same invalid reservation may be “deemed” permissible after a second depositary notice, the commentary favourably cites the same factors. It relies on the absence of objections after a second notice as evidence of unanimous acceptance of the reservation. Further, it later explains that reservations addressed by guideline 3.3.3 are “deemed” permissible rather than made permissible, in part because competent monitoring bodies are still able to assess such a reservation later in time. In short, if the reservations contemplated by guideline 3.3.3 are only deemed permissible and are still “impermissible in principle”, it appears that such a rationale should apply to any reservation that is suspected of being invalid, not just those reservations that are subject to a second depositary notice.3 4 See also the observations made concerning guideline 3.4.1, below.

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**Guideline 3.4.1 (Permissibility of the acceptance of a reservation)**

**AUSTRALIA**

See the observations made in respect of guideline 3.3.3, above.

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1 *Yearbook ... 2010*, vol. II (Part Two), p. 52, para. (6) of the commentary.

2 See *ibid.*, para. (5).

3 The commentary raises a related issue as well. If the legal theory underlying this proposal is that the parties have agreed, at least tacitly, to a subsequent amendment modifying the original treaty, then it is not clear why the reservation would continue to be “impermissible in principle”. Rather, amending the treaty and tacitly accepting the reservation should cause the original restrictions on making such a reservation, i.e. the restrictions that would make a reservation impermissible, to fall away.

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**FRANCE**

1. France has misgivings about this guideline. The wording suggests the possibility that the acceptance of a “non-permissible” reservation may itself be “non-permissible”, but that would not always be the case. Based on the purely objective logic of “permissibility” used in this article—about which France continues to have very serious doubts—if the reservation is “non-permissible”, should its acceptance not also be automatically “non-permissible”? In reality, the question should not be framed in these terms, but rather in terms of the effects that the acceptance should be deemed to produce. It is difficult to understand the justification for asserting that the express acceptance of a non-permissible reservation is “non-permissible”. In that case, why should it not be said that implicit acceptance of a “non-permissible” reservation is also “non-permissible”? Nonetheless, the crux of the matter is that to affirm that an acceptance, whether express or not, of a “non-permissible” reservation is also “non-permissible” would directly undermine the ability of States, even collectively, to accept a reservation that some might deem non-permissible.

2. As regards the connection between guidelines 3.3.3 and 3.4.1, it is strange that the consequences of a collective acceptance of a non-permissible reservation are not taken into account in guideline 3.4.1. Thus, individual acceptance of a “non-permissible” reservation may itself be “non-permissible”, but this would not always be the case, depending on whether this acceptance is express or tacit. Similarly, a “non-permissible” reservation could be “deemed to be permissible” if accepted by all the States. In this regard, it is difficult to understand justification of the affirmation that the express acceptance of a “non-permissible” reservation is “non-permissible”. Does not such a statement undermine the possibility for States, albeit only collectively, to accept a reservation said to be “non-permissible”? As for this latter possibility, does not it also run directly counter to the purely objective logic of the concept of permissibility retained here and regarding which, incidentally, France still has misgivings?

**GERMANY**

See the observations made in respect of guideline 4.5.1, below.

**UNITED STATES**

To the extent that 3.3.3 remains in the guidelines, the United States believes that its relationship to guideline 3.4.1 may merit further clarification. As discussed above, guideline 3.3.3 permits invalid reservations to be “deemed permissible” when no parties object to the reservation after a second notice from the depositary. Guideline 3.4.1 in turn provides that the express acceptance of an impermissible reservation is itself impermissible. The commentary leaves unclear whether an express acceptance could have some legitimate effects on the later assessment of a reservation’s permissibility.1 To the extent a competent third party is charged with assessing

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1 See *Yearbook ... 2010*, vol. II (Part Two), pp. 53–54, commentary to guideline 3.4.1.
permissibility, it seems that such State practice towards the subject reservation should be taken into consideration. Also, the United States would like to better understand the legal theory underlying guideline 3.4.1. The commentary reafirms that collective tacit acceptance creates agreement among the parties to modify the treaty, but article 41, paragraph 1 of the Vienna Convention also permits two parties to modify the treaty as between themselves. While the Commission may believe that express acceptance of an impermissible reservation would fail to meet the requirements of article 41, it would be helpful to be able to understand the Commission’s analysis in this regard.

**Guideline 3.4.2 (Permissibility of an objection to a reservation)**

**France**

France sees little merit in subjecting objections to conditions for permissibility. The real problem lies in the effects of reservations and objections. Objections with so-called “intermediate effect” give rise to special problems, since they purport not only to exclude the effects sought by the reserving State, but also to modify the effect of other provisions of the treaty. In this regard, the question of the compatibility of the modification with the object and purpose of the treaty may arise. The analysis of practice in the matter would have to be approved, however. It demonstrates that the treaty provisions which the objecting State seeks to modify often are closely related to the provisions to which the reservation applies. The practice in respect of objections with intermediate effect has developed in a very unique context. Other scenarios involving objections could also be envisaged: the reserving State may consider that the treaty provisions which the objecting State seeks to modify are not closely related to the reservation, or are even contrary to the object and purpose of the treaty, and may oppose the objection. Although this guideline does not resolve the question of the effects that such objections might produce, France considers it useful to emphasize that a State should not be able to take advantage of an objection to a reservation which it has formulated outside the allowable time period for formulating reservations to modify other provisions of the treaty which bear little or no relation to the provisions to which the reservation applies.

**Guideline 3.5 (Permissibility of an interpretative declaration)**

**France**

For France, the assertion that a State “may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty” appears sufficient. On the one hand, the reference to peremptory norms of general international law (jus cogens) raises the issue of the scope of such a notion, the content of which is not defined and remains to be clarified. On the other hand, it appears that little more could be said about interpretative declarations and reactions to such declarations under the heading of permissibility; the subject has more to do with the specifics of the execution and implementation of treaty obligations, with all the attendant specificities in international relations, than with an objective fact that would govern the introduction and formulation of these obligations.

**Guidelines 3.5.2 (Conditions for the permissibility of a conditional interpretative declaration) and 3.5.3 (Competence to assess the permissibility of a conditional interpretative declaration)**

**France**

See the comments on guideline 2.4.5, above.

**Portugal**

One should be aware of the unclear legal nature of conditional interpretative declarations, which may bring uncertainty to the analysis, thus harming the “reservations dialogue” which should be carefully preserved. Portugal would favour further comprehensive analysis of this matter in order to clearly establish the legal nature of conditional interpretative declarations as well as to identify the legal effects and procedures associated with it and also to decide on the opportunity to deal with them in this context. Portugal took note that the Commission’s report still mentions guideline 2.9.10 (Reactions to conditional interpretative declarations) within brackets.

**United States**

One of the substantive concerns of the United States relates to the treatment of interpretative declarations, and in particular conditional interpretative declarations. Regarding interpretative declarations generally, the United States does not support the creation of a rigid structure along the lines of what has been proposed, as it believes it is likely to undermine the flexibility with which such declarations are currently employed by States. Further, with regard to conditional interpretative declarations, which already have been the subject of considerable debate, the United States notes that guidelines 3.5.2 and 3.5.3 address this issue by placing the entire issue of conditional interpretative declarations under the legal regime of reservations. The United States continues to have serious concerns regarding this treatment. If the content of a conditional interpretative declaration purports to modify the treaty’s legal effects with regard to the declarant then it is a reservation. If the content of a conditional interpretative declaration merely clarifies a provision’s meaning, then it cannot be a reservation, regardless of whether it is conditional. The United States disagrees with the view that an interpretative declaration that would not otherwise qualify as a reservation could be considered a reservation simply because the declarant makes its consent to be bound by the treaty subject to the proposed interpretation. Subjecting conditional interpretative declarations, regardless of whether they are in fact reservations, to a reservations framework is inappropriate and could lead to overly restrictive treatment of such issues as temporal limits for formulation, conditions of form, and subsequent reactions regarding such declarations.

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1 The guidelines on conditional interpretative declarations have been placed by the Commission in square brackets, pending a final determination by the Commission on whether the legal regime of such declarations entirely follows that of reservations.
Guideline 3.6  *(Permissibility of reactions to interpretative declarations)*

**FRANCE**

With regard to the consequences of an interpretative declaration for a State which expressly approves or opposes it, a general reference to customary rules on the interpretation of treaties should be sufficient. Generally speaking, reactions to interpretative declarations cannot be straitjacketed in formal or substantive rules. Except in cases where one or several other contracting States reclassify an interpretative declaration as a reservation, which shifts the debate towards the effects of reservations, there is an inherent flexibility in the system of interpretative declarations and the reactions that they produce, in accordance with the essential role played in the life of a treaty by the intention of the parties and their interpretation of the treaty.

**PORTUGAL**

1. As already stated in its comments on guideline 2.9.1 (Approval of an interpretative declaration), in Portugal’s view the word “approval” has a specific legal meaning that is not coherent with the matter being dealt with. It could even be misleading in suggesting that an interpretative declaration may have to fulfill the same domestic legal requirements for the formulation of a reservation.

2. Portugal would welcome a clearer explanation for the use of this term to be included in the commentary to guideline 2.9.1.

**Guideline 3.6.1  (Permissibility of approvals of interpretative declarations)**

**FRANCE**

See the comments on guideline 3.6, above.

**Guideline 3.6.2  (Permissibility of oppositions to interpretative declarations)**

**FRANCE**

See the comments on guideline 3.6, above.

**Section 4  (Legal effects of reservations and interpretative declarations)**

**FRANCE**

France considers that a clear distinction should be drawn between the effect of interpretative declarations and that of reservations, and that the distinction should be borne in mind when considering the question of reactions to declarations and reservations and their respective effects.

**Guideline 4.1  (Establishment of a reservation with regard to another State or organization)**

**AUSTRIA**

The procedure concerning the establishment of reservations as provided in guideline 4.1 cannot relate to reservations that are explicitly authorized by the treaty as defined in guideline 4.1.1. Accordingly, guideline 4.1 needs a clarification to this effect.

**Section 4.2  (Effects of an established reservation)**

**AUSTRALIA**

Australia notes that section 4.2 builds upon the regime of the Vienna Conventions, particularly article 20, paragraph 4 (c) of the 1969 Vienna Convention, and seeks to provide some further certainty on when a reserving State may be considered among the contracting parties.

**BANGLADESH**

The guidelines on the effects of an established reservation (section 4.2) are logical and based on actual State practices and understanding. It should not be difficult for any party to follow these guidelines in order to apply the relevant provisions of the Conventions.

**Guideline 4.2.1  (Status of the author of an established reservation)**

**AUSTRALIA**

The effect of this guideline is that the author of a reservation does not become a contracting party until at least one other contracting State has accepted the reservation either expressly or tacitly (through the expiration of the 12-month time period in guidelines 2.6.13 and 2.8.1). At the same time, the guidelines could define with greater precision the status of the reserving State during the period between the formulation of its reservation, and up to and in the event of its reservation being established.

**EL SALVADOR**

1. As can be seen, this guideline is based on the provisions of article 20, paragraph 4, of the 1969 Vienna Convention, which sets out a general rule that:

   (a) Acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
   
   (b) An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
   
   (c) An act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one of the contracting States has accepted the reservation.

2. In practice, this provision has not been applied uniformly, a fact which created considerable difficulty for the Commission in taking a specific stance as to the status of the author of an established reservation. Nonetheless, it should be acknowledged that although the final formulation of the guideline is based on the Vienna Convention, it does not merely repeat the language of that Convention, but adopts a broader approach by referring to the “establishment of a reservation”, thereby, as the Commission pointed out, covering situations in which reservations do not require acceptance as well as those in which they do.
3. It is also worth noting that the language concerning the status of the author of a reservation has been reformulated, such that the author is classified as a “contracting” entity; in general terms, and a distinction is drawn as to the effects of the reservation depending on whether the treaty has entered into force or not. In that connection, a State will be classified as a “contracting” State when the treaty has not yet entered into force, and a “party”—as originally set out in the Vienna Convention—when the treaty has entered into force.

FRANCE

The conditions for the entry into force of the agreement in respect of the reserving State or organization, envisaged in guidelines 4.2.1 to 4.2.3, need to be clarified. Article 2, paragraph 1 (f), of the 1969 Vienna Convention provides:

“Contracting State” means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force.

In its current formulation, guideline 4.2.1 appears to contradict this provision, since it implies that a reserving State does not become a contracting State until its reservation is established (in other words, that it is valid and permissible and has been accepted within the meaning of guideline 4.1). France has serious doubts about this provision. The establishment of a reservation affects the applicability of the treaty only between the reserving State and the accepting State; it has no effect on the entry into force of the treaty. The system of reservations, acceptances and objections is subject to the rules of treaty law, the legal technicality of which is illustrated by the Commission’s work.

PORTUGAL

1. In Portugal’s view, the Guide could provide a more precise definition of the moment when the author becomes a contracting State or organization. Should that moment coincide with the establishment or with the formulation of the reservation? In other words, is there a retroactivity of effects to the earlier moment of formulation of the reservation? These are some questions that may arise in daily practice and could receive clearer guidance from the commentaries.

2. See also the observations made in respect of guideline 4.2.2, below.

Guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty)

AUSTRALIA

As noted by the Commission, a divergent practice exists concerning the practice adopted by the Secretary-General, in his capacity as depositary of multilateral treaties, whereby all States that have deposited instruments (whether or not accompanied by reservations) are included in the number of instruments required for entry into force. States retain the discretion to draw their own legal consequences from any reservations, including whether or not the treaty enters into force between itself and the reserving State. To avoid further divergent practice and with a view to providing further certainty, the Commission could adopt a view on the practice taken by the Secretary-General.

EL SALVADOR

1. This guideline is similar to the rule set out above in guideline 4.2.1, but is formulated here for the specific case of a treaty which has not yet entered into force.

2. In the view of El Salvador, the most significant part of guideline 4.2.2 is paragraph 2, which recognizes the common practice adopted by depositaries to give effect to the final deposit of the instrument of ratification or accession containing a reservation before any other State has accepted the reservation, without giving consideration to the validity or invalidity of the reservation. Adapting this guideline to reality is therefore a highly important element which reinforces a well-established and well-accepted practice among States and international organizations.

FRANCE

See the comments on guideline 4.2.1, above.

PORTUGAL

1. As regards guideline 4.2.2, the 1969 and 1986 Vienna Conventions both state that the author of a reservation does not become a contracting State or organization until at least one other contracting State or contracting organization accepts the reservation, either expressly or tacitly. That could represent a 12-month delay. However, the depository practice often does not go in this direction. For instance, the Secretary-General of the United Nations does not wait for any acceptance to be received before accepting the definitive deposit of an instrument of ratification or accession accompanied by a reservation.

2. There are other specific examples of divergent practice of depositaries regarding reservations that can be provided. For instance, Portugal submitted its instrument of accession to the Convention on the privileges and immunities of the specialized agencies, adopted in New York on 21 November 1947, for deposit with the Secretary-General on 20 March 2007, formulating a reservation to section 19.B (on tax exemptions) of the Convention. However, on 24 April 2007 the depository notified that in accordance with “established practice”, the instrument would only be deposited with the Secretary-General upon receipt of the approval of the reservation by the concerned specialized agencies. The deposit of the instrument of accession was suspended, thus lacking the last international act necessary for Portugal to become bound by the Convention. However, the Secretary-General is guided in the performance of depository functions mainly by relevant provisions of the Convention, customary international law and article 77 of the 1969 Vienna Convention. Thus, the Summary of Practice of the Secretary-General as Depository of Multilateral Treaties is not a source for the performance of depository functions by the Secretary-General, but rather a relevant record of practice. The Guide to Practice itself states that the permissibility of reservations may be assessed only by contracting States or contracting organizations, dispute settlement bodies

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1 See Summary of Practice of the Secretary-General as Depository of Multilateral Treaties (ST/LEG/7/Rev.1) (United Nations publication, Sales No. E.94.V.15).
or treaty monitoring bodies. Neither the depositary nor the specialized agencies are included in any of those categories.

3. These observations intend to underline that the guidelines could indeed take a stance on the correctness of the depository practice (contrary to the intention of the Commission as stated in paragraph (11) of the commentary to guideline 4.2.1). It would be important not to void the effects of the Vienna Conventions in favour of divergent practices.

4. See also the observations made in relation to guideline 4.2.1, above.

Guideline 4.2.3 (Effect of the establishment of a reservation on the status of the author as a party to the treaty)

EL SALVADOR

This guideline, which indicates the establishment of treaty relations between the author of a reservation and the State that has accepted it, has been recognized on several occasions by all special rapporteurs, from J. L. Brierly to Alain Pellet. This is why the Commission has taken the view that it makes good sense. Given the exhaustiveness of the Guide to Practice, its inclusion stands as acknowledgement of a basic principle in the area of reservations.

FRANCE

See the comments on guideline 4.2.1, above.

Guideline 4.2.4 (Effect of an established reservation on treaty relations)

EL SALVADOR

While El Salvador does not see the need to make any formal or substantive comments concerning this guideline, it recognizes the wisdom of including in the guideline other elements which are not found in the Vienna Conventions. This helps to improve understanding of the effects of reservations on treaty relations, including consideration of reservations with exclusionary effects and their corresponding contraregularity effect; the stipulation that a reservation does not modify the provisions of a treaty, except its legal effects; and recognition that these effects could apply not only to certain provisions of the treaty, but also to the treaty as a whole in respect of certain aspects.

Guideline 4.2.5 (Non-reciprocal application of obligations to which a reservation relates)

EL SALVADOR

1. This guideline recognizes that the principle of reciprocity is not absolute, based on an increasingly well-established trend in legal writings and jurisprudence, which has determined that not all treaties involve the exchange of obligations between States. The clearest example of this exception is human rights treaties, which, in contrast to other types of treaty, are primarily intended to benefit persons within their jurisdiction.

2. The view has been expressed that the current system of reservations is entirely inadequate to treaties whose ultimate beneficiaries are human beings, not Contracting Parties. ICJ said much the same over half a century ago in its advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, pointing out:

The contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

3. Therefore, in view of the importance of recognizing the sui generis nature of human rights treaties, and considering that, with regard to the issue of reservations, the Commission does not intend to draft a Convention, but rather a Guide to Practice for illustrative purposes, El Salvador would propose the inclusion of an explicit reference to such treaties in this guideline, as an example not intended to be exhaustive. As the Commission pertinently indicates in its report:

Reciprocity is also absent from treaties establishing obligations owed to the community of contracting States. Examples can be found in treaties on commodities, in environmental protection treaties, in some demilitarization or disarmament treaties and also in international private law treaties providing for uniform law.

4. Furthermore, it would be worth considering the inclusion in guideline 3.1.12, on reservations to human rights treaties, of a direct reference to the guideline in question, which would successfully provide explicit recognition of the non-reciprocal application of obligations in human rights treaties. Such recognition, while not intended to minimize the non-reciprocal application of other treaties, is needed for the special case of human rights treaties, given the emergence of both regional and international human rights treaties, which, despite signifying a momentous achievement in the protection of the individual with regard to State power, are regrettably often attended by declarations by some States that modify or annul a basic right recognized in the treaty, or that render their fulfillment of the treaty contingent on the actions of another State, with the intention of protecting their own interests rather than those of the persons under their jurisdiction.

REPUBLIC OF KOREA

Regarding guideline 4.2.5, it is better to exemplify feasible cases to which guideline 4.2.5 can be applied by including them in the commentary of the Commission on this guideline. Guideline 4.2.5 is an exception to

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1 Inter-American Court of Human Rights, Blake v. Guatemala (reparations), Series C, No. 48, 22 January 1999, Separate opinion of Judge Cançado Trindade, para. 15.
2 I.C.J. Reports 1951, p. 23.
3 Yearbook ... 2010, vol. II (Part Two), para. (6) of the commentary to guideline 4.2.5.
guideline 4.2.4. The exceptional clause should be provided in a restrictive and concrete manner. However, because of ambiguous expressions in guideline 4.2.3 such as “nature of the obligations”, “object and purpose of the treaty”, and “content of the reservation”, it is uncertain whether the reservation cannot be applied to other parties of the treaty. Moreover, this uncertainty leads to legal instability concerning the application of reservations.

Guideline 4.3  (Effect of an objection to a valid reservation)

UNITED STATES

Guideline 4.3 provides that “unless a reservation has been established with regard to an objecting State or organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or organization”. This guideline appears to reaffirm the relatively straightforward proposition that an objection counters a reservation’s intended effects. However, the initial clause in this guideline seems unnecessary and could cause confusion as to the operation of the guidelines. If a reservation must be accepted by a State to be established with regard to that State, as guideline 4.1 expressly provides, then it would not seem possible for a reservation to have been established vis-à-vis an objecting State. Thus, the United States would recommend the deletion of the initial clause of guideline 4.3 or that the commentary further explain the intent behind this clause.

Guideline 4.3.1  (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation)

FRANCE

According to this guideline, an objection to a “valid” reservation by a contracting State does not preclude the entry into force of the treaty as between the objecting State and the reserving State. In reality, France considers that the issue is not one of effects on the entry into force of the treaty, but of effects on the applicability of the treaty as between the reserving State and the objecting State.

Guideline 4.4.3  (Absence of effect on a peremptory norm of general international law (jus cogens))

FRANCE

The reference to peremptory norms of general international law (jus cogens) raises the issue of the scope of that notion, the content of which has yet to be determined.

Section 4.5  (Consequences of an invalid reservation)

AUSTRALIA

1. Australia welcomes the formulation of section 4.5. This will provide important clarity and guidance for States given that this is a significant lacuna within the treaty regime established by the Vienna Conventions. Australia agrees with the objective regime established by guidelines 4.5.1 and 4.5.3, whereby reservations that do not meet the conditions of formal validity and permissibility are null and void, independent from the reactions of other contracting States.

This is consistent with the conditions set out in the Vienna Conventions and builds on existing State practice.

2. However, Australia is particularly concerned with the current rebuttable presumption in guideline 4.5.2, namely that a reserving State will become a party to the treaty without the benefit of the invalid reservation absent a contrary intention.

3. See also the observations made in respect of guideline 4.5.2, below.

BANGLADESH

1. The effects of an invalid reservation are more problematic than the question addressed in section 4.2 of the Guide to Practice. The provisions of the Convention are not very clear on this. Therefore, the guidelines of the Commission are more useful for understanding the impact and consequences of the invalid reservations. The guidelines have been drafted based on serious research and analysis of numerous State practices and views of authoritative individuals and institutions. It is quite understandable and acceptable that the main thrust of the guidelines is not towards excluding the reservation-making parties from treaty relations but to limit the relations. This position is closer to the views and approaches of the overwhelming majority of the States.

2. The provision for reservations promotes the goal of maximum participation of the States in the multilateral treaties. However, this must not undermine the very object and essence of the treaty. While the decision to make reservation rests with the reservation-making State, other States’ reactions and responses are immensely significant for the establishment of treaty relations with the reserving States, this being especially important in the cases of impermissible and invalid reservation and any special mention about reservations in the text of the treaty. The guidelines of the Commission are based on the rational understanding of the spirit and idea of the provisions on reservations in the Conventions. To follow these guidelines would mean to promote a better realization of the objectives of the treaties and healthy treaty relations.

FINLAND

1. According to article 19 of the 1969 Vienna Convention, States may not make a reservation to a treaty when such a reservation is prohibited by the treaty; or when the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or if, in any other case, the reservation is incompatible with the object and purpose of the treaty.

2. But what happens when a State puts forward an impermissible reservation? As the Special Rapporteur has correctly argued, we must distinguish between two analytically separate questions: (a) what are the legal effects, if any, of an impermissible reservation, and (b) what are the consequences of the act of making an impermissible reservation on the existence or non-existence of a contractual relationship between the reserving State and others.

3. See also the observations made below in respect of guidelines 4.5.1, 4.5.2 and 4.5.3.
Guideline 4.5.1  *(Nullity of an invalid reservation)*

**AUSTRALIA**

See the observations made in respect of section 4.5, above.

**EL SALVADOR**

1. Despite the fact that this guideline and the section on invalid reservations as a whole constitute a critical aspect of the issue of reservations, the consequences of an invalid reservation were not stipulated in the Vienna Conventions, creating a gap that caused serious practical problems. While the assumption existed that an invalid reservation could not have the same effects as a valid reservation, there was no consistent position as to how such effects should be handled.

2. Thus, the Guide to Practice in the view of El Salvador rightly indicates that the consequences of this type of reservation should be governed by the objective criterion of whether a reservation is “null and void”, implying that the reservation’s consequences, or lack thereof, are not governed by the opinions of States or international organizations.

3. See also the observations made in respect of guideline 4.5.3, below.

**FINLAND**

1. As to the legal effects of an impermissible reservation, the Vienna Convention itself offers no specific guidance. Article 21 of the Convention explicitly deals with permissible reservations only. However, Finland finds it easy to agree with the argumentation of the Commission that an impermissible reservation, as well as a reservation which does not fulfill the criteria of formal validity as codified in article 23 of the Convention, must be considered null and void. This is a consequence of the impermissibility of the reservation by definition; as the Commission notes, “nullity” is the defining characteristic of a legal act which would have certain legal effects but for the lack of its conformity with formal or substantial requirements placed upon such acts.

2. A reservation, again by definition, is a legal act which purports to have the legal effect of modifying the extent or content of an obligation a treaty would, in the absence of such a reservation, place upon the State. It would seem reasonable, then, to argue that when a reservation does not conform with the substantial requirements (as listed in article 19 of the Vienna Convention) or with the formal requirements (article 23 of the same) placed upon reservations as legal acts, the reservation is null and void. The consequence of this nullity is that the reservation is incapable of having the legal effects it purports to have, i.e. to alter the extent or content of the reserving State’s contractual obligations.

3. Finland, therefore, wishes to express its continued support for guideline 4.5.1.

**FRANCE**

1. In practice, when faced with an “invalid” reservation, States may stipulate in their objection that the reservation is not opposable to them but still agree to recognize the existence of treaty relations with the reserving State. This midway position may seem paradoxical: how could a State object to a reservation that is incompatible with the object and purpose of the treaty—the essential elements that constitute its raison d’être—without concluding that the treaty cannot be binding on it in its relations with the reserving State? The paradox may be less profound than it appears; the objecting State may consider that while the reservation in question may undermine the object and purpose of the treaty, it will not prevent the application of important provisions as between itself and the reserving State.

2. It may also hope that its objection, as a sign of its opposition, will allow it to engage in a “reservations dialogue” and will encourage the reserving State to reconsider the necessity or the content of its reservation. It appears, however, that the objecting State cannot simply ignore the reservation and act as if it had never been formulated. Such an objection would create the so-called “super maximum effect”, since it would allow for the application of the treaty as a whole without regard to the fact that a reservation has been entered, and would compromise the basic principle of consensus underlying the law of treaties.

3. For France, it is possible, in accordance with both the Vienna Convention and practice, that States that have objected to a reservation they consider incompatible with the object and purpose of the treaty (or prohibited by a reservation clause) would not oppose the entry into force of the treaty between them and the reserving State. The scenario according to which a reservation incompatible with the object and purpose of the treaty could completely invalidate the consent of the reserving State to be bound by the treaty seems to run counter to both the will expressed by the reserving State and the freedom of the objecting State to choose whether the treaty should enter into force between itself and the reserving State. The latter may well be bound by some important provisions of the treaty, even though it has formulated a reservation to other provisions relating to the general thrust of the treaty, and hence incompatible with its object and purpose. France’s practice is that, when it objects to a reservation prohibited by the treaty but does not oppose the entry into force of the treaty vis-à-vis the reserving State, it respects the intention expressed by that State. Moreover, in expressly recognizing that the objection does not prevent the entry into force of the treaty—which is not strictly necessary under the system envisaged by the Vienna Convention—the State means to emphasize the importance of the treaty relationship thus established and to contribute to the “reservations dialogue”. It is true that the effects of such an entry into force may be extremely limited in practice, particularly for so-called “normative” treaties or in cases where the reservation is so general that few of the treaty’s provisions have been truly accepted by the reserving State. France still believes that, unsatisfactory as such a solution might sometimes be, it is the one that best respects the characteristics of the international legal system and the only one to offer a practical response to questions that might prove to be insoluble in theory. A reservation might be
“invalid”, but the law of treaties can neither deprive a reservation of all its effects by recognizing the possibility of objections with “super-maximum” effect, nor deprive the consent of a State to be bound by a treaty of any scope on the grounds that its reservation is incompatible with the treaty from the moment that the objecting State consents to maintain a treaty relationship with it.

1. The following comments focus on what is probably the most important aspect of the Commission’s Guide to Practice, the Commission’s conclusions with regard to the permissibility of reservations and, in particular, to the legal effects and consequences of non-permissible reservations on treaty relations. The issue has been much discussed by legal experts. This issue of international law remains unresolved.

2. With regard to the question of the permissibility of a reservation, the guidelines propose to settle an ongoing legal debate.

3. Guideline 4.5.1 establishes that “a reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect”. Guideline 3.3.2 clarifies that “acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation”.

4. The relationship of the different grounds for impermissibility of a reservation as defined in article 19 of the Vienna Convention and the consequences thereof is the object of discussion in legal literature and a matter of concern for any pragmatic approach by contracting States. It is the criterion of impermissibility under article 19 (c) of the Vienna Convention (guideline 3.1 (c)), which is at the core of this discussion. Incompatibility with the object and purpose of a treaty is a complex matter and generally more difficult to assess than the other criteria for impermissibility established in article 19 of the Vienna Convention. And while the compatibility requirement in article 19 (c) of the Vienna Convention is an objective criterion, it is undisputed that it is up to the individual contracting States to assess—with possibly diverging results—whether a particular reservation meets the test or not. The difficulty of determining the compatibility or incompatibility of a reservation has led to a differentiated State approach to dealing with those reservations that do not meet the compatibility test. States still seem to be following the guidance of IJC in its opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide when they—in finding that a particular reservation is incompatible with the object and purpose of a treaty—say so by objecting to the reservation, while others, that do not find such incompatibility, may expressly or tacitly accept it.

5. The Commission’s guidelines as referred to above would represent a radical change in this approach, since it would leave no room for differing results of the compatibility test. How radical and problematic such a change in approach would become becomes clear when one takes a closer look at the Commission’s conclusions with regard to the legal consequences of an impermissible reservation and its severability, and the resulting “positive presumption”.

6. See also the observations made in relation to guideline 4.5.2, below.

NORWAY

Experience shows that the 1969 and 1986 Vienna Conventions have a number of lacunae and ambiguities to be found in their articles 20 and 21. Guideline 4.5.1, which concerns in part the nullity of an impermissible reservation, aims to fill one of the major gaps in the Vienna Conventions. It is firmly grounded in State practice and is, moreover, in line with the logic of the Vienna regime.

PORTUGAL

Guideline 4.5.1 is important since it fills an existing gap in the Vienna Conventions. Another gap that the Commission could fill in relation to the latter is connected to the consequences of acts having nevertheless been performed in reliance on a null reservation.

REPUBLIC OF KOREA

Concerning guideline 4.5.1, the validity and permissibility of reservations should be evaluated by an independent administrative body. However, the author of the evaluation is none other than the author of the reservation. It is desirable that for each treaty, an impartial evaluator such as an implementation committee or a contracting parties meeting should be established, which can decide upon the validity and permissibility of reservations.

AUSTRALIA

1. Australia is particularly concerned with the current rebuttable presumption in guideline 4.5.2, namely that a reserving State will become a party to the treaty without the benefit of the invalid reservation absent a contrary intention. Notwithstanding the factors set out in guideline 4.5.2 for ascertaining that intention, Australia envisages practical difficulties for States other than the reserving State determining the extent of the reserving State’s consent to be bound. This is particularly so in the absence of a third-party adjudicative body providing a determination that is binding for all the contracting States. This could lead to the situation whereby the reserving State considers its reservation valid, whereas an objecting State does not but nevertheless considers that the presumption applies, with the result that there would be no consensus as to whether the reserving State was bound to the treaty and, if so, whether the reservation applied. Consequently the presumption may be difficult to apply in practice and could lead to uncertainty among States in their treaty relations.

2. Australia would prefer a reversal of the presumption in guideline 4.5.2, whereby a reserving State would not be considered a party to the treaty unless it indicated to the contrary. This would ensure that the intention of the reserving State remains the key determinant as to whether it becomes a party to the treaty, provides greater certainty for States and preserves the voluntary nature of the regime of treaties. Reversing the presumption also appropriately leaves the responsibility for taking action with the reserving State—either to modify or withdraw its reservation to remove its inadmissibility, or to forgo becoming a party to the treaty. A further advantage of this approach enables objecting States to maintain a treaty relationship with the reserving State, even with the invalid reservation, rather than have no treaty relationship at all.

**Austria**

Guideline 4.5.2 is undoubtedly the heart of the matter of invalid reservations. According to this guideline the author of an invalid reservation becomes a party to the treaty without the benefit of the reservation, “unless a contrary intention of the said State or organization can be identified”. Austria fully concurs with the general rule expressed in paragraph 1 of this guideline, but would suggest a further look into its exceptions. Austria is of the view that the intention of the author of the reservation cannot be ascertained from the list of factors contained in paragraph 2. To take just one example: how can subsequent reactions of other contracting States express or reflect the intention of the author of the reservation? Moreover, it is not clear who shall “identify” the author’s intention as required in paragraph 1. These problems could be avoided simply by requiring that the author of the reservation clearly expresses his intention not to be bound if the reservation is null and void. Austria therefore proposes to delete the second paragraph of guideline 4.5.2 and replace the words “unless a contrary intention of the said State or organization can be identified” by the expression “unless the said State or organization expresses a contrary intention”. Austria is of the view that it would not be appropriate to force the author of a reservation to become bound by the terms of a treaty when the reservation is null and void.

**El Salvador**

1. El Salvador expresses its support for the contents and phrasing of this guideline for the following reasons.

2. With regard to the status of the author of an invalid reservation, it is indisputable that the nullity of a reservation does not affect the consent of a State or an international organization to be bound by the treaty. The author of such a reservation is therefore fully subject to the treaty obligations and is considered a “party” to the treaty, or, if the treaty is not yet in force, a “contracting party”.

3. This was precisely the position expressed by the European Court of Human Rights in *Bellilos v. Switzerland*: “It is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration”. This position was subsequently reiterated in *Loizidou v. Turkey*. At the regional level, the Inter-American Court of Human Rights continued that trend by indicating, in the case of *Hilaire v. Trinidad and Tobago*:

Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in Article 62 of the American Convention, because this limitation is incompatible with the object and purpose of the Convention. Consequently, the Court considers that it must dismiss the second and third arguments in the preliminary objection submitted by the State insofar as they refer to the Court’s jurisdiction.

1 *ECHR, Bellilos v. Switzerland*, judgment of 29 April 1988, Series A, No. 152, para. 60: “In short, the declaration in question does not satisfy two of the requirements of Article 64 (art. 64) of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration. Moreover, the Swiss Government recognised the Court’s competence to determine the latter issue, which they argued before it. The Government’s preliminary objection must therefore be rejected.”

2 *ECHR, Loizidou v. Turkey*, Preliminary Objections, judgment of 23 March 1995, Series A, No. 310, paras. 97 and 98:

97. The Court has examined the text of the declarations and the wording of the restrictions with a view to determining whether the impugned restrictions can be severed from the instruments of acceptance or whether they form an integral and inseparable part of them. Even considering the texts of the Article 25 and 46 (art. 25, art. 46) declarations taken together, it considers that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.

98. It follows that the declarations of 28 January 1987 and 22 January 1990 under Articles 25 and 46 (art. 25, art. 46) contain valid acceptances of the competence of the Commission and Court.

3 Inter-American Court of Human Rights, *Hilaire v. Trinidad and Tobago*, Preliminary Objections, judgment of 1 September 2001, Series C, No. 80, para. 98.

**Finland**

1. The fact that an impermissible reservation cannot have its intended legal effect does not as such determine whether the State or the international organization which has made the impermissible reservation becomes a party to the treaty in question. As the Commission points out, two opposite outcomes are consistent with the lack of legal effects of the reservation: either the reserving State or organization becomes a party to the treaty without benefiting from its reservation, in which case the reservation of course does not have its purported effect; or the State or organization does not become a party to the treaty at all, in which case the reservation also lacks its intended effects, since no treaty relation exists in the first place. The Vienna Convention is silent on this crucial matter.

2. It is well known that Finland, together with an increasing number of other States, has favoured what has been called the “severability” approach. As noted in the report of the Commission, an objection based on this approach would first acknowledge that the reservation is impermissible and then go on to state that the objection does not preclude the entry into force of the treaty between X and Y and that the treaty enters into force without Y benefiting from its reservation. Although in increasing use, not all States have adopted this approach—as evidenced in the Commission’s report, some States prefer merely to state that the treaty in question will enter into force regardless of the objection, and say nothing about what effect the reservation

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and the subsequent objection have on the extent and content of their treaty obligations, if any. As the Commission points out, however, these approaches seem to have little or no difference as to their ultimate outcome: surely a State using the latter formulation would not be of the opinion that, despite the objection and the impermissibility of the reservation itself, the reserving State has still in fact succeeded in modifying the treaty obligations in question.

3. The other solution would be to determine that in cases where a State makes an invalid reservation, it does not in fact become a party to the treaty at all. Most supporters of this approach would likely argue that any other solution would contradict the consensual foundation of treaty law: no State may become bound by contractual obligations against its will. There is no doubt that any solution to the problem at hand must respect this fundamental principle.

4. Indeed, any difference of opinion surrounding the subject matter of guideline 4.5.2 will surely not stem from disagreement as to this fundamental principle; rather, the question is what should be the legal presumption in cases where the actual intent of the reserving State or organization is unclear. There are, obviously, two alternative presumptions from which to choose: first, that in case of uncertainty, we should assume that any reservation is an integral part of that State’s acceptance of the treaty obligations in question, and therefore, should the reservation be deemed not to have the desired effects, the State would not wish to be bound. The second possible presumption is, of course, the opposite: that in the lack of clear evidence to the contrary, we presume that the State is willing to be bound nevertheless.

5. Some have argued that the second approach would make a mockery of the principle of consent and that it would in fact lessen States’ interest in becoming parties to multilateral treaties for fear of inadvertently becoming bound by obligations that they would not voluntarily accept. The force of this argument is lessened, however, by the fact that the reserving State may easily refute this presumption by making it known that the reservation forms an integral part of its willingness to become a party to the treaty. On the whole, Finland fully agrees with the Commission that the second presumption will yield far superior practical benefits compared with the first one. The Commission explains these benefits in a laudable manner,1 and draws deserved attention to the widespread State practice in support of this presumption; neither argument needs to be repeated here in detail. However, Finland wishes to make one additional point in favour of the second presumption: that of effectiveness.

6. Where a State makes to a multilateral treaty a reservation the permissibility of which can reasonably be questioned, the reservation inevitably leads to some degree of legal uncertainty with regard to the contractual relations of the reserving State and the States parties to the treaty. This uncertainty is, presumably, unwanted and harmful, so it is in the interest of the States parties to reduce this uncertainty the best they can. Finland is of the opinion that, other things being equal, the preferable solution to such an issue is to place the responsibility for the uncertainty on the party who can resolve it with the least effort, that is to say, most efficiently.

7. The generally accepted principle of consent means that the only relevant factor as to whether a State becomes bound by the treaty in case of an invalid reservation is its own intent; that is to say, whether its consent to be bound was, at the time it was given, conditional on the validity of its reservation. This being the case, the only entity capable of resolving the issue beyond any doubt is, in the absence of an outside arbitrator, the reserving State itself. It alone has access to its intentions, while others can only conjecture. Therefore, the most efficient solution is to place the responsibility for any uncertainty resulting from a potentially impermissible reservation on the reserving State.

8. To require the reserving State to make it clear when a reservation is a *sine qua non* of its consent, in order to avoid the risk of being bound by the entire treaty, would create a powerful incentive for States to produce more reasoned reservations, and therefore reduce future uncertainty.

9. For all these reasons, Finland remains firmly supportive of guideline 4.5.2 and is of the opinion that it is the best compromise available.

**France**

France reiterates the position it has expressed on many occasions as to the crucial importance of the principle of consent underlying the law of treaties. It is not possible to compel a reserving State to comply with the provisions of a treaty without the benefit of its reservation, unless it has expressed a clear intention to that effect. In this respect, only the reserving State can clarify exactly how the reservation affects its consent to be bound by the treaty. It is difficult for France to imagine how a State other than the reserving State could assess the extent of the latter’s consent.

**Germany**

1. The following comments focus on what is probably the most important aspect of the Commission’s Guide to Practice, the Commission’s conclusions with regard to the permissibility of reservations and, in particular, to the legal effects and consequences of non-permissible reservations on treaty relations. The issue has been much discussed by legal experts. This issue of international law remains unresolved.

2. Guideline 4.5.2 introduces a general presumption that—in case of an impermissible reservation—the reserving State becomes a party to the treaty without the benefit of the reservation that it has submitted unless there is clear indication that the State in question did not want to be bound by the treaty under these circumstances.

3. This positive presumption is based on the Commission’s finding in guideline 4.5.1, stating that “a reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect”, and that it thus can be severed from a State’s consent to be bound by a treaty.

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1 *Yearbook ... 2010*, vol. II (Part Two).
4. The positive presumption represents, in Germany’s view, a proposal for a new rule in international treaty law. It clearly goes beyond a mere guideline to existing practice within the framework of existing international law.

5. And while the Commission’s proposal is an intriguing attempt to resolve the issue of the legal consequences of impermissible reservations which was not addressed by the Vienna Conventions, Germany is not convinced by the Commission’s conclusions on this issue and would be hesitant if not opposed to introducing such a new rule in the guidelines.

6. It is Germany’s position that the Commission’s proposal of a positive presumption cannot be deduced from existing case law or State practice—certainly not as a general rule equally valid for all cases of reservations impermissible under article 19 of the Vienna Convention or with respect to all treaties.

7. State practice remains ambiguous in this area; it would be difficult to identify a consistent State approach even in the more specific field of human rights treaties.

8. Upon closer examination of the cases most often referred to in support of the Commission’s proposal of the positive presumption (the Belilos and Loizidou cases before the European Court of Human Rights), it becomes clear that these need to be evaluated within their specific context, which is the Council of Europe: a rather close regional group of States sharing and upholding common social and political values, most prominently formulated in the European Convention on Human Rights. Its member States are willing to subject themselves to the scrutiny and authoritative interpretation of a mandatory judicial system that even allows for individual claims. In its decisions to consider member States bound to their contractual commitment without the benefit of their reservations, the Court refers to this “special character of the Convention as an instrument of European public order”. It stresses “the consistent practice of the Contracting Parties and the States’ active participation within this system which imply “the inherent risk” (for a member State making a reservation) that “Convention organs might consider the reservation impermissible” and that it will be bound anyhow.

9. There may be other very special treaty settings or treaties of fundamental significance where similar conclusions as to the possibility of a positive presumption as suggested by the Commission in its guidelines may be drawn. However, it is Germany’s position that this is not the case in general.

10. In Germany’s view, in the case of an impermissible reservation it cannot be assumed that the State in question is then fully bound by a treaty. Such an interpretation would not take into account the State’s evident intention that it does not intend to be fully bound.

11. Germany would like to express its concern that the proposed positive presumption in section 4.5 of the guidelines may actually harm treaty law development in the long run and could hamper contractual relations between States.

12. The Guide’s proposed positive presumption claims that an impermissible reservation is devoid of legal effect (guideline 4.5.1) and that, as a result, the reserving State is considered a contracting party without the benefit of its reservation unless a contrary intention of the said State can be identified.

13. Germany fears that a broad positive presumption would make States more reluctant to adhere to treaties. Numerous States make reservations for constitutional reasons, such a reservation being a condition for parliamentary approval. These States, Germany included, would be forced—as a matter of routine—to expressly clarify that their consent to be bound by a treaty is dependent on their reservations. Chances are that over time most reservations would be accompanied by such a clarification. In case of the impermissibility of such a reservation, such a State thus would not become a party to the international agreement in question.

14. This gives rise to a number of questions and uncertainties: first, how to determine the impermissibility of a reservation in these cases, especially with regard to the compatibility test. The guidelines state the obvious in guideline 3.2 by allowing contracting States, dispute settlement bodies or treaty monitoring bodies to assess a reservation’s permissibility. Among the contracting States, however—and this would not be unusual—there may exist diverging views in this regard. One objection alone, on the grounds that a reservation did not meet the compatibility test (article 19 (c) of the Vienna Convention), would suffice to cast doubt on the reserving State’s status as a party to the treaty. Individual acceptance of the reservation by other States—tacitly or express—would and could not settle the matter, as acceptance of an impermissible reservation also is impermissible (guideline 3.3.2). An option might be to resort to the collective acceptance as proposed in guideline 3.3.3. That procedure, however, requires unanimity, which could be difficult to reach, considering the objection already made. The procedure also presupposes that the reservation is impermissible, which is the question under dispute. The matter of whether a reserving State had become a party to a treaty or not would need to be taken before a dispute settlement body in these cases. The individual States, or even a majority of them, would no longer be in a position to define the contractual relations for themselves and/or remedy the situation.

15. Whether a reserving State has become a Party to a treaty or not is of particular interest in cases where it is that State’s consent to be bound which would allow the treaty to enter into force or not. Yet another matter is to consider the resulting implications for the treaty relations while the reservation is in limbo.

16. Germany is concerned that, instead of contributing to legal clarity, a general positive presumption as proposed in the guidelines would create uncertainty in treaty relations and in fact hamper the development of treaty
relations. States might refrain from making objections at all, for fear of the consequences, although they are entitled to making objections to reservations they do not wish to accept, whatever the reason.

17. Germany is fully aware that it is not offering a solution to the issue. However, at this point in time Germany is not willing to accept the solution offered by the Commission with regard to the impermissibility of a reservation and the consequences thereof as a rule under public international law.

NORWAY

Guideline 4.5.2 does not purport to identify and codify a consistent practice. Nor is it an attempt to generalize a specific European treaty context, based on Strasbourg standards, although the guidance should not run counter to it, in its specific context. Rather, it proposes a middle solution that takes into account existing sources and practices. It subtly bridges a divergence of views. It does so in a spirit of intellectual honesty, in seeking to promote legal certainty. A careful reading shows, moreover, that it does so in keeping with the logic of the Vienna regime. States will, on the basis of such guidance, be motivated to clarify their intentions, as appropriate, when issuing a reservation. A combination of factors combined with a rebuttable presumption may, at the same time, serve as a guide to authorities based on enhanced clarity. If relevant, they may express the premises for their consent to be bound.

PORTUGAL

1. As regards guideline 4.5.2, Portugal tends to concur with the view that the nullity of a reservation also affects its author’s consent to be bound by the treaty.

2. This conclusion derives from the Vienna Conventions in the sense of it stating that the author of a reservation does not become a contracting State or contracting organization until at least one other contracting State or organization accepts the reservation. The reservation is thus presumed to be an essential condition for the consent to be bound.

3. Therefore, the starting point should be the assumption that a treaty does not enter into force for the author of a null reservation. The principle of consent (and consequently intention) remains the cornerstone of this subject matter. In any case, we would arrive at a conclusion similar to the one proposed by the Commission. It would, however, be more consistent with the options taken in the Vienna Conventions.

REPUBLIC OF KOREA

Guideline 4.5.2 is mainly based upon the rulings of the European Court of Human Rights. However, the principle of separating the validity of a reservation and the contracting parties’ status may not necessarily be applied to treaties other than those on human rights. Therefore, it is desirable to exemplify possible treaties that can follow the rulings of the European Court of Human Rights, even though these treaties are not characteristic of those on human rights.

SWITZERLAND

1. Switzerland will focus its observations more briefly on proposed guideline 4.5.2, as follows.

2. The question of knowing whether the author of a reservation can be considered, when the reservation proves impermissible, as bound by the treaty without the benefit of the reservation, or if on the contrary that author must be considered as entirely unbound by the treaty, is one for which an answer is needed. It would be regrettable to allow it to remain unresolved simply because of the difficulty of the problem it presents.

3. It would seem indisputable that the intention of the author of the reservation must serve as the basis, and that this issue arises only in the event that such intention cannot be established. The converse argument that if the intention of the author of a reservation cannot be established, that author is not bound by the treaty, does not appear desirable and could even raise additional issues. Switzerland also wonders whether a solution could be found in maintaining the presumption of proposed guideline 4.5.2, but at the same time reducing the degree of plausibility required for considering that the intention of the reservation’s author has been established. A guideline on the topic that included such a presumption would have, inter alia, the certain advantage, in the case of an impermissible reservation, of strongly encouraging the author of the reservation to reveal his intentions rather than staying silent or continuing to insist, without further explanation, on the validity of that reservation.

UNITED KINGDOM

1. In its comments at the Commission debate in 2010, the United Kingdom reiterated its long-standing view that if a State has made an invalid reservation, it has not validly expressed its consent to be bound and therefore treaty relations cannot arise. The United Kingdom committed to reflect on comments made by others during the debate and return to the issue with further views.

2. The issue of the status of an invalid reservation is central to the work of the Commission. In the view of the United Kingdom, the current situation arising from the “permissive” approach of the 1969 Vienna Convention has certain advantages in encouraging wider treaty participation. However, it also brings with it risks of divergences in practice and opinio juris between States and thus raises concerns as to the integrity of treaties and legal certainty. The United Kingdom is firmly of the view that the current guidelines offer an important opportunity to seek to resolve the ambiguities and uncertainties that may arise from the current situation, which will prove acceptable to all States.

3. The United Kingdom continues to believe that “strict” position previously espoused, most notably in our observations to the Human Rights Committee’s general comment No. 24,1 is lex lata. However, it accepts that this position is challenged by the practical difficulties as to where, when or by whom the impermissibility or

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invalidity of a reservation is established. Invalidity cannot always be readily ascertained objectively, particularly where the doubt is whether the reservation is consistent with the object and purpose of the treaty.

4. While the United Kingdom commends the Commission for the skilful way in which, through guideline 4.5.2, it has tried to strike a compromise between the “strict” position espoused by, among others, the United Kingdom, and the “super-maximum” effect of invalid reservations, it maintains the concerns previously expressed on the issue. The “rebuttable presumption” as set out in the guideline contains what appears to be an important safeguard for the reserving State in that it can rebut the presumption if it can show a contrary intention. The result of such rebuttal would be that the reserving State simply does not become a party to the treaty. However, it is not clear what evidence will be sufficient to establish that “the reservation is deemed to be an essential condition for the author’s consent to be bound by the treaty”. The United Kingdom remains unconvinced by the non-exhaustive but ultimately restrictive factors set out in the guidelines. Would, for example, a simple statement in an instrument of ratification that a State consents to be bound subject to a certain reservation constitute sufficient evidence? If not, what would be the standard of assessment?

5. For the purposes of encouraging progressive development of practice in this area, and in the spirit of seeking to inject greater legal certainty as to the legal consequences of what the Special Rapporteur has described as the “reservations dialogue”, the United Kingdom would therefore propose as an alternative to guideline 4.5.2 the following:

“The reserving State or international organization must within 12 months of the making of an objection to a reservation on grounds of invalidity indicate expressly whether it either wishes to withdraw the reservation or its consent to be bound. In the absence of an express response, the reserving State or international organization will be considered to be a contracting State or a contracting organization without the benefit of the reservation.”

6. In the case of an express response, this would be considered on a case-by-case basis. This proposal results in a better chance of clarity over treaty relations. It achieves a fair balance between the interests of the reserving and other States. It gives the author of the reservation an incentive to enter into a dialogue with the objecting State or international organization and revisit its reservation. It puts the onus on the author of the reservation to make clear its intention as to whether or not it wishes to be a party to the treaty if the reservation proves invalid. Finally, it gives the proponent of the reservation sufficient latitude to encourage it to consider remaining a party.

UNITED STATES

1. The chief concern of the United States regarding the guidelines, which also was highlighted by a number of States during Sixth Committee discussions last year, relates to the consequences of making an invalid reservation that is not collectively accepted by the parties to a treaty. Guideline 4.5.2 provides that when an invalid reservation has been formulated, the reserving State is considered a party to the treaty without the benefit of the reservation, unless the reserving State has expressed a contrary intent. After having studied this provision and the related commentary more closely, the United States fundamentally disagrees with the conclusion reached by the Commission on this guideline.

2. In examining the Commission’s reasoning more closely, the United States concurs with the statements made by both Germany and Hungary during the Sixth Committee that the Commission places far too much reliance on State practice and tribunal precedents that are limited both substantively and regionally. The tribunal precedents cited by the Commission come almost exclusively from the area of human rights and, in terms of State practice, the Commission only appears to rely on a handful of European States that have lodged objections with so-called “super-maximum” effect. Regardless of the character of other State practice, it is insufficient in the view of the United States to rely on limited practice in one area of international law and from one geographic region to propose such an important generally applicable guideline.

3. The commentary also too quickly rejects the opposite approach for dealing with invalid reservations. Namely, the commentary describes the approach in which an invalid reservation prevents a State from becoming a party as a “radical solution”, even though it is based on the relatively uncontroversial proposition that a reservation is a reflection of the extent to which a State consents to be bound. Further, the commentary asserts legal conclusions that are not necessarily justified by State practice. Specifically, the commentary expressly acknowledges that “in virtually all cases” States objecting to a reservation as invalid “have not opposed the treaty’s entry into force”. Because an invalid reservation is null and void, the Commission arrives at the legal conclusion that it “can only mean that the reserving State is bound by the treaty as a whole without benefit of the reservation”. However, the commentary’s admission that there is “no agreement” among States on the approach to this issue seems to undermine such a conclusion. Indeed, such varied State practice is not sufficient to support this conclusion.

4. Even though the Commission arrives at what it considers to be a compromise approach—establishing a rebuttable presumption that a reserving State is bound without the benefit of its invalid reservation—such an approach is nevertheless inconsistent with the bedrock principle of consent. It is the long-standing view of the United States that any attempt to assign an obligation expressly not undertaken by a country, even if based on an invalid reservation, is inconsistent with the fundamental principle of consent, which is the foundation upon which the law of treaties is based, as the Special Rapporteur himself has recognized. Moreover, when the principle of consent is combined with a good-faith assumption that States do not make reservations lightly and should be presumed to do

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1. See Yearbook ... 2010, vol. II (Part Two), pp. 113–115, paras. (6)–(13) of the commentary to guideline 4.5.2.
2. Ibid., pp. 112–113, paras. (3)–(5).
3. Ibid., p. 115, para. (16).
4. Ibid., p. 112, para. (2); see also p. 116, para. (19).
5. Ibid., p. 112, para. (2).
so only when such reservations are an essential condition of the reserving State’s consent to be bound by the treaty, the presumption in the proposed guidelines should point in the opposite direction. In other words, when an invalid reservation has been formulated, the reserving State should only be considered a party to the treaty without the benefit of the reservation if the reserving State has expressly indicated that upon objection, the reserving State would effectively withdraw the reservation and thus be a party without the benefit of the reservation.

5. Indeed, none of the factors cited by the Commission to support its proposed presumption is persuasive. The Commission first notes that because a reserving State is taking the significant action of becoming a party to the treaty, the importance of the reservation itself should not be overestimated. But this view of reservations ignores the crucial role they often play for a State. For example, a reservation may arise from domestic restrictions in a State’s fundamental law, which a treaty provision cannot override as a domestic law matter. Further, many States must obtain the approval of their legislative bodies to become party to a treaty and such entities can play a role in determining what reservations are necessary. Thus, if a reservation is formulated to take into account the limits of a State’s Constitution or the concerns of the State’s legislature, a State’s desire to become a treaty party does not automatically outweigh reservations tailored to address domestic concerns. In fact, such reservations are critical to the State’s consent. Second, the Commission argues that its proposed presumption will provide legal certainty. The commentary states that the presumption can resolve uncertainty between the formulation of the reservation and the establishment of its nullity; during this entire period (which may last several years), the author of the reservation has conducted itself as a party and has been deemed to be so by the other parties.

6. Third, the Commission argues that its proposed presumption will provide legal certainty. The commentary states that the presumption can resolve uncertainty.

7. The proposed presumption arguably would provide little clarity during the potentially long period between the formulation of the reservation and establishment of its nullity. Indeed, the presumption, as currently set forth, would be difficult to apply in practice and could undermine the stability of treaty obligations that the Vienna Conventions were designed to foster. For example, given the subjectivity inherent in assessing a reservation’s validity and the good-faith assumption that a reserving State intends to make permissible reservations, it is quite likely that a reserving State would consider its reservation valid, despite an objecting State’s view that it is not permissible. If the objecting State does not find the presumption rebutted, both States would agree that they have a treaty relationship, but the scope of that relationship would be disputed. Alternatively, if the objecting State decided on its own that the presumption had been overcome by the reserving State based on the factors listed in the guideline, there would be no consensus between these two States regarding whether the reserving State was bound at all to the treaty. The reserving State would continue to maintain that the reservation was valid and therefore that it remains a party to the treaty, while the objecting State would take the view that the reserving State cannot be party to the treaty.

8. The proposed presumption also arguably would do little to facilitate certainty for the period after an invalid reservation is established, unless the presumption is particularly difficult to overcome. Improved legal certainty would seem to come, at least in part, from the application of a strong presumption and anticipated continued treaty relations without the benefit of the reservation. If, however, the presumption can be easily rebutted once invalidity is established, or States can take action in advance to ensure that they can rebut it, treaty relations between the reserving State and objecting State would end. Thus, if the presumption is easy to rebut, States could not have reasonable certainty in advance that whatever the ultimate characterization of the reservation, treaty relations would continue.

9. Furthermore, the presumption proposed by the Commission arguably creates undesirable incentives in the treaty practice of States. In order to most effectively rebut the presumption, the reserving State would presumably indicate when making a reservation whether it is willing to be bound without benefit of the reservation if it turns out that the reservation is considered invalid. Yet, to do so would suggest that the reserving State is concerned that the reservation is invalid. Thus, to most effectively rebut the presumption, a State is, in a sense, forced to concede that its actions may be impermissible. It is not obvious to us that this approach is practical or would improve the process for clarifying the effect of reservations in treaty relations among States.

10. It also is worth noting that the guidelines leave the reserving State that has made an invalid reservation with only two choices: to become a party without the benefit of the reservation consistent with the presumption, or to refrain from becoming party to the treaty at all. This does not allow for the possibility that the objecting State may prefer to have a treaty relationship even with the invalid reservation than to have no treaty relationship at all, assuming the reserving State has overcome the presumption. The commentary explains that such treatment would amount to giving impermissible reservations the same effect as permissible reservations. Whether or not the negotiators of the Vienna Convention would have anticipated this result, it should not be rejected out of hand. Because there is an element of subjectivity in judging the compatibility of a reservation with a treaty’s object and purpose, as the United Kingdom has accurately pointed out in its Sixth Committee statement, and because “the vast majority of objections are based on the invalidity of
the reservation to which the objection is made\textsuperscript{11},\textsuperscript{11} it seems that the system for dealing with reservations characterized as invalid should be as flexible as possible. From a practical perspective, there are times when it may be better to continue to have a treaty relationship with a State, despite the existence of an impermissible reservation.\textsuperscript{12}

11. It is also worth echoing a point articulated by the United Kingdom in its Sixth Committee statement regarding the threshold for triggering the presumption. Namely, to the extent any presumption is retained, the commentary should make clear that one party’s objection cannot initiate the presumption such that it applies for all parties, an outcome that could be inferred from the current guidelines and commentary. Judging the permissibility of a reservation can be a very subjective exercise and, as a result, the guidelines or commentary should clarify that one objection does not erect any presumption applicable to all parties.

12. In addition to concerns regarding the existence and direction of the presumption, the United States has concerns with the Commission’s approach to determining the intent of the author of a reservation. The Commission acknowledges that determining the intention of the author may be challenging and sets forth a non-exhaustive list of factors to be considered.\textsuperscript{13} That list includes several factors: the reservation’s wording, the reserving State’s statements at the time it consents to be bound, subsequent conduct of the reserving State, the reactions of other contracting States, the provisions to which the reservation relates, and the treaty’s object and purpose. However, it is not clear why the express views of a reserving State made at the time it expresses consent to be bound would not always trump other factors. The United States also questions the relevance of the subsequent conduct of the reserving State to the intent determination. As discussed above, the reserving State presumably formulates its reservation to be valid. Thus, the fact that a reserving State engages in treaty relations with other parties should not be taken as evidence that the State desires to be bound without the benefit of the reservation, as it is equally if not more likely that such engagement is simply a reflection that the State assumes it has a valid reservation. Further, even actions by a reserving State to act consistently with a treaty provision on which it has formulated a reservation do not necessarily validate the proposed presumption, as States may take a reservation for certain reasons related to their internal allocation of authorities, but in practice still generally act consistently with the relevant obligations.

13. As the United States explained in its 2010 Sixth Committee statement, the questions being addressed in these guidelines are of fundamental importance. Proposed guideline 4.5.2 addresses an issue not clearly articulated in the Vienna Conventions and on which, as is noted in the commentary, there are widely varying views and thus no customary international law rules to codify. Under such circumstances, The United States believes this issue deserves more discussion before final adoption occurs.

**Guideline 4.5.3 (Reactions to an invalid reservation)**

**Australia**

See the observations made in respect of section 4.5, above.

**El Salvador**

1. As noted by the Commission itself, the first paragraph of this Guideline is “a reminder… of a fundamental principle… according to which the nullity of an invalid reservation depends on the reservation itself and not on the reactions it may elicit”, and “is perfectly consistent with guideline 3.1…, guideline 3.3.2 and guideline 4.5.1”.\textsuperscript{1}

2. Therefore, El Salvador considers the first paragraph of the guideline to be superfluous, as it reiterates the contents of guideline 4.5.1, on the nullity of an invalid reservation. The subsequent commentary highlights the point that that nullity does not depend on the objection or acceptance of a contracting State or organization.

3. While the second paragraph of guideline 4.5.3 likewise follows the same logic as preceding guidelines, it does add something new by establishing the deterrent requirement for States and international organizations to state their reasons for considering a reservation to be invalid, thus enhancing the stability and transparency of the legal positions of States and international organizations in their treaty relations. However, this paragraph could be moved to become the second paragraph in guideline 4.5.1, given that, as already noted, the first paragraph of guideline 4.5.3 is superfluous.

**Finland**

1. As guideline 4.5.3 rightly explains, the lack of conformity with the formal and/or substantial requirements placed on the act is in itself sufficient to render the reservation null and devoid of legal effect. Nothing further, such as objection or any other opposing reaction by other contracting parties, is required. Finland supports, however, the Commission’s view that it may often be beneficial for contracting States, if appropriate, to make it officially known that they consider a reservation to be impermissible or formally invalid. While such a declaration is not legally speaking necessary, a reasoned opinion will draw wider attention to the issue and may contribute towards clarifying the existing legal situation.

2. Finland, therefore, wishes to express its continued support for guideline 4.5.3.

3. See also the observations made in relation to guideline 4.5.1, above.
4. Finland also agrees with the Commission also on the point that, even though an analytical distinction can be made between the act of opposing a valid reservation and that of opposing an invalid one, both these acts should be referred to as “objections”, since this is the consistent practice of States and there seems to be no real danger of confusion. However, Finland is less convinced by the Commission’s reasoning according to which the definition of “objection” in guideline 2.6.1 is sufficiently wide to cover objections to invalid reservations in addition to those made to valid ones. According to guideline 2.6.1, an objection is a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

The verb “purport”, of course, would imply a purpose or intention on the part of the objecting State, in this case the specific purpose or intention of modifying or excluding the effects of the reservation. A State could not, however, have any such intention when it considers the reservation to lack any legal effects to begin with; the purpose of objecting is merely to point out the invalidity and consequent lack of legal effects of the reservation.

5. For these reasons, Finland proposes to the Commission that it consider the feasibility of refining the definition in guideline 2.6.1 so that it expressly includes both types of objections, perhaps by adding to it the phrase “or whereby the objecting State or international organization expresses its view that the reservation is invalid and without legal effect”.

**Portugal**

1. Portugal welcomes the reminder in guideline 4.5.3. Portugal also welcomes the willingness of the Commission to be pedagogic by encouraging States and international organizations to react to invalid reservations.

2. Nevertheless, it is known that such a reaction would not be a real objection since an invalid reservation is void of legal effects. Hence, the reaction to it would not have any direct legal effects. Furthermore, the wording compels the Contracting States and international organizations to a reaction in a rather imposing manner which is not consistent with the complete freedom of making such a reaction. Portugal therefore suggests changing the wording from “should [...] formulate a reasoned objection” to “may react [...] by making a corresponding reasoned statement”.

**Republic of Korea**

Guideline 4.5.3 seems redundant. Following article 20, paragraph 5, of the 1969 Vienna Convention, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation. Other parties may raise objections based on this clause of the Vienna Convention.

**United States**

Guideline 4.5.3 encourages States to formulate reasoned objections to invalid reservations as soon as possible, and the commentary explains that it is not indispensable that objections to impermissible reservations be formulated within 12 months, the time frame set forth in the Vienna Convention for objections to permissible reservations. However, to the extent an impermissible reservation may have an even greater effect on treaty relations than a permissible reservation—i.e. by binding a reserving State without the benefit of its reservation or by preventing the reserving State from becoming party to the treaty—then it would appear to be quite important to establish a concrete time frame in which objections on such grounds should be made. As a result, the Commission might consider adding to the end of paragraph 2 of guideline 4.5.3 the phrase “and preferably within 12 months of notification of the reservation”.

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1. See Yearbook ... 2010, vol. II (Part Two), para. (14) of the commentary to guideline 4.5.3.

**Section 4.7 (Effect of an interpretative declaration)**

**France**

The effects of an interpretative declaration and possible reactions to it must be distinguished from the effects of a reservation, since interpretative declarations sometimes form part of a broader context than the single treaty to which they relate and touch generally on the way in which States interpret their rights and obligations in international law. It is also important to differentiate between approval of an interpretative declaration and agreement between the parties on the interpretation of the treaty.

**Guideline 4.7.1 (Clarification of the terms of the treaty by an interpretative declaration)**

**Malaysia**

1. Malaysia wishes to seek clarification on the intended function of an approval of or opposition to an interpretative declaration in interpreting a treaty in the second paragraph of guideline 4.7.1, i.e. whether it plays a role in determining how much weight and value should be given to the interpretation proposed by the interpretative declaration, or merely functions as an aid to interpret a treaty without having any implication on the interpretation proposed by the declaration. Malaysia is of the view that the approval of or opposition to an interpretative declaration should not determine the weight to be given to the interpretative declaration but should be regarded merely as an aid to interpret a treaty. In expressing consent to be bound by a treaty, States have in their mind a certain understanding of the terms used in that treaty. Besides, a treaty calls upon its contracting parties to implement its provisions in their international relations between each other as well as in their own domestic affairs. Thus, it is necessary for the States to interpret the treaty in order to apply the provisions and meet their obligations. To have approval and opposition determine the admissibility of the interpretation proposed by the author State will hinder the implementation of treaty obligations by that State in its
domestic and international affairs. For that reason, Malaysia is of the view that approval of or opposition to interpretative declarations should not determine the weight to be given to the interpretation proposed.

2. Malaysia notes that under guideline 2.9.1 and 2.9.2 the terms “approval” and “opposition” refer to express approval and opposition. However, under guideline 2.9.8 and 2.9.9, approval and opposition can also be inferred from the “silence” of contracting parties. Malaysia understands that the terms “approval” and “opposition” in guideline 4.7.1 should only include the definitions stipulated in guideline 2.9.1 and 2.9.2. If, however, the rules laid down in guideline 2.9.8 and 2.9.9 are also to be made applicable to guideline 4.7.1, it would follow that an interpretative declaration may be accepted or rejected simply on the basis that silence of contracting States may be inferred as an approval or opposition to the declaration. The uncertainty of the legal status of silence on a specific interpretive declaration could consequently lead to an undesirable result. For this reason, Malaysia is of the view that this inference should not be simply drawn from the inaction of States, as it will have an effect on treaty interpretation, and that the terms “approval” and “opposition” in guideline 4.7.1 should refer to express approval and opposition.

**Guideline 4.7.2 (Effect of the modification or the withdrawal of an interpretative declaration in respect of its author)**

**MALAYSIA**

On the proposed guideline 4.7.2, Malaysia understands that the guideline is based on the principle that a State should not be allowed to “blow hot and cold”. It cannot declare that it interprets certain provisions in one way and then take a different position later. Thus, States have to be cautious in proposing an interpretation to a treaty. This would mean that States must be fully ready to comply with the obligations stipulated in the treaty before becoming a party, and be able to consider the possibility of future development such as a change of national policy before formulating any interpretative declaration. This is because the withdrawal or modification mechanism, though it is available, may not produce the effect intended by the States. Having said this, however, since the application of the guideline in relation to guideline 4.7.1 depends on whether the other States have relied on the interpretative declaration made by the declarant State, Malaysia is of the view that it may be necessary for the Commission to provide explanations in the commentary to the guideline on the extent to which reliance by States on an interpretative declaration can prevent the withdrawal or modification of that declaration from producing the effects provided for under guideline 4.7.1.

**Section 5 (Reservations, acceptances of and objections to reservations, and interpretative declarations in the case of succession of States)**

**AUSTRALIA**

In relation to section 5, Australia notes that these provisions involve both codification and the progressive development of international law.

**AUSTRIA**

The guidelines concerning reservations and State succession seem to present, in Austria’s view, a glass bead game as they refer to concepts which only partly reflect the current state of international law. They are based on the 1978 Vienna Convention, which has only very few parties and is generally seen as only partly reflecting customary international law. This convention—as well as the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts—distinguishes between newly independent States and other successor States. Austria wonders whether the use of the category of “newly independent States” is still appropriate in present times, as the process of decolonization and the need to consider special circumstances arising therefrom in the context of State succession lie in the past. The Commission itself has ceased using this distinction: its articles on the nationality of natural persons in relation to the succession of States (annex to General Assembly resolution 55/153 of 12 December 2000) no longer contain a reference to “newly independent States”.

1 Not yet in force.
2 Yearbook ... 1999, vol. II (Part Two), p. 20, para. 47.

**FRANCE**

Section 5, which deals with “reservations, acceptances of and objections to reservations, and interpretative declarations in the context of succession of States”, is a complex one involving both codification and the progressive development of international law. On this point, the lack of well-established practice on which to base such guidelines makes any attempt at systematization on the matter particularly difficult, given that succession of States is not governed by clear rules in international law. For example, it may be noted that the practice of States with regard to succession of States to treaties, and in particular that of France, shows that the principle that treaties continue in force in cases of separation of States, contained in article 34 of the 1978 Vienna Convention, does not reflect the state of customary law on the topic. On the contrary, it appears that treaties do not continue to apply as between the successor State and the other State party unless these States agree expressly or implicitly thereto. While concern for legal security and the day-to-day requirements of international relations would suggest that to the extent possible, treaties concluded with the predecessor State should continue in force, it is difficult to assume more than a rebuttable presumption of continuity in case of succession.

**MALAYSIA**

See the observations made in respect of guideline 2.4.6, above.

**PORTUGAL**

Portugal maintains its doubts on whether it is suitable to deal, in the Guide to Practice, with the question of reservations to treaties in the context of succession of States. The 1978 Vienna Convention, which has only 22 States parties, deals with this question in a superficial manner. Portugal fully acknowledges the practical
relevance of dealing with the issue in the Guide to Practice. However, it should not be forgotten that the Commission has no mandate to enter into the progress of international law while developing this Guide to Practice.

**United Kingdom**

The view of the United Kingdom is that there is insufficient clear practice on which to base such guidelines that purport to set out international law either as it is or as it should be. The lack of practice in this area is apparent from the small number of cases referred to in the commentary. The United Kingdom therefore does not see the merit in extending the Guide to succession of States and does not believe that omission of section 5 will have any sort of detrimental effect on the work as a whole. The United Kingdom thinks that energies should instead be focused on the preceding chapters, which represent the main focus of the topic and the work of the Commission in this area over the past 15 years.
RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

[Agenda item 3]

DOCUMENT A/CN.4/640

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

[Original: English]
[14 March 2011]

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SICILIANOS, Linos-Alexandre
Introduction

1. The present report is intended to provide a survey of the comments made by States and international organizations on the draft articles on responsibility of international organizations which were adopted at first reading by the Commission at its sixty-first session, in 2009.1 In paragraph 5 of its resolution 64/114 of 16 December 2009, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations by 1 January 2011 on the draft articles and commentaries on the topic “Responsibility of international organizations”, adopted on first reading by the Commission at its sixty-first session. In paragraph 5 of resolution 65/26 of 6 December 2010, the Assembly once again drew the attention of Governments to the importance for the Commission of having their comments and observations by 1 January 2011. The Special Rapporteur is particularly grateful to States and international organizations that submitted their written comments within the deadline or soon afterwards. This timeliness enabled him to prepare the present report by 4 March 2011, as required to make the report available in all six official languages at the start of the sixty-third session of the Commission in 2011. The report is intended to cover comprehensively all the statements and written comments that were made by 1 February 2011 on the first reading of the articles and their commentaries. An effort has also been made to take into account written comments that arrived during February.

2. The present report also covers some instances of practice that have become available after the first reading of the draft articles was completed. Moreover, certain views that have been expressed in the growing literature on the subject have been considered.

3. The overall structure of the draft articles as they were adopted at first reading has not been criticized. Moreover, there was only one proposal concerning the order in which the draft articles are presented. This was a suggestion by OSCE, echoed by WHO and a group of other organizations. According to this proposal, which was designed to give more emphasis to “the principle of speciality” in its application to international organizations, the Commission should consider the possibility of including draft article 63 (Lex specialis) in part one (Introduction) of the draft articles, as a new draft article 3.2 This proposal does not concern the substance of the draft articles, since changing the position of the provision on speciality would not affect its legal effects. The placement of this provision among the “general provisions” at the end of the draft articles is based on the idea that one should first set forth the rules that apply to international organizations generally and then refer to the possible existence of different rules for certain organizations, especially in their relations with their members. Those rules may be of great practical importance, but cannot be expressed in the draft articles, which may only aspire to set forth the residual rules. Moreover, the placement of the provision on lex specialis corresponds to the one that was adopted in the draft articles on responsibility of States for internationally wrongful acts (hereinafter referred to as “the draft articles on responsibility of States”);3 the greater importance that the principle of speciality may have with regard to international organizations does not seem to require a change.

4. Some recurrent themes of a general nature have appeared in certain statements and written comments. One of these themes relates to the great variety of international organizations. For instance, the Secretariat of the United Nations pointed to the need to take into account the “specificities of the various international organizations” and quoted the following passage from the advisory opinion of ICJ on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict:

International organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.4

The variety of international organizations is an undeniable fact which also helps to explain why some draft articles do not offer precise answers to possible questions. It is also true that some draft articles are hardly relevant to certain organizations. For instance, a technical organization would be highly unlikely to be in a position to invoke certain circumstances precluding wrongfulness. The draft articles at issue would apply to an organization only if the required conditions are met.

5. Another recurrent theme is that the draft articles follow the draft articles on responsibility of States too closely. The draft articles are certainly close with regard to various issues on which there is no reason to make a distinction between States and international organizations. When this conclusion is reached, it is based on a specific analysis and never on an uncritical assumption. It is noteworthy that no specific comments were addressed on most of the draft articles that closely correspond to draft articles on responsibility of States. On the other hand, several draft articles contain significant changes in order to reflect the particular situation of international organizations. Moreover, various draft articles consider issues that were not dealt with in the draft articles on responsibility of States.

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1 The text of the draft articles adopted at first reading and the commentaries thereto is reproduced in Yearbook ..., 2009, vol. II (Part Two), pp. 19 et seq., paras. 50 and 51.
2 Document A/CN.4/637 and Add.1, reproduced in the present volume. The comments submitted by WHO were made also on behalf of the CMBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WIPO, WMO and WTO.
3 The text of these articles and the commentaries thereto are reproduced in Yearbook ..., 2001, vol. II (Part Two), pp. 30 et seq., para. 77. Article 55 (Lex specialis) opens part four (General provisions).
6. A third theme is that some draft articles are based on limited practice. This could hardly be attributed to the lack of efforts deployed by the Commission to acquire knowledge of the relevant practice and take it into account. Unfortunately, only a few instances of unpublished practice have been contributed by States and international organizations in order to facilitate the Commission’s study. Incidentally, it is significant that the recent flow of academic writings has not brought to light elements of relevant practice that the Commission did not consider. Practice concerning the responsibility of international organizations indeed appears to be limited, in particular because of the reluctance of most organizations to submit their disputes with States or other organizations to third-party settlement. While certain draft articles are based on scant practice, this is not a decisive reason for omitting their text. An omission would not only entail a gap in the draft articles, but affect the substance of the proposed rules. Should, for instance, a draft article on necessity be omitted from among the draft articles dealing with the circumstances precluding wrongfulness, the implication would be that an international organization could never invoke necessity for this purpose.

7. The following six chapters correspond to the six parts of the draft articles adopted at first reading. Each chapter contains a survey of the comments concerning the relevant part and includes the related observations and suggestions to the Commission. These concern both the draft articles and their commentaries and call for views by members of the Commission. To facilitate the discussion, the end of each chapter contains a brief summary of the proposals made with regard to the text of the draft articles contained in the relevant part. The large numbers of suggested amendments concerning the commentaries are not to be summarized.

Chapter I

Part One. Introduction

Draft article 1

8. In defining the scope of the draft articles, draft article 1, paragraph 1, says that the draft articles “apply to the international responsibility of an international organization for an act that is wrongful under international law”. Paragraph 2 then adds that “[t]he present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization”. This draft article reflects the content of draft article 57 on State responsibility, according to which the articles on State responsibility “are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization”.

9. Coherently with draft article 1, paragraph 2, part five of the current draft only deals with the responsibility of a State in connection with the conduct of an international organization. Some questions relating to the responsibility of States towards international organizations are not considered, at least expressly, either in the present draft articles or the draft articles on responsibility of States. The main question at issue is the invocation of the responsibility of a State by an international organization when the responsibility of a State is not connected with the conduct of an international organization: for instance, when a State infringes on an obligation under a bilateral treaty concluded with an international organization. One point of view is that, since the draft articles on responsibility of States only consider the invocation of responsibility by a State, the current draft articles should fill the gap. Another opinion is that this matter pertains to State responsibility and could be covered by analogy; if it was felt that it should be dealt with expressly, there would be the need to amend the draft articles on responsibility of States. In that case, the chapeau of draft article 42 on State responsibility should, for instance, be amended to say, instead of “A State is entitled as an injured State to invoke the responsibility of another State”. When the matter was discussed within the Commission, the second view prevailed, and was expressed in paragraph (10) of the commentary to article 1. However, it was considered useful to sound out the opinions of States and international organizations on this matter. Consequently, in the report of the Commission on its sixty-first session, in 2009, it was pointed out that:

Certain issues concerning international responsibility between States and international organizations have not been expressly covered either in the articles on the responsibility of States for internationally wrongful acts or in the draft articles on the responsibility of international organizations.

Some examples of these issues were given; and the Commission asked for comments and observations from Governments and international organizations about the context in which these questions should be considered.\

10. The response given by States has been divided. In the Sixth Committee of the General Assembly, some States expressed the view that issues relating to the responsibility of States towards international organizations should be covered in the present text, while other States considered that these issues did not belong to the current text. The same division of opinions has appeared in the written comments subsequently made by States.

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6 Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 16th meeting, statements by Switzerland (A/C.6/64/SR.16), para. 2; Mexico, ibid., para. 32; Spain, ibid., para. 82; and Malaysia, 21st meeting (A/C.6/64/SR.21), para. 32.
7 This was the opinion of Belarus, ibid., 15th meeting (A/C.6/64/SR.15), para. 35; Italy, 16th meeting (A/C.6/64/SR.16), para. 17; Netherlands, ibid., para. 55; Greece, ibid., paras. 60 and 61; and Ghana, 17th meeting (A/C.6/64/SR.17), para. 9. See also the statement by France, 15th meeting (A/C.6/64/SR.15), para. 68.
8 Austria expressed concern about the resulting gap (A/CN.4/636, Add.1–2, reproduced in the present volume, general comments). The first view was defended by Portugal (ibid., para. 2 of the general comments), while the opposite opinion was expressed by Germany (ibid., general comments to article 1).
11. The first opinion has been defended also by WHO and a group of other organizations in their joint comments. These organizations argued from an alleged inconsistency that the Commission would have incurred in considering issues of State responsibility towards international organizations. They maintained that “several articles do address such issues, explicitly or by implication.” However, articles 57 to 61, which are mentioned on this point, are within the scope as defined in draft article 1, paragraph 2, while draft article 32, paragraph 2, and draft articles 39 and 49, to which the comments also refer, are all “without prejudice” clauses and therefore do not cover any additional matter.

12. The Commission could embark on a study of certain issues that have not been expressly dealt with in the draft articles on responsibility of States and in the current draft articles. It could then discuss the preferred placement of any additional provision that it may wish to suggest. For the present purposes, since these additional provisions would not affect the content of the draft articles included in the current draft, taking the option of a further study would not require the Commission to postpone consideration of the draft articles adopted at first reading.

13. The Drafting Committee may wish to consider Ghana’s suggestion that paragraph 2 of draft article 1 be reworded as follows: “The present draft articles also apply to the international responsibility of a State for an act by an international organization that is wrongful under international law”.

14. With regard to draft article 2 (Use of terms), only a few comments were made on the definition of “international organization” in subparagraph (a). Two States expressed their preference for defining international organizations as “intergovernmental organizations”, according to the definition which traditionally appears in international conventions. In the commentary, the Commission gives the reason for seeking in the present draft articles a more detailed definition which in particular takes into account the fact that “an increasing number of international organizations include among their members entities other than States as well as States”.

15. One State queried whether the qualifier “possessing its own international legal personality” was necessary, because “international organizations possess international legal personality as a result of being such organizations”.

16. In paragraph (4) of the commentary to draft article 2, it would be preferable to specify that the current status of OSCE is controversial. OSCE itself noted in a written comment that “there is no consensus among the OSCE participating States that OSCE should fulfill either of the two listed conditions: whether OSCE possesses its own legal personality, or whether the founding documents of OSCE (in the first place the Helsinki Final Act and the Charter of Paris for a New Europe) are governed by international law”.

17. By using the plural “States”, subparagraph (a) does not imply that an international organization within the definition may be established only by a plurality of States. The commentary could specify, as suggested by the Secretariat, that “a (single) State and an international organization can, by agreement, establish an international organization” and give as examples the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

18. With regard to the definition of “rules of the organization” in subparagraph (b) of draft article 2, and more particularly the part of the definition which refers to “other acts of the organization”, one State welcomed this reference, “bearing in mind the great variety of acts that constituted such rules”. Another State wished the commentary to “clarify in greater detail the substance, form and nature of such other acts” and questioned “the unqualified statement that the rules of an organization might include agreements concluded by the organization with third parties and judicial or arbitral decisions binding the organization”. However, one could say that the statement in the commentary is already qualified by the use of the verb “may”. It is difficult to envisage a detailed definition that would accommodate a great number of international organizations. This also applies to including a “hierarchy among the rules of the organization”, as wished by WHO and a group of other organizations in their joint comments. The Secretariat questioned the broad definition of the ‘rules of the organization’ which includes instruments extending far beyond the constituent

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9 Document A/CN.4/637 and Add.1, comments to article 1.
11 China, ibid., 15th meeting (A/C.6/64/SR.15), para. 43; and Cuba (document A/CN.4/636 and Add.1–2, comments to article 2).
12 Yearbook ..., 2009, vol. II (Part Two), para. (3) of the commentary to article 2. ILO “supports the idea of not using the expression of ‘inter-governmental organization’”; on the other hand, ILO finds that the addition of “other entities” in the draft article “does not add a significant element to what is already covered by the first part of the definition, which seems broad enough to include different possibilities of membership of entities other than States” (document A/CN.4/637 and Add.1, para. 1 of the comments to article 2).
13 Austria (document A/CN.4/636 and Add.1–2, para. 2 of the comments to article 2).
14 Document A/CN.4/637 and Add.1, comments to article 2. The same two queries were raised by the Russian Federation, Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 16th meeting (A/C.6/64/SR.16), para. 7; and Austria (document A/CN.4/634 and Add.1–2, para. 2 of the comments to article 2).
15 Document A/CN.4/637 and Add.1, para. 1 of the comments to article 2.
17 Russian Federation, ibid., para. 6.
18 Document A/CN.4/637 and Add.1, comments to article 2, footnote.
The subparagraph could read:

rules of the organization is made later in the draft articles, advantage of clarifying the relation between organs and article and document A/CN.4/636 and (World Bank), para. 20. The EU provides an example of the inclusion of both agreements concluded by the organization and judicial decisions within the rules of the organization.

19. According to the Secretariat of the United Nations, the definition of “rules of the organization” should also make clear that a violation of the rules of the organization entails its responsibility, not for the violation of the “rule”, as such, but for the violation of the international law obligation it contains.21 This distinction among the rules of the organization is made later in the draft articles, in draft article 9, which seems the appropriate location since it deals with the “existence of a breach of an international obligation”. The wider definition of the rules of the organization is justified by the fact that in the draft articles they play a larger role than that of determining when there is a breach of an obligation under international law. The rules of the organization are, for instance, relevant for identifying who is competent to express the consent of the organization or to make a claim for the organization.

20. While subparagraph (c) of draft article 2 contains a definition of “agent”, the draft articles do not include any definition of “organ”. OECD, the World Bank, the Secretariat of the United Nations and Belgium proposed in their comments to introduce one.22 This would have the advantage of clarifying the relation between organs and agents in the draft articles. The appropriate place for a definition of “organ” would be a new subparagraph (c). The articles on State responsibility do not include a provision on the use of terms, but they do contain, in article 4, paragraph 2, the following text concerning the meaning of organ of a State: “An organ includes any person or entity which has that status in accordance with the internal law of the State.” A definition could be provided in the present draft articles on the same line. The Secretariat suggested: “any entity which has that status in accordance with the rules of the organization”.23 Taking the same approach, the subparagraph could read:

“(c) ‘Organ of an international organization’ means any person or entity which has that status in accordance with the rules of the organization.”

This proposal takes into account a suggestion by the World Bank to replace “includes”, as used in article 4 on State responsibility, with “means”.24 Although there are various approaches to the definition of “organ” in the constitutive instruments and other rules of international organizations, it seems preferable not to superimpose a concept of organ that does not find a counterpart in the rules of the organization concerned. This also reflects the limited significance that the distinction between organs and agents has in the draft articles.

21. If the proposal to include a definition of “organ” in draft article 2 is accepted, the definition of “agent” would have to be redesignated as subparagraph (d). According to draft article 2 (c), “‘agent’ includes officials and other persons or entities through whom the organization acts”. Two States and ILO would like to complete this definition by specifying that the person or entity concerned has been “charged by an organ of the organization with carrying out, or helping to carry out, one of its functions”.25 This would follow more closely the wording of the advisory opinion of ICIJ on Reparation for Injuries Suffered in the Service of the United Nations.26 Although the majority of the Commission expressed its preference for a shorter version when it examined a similar proposal that had been made in the seventh report of the Special Rapporteur,27 the question could be reconsidered. A possible intermediate solution would be to omit the words “an organ of” in the suggested addition. The omission would be justified by the great variety of approaches to the use of the term “organ” in the rules of different organizations.

22. The proposal made at the end of the preceding paragraph would seem to meet part of the concern of the Secretariat that “the definition of an ‘agent’ in the draft articles should, at the very least, differentiate between those who perform the functions of an international organization, and those who do not perform such functions.”28 The Secretariat also pointed out the importance of other factors, such as the status of the person or entity and the relationship and degree of control that exists between the organization and any such person or entity (para. 12). These elements may be considered as implied in the requirement that agents of an international organization are “persons or entities through whom the organization acts”. This point could usefully be developed in the commentary.

23. The World Bank and ILO suggested that the word “includes” instead of “means” in the definition of “agent” is inappropriate insofar as this definition also contains a reference to “other persons or entities”.29 The use of the word “includes” would be justified if the definition of agent contained a reference to the rules of the organization. In that case, the term “includes” would suggest that, as noted in paragraphs (8) and (10) of the commentary to

21 Ibid., para. 3 of the comments to article 2.
22 Ibid., comments to article 63.
23 Ibid., para. 6 of the comments to article 2.
24 Document A/CN.4/637 and Add.1, para. 12 of the comments to article 5.
25 Document A/CN.4/637 and Add.1, para. 12 of the comments to article 5.
26 Ibid. subpara. (b) of the comments to article 2.
draft article 5, a person or entity could in exceptional cases be considered an agent even if not so regarded under the rules of the organization. Since the definition of “agent”, unlike that of “organ” proposed in paragraph 20 above, does not contain a reference to the rules of the organization, the suggested replacement of “includes” by “means” does seem more appropriate.

24. If the idea of including a definition of “organ” is retained, it would be preferable to avoid an unnecessary overlap between the categories of organs and agents. This could be achieved by making it clear that only persons and entities other than organs of an international organization may be regarded as agents of that organization. The definition could then be reworded as follows:

“(d) “Agent” means an official or other person or entity, other than an organ, through whom the organization acts and who is charged by the organization with carrying out, or helping to carry out, one of its functions.”

Recommendation

25. In conclusion to this chapter, the following proposals concerning part one are made: a new subparagraph (c), concerning the definition of “organ”, should be introduced in draft article 2, as suggested in paragraph 20 above, and the current subparagraph (c), as reworded according to the proposal made in paragraph 24, should become subparagraph (d).

CHAPTER II

Part Two. The internationally wrongful act of an international organization

Draft article 4

26. One State would like to see damage included among the elements of an internationally wrongful act set forth in draft article 4. This question was discussed with regard to State responsibility. It was then considered that the requirement of damage “depends on the content of the primary obligation, and there is no general rule in this respect”. The need for coherence among the instruments on international responsibility prepared by the Commission suggests that the same approach should be taken with regard to responsibility of international organizations.

27. Another State requested clarification of the statement in the commentary that “the responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization”. This may happen not only, as the same State suggested, when “an international organization has expressly (for example via a treaty clause) assumed such responsibility”; it may also occur when an international organization is responsible, according to chapter IV of part two, in connection with the act of a State or another international organization.

28. The fact that draft article 4 refers to international law in order to determine when an act is attributable to an international organization was found ambiguous by one State, because international law is “unclear in that regard”. The reference to international law in draft article 4 has to be appraised in its context. An attempt to elucidate the rules of international law on attribution has been made in draft articles 5 to 8.

Draft article 5

29. Paragraph 2 of draft article 5 sets forth that “[r]ules of the organization shall apply to the determination of the functions of the organs and agents”. Generally an agent will have “acted on the instruction or under the control of the organization in question” as the World Bank would like the text to specify. However, when an international organization confers functions on an agent without giving instructions or exercising control, the organization would still act through the agent and should not be exempted from having the agent’s conduct attributed to it. The same conclusion also applies to the case, referred to by one State, of “semi-autonomous entities on which the creator organizations conferred significant powers, but whose conduct they could not control, at least not in an ‘effective’ manner”.

30. Another State would like to see “private conduct” included in draft article 6. This proposal concerns the attribution of conduct of private persons “acting under the effective control of an organization and exercising functions of the organization”. These persons would appear to be included in the definition of agents. Therefore their conduct would be attributed to the international organization according to draft article 5, as explained in paragraph (10) of the commentary to this draft article. Draft article 6 is a less appropriate placement for a rule on attribution of the conduct of private persons, since it concerns the conduct of organs and agents placed at the disposal of an international organization by a State or another international organization.

31 Cuba, document A/CN.4/636 and Add.1–2, comments to article 4.
32 See Yearbook ... 2001, vol. II (Part Two), para. (9) of the commentary to article 2.
33 Germany, document A/CN.4/636 and Add.1–2, para. 2 of the comments on chap. 1 of part two, referencing para. 2 of the introductory comments to chap. II.
34 Ibid., para. 3.
35 Mexico, Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 16th meeting (A/C.6/64/SR.16), para. 30, which went on to say that the “key criterion for the attribution of responsibility to international organizations, particularly in cases where the constituent instrument of the organization contained no express provision on the matter, continued to be that of effective control of the acts in question”.
36 Document A/CN.4/637 and Add.1, para. 1 of the comments to article 5.
38 Austria, document A/CN.4/636 and Add.1–2, para. 2 of the comments to article 6.
31. On the other hand, the Nordic countries would
like the commentary to clarify that “civilian or military
experts, advisers or other personnel” who are seconded
to an international organization “fall within the general
rule contained in draft article 5” rather than under draft
article 6. 38 Paragraph (1) of the commentary to the lat-
ter draft article makes the point that, when an organ is
“fully seconded” to an organization, “the organ’s con-
duct would clearly be attributable only to the receiving
organization”. 39 The commentary to draft article 5 could
also make the same point.

**Draft article 6**

32. Various views were expressed on draft article 6 and
in particular on the “effective control” over the conduct
of the organ of a State or an international organization
put at the disposal of another organization as the criterion
for the attribution of control to the latter organization.
Austria would like to “add to the criterion of control also
that of the exercise of functions of the organization”.
40 This additional criterion may be taken as implied, but
could be expressly stated in the commentary.

33. Greece expressed the opinion that, in accordance
with the judgment of the European Court of Human Rights
in the Behrami and Saramati cases, 41 “conduct should be
attributed to the international organization exercising
ultimate control and not to the State exercising opera-
tional control”. 42 On the other hand, the United Kingdom
observed that, “[i]n the absence of judicial criticism of
the effective control test” in the decision of the European
Court, “no change to draft article 6 was required”. 43 The
Nordic countries “agreed with the view expressed in the
commentary to draft article 6 that the international re-
ponsibility of an international organization must be lim-
ited to the extent of its effective operational control, and
not merely according to the criterion of ultimate authority
and control”. 44 Germany endorsed the view expressed
in paragraph (5) of the introductory commentary of the
Commission to chapter II that “conduct of military forces
of States or international organizations is not attributable
to the United Nations when the Security Council author-
izes States or international organizations to take neces-
sary measures outside a chain of command linking those
forces to the United Nations”. 45 The same conclusion
was expressed in detailed comments by the Secretariat review-
ing United Nations practice. 46

34. In order to settle the issue of where the effective
control lies, one needs to consider the “full factual circum-
cstances and particular context in which international or-
ganizations and their members operated”, as was stressed
by the United Kingdom in a statement. 47 This implies that,
with regard to a United Nations peacekeeping force, while
in principle the conduct of the force should be attributed
to the United Nations, effective control of a particular
conduct may belong to the contributing State rather than
to the United Nations. One example from practice show-
ing the same approach was recently provided by a judg-
ment of 8 December 2010 of the Court of First Instance
of Brussels, which found that the decision by the com-
mander of the Belgian contingent of the United Nations
Assistance Mission for Rwanda (UNAMIR) to abandon a
de facto refugee camp at Kigali in April 1994 was “taken
under the aegis of Belgium and not of UNAMIR”. 48

35. The Secretariat recalled that, for a number of rea-
sons, notably political, the practice of the United Nations
had been to maintain the principle of United Nations re-
sponsibility vis-à-vis third parties in connection with
peacekeeping operations. Nevertheless, the Secretariat
supported “the inclusion of draft article 6 as a general
guiding principle in the determination of responsibilities
between the United Nations and its Member States with
respect to organs or agents placed at the disposal of
the Organization, including possibly in connection with
activities of the Organization in other contexts”. 49

**Draft article 7**

36. According to draft article 7, *ultra vires* acts are at-
tributable to an international organization under conditions
similar to those applying to States according to draft art-
cle 7 on State responsibility. One State expressed doubts
about this criterion. 50 It was also questioned by WHO,
“ultra vires” acts are attributable to an international organization under conditions similar to those applying to States according to draft article 7 on State responsibility. One State expressed doubts about this criterion. 50 It was also questioned by WHO, together with a group of other international organizations, 51 who stated that “the rules and established practices

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39 This paragraph appears to meet a criticism expressed by ILO with regard to draft article 6, concerning the need to take into account the “modalities in the law of international civil services under which national officials are put at the disposal of international organizations” (document A/61/4/637 and Add.1, comments to article 6).

40 Document A/61/4/636 and Add.1–2, para. 1 of the comments to article 6.

41 Decision (Grand Chamber) of 2 May 2007 on the admissibility of application Nos. 71412/01 and 78166/01, paras. 29–33. This decision was examined in paragraph (9) of the commentary to draft article 6. To the writings listed in the commentary that criticize the application by the European Court of the criterion of effective control (footnote 107), one may add Bell, “Reassessing multiple attribution: the International Law Commission and the Behrami and Saramati decision”, p. 501; Laly-Chevaller, “Les opérations militaires et civiles des Nations Unies et la Convention européenne des droits de l’homme”, pp. 642–644; Messineo, “The House of Lords in Al-Jedda and public international law: Attribution of conduct to UN-authorized forces and the power of the Security Council to displace human rights”, pp. 39–43; and Siciliano, “L’irresponsabilité des forces multilatérale?” pp. 98–106.


43 Ibid., para. 23.

44 Denmark on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), ibid., 15th meeting (A/C.6/64/SR.15), para. 27. A similar view was expressed by Belgium (A/61/4/636 and Add.1–2, comments to article 6).

45 Document A/61/4/636 and Add.1–2, para. 1 of the introductory comments on chapter II of the second part.

46 Document A/61/4/637 and Add.1, paras. 2–10 of the comments to article 5.

47 *Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 16th meeting (A/C.6/64/SR.16)*, para. 23. It is not clear why this part of the statement was intended as a criticism of the approach taken by the Commission.

48 Unpublished judgment, Mukeshimana-Ngiluziniza and others v. Belgian State and others, para. 38.

49 Document A/61/4/637 and Add.1, para. 6 of the comments to article 6.


51 See footnote 2 above.
applicable to privileges and immunities of international organizations and their agents might constitute a check on the nature of the acts in question”.

However, these rules address a different issue. There may be a reason for not extending immunities to *ultra vires* acts, but to restrict them within the bounds of the functions that an organization has been admitted to exercise in the territory of the State granting immunity. The same reason does not necessarily apply when the international responsibility of the organization is invoked with regard to a wrongful act.

37. The Secretariat maintained that “there is practice to suggest that when an organ or an agent identified as such by the Organization acts in its official capacity and within the overall functions of the Organization, but outside the scope of the authorization, such act may nevertheless be considered an act of the Organization”.

Regrettably, no examples of that practice were supplied. The United Nations Secretariat suggested that attribution to the United Nations “could exist only where an organ or agent ‘acts in an official capacity and within the overall functions of the organization’”.

The point that the organ or agent acts in an official capacity is implicitly made in the text of draft article 7 and expressly set forth in paragraph (4) of the commentary. A reference to the “overall functions of the organization” could be added.

38. The Secretariat also noted that the 1986 opinion quoted by the Commission in paragraph (9) of the commentary “does not reflect the consistent practice of the organization”.

However, the Secretariat cited one example, an opinion of the Office of Legal Affairs, dated 1974, which advised that “there may well be situations involving actions by Force members off-duty which the United Nations could appropriately recognize as engaging its responsibility”.

This passage should be included in the commentary.

**Draft article 8**

39. With regard to draft article 8, relating to conduct acknowledged and adopted by an international organization as its own, one State suggested that the commentary mention *de facto* conduct of an official who has been suspended from duty or whose appointment has been terminated. This may be one instance when an organization may wish to acknowledge its responsibility. However, it seems preferable not to attempt to set forth in the commentary a typology of cases in which acknowledgement of responsibility would be considered appropriate.

40. The Secretariat wished for some clarifications on “the form of the acknowledgement, and whether the act of acknowledging should be made in full knowledge of the unlawful character of the conduct, and of the legal and financial consequences of such acknowledgement”.

These would be wise precautions that an organization should take, but cannot be viewed as requirements for a valid acknowledgement of attribution of conduct. The form of acknowledgement depends on the specific circumstances and cannot be precisely defined. It would also seem inappropriate to attempt to make some general remarks on “the question of the competence of the organization or of any of its agents or organs to acknowledge or adopt the conduct in question”.

41. The European Commission considered that an example given in paragraph (3) of the commentary to draft article 8 was “misplaced”. This example concerns a statement made by the European Community to the effect that the Community was “ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the European Community level or at the level of Member States”. The European Commission pointed out that the basis of this statement was that the European Community “was exclusively competent for the subject matter concerned and thus the only entity in a position to repair the possible breach”. This remark leaves the question open whether an acknowledgement of attribution of conduct was in fact involved. An acknowledgement of attribution of conduct would be in line with the position often taken by the European Commission and referred to in the commentaries on draft article 63.

**Draft article 9**

42. Two States expressly endorsed the wording of draft article 9, paragraph 2, according to which a breach of an international obligation by an international organization “includes the breach of an international obligation that may arise under the rules of the organization”.

As was said in paragraph (4) of the commentary to draft article 9, “the practical importance of obligations under the rules of the organization makes it preferable to dispel any doubt that breaches of these obligations are also covered by the present articles”. The World Bank maintained that “retaining paragraph 2 may wrongly lead to an unsubstantiated conclusion (expressly denied in the Commission’s commentary) that the breach of any rule of the organization is necessarily a breach of an international obligation”.

On the other hand, while seeking further clarifications in the commentary, the Secretariat correctly noted that “only breaches of international law obligations contained in the rules, and not breaches of the rules as such, would be considered breaches of an international obligation within the meaning of draft article 9”.

43. The European Commission drew from its remark that the law of the EU is “separate from international law” the conclusion that “the relationship between the EU and its member States is not governed by international

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52 Document A/CN.4/637 and Add.1, comments to article 7.
53 *Ibid.*, para. 2 of the comments to article 7.
55 *Ibid.*, para. 4 of the comments to article 7.
57 El Salvador, document A/CN.4/636 and Add.1–2, para. 2 of the comments to article 8.
58 Document A/CN.4/637 and Add.1, para. 1 of the comments to article 8.
60 *Ibid.*, comments to article 8.
63 *Ibid.*, para. 3 of the comments to article 9.
64 *Ibid.*, para. 1 of the comments to article 4.
law principles, but by European law as a distinct source of law. This seems to go too far. While no doubt there exist rules of international law that are discarded by EU law in the relationship between the EU and its members, the application of international law is not entirely excluded even in areas covered by EU law.

44. The European Commission also questioned the pertinence of the reference to a judgment of the European Court of Justice in the last lines of paragraph (9) of the commentary to draft article 9. Some additional sentences could explain the reason why this text is quoted here. However, since the same passage also appears in the commentary to draft article 47 and the reason for the reference is clearer there, it seems preferable to delete this reference from the commentary to draft article 9.

**Draft article 13**

45. The commentary to draft article 13 on aid or assistance by an international organization in the commission of an internationally wrongful act is very short and clearly needs to be supplemented. Various elements that were incorporated in the commentary to draft article 16 on State responsibility could be transposed here. For instance, although it may be considered as incoherent from a policy perspective, a de minimis criterion would allow one to discard responsibility when the contribution by the international organization is negligible. As stated in the commentary to article 16, there “is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that end.”

46. Another clarification that could be given in the commentary to draft article 13 concerns the requirement under subparagraph (a) of “knowledge of the circumstances of the internationally wrongful act”. The commentary on article 16 on State responsibility noted that by “providing material or financial assistance or aid”, a State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

One could state that an international organization contributing financially to a project undertaken by a State would normally not be responsible for the way the project is run. However, the organization could be aware of the implications that the execution of a certain project would have for the human rights, including the right to life, of the affected individuals. That issue has arisen, for instance, in relation to compliance with the World Bank’s operational policies.

47. In this context, reference should be made to an internal document issued on 12 October 2009 by the United Nations Legal Counsel. This concerned the support given by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) to the Armed Forces of the Democratic Republic of the Congo (FARDC), and the risk, to which an internal memorandum had referred, of violations by the latter forces of international humanitarian law, human rights law and refugee law. The Legal Counsel wrote:

If MONUC has reason to believe that FARDC units involved in an operation are violating one or the other of those bodies of law and, if despite MONUC’s intervention with the FARDC and with the Government of the Democratic Republic of the Congo, MONUC has reason to believe that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely… MONUC may not lawfully continue to support that operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law… This follows directly from the Organization’s obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.

48. The Secretariat requested the Commission to specify in its commentary to draft article 13 that “knowledge of the circumstances of the wrongful act” should be taken to include knowledge of the wrongfulness of the act.

Since subparagraph (b) requires, for responsibility to arise for an assisting international organization, that “the act would be internationally wrongful if committed by that organization”, an additional requirement of knowledge of wrongfulness of the act does not seem warranted.

49. Although the text of draft article 16 on State responsibility does not convey that responsibility arises only when the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful act, this is the view expressed in the related commentary. With regard to draft article 13, the European Commission suggested that one should add in the commentary some limiting language (intent) in line with the commentaries of the articles on State responsibility. The Secretariat suggested that the commentary specify that “the assistance should be intended for the wrongful act”. On the

68. See footnote 69 above.

other hand, Cuba proposed that there be no reference to intention and moreover that, as a matter of progressive development, a presumption of knowledge of the circumstances be established.\textsuperscript{77} In view of these conflicting comments and of the difficulty of reconciling the requirement of intent with the text of the provision, it seems preferable not to include in the commentary to draft article 13 a discussion of the relevance of intention on the part of the assisting or aiding international organization.

**Draft article 14**

50. The commentary to draft article 14 should also be developed. This draft article concerns direction and control exercised over the commission of an internationally wrongful act. One could thus include, as suggested by the World Bank,\textsuperscript{78} the observation that control “refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight”, as stated in the commentary to article 17 on State responsibility.\textsuperscript{79}

51. Paragraph (4) of the commentary to draft article 14 points out that there may be a partial overlap between this draft article and draft article 16. Such an overlap may be limited because, as was observed by the Secretariat, “to the extent that ‘direction and control’ takes the form of a binding resolution it is difficult to envisage a single resolution controlling or directing a State”.\textsuperscript{80} The possibility of a similar overlap between draft articles 16 and 15 was envisaged in paragraph (3) of the commentary to the latter draft article. Moreover, a partial overlap between draft articles 13 and 16 could also be envisaged. One State suggested that the Commission “should consider ways of eliminating such overlaps”.\textsuperscript{81} This could be done by inserting at the beginning of draft article 16 the words “subject to articles 13 to 15”. However, this is not strictly necessary because there is no inconsistency in the fact that responsibility may arise in some circumstances under different draft articles when the conditions set out by each draft article are fulfilled.

**Draft article 15**

52. One State suggested to specify in paragraph (3) of the commentary to draft article 15 that “only where a binding decision is accompanied by additional and illegal action such as a threat or use of force may article 15 become applicable”.\textsuperscript{82} However, one could also envisage an act of coercion which is not per se unlawful.

\textsuperscript{77} Document A/CN.4/636 and Add.1–2, para. 1 of the comments to article 13. In the perspective of progressive development, Cuba also proposed the deletion of the requirement under (b) that the act be internationally wrongful if committed by the assisting or aiding organization. Both proposals concerning progressive development would widen the responsibility of an international organization in relation to that of a State acting under similar circumstances.

\textsuperscript{78} Document A/CN.4/637 and Add.1, para. 2 of the comments to article 14.

\textsuperscript{79} Yearbook ... 2001, vol. II (Part Two), para. (7) of the commentary to article 17.

\textsuperscript{80} Document A/CN.4/637 and Add.1, para. 3 of the comments to article 14.


\textsuperscript{82} Germany, document A/CN.4/636 and Add.1–2, para. 2 of the comments to article 15.

### Draft article 16

53. Draft article 16 covers responsibility of an international organization for decisions, authorizations and recommendations addressed to member States and international organizations to commit an act that would be wrongful if committed by the former organization. It might be more accurate to refer throughout this draft article to “members” in general rather than to “member States or international organizations”, because of the possibility that an international organization avails itself of the conduct of a member which is not a State or an international organization.\textsuperscript{83} Were some legal consequences provided in draft article 16 for the member because of its conduct following a decision, authorization or recommendation, the reference to members that are States or international organizations would be in line with the scope of the present draft articles. Since no such consequence is envisaged in draft article 16, it would be preferable to omit this reference.

54. OECD queried the rationale of draft article 16, because a member State to whom a decision or recommendation is addressed “should be responsible for the manner in which it implements, or not, a decision or recommendation”.\textsuperscript{84} While the responsibility of the member State concerned is considered in the “without prejudice” clause in draft article 18, draft article 16 seeks to prevent an international organization from taking advantage of its separate legal personality in order to circumvent one of its obligations. While finding that “the term ‘circumvent’ lacked clarity”, the United Kingdom “supported the rationale behind draft article 16”.\textsuperscript{85}

55. It may be worth considering whether it is necessary to mention “circumvention” in the text of draft article 16.\textsuperscript{86} The last words in paragraph 1 (“and would circumvent an international obligation of the former organization”) are more an explanation than an addition of a condition. This is clarified by paragraph (4) of the commentary, which states that “a specific intention of circumventing is not required”. However, according to one State, there should be “an intentional misuse of an organization’s powers in order to evade responsibility”.\textsuperscript{87} Since such an intention would be difficult to prove in practice, the requirement suggested by this State would make responsibility according to draft article 16 problematic.

56. Paragraph 1 of draft article 16 considers the case where an international organization addresses a binding act

\textsuperscript{83} This amendment was suggested by Blokker, “Abuse of the members: Questions concerning draft article 16 of the draft articles on responsibility of international organizations”, pp. 40–41.

\textsuperscript{84} Document A/CN.4/637 and Add.1, comments to article 16.

\textsuperscript{85} *Official Records of the General Assembly*, Sixty-fourth Session, Sixth Committee, 16th meeting (A/C.6/64/SR.16), para. 24. The United Kingdom also made some remarks with regard to the distinction between the two categories outlined in paragraphs 1 and 2 of draft article 16. Singapore sought clarification on “the element of circumvention”, *ibid.*, 15th meeting (A/C.6/64/SR.15), para. 76.

\textsuperscript{86} This point was made by Blokker (footnote 83 above), pp. 42–43. A proposal to suppress the last words in paragraph 1 was also made by Belgium (document A/CN.4/636 and Add.1–2, paras. 1 and 2 of the comments to article 16), but for the different reason that they introduce a subjective element that would be too strict.

\textsuperscript{87} “Germany, document A/CN.4/636 and Add.1–2, comments to article 16: “Germany would understand and support a reading which interprets an act of circumvention to mean an intentional misuse of an organization’s powers in order to evade responsibility.”
to one or more members. Paragraph 2 concerns non-bind-
ing acts, the denomination of which varies according to the
different international organizations. It may be expedient
here to use “recommendation” as a generic term. The idea
that an international organization may be responsible when
it recommends a certain action to a member is based on
the assumption that members are unlikely to ignore recom-
mandations systematically. At least some of the members
may be prompted to follow the recommendation. On the
other hand, given the large number of recommendations
that international organizations make, paragraph 2 widens
their responsibility considerably.

57. While one State found that paragraph 2 (b) “struck
the right balance between the need to pursue an effective
practical criterion and the need for a more restrictive
approach”, 88 certain States and international organiza-
tions were more critical of paragraph 2. IMF emphasized
that this was “an attempt at progressive development”. 89
According to the Secretariat, “at least in respect of the
proposal to extend responsibility to international organ-
izations in certain cases in connection with recommenda-
tions that they may make to States or other international
organizations, this would appear to extend the concept
of responsibility well beyond the scope of previous
practice with regard to either States or international
organizations”. 90 The European Commission expressed
the view that “to hold that an international organization
incurs responsibility on the basis of mere ‘recommendations
made to a State or an international organization
appears to go too far”. 91 A similar view was expressed by
ILO, which noted that in the case of a recommendation
“there needs to be an intervening act—the decision of the
State or another international organization to commit that
act. The chain of causation would be thus broken”. 92 The
Nordic countries expressed their concern “at the suggestion…
that recommendations by international organiza-
tions might give rise to the international responsibility of
the organization concerned”. 93 Several States stressed the
need to require in paragraph 2 a stronger link between the
recommendation and the conduct of the member. 94

88 Hungary, Official Records of the General Assembly, Sixty-fourth
Session, Sixth Committee, 16th meeting (A/C.6/64/SR.16), para. 38.
89 Document A/CN.4/637 and Add.1, para. 4 of the general
comments.
90 Ibid., para. 8 of the comments to article 16.
91 Ibid., comments to article 16.
92 Ibid.
93 Denmark on behalf of the Nordic countries (Denmark, Finland,
Iceland, Norway and Sweden), Official Records of the General As-
sembly, Sixty-fourth Session, Sixth Committee, 15th meeting (A/C.6/64/
SR.15), para. 28. Although this concern was expressed with regard to
the commentary, it clearly applies also to the text of draft article 16.
94 Austria suggested requiring “a very close connection between the
authorization or recommendation and the relevant act of the member
State” (document A/CN.4/636 and Add.1–2, para. 1 of the comments to
article 16). The Russian Federation (Official Records of the General As-
sembly, Sixty-fourth Session, Sixth Committee, 16th meeting (A/C.6/64/
SR.16), para. 10) and Switzerland (document A/CN.4/636 and Add.1–2),
went in the same direction. Singapore (Official Records of the General
Assembly, Sixty-fourth Session, Sixth Committee, 15th meeting (A/C.6/64/SR.15),
para. 77) noted that the commentary “left open the question of whether a mere factual link, or a further element such as pre-
dominant purpose, was required”. South Africa (ibid., para. 72) observed
that the “draft article would place a heavy obligation on an organization’s
member States to resist even the powerful in their midst”. However, draft
article 16 does not add to the responsibility of members. The proposal by
Germany (footnote 87 above), also covers paragraph 2.

58. In view of all these critical comments, it may be ap-
propriate for the Commission to reconsider whether draft
article 16 should include the current paragraph 2. 95 Should
this paragraph be deleted, paragraph 3 would have to be
modified. It could read as follows:

“Paragraph 1 applies whether or not the act in ques-
tion is internationally wrongful for the member or
members to which the decision is directed.”

Draft article 19

59. One State noted that in draft article 19, which con-
siders consent as a circumstance precluding wrongfulness,
the “qualification of the consent by the term ‘valid’
does not solve the problem” of whether a recommenda-
tion by an international organization “already constitutes
consent”. 96 This would depend on the circumstances. In
any event, there is no attempt in draft article 19 or the
commentary to establish when consent exists under specific circumstances. However, the commentary
could specify, as the same State appears to suggest, 97 that
consent given by an international organization cannot
affect the rights that its members may have towards the
international organization committing what would be, but
for consent, an internationally wrongful act.

60. The Secretariat observed that in the examples given
in the commentary to draft article 19, “the consent of the
host State is not necessarily precluding the wrongfulness
of conduct, but rather a condition for that conduct”. 98 As
with regard to States, consent generally provides a justi-
fication of conduct, but may exceptionally be a circum-
stance precluding wrongfulness. As the Secretariat also
noted, in the latter scenario, “the act must be unlawful or
already in breach of an international obligation for the
responsibility of an international organization to be pre-
cluded by the consent of a State or another international
organization”. 99 The fact that such an event seldom occurs
does not render draft article 19 superfluous.

Draft article 20

61. Draft article 20, on self-defence, had a mixed recep-
tion. Two States suggested the deletion of draft article 20,
one of them on the basis of the argument that Article 51
of the Charter of the United Nations applies only to States
and not to international organizations. 100 Another State
said that “the very general reference to international law at
the end of the draft article should be clarified to avoid any
possible violation of the Charter of the United Nations”. 101
As paragraph (5) of the commentary on draft article 20

95 Paragraph 2 was also criticized by Blokker (footnote 83 above),
pp. 43–46.
96 Austria, document A/CN.4/636 and Add. 1–2, para. 2 of the com-
ments to article 19.
97 Ibid., para. 1.
98 Document A/CN.4/637 and Add.1, para. 2 of the comments to
article 19.
99 Ibid., para. 4.
100 The Islamic Republic of Iran (Official Records of the General As-
sembly, Sixty-fourth Session, Sixth Committee, 16th meeting (A/C.6/64/
SR.16), para. 50) suggested that the draft article “should be deleted”,
while Belarus (ibid., 15th meeting (A/C.6/64/SR.15), para. 37) said that
it “could be omitted”.
101 Brazil, ibid., 17th meeting (A/C.6/64/SR.17), para. 3. A similar
concern was expressed by Ghana (ibid., para. 13).
62. It would be difficult to provide a detailed analysis of the state of the law, including, as one State suggested, the issue how self-defence on the part of an international organization relates to the sovereignty of the host State. In any event, consistency with the Charter of the United Nations is ensured by draft article 66. As one State noted, it would be risky to make too general an inference concerning the analogy between the State’s natural right to self-defence against armed aggression and any right of any international organization or of its organs or agents to resort to force in a variety of circumstances. The wording of draft article 20 was nonetheless sufficiently general to leave the question open.

According to another State, “draft article 20 constituted an appropriate compromise solution”. Also, the Secretariat expressed the view that self-defence should be included in the text of the draft articles among the circumstances precluding wrongfulness.

63. The issue of whether self-defence should be included among the circumstances precluding wrongfulness was already discussed in the seventh report of the Special Rapporteur, where it was proposed to delete the draft article. This proposal was not accepted by the majority of the Commission. There does not seem to be sufficient reason for reiterating the same proposal here.

**Draft article 21**

64. Draft article 21 considers countermeasures that an international organization may take both against another international organization and against a State. This is because an international organization could invoke this circumstance precluding wrongfulness in order to justify the breach of an obligation owed to a State.

65. Paragraph 1 sets forth a general rule concerning countermeasures that are taken by international organizations, while paragraph 2 addresses the special case of countermeasures taken by an organization against one of its members. Some States suggested the need for a “cautious approach” or even “extreme caution”, but did not propose the deletion of draft article 21 or the inclusion of some additional conditions. Another State stressed the “need for further clarification with regard to countermeasures taken by international organizations, owing to the scarcity of practice, the uncertainty surrounding the relevant legal regime and the risk of abuse”. Some other States expressed their approval of the text. While OSCE expressed its agreement “with the possibility of countermeasures by and against international organizations”, the Secretariat recommended that “the Chapter on countermeasures not be included” in the draft articles on the responsibility of international organizations; presumably this should apply also to draft article 21.

66. Measures taken by an international organization against its members in case of non-compliance are not necessarily countermeasures. A distinction should be made between, on the one hand, non-compliance by a State with its obligations as a member of the organization and, on the other, non-compliance with obligations that the member State may have otherwise acquired, for instance through a headquarters agreement or a bilateral agreement on immunities and privileges of the organization and its agents. While countermeasures could be envisaged in the latter case, in the former case the rules of the organization may provide for sanctions that cannot be assimilated to countermeasures, as was noted in paragraph (3) of the commentary to draft article 21 and emphasized by one State.

67. Paragraph 2 considers countermeasures that an international organization may take against members, whether they are States or international organizations. The expression “member State or international organization” is intended to cover all the States and international organizations that are members. One State “supported the room for countermeasures between an international organization and its members”. However, one could envisage cases which involve non-compliance of obligations by States that are not members.

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102 There is some merit in the observation by Japan (ibid., 16th meeting (A/C.6/64/SR.16), para. 71) that the “substance” of the right of self-defence “with respect to international organizations was not well established under international law, and its scope and the conditions for exercising it were far less clear than in the case of States”.

103 This is one of the questions that Austria would like to see elucidated (document A/CN.4/636 and Add.1–2, comments to article 20). The question of the invocability of self-defence by a State when its peacekeeping force is the object of an attack by the host State was recently discussed by the Independent International Fact-Finding Mission on the Conflict in Georgia (see report of the Mission, vol. II, pp. 263–283, available from www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf).


105 Hungary, ibid., 16th meeting (A/C.6/64/SR.16), para. 39.

106 Document A/CN.4/637 and Add.1, para. 4 of the comments to article 20.


108 The view that “the question of countermeasures by international organizations against States should better be excluded from the scope of the draft articles” was expressed by Germany (document A/CN.4/636 and Add.1–2, para. 1 of the comments to article 21). This view rests on the main argument that “as a general rule there is... no
restrictive approach taken with regard to countermeasures in draft article 21, paragraph 2." 117 Another State suggested excluding countermeasures altogether in the relations between an international organization and its members, or at least "to make it very clear that countermeasures have to be deemed inconsistent with the rules of the organization unless there are clear indications that the internal rules of the organization (potentially also including sanctions) were not meant to exclusively govern the relationship between an international organization and its members". 118 While this may be how the rules of several international organizations have to be understood, the current exercise does not purport to offer criteria for interpreting the rules of the organization in general or the rules of a particular organization.

Draft article 24

68. Draft article 24 considers necessity among the circumstances precluding wrongfulness. The Secretariat supported the inclusion of the rule on ‘necessity’ in the proposed draft articles”. 119 One State criticized the inclusion of this draft article, stressing in particular the difficulty in understanding the terms “essential interest of the international community” and “seriously impair [an] essential interest of the State”. 120 However, these terms already appear in article 25 on State responsibility. Another State, while agreeing on the content of draft article 24, maintained that the term “essential interest” should be defined and suggested references to the protection of the environment and the preservation of the very existence of a State or its population at the time of public emergency. 121 The consideration of a more specific definition would be more appropriate with regard to the draft articles on responsibility of States, where the commentary took, however, the view that “the extent to which a given interest is ‘essential’ depends on all the circumstances, and cannot be prejudged.” 122

69. One State favoured the opinion of some members of the Commission, which was referred to at the end of paragraph (4) of the commentary to draft article 24, “according to which an international organization may invoke necessity where it is the only means for the organization to safeguard an essential interest of its member States, which the organization has the function to protect against a grave and imminent peril”. 123 Although this opinion is not without merit, it would lead to widening the scope of necessity considerably.

70. With regard to the relations between an international organization and its members, another State “would prefer if the principle of necessity were invocable only if the act in question constitutes the only means for the organization to fulfil its mandate”. 124 In the draft articles, the possibility that the scope of necessity in the relations with the members reflects particular principles is left to the rules of the organization as special rules.

71. It was suggested that the “international practice of NATO, the United Nations, the Organization of American States, etc. shows that international organizations consider the operational/military necessity principle as a rule based first and foremost on customary law”. 125 A reference to this practice could be included in the commentary, although it may appear to concern the content of primary rules on the conduct of armed conflict rather than the circumstance precluding wrongfulness now under consideration.

Recommendation

72. The proposals concerning amendments to the text of the draft articles discussed in this chapter relate to draft article 16. These proposals are outlined in paragraphs 51, 55 and 58 above. On the basis of these proposals, draft article 16 would read as follows:

“1. Subject to articles 13 to 15, an international organization incurs international responsibility if it adopts a decision binding a member to commit an act that would be internationally wrongful if committed by the organization.

“2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the member or members to which the decision is directed.”

Part Three. Content of the international responsibility of an international organization

Draft article 29

73. The Secretariat queried whether draft article 29 (b), concerning assurances and guarantees of non-repetition, should be included, “in view of the complete absence of cited practice with respect to the provision of assurances and guarantees of non-repetition by international organizations” 126 This subparagraph is identical to draft article 30 (b) on State responsibility. It is difficult to see why international organizations should be exempted from giving assurances and guarantees of non-repetition when, as subparagraph (b) sets forth, “circumstances so require”.

Chapter III

117 Brazil, Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 17th meeting (A/C.6/64/SR.17), para. 3. There is some similarity to the opinion expressed by Switzerland, document A/CN.4/636 and Add.1–2, according to which countermeasures may be taken against member States only if the purpose and mandate of the organization envisage that possibility or, at least, are not against it.

118 Germany, document A/CN.4/636 and Add. 1–2, para. 2 of the comments to article 21.

119 Document A/CN.4/637 and Add.1, para. 4 of the comments to article 24.


121 Cuba, document A/CN.4/636 and Add.1–2, comments to article 24.

122 Yearbook ... 2001, vol. II (Part Two), p. 83, para (15) of the commentary to article 25 (Necessity).

123 Germany, document A/CN.4/636 and Add.1–2, comments to article 24.

124 Austria, ibid., para. 3 of the comments to article 24.

125 Ibid., para. 4.

126 Document A/CN.4/637 and Add.1, para. 2 of the comments to article 29.
74. WHO, in the comments it submitted together with a group of other organizations, criticized the principle set forth in draft article 30 that a responsible international organization is required to make “full reparation for the injury caused by the internationally wrongful act”. The reason given is that the principle “could lead to excessive exposure taking into account that international organizations in general do not generate their own financial resources”. 127 A similar point was made by ILO. 128 The difficulty or even impossibility of facing the obligation to provide full reparation concerns not only international organizations. Paragraphs (1) and (2) of the commentary recall that the principle “seeks to protect the injured party from being adversely affected by the internationally wrongful act”, but that “it is often applied in practice in a flexible manner”. It is to be noted that the only State that made a comment on reparation “supported the draft articles on reparation for injury contained in part three, chapter II, in particular draft article 35”, relating to compensation. 129

75. The Secretariat called attention to the financial limitations applying to claims against the United Nations resulting from peacekeeping operations, but acknowledged that “in order to ensure the opposability of such limitations to third parties, the United Nations concludes agreements with member States in whose territories peacekeeping missions are deployed”. 130

**Draft article 31**

76. According to paragraph 1 of draft article 31, “the responsible international organization may not rely on its rules as justification for failure to comply with its obligations”. This paragraph refers to the obligations under part three, but since draft article 31 directly concerns the relations between obligations under international law and the rules of the organization, it has been the focus of criticism by several international organizations.

77. The Council of Europe noted that “it would seem difficult to hold an international organization responsible for provisions contained in its constituent treaty which are wrongful under international law”. 131 Clearly, the international organization is not the author of its constituent treaty and cannot be responsible for this. However, it may be responsible for conduct taken in accordance with its constituent treaty. The IMF expressed in a modified form its long-standing view that an international organization cannot be held responsible unless it has breached its “constituent document which, along with the rules and decisions adopted thereunder, constitute the lex specialis... or has otherwise breached a peremptory norm of international law or another obligation that it has voluntarily accepted”. 132 A similar view was expressed by OECD, though without making an exception with regard to obligations voluntarily accepted. 133 There may not be many rules of general international law that apply to international organizations. Insofar as they do, these rules and the agreements concluded with other subjects of international law could conceivably be modified by the rules of the organization only in the relations between the international organization and its members. Thus, with regard to non-members, including persons and entities which may benefit from obligations under general international law, international organizations cannot be relieved by their rules from complying with their obligations. In the relations with non-members, the constituent instrument of an international organization cannot exempt the organization from responsibility arising under the otherwise applicable rules of international law. 134

78. The European Commission considered that “it is not consistent for the draft articles to state on the one hand, that a responsible international organization may not rely on its internal law (‘its rules’) to justify its failure to comply with its obligations (draft article 31, para. 1) and, on the other hand, state that a breach of the internal law of the organization may amount to a breach of international law (draft article 9, para. 1)”. 135 Consistency is in fact ensured by the fact that, in the relations between an international organization and its members, the general rules of international law do not apply to the extent that they have been modified by the rules of the organization. This also covers the rules on the responsibility of international organizations, which are specifically mentioned in paragraph 2 of draft article 31 with regard to the provisions contained in part three. In this context, the Secretariat recalled that, since the rules of the United Nations “include the Charter of the United Nations, reliance on the latter would be a justification for failure to comply, within the meaning of article 31, paragraph 1”. The wider significance of the Charter results from draft article 66.

**Draft article 32**

79. Draft article 32, paragraph 1, states that the obligations owed according to part three “may be owed to one or more other international organization, to one or more States, or to the international community as a whole”. Paragraph (5) of the commentary adds that “while the consequences of... breaches with regard to individuals, as stated in paragraph 1, are not covered by the draft, certain issues of international responsibility arising in these contexts are arguably similar to those that are examined in the draft”. The Secretariat recommended the deletion of paragraph (5) of the commentary because “it may create the misconception that the rules contained in the draft article apply with respect to entities and persons other than States and international organizations”. 137 Such a misconception would arise from ignoring the statement that breaches with regard to individuals are not covered. However, if it was felt more appropriate, the last part of the quoted passage could be omitted.

127 Ibid., comments to article 30.

128 Ibid.


130 Document A/CN.4/637 and Add.1, para. 6 of the comments to article 30.

131 Ibid., comments to article 31.

132 Ibid., para. 2 of the general comments.

133 Ibid., para. 1 of the comments to article 63.

134 ILO (ibid., comments to article 31) maintained that constituting instruments take “precedence” without distinguishing between relations that an international organization may have with members and those with non-members.

135 Ibid.

136 Ibid., para. 1 of the comments to article 31.

137 Ibid., para. 2 of the comments to article 32.
Draft article 36

80. With regard to draft article 36 on satisfaction, ILO suggested “to add a qualifier at the end of the second paragraph of draft article 36, such as ‘made in accordance with the rules of the organization concerned’ or a reference to a ‘competent organ’.” It is to be assumed that the rules of the organization will apply to determining the organ of the international organization that is competent to give satisfaction. They will also be relevant for many other articles. As was noted in paragraph (7) of the commentary to draft article 63, “the rules of the organization may, expressly or implicitly, govern various aspects of the issues considered in parts two to five”. There does not seem to be sufficient reason for adding a specific reference to the rules of the organization in draft article 36.

Draft article 37

81. According to the Secretariat, draft article 37 on interest, “like others in this part, should be subject to the ‘rules of the organization’ and the principle of lex specialis within the meaning of article 63 of the present draft articles”. While there may exist special rules on interest applying to particular international organizations, and possibly to the United Nations because it “does not pay interest” “as a matter of policy”, this does not seem to be a sufficient reason for making a specific reference to special rules in draft article 37. These rules, to the extent that they modify the general rule on interest, would be applicable on the basis of draft article 63.

Draft article 39

82. WHO and the organizations making joint comments with it suggested, as “an exercise in progressive development”, to modify draft article 39 in order “to state the obligation of member States to provide sufficient financial means to organizations with regard to their responsibility.” ILO would like to see draft article 39 “reinforced even further”.

83. The text of draft article 39 and its commentary clearly imply that member States have no obligation under international law, other than the obligation that may exist under the rules of the organization, to provide the organization with the means for effectively making reparation. Several States endorsed this approach, some of them wishing to see this idea stated more explicitly. This may not be necessary in view of what is stated in draft article 61 on the responsibility of member States; however, the term “in accordance with the rules of the organization” in draft article 39 may be the source of some ambiguity which could be removed. There is also merit in the proposal made by one State to modify the commentary when it suggests that a requirement to contribute is “generally implied” in the rules of the organization. A more nuanced commentary would be in line with the approach of restraint generally maintained in the commentaries when the rules of the organization are considered.

84. Paragraph (4) of the commentary to draft article 39 includes a text that had been proposed by some members of the Commission. According to this text, “the responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under this chapter”. The commentary noted that this obligation for the organization may be considered as “implied in the obligation to make reparation”. Two States suggested including the proposed text in the draft article. An attempt could be made to combine the draft article with the text proposed by the minority. A tentative text, which also tries to meet the concern referred to in paragraph 83 above, could run as follows:

“1. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this chapter.”

Draft article 41

85. The only comment on draft article 41, concerning the consequences of a serious breach of an obligation arising under a peremptory norm, was made by a State to the effect that “international organizations should have the obligation, similar to that incumbent on States, to cooperate, within the framework of their constituent instruments, in putting an end to a serious breach committed by another organization”. This is in substance an endorsement of paragraph 1 of draft article 41.

Recommendation

86. In conclusion to this chapter, the only proposal of amendment concerning the text of the draft articles included in part three concerns draft article 39. This amendment is suggested in paragraph 84 above.

\[138\] Ibid., comments to article 36.
\[139\] Ibid., para. 3 of the comments to article 37.
\[140\] Ibid., para. 2.
\[141\] Ibid., comments to article 39.
\[142\] Ibid.
\[143\] See the statements by Belarus, Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 15th meeting (A/C.6/64/SR.15), para. 36; Hungary, Ibid., 16th meeting (A/C.6/64/SR.16), para. 40; Portugal, Ibid., para. 46; and Greece, Ibid., para. 62; as well as the written comments by Germany, document A/CN.4/636 and Add.1–2, para. 3; and the Republic of Korea, Ibid. A similar position was taken by Austria, Ibid., para. 4. The Islamic Republic of Iran (Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 16th meeting (A/C.6/64/SR.16), para. 53), while sharing the same view, maintained that “the brunt of responsibility in such cases should be borne by those members which, on account of their decision-making role or overall position within the organization, had contributed to the injurious act.”

\[144\] Germany, document A/CN.4/636 and Add.1–2, para. 2 of the comments to article 39.

\[145\] India, Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 16th meeting (A/C.6/64/SR.16), para. 74; and Austria, document A/CN.4/636 and Add.1–2, para. 4 of the comments to article 39.

Part Four. The implementation of the international responsibility of an international organization

Draft article 44

87. One State suggested rewording paragraph 1, concerning the admissibility of claims against an international organization, especially in order to make it clear that the protection of human rights is not subject to the requirement of the nationality of claims. Paragraph 1 states that “an injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims”. Given that obligations concerning human rights are obligations erga omnes, any State other than the State of nationality would be entitled to invoke responsibility as a non-injured State. The fact that nationality is irrelevant for such a claim already results from draft article 48, paragraph 5, according to which paragraph 1 of draft article 44 does not apply to claims put forward by States which are entitled to invoke responsibility other than as injured States.

88. The present draft articles do not specifically address questions relating to the exercise of functional protection. OSCE suggested that the Commission consider functional protection specifically. Another State noted that the “present text leaves open the question of whether an international organization can exercise functional protection on behalf of its officials that were injured by a different organization”. A specific consideration of these issues would not seem necessary, also in view of the fact that functional protection will only rarely be exercised by an international organization against another international organization.

89. Paragraph 2 of draft article 44 concerns the exhaustion of local remedies in relation to a claim by an injured State or international organization against another international organization. The Secretariat stressed that “it is essential to clarify at the outset that the reference to ‘exhaustion of local remedies’ should not be read to suggest any obligation on the part of international organizations in any context to open themselves up to the jurisdiction of national courts or administrative bodies”. Since paragraph 2 requires the exhaustion of remedies “provided by that organization”, the point already seems sufficiently clear. Moreover, paragraph (7) of the commentary to draft article 44 explains that the term “local remedies” has been used as a “term of art” and paragraph (9) says that remedies to be exhausted before national courts are only required when “the international organization has accepted their competence to examine claims”.

Draft article 47

90. The last sentence of paragraph (3) of the commentary to draft article 47, concerning plurality of responsible States or international organizations, considers subsidiary responsibility and reads: “Subsidiarity does not imply the need to follow a chronological sequence in addressing a claim.” One State found this sentence to be inconsistent with paragraph 2 of draft article 47, according to which subsidiary responsibility “may be invoked insofar as the invocation of the primary responsibility has not led to reparation”. However, the sentence included in the commentary is not intended to imply that the State or international organization which has only subsidiary responsibility should provide reparation before the condition set forth in paragraph 2 has been fulfilled. The sentence in question is only designed to allow flexibility when presenting claims. This could be further explained in the commentary.

Draft article 48

91. One State considered that in draft article 48 the concepts of “obligations owed to the international community as a whole” and “responsibility towards the international community” were “problematic”. However, these concepts were already used in draft article 48 on State responsibility and appear to keep the same meaning when they are applied with regard to international organizations.

92. In respect of the breach of an obligation owed to the international community as a whole, two States expressed their support for the solution adopted in paragraph 3 of draft article 48. This restricts the entitlement to make a claim to those international organizations which have the function to safeguard “the interest of the international community underlying the obligation breached”. One of these States considered that it would be “too far-reaching to grant an entitlement to all international organizations, regardless of the functions entrusted to them by their members”.

Draft article 50

93. Draft article 50 opens the chapter on countermeasures. The divided views offered by States and international organizations on whether international organizations are entitled to take countermeasures or may be targeted by countermeasures have been examined above, in relation to draft article 21.

94. Non-performance of international obligations may be justified as a countermeasure only insofar as it is

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147 El Salvador, document A/CN.4/636 and Add.1–2, para. 4 of the comments to article 44. The suggested rewording is intended to remove any ambiguity that paragraph 1 could have in making the requirement of nationality of claim applicable in all circumstances. While the English text does not seem ambiguous, the Spanish text of the draft articles may be improved to meet this concern.

148 Document A/CN.4/637 and Add.1, comments to article 44.

149 Austria, document A/CN.4/636 and Add.1–2, comments to article 44.

150 Document A/CN.4/637 and Add.1, para. 2 of the comments to article 44. The Secretariat added that “the reference to ‘exhaustion of local remedies’ in this context could create confusion” (ibid.).
directed against a responsible international organization. As suggested by OSCE, the commentary could include some developments on “the issue of the impact of countermeasures on non-targeted entities”. 155

95. One State considered that “an international organization may resort to countermeasures only if such measures are in conformity with its constituent instrument”. 156 While it may be expected that an international organization will comply with its rules when adopting countermeasures, compliance with the rules of the organization cannot represent a general condition for the lawfulness of countermeasures in relation to non-members. The same State suggested that, in order to take countermeasures, an international organization “must be endowed with the competence to take such measures under its rules”. 157 The existence of particular requirements under the rules of the organization would seem to depend on the specific rules of the organization concerned.

96. The European Commission noted that, given the specific regime of countermeasures in the WTO system, “to the extent that these countermeasures are authorized by treaty, it is arguable that these do not provide genuine examples of countermeasures under general international law”. 158 This is meant as a criticism of the fact that paragraph (4) of the commentary to draft article 50 included a reference to a decision taken by a WTO panel. However, the commentary quoted a passage of that decision because it contains remarks concerning the regime of countermeasures under general international law.

**Draft article 51**

97. When considering countermeasures by members of an international organization, draft article 51 sets forth two conditions, one of which is that “countermeasures are not inconsistent with the rules of the organization”. It may well be that with regard to many international organizations, as one State suggested, the requirement that countermeasures should not be inconsistent with the rules of the organization would imply the need for “a clear indication that the rules were not meant to fully regulate their subject matter, that is, the legal relationship between a member State and the organization”. 159 Another State observed that “the Commission might wish to give further consideration to the case of organizations that did not have [a dispute resolution] mechanism and/or had either constitutive agreements or rules that either prohibited countermeasures or were silent on their use”. 160 However, as has already been observed, it is not the task of the Commission to state a general presumption concerning the content of the rules of international organizations or to interpret the rules of any particular international organization.

98. Draft article 52 concerns the international obligations existing towards international organizations which cannot be the object of countermeasures. Paragraph (1) of the commentary to draft article 52 explains the concept of countermeasures as implying “the existence of an obligation towards the targeted entity”: in this context, the commentary gives the example of the prohibition of the use of force. Contrary to an observation of the Secretariat, 161 the Commission never suggested that force could be lawfully used against an international organization as a countermeasure. Moreover, subparagraph 1 (a) expressly sets forth that countermeasures shall not affect “the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations”. It might nevertheless be preferable, in order to avoid further misunderstandings, for the commentary to give a different example of an “obligation towards the target entity”.

99. One State suggested the deletion of the term “fundamental” as a qualifier of “human rights” in draft article 52, subparagraph 1 (b). 162 This proposal was made in view of developments in the protection of human rights. However, these developments are not specific to international organizations. Moreover, the extent to which norms of general international law apply to the protection of human rights by international organizations is still unclear. It is therefore preferable to retain the wording “fundamental human rights”, which was used in article 50, subparagraph 1 (b) on State responsibility.

100. According to the Secretariat, subparagraph 2 (b) of draft article 52 “should be redrafted to reflect accurately the privileges and immunities enjoyed by international organizations”. 163 As explained in paragraph (2) of the commentary to draft article 52, subparagraph 2 (b) is not intended to cover all the privileges and immunities of international organizations. Its purpose is to set forth a restriction to countermeasures which is parallel to the one contained in draft article 50, subparagraph 2 (b) on State responsibility. This refers to “the inviolability of diplomatic or consular agents, premises, archives and documents”.

**Draft article 56**

101. Draft article 56 is a saving clause, which is similar to draft article 54 on State responsibility. Thus, draft article 56 does not purport to provide a solution of the controversial issue concerning measures taken by an entity other than an injured State or international organization. One State endorsed draft article 56 while alleging the existence of a grammatical error in the French text. 164 Another State suggested that the current formulation be deleted and replaced by a text referring to collective

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155 Document A/CN.4/637 and Add.1, comments to article 50.
156 Austria, document A/CN.4/636 and Add.1–2, para. 2 of the comments to article 50.
157 Ibid.
158 Document A/CN.4/637 and Add.1, comments to article 50.
159 Germany, document A/CN.4/636 and Add.1–2, para. 2 of the comments to article 51.
161 Document A/CN.4/637 and Add.1, para. 1 of the comments to article 52.
162 El Salvador, document A/CN.4/636 and Add.1–2, para. 11 of the comments to article 52.
163 Document A/CN.4/637 and Add.1, para 2 of the comments to article 52.
164 Written comments by Belgium, on file with the Codification Division of the Office of Legal Affairs and available for consultation.
security under the Charter of the United Nations.\textsuperscript{165} An explanation may be added to the commentary to the effect that the measures envisaged in draft article 56 are \textit{a fortiori} subject to the restrictions set forth for countermeasures in the preceding draft articles, including respect for the prohibition to the threat or use of force according to draft article 52, subparagraph 1 (a).

\textbf{Recommendation}

102. Part four of the draft articles has been the object of relatively few comments. No proposal of amendment to the text of the draft articles has been made in this chapter.

\textbf{Chapter V}

\section*{Part Five. Responsibility of a State in connection with the act of an international organization}

\textit{Draft article 57}

103. Draft article 57 concerns aid or assistance given by a State to the commission of an internationally wrongful act by an international organization. According to ILO, this draft article and the two following ones “seem to deny a distinct legal personality of international organizations”\textsuperscript{166} Similarly, a State expressed concern about the possibility that “the distinction between the acts of the State and those of international organizations” could be blurred and “the separate legal personality of international organizations” be called into question.\textsuperscript{167} Paragraph (2) of the commentaries on draft articles 57 and 58 pointed to the need to distinguish “between participation by a member State in the decision-making process of the organization according to its pertinent rules”, on the one hand, and aid or assistance, or direction and control, which would trigger the application of draft articles 57 and 58, on the other hand.\textsuperscript{168} Two States sought clarification on this point.\textsuperscript{169} Another State suggested that “the character of an international organization, its function, its powers and its internal rules of decision-making make a decisive difference in clarifying the ‘repartition’ of international responsibility for a wrongful act between a State and an organization”.\textsuperscript{170} The commentary could explain that, while a member State is not relieved of its own obligations when it acts within an international organization, it cannot be held responsible for the conduct of an international organization to which it contributed according to the rules of the organization. Only the conduct of a member State which goes beyond what is required from it by the rules of the organization could amount to aid or assistance, or direction and control, in an internationally wrongful act of the international organization.

\textit{Draft article 58}

104. One State found that in draft article 58 the words “directs and controls” were “ambiguous”.\textsuperscript{171} These words appear in draft article 17 on State responsibility in relation to the responsibility of a State for directing and controlling another State in the commission of an internationally wrongful act. It seems reasonable to use the same words when a State directs and controls an international organization, although the modalities may be different.

\textit{Draft article 59}

105. The point was made by one State that “the circumstances under which a State would be deemed to have coerced an international organization should be clarified”.\textsuperscript{172} Another State suggested that coercion should be further qualified, to the effect that “there must be a direct link between the coercive act of the State and the activity of the international organization”.\textsuperscript{173} Here again, the concept of coercion cannot reasonably differ from the one used in article 18 on State responsibility with regard to the coercion exercised by one State over another for the commission of an act that would, but for the coercion, be an internationally wrongful act of the coerced State. The requirement that “the act would, but for the coercion, be an internationally wrongful act” of the coerced international organization appears with the same wording in draft article 59, subparagraph (a). This requirement would seem to imply the existence of a “direct link” between the act of the coercing State and the act of the coerced international organization. This point could be further developed in the commentary.

\textit{Draft article 60}

106. Various States approved the approach taken by the Commission in adopting draft article 60 on the responsibility of a member State for seeking to avoid compliance, although some of these States sought certain clarifications or amendments.\textsuperscript{174} On the other hand, the European Commission reaffirmed its view that it saw no “need for this provision”.\textsuperscript{175} Two States suggested that paragraph (7) of

\textsuperscript{165} Cuba, document A/CN.4/636 and Add.1–2, comments to article 56.

\textsuperscript{166} Article 57 concerns aid or assistance given by a State to the commission of an internationally wrongful act by an international organization. According to ILO, this draft article and the two following ones “seem to deny a distinct legal personality of international organizations”.

\textsuperscript{167} Paragraph (2) of the commentaries on draft articles 57 and 58 pointed to the need to distinguish “between participation by a member State in the decision-making process of the organization according to its pertinent rules”, on the one hand, and aid or assistance, or direction and control, which would trigger the application of draft articles 57 and 58, on the other hand.

\textsuperscript{168} Two States sought clarification on this point.

\textsuperscript{169} Another State suggested that “the character of an international organization, its function, its powers and its internal rules of decision-making make a decisive difference in clarifying the ‘repartition’ of international responsibility for a wrongful act between a State and an organization”.

\textsuperscript{170} The commentary could explain that, while a member State is not relieved of its own obligations when it acts within an international organization, it cannot be held responsible for the conduct of an international organization to which it contributed according to the rules of the organization. Only the conduct of a member State which goes beyond what is required from it by the rules of the organization could amount to aid or assistance, or direction and control, in an internationally wrongful act of the international organization.

\textsuperscript{171} One State found that in draft article 58 the words “directs and controls” were “ambiguous”.

\textsuperscript{172} Another State suggested that coercion should be further qualified, to the effect that “there must be a direct link between the coercive act of the State and the activity of the international organization”.

\textsuperscript{173} Here again, the concept of coercion cannot reasonably differ from the one used in article 18 on State responsibility with regard to the coercion exercised by one State over another for the commission of an act that would, but for the coercion, be an internationally wrongful act of the coerced State.

\textsuperscript{174} On the other hand, the European Commission reaffirmed its view that it saw no “need for this provision”.

\textsuperscript{175} Two States suggested that paragraph (7) of...
the commentary to draft article 60 be modified so as to include the requirement of a specific intent of circumvention.176 Another State considered that responsibility should be conditional on an abuse of rights, an abuse of the separate legal personality of the organization or bad faith.177 According to yet another State, “a requirement of specific intent to circumvent obligations and of proof of such intent might make it difficult to establish responsibility in practice”.178 While the latter point is well taken, the wording of draft article 60, which considers that a State “seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation”, implies the existence of a subjective element which at present is not adequately reflected in the commentary.

107. A State raised various questions concerning the role of member States in relation to the modalities of voting within the international organization concerned.179 The observations made in paragraph 103 above seem pertinent also with regard to draft article 60. Thus, a State would not incur responsibility for conduct as a member within an international organization when that conduct is in accordance with the rules of that organization. On the other hand, there may be an overlap between draft article 60 and draft articles 57 to 59, as the same State implicitly suggested.180 As has been suggested in paragraph 51 above, with regard to draft article 16, the overlap could be avoided by introducing at the beginning of draft article 60 the words “subject to articles 57 to 59”.

108. Paragraphs (3) and (4) of the commentary to draft article 60 consider two decisions by the European Court of Human Rights concerning the obligations of States parties to the European Convention of Human Rights when they transfer functions to an organization of which they are members. A State suggested that the Commission also consider some more recent decisions by the same Court.181 A reference could be made in the commentary to the decision of 12 May 2009 in Gasparini v. Italy and Belgium. An application had been made against these two States in view of the alleged inadequacy of the settlement procedure concerning employment disputes with NATO. The Court said that States, when they transfer part of their sovereign powers to an organization of which they are members, are under an obligation to see that the rights guaranteed by the Convention receive within the organization an “equivalent protection” to that ensured by the Convention mechanism. As in previous decisions, the Court found that this obligation had not been breached, in this case because the procedure within NATO was not tainted with “manifest insufficiency”.182

Draft article 61

109. Draft article 61 concerns the responsibility of a State member of an international organization for the internationally wrongful act of that organization. Subparagraph 1 (a) considers acceptance of responsibility by a member State. This has been rightly understood as implying an acceptance expressed vis-à-vis the party invoking a State’s responsibility.183 The European Commission suggested to add in subparagraph 1 (a) the requirement that acceptance is made “in conformity with the rules of the organization”.184 However, when a State accepts responsibility, what may be relevant in order to establish the validity of acceptance is the internal law of that State rather than the rules of the organization.

110. The European Commission criticized subparagraph 1 (b), which considers a member State responsible when “it has led the injured party to rely on its responsibility”, as insufficiently supported by practice.185 One State queried the pertinence of certain references in the commentary to judicial decisions which dealt with “responsibility or liability under a domestic legal order”.186 However, these references concern passages in which national courts either made some remarks on the issue whether member States were responsible under international law or expressed some general views that seem applicable also under the perspective of international law.187

111. Another State, apart from suggesting the deletion of the reference in paragraph (10) of the commentary to draft article 61 to the size of membership, suggested adding in subparagraph 1 (b) a qualifier of reliance such as “legitimate”.188 The rationale of this subparagraph is to protect third parties when they have been prompted by certain States to deal with an international organization of which they are members on the understanding that the same States would ensure that the organization complies with its obligations. One could say that the third parties then legitimately rely on this implied guarantee, but the adverb does not seem to add significantly to the text.

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176 See the statement of France, Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 15th meeting (A/C.6/64/SR.15), para. 65; and the written comments by Germany (document A/CN.4/636 and Add.1–2, para. 2). Also, the European Commission expressed the view that “some basic or general level of intent on the part of the member State should be required” (Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 17th meeting (A/C.6/64/SR.17), para. 22). Paragraph (7) of the commentary to draft article 60 includes the following sentence: “An assessment of a specific intent on the part of the member State of circumventing an international obligation is not required.”

177 This is the position taken by Belgium (document A/CN.4/636 and Add.1–2, para. 2 of the comments to article 60), although this State also criticized the draft article because of the presence of some subjective elements which in its opinion should not be included (para. 1).


179 Austria, document A/CN.4/636 and Add.1–2, comments to article 60.

180 Ibid.

181 Written comments by Belgium (ibid., para. 3), which expressed some criticism of the decisions by the European Court of Human Rights. As this State noted, draft article 60 is not intended to codify the jurisprudence of that Court.

182 ECHR, application No. 10750/03, decision of 12 May 2009, unpublished.

183 Germany, document A/CN.4/636 and Add.1–2, para. 2 of the comments to article 61.

184 Document A/CN.4/637 and Add.1, para. 1 of the comments to article 61.

185 Ibid., para. 2.

186 Ibid., para. 2.

187 Austria, document A/CN.4/636 and Add.1–2, para. 6 of the general comments.

188 Paras. 4, 7 and 9 of the comments to draft article 61.

189 Germany, document A/CN.4/636 and Add.1–2, para. 3 of the comments to article 61.
112. One State queried as “unusual” the assertion in paragraph 2 of draft article 61 that member States are presumed to have only a subsidiary responsibility.189 Given the fact that in the case at hand it is the international organization that committed an internationally wrongful act, it seems likely that member States intend to acquire an obligation to make reparation only when the organization fails to meet its obligations.

Recommendation

113. In the present chapter, the only amendment suggested to the text of the draft articles concerns the opening words of draft article 60, as proposed in paragraph 107 above.

CHAPTER VI

Part Six. General provisions

Draft article 63

114. Some aspects of the role of the lex specialis within the draft articles were considered above, particularly in paragraph 3. International organizations emphasized in their comments the importance of draft article 63. Both ILO and the World Bank described it as a “key provision” in the draft articles.190 ILO suggested that “the scope of draft article 63... be understood broadly, not just as relevant to the determination of responsibility of an international organization, but also as pre-empting any general international law rules where they coexist, following the principle lex specialis derogat legi generali”.191 On the other hand, one State found that draft article 63 was extremely wide in scope;192 another State cautioned against the possible invocation by an organization of its internal rules in order to justify the breach of an international obligation;193 yet another State considered that “no lex specialis should be contemplated apart from the internal law of the international organization concerned”.194 To complete the picture, one State found draft article 63 “satisfactory”.195

115. Most of the special rules that prevail over general rules are likely to be contained in the rules of the organization. As draft article 63 sets forth, the rules of the organization would be “applicable to the relations between the international organization and its members”. For instance, they may regulate the entitlement of a State to invoke the responsibility of an international organization of which it is a member.196 There may also be special rules that apply to a group of international organizations or to a particular international organization also in their relations to non-members. A possible example is given in paragraphs (2) to (5) of the commentary to draft article 63.

116. The example in question relates to the attribution to the EU of conduct of member States when they implement binding acts of the EU.197 Paragraph (5) referred to two decisions of the European Court of Human Rights. One could add to the commentary a reference to the decision of 20 January 2009 in Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. The Netherlands.198 In this decision, which concerned “the guarantees offered by the European Community—especially the European Court of Justice—in discharging its own jurisdictional tasks” with regard to a preliminary reference by a court in the Netherlands, the European Court of Human Rights reiterated its position that the conduct of an organ of a member State should at any event be attributed to that State. The Court said:

A Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.199

117. As has been noted in the two preceding paragraphs, draft article 63 admits the possibility that special rules may govern the relations between a particular international organization and non-members. One State suggested going further and including a “provision requiring the special characteristics of a particular organization to be taken into account in applying the draft articles”.200 On the other hand, another State approved the fact that “the Commission had refrained from adding a new provision on the specific characteristics and variety of international organizations, since such a provision could have jeopardized the draft articles as a whole by allowing organizations leeway to sidestep them”.201

Draft article 65

118. Draft article 65 is a saving clause, concerning “any question of the individual responsibility under international law of any person acting on behalf of an international organization or State”. One State suggested that it should be “made clear in draft article 65 that individual responsibility included both civil and criminal matters”.202 The commentary to draft article 58 on State responsibility,

Union and its member States: who responds under the ILC’s draft articles on international responsibility of international organizations?”

189 Austria, ibid., comments to article 61.

190 Document A/CN.4/637 and Add.1, paras. 1 and 2 of the respective comments to article 63.

191 Ibid., para. 2.

192 Belgium, official records A/CN.4/636 and Add.1–2, comments to article 63.


194 Belarus, ibid., 15th meeting (A/C.6/64/SR.15), para. 41.

195 France, ibid., para. 67.

196 See United Kingdom, ibid., 16th meeting (A/C.6/64/SR.16), para. 26.

197 The view that conduct should then be attributed to the EU was recently restated by Hoffmeister, “Litigating against the European...
which is a parallel provision to draft article 65, only refers to criminal responsibility.\textsuperscript{203} While only criminal responsibility is likely to arise for individuals under international law, criminal responsibility may also entail civil responsibility towards the victims of a crime. This point may be added in the commentary.

**Draft article 66**

119. Four States queried the need for a provision such as draft article 66.\textsuperscript{204} This opinion was expressed for different reasons. For instance, one State found the provision superfluous,\textsuperscript{205} while another State cast doubts over the idea that international organizations are generally bound by the Charter of the United Nations.\textsuperscript{206} Views were expressed also in defence of keeping draft article 66. A State considered that “the specific reference to the Charter in draft article 66 was also a step in the right direction”.\textsuperscript{207} The Secretariat suggested that the commentary should also include, like the commentary on the parallel provision in the draft articles on responsibility of States,\textsuperscript{208} the statement that “the articles are in all respects to be interpreted in conformity with the Charter”.\textsuperscript{209}

120. Since draft article 66 is a saving clause, it may not be necessary for the Commission to dwell on the effects that the Charter has on the responsibility of international organizations. The view expressed in paragraph (2) of the commentary, that “practice points to the existence of a prevailing effect [of the Charter] also with regard to international organizations”, does not need to be stated. This view was criticized by one State,\textsuperscript{210} which referred to the judgment of the European Court of Justice in the Kadi case.\textsuperscript{211} However, this judgment did not adopt the perspective of international law when considering the relations between the Charter of the United Nations and the Treaty establishing the European Community.

121. Paragraph (3) of the commentary to draft article 66 points out that “the present article is not intended to affect the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the United Nations”. The Secretariat found that this paragraph was “unclear as to whether it is intended to exclude the United Nations from the scope of application of article 66”.\textsuperscript{212} This is certainly not the meaning of the paragraph in the commentary. As the Secretariat noted, “the United Nations could invoke the Charter of the United Nations and Security Council resolutions—to the extent that they reflect an international law obligation—to justify what might otherwise be regarded as non-compliance”.\textsuperscript{213} This could be explained in the commentary.

**Recommendation**

122. No proposal of amendment to the text of the draft articles is made in this chapter.
RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

[Agenda item 3]

DOCUMENT A/CN.4/636 and Add. 1–2

Comments and observations received from Governments

[Original: English/French/Spanish]
[14 February, 13 April and 8 August 2011]

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International Covenant on Civil and Political Rights (New York, 16 December 1966)
Ibid., vol. 999, No. 14668, p. 171.

Ibid., vol. 1155, No. 18232, p. 331.

American Convention on Human Rights: “Pact of San José, Costa Rica” (San José, 22 November 1969)
Ibid., vol. 1144, No. 17955, p. 123.

Ibid., vol. 1833, No. 31363, p. 3.

Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984)
Ibid., vol. 1465, No. 24841, p. 85.

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)
A/CONF.129/15.

Convention on the protection of the Alps (Alpine Convention) (Salzburg, 7 November 1991)

Introduction

1. At its sixty-first session, in 2009, the International Law Commission adopted, on first reading, the draft articles on the responsibility of international organizations. The Commission decided, in accordance with articles 16 to 21 of its statute, to request the Secretary-General to transmit the draft articles to Governments and international organizations for comments and observations, requesting also that such comments and observations be submitted to the Secretary-General by 1 January 2011. In paragraph 5 of its resolution 64/114, of 16 December 2009, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft articles. The Secretary-General circulated a note dated 22 January 2010 transmitting the draft articles to Governments.

2. As at 8 August 2011, written replies had been received from Austria (14 December 2010), Belgium (22 February 2011), Chile (9 May 2011), Cuba (5 November 2010), the Czech Republic (1 April 2011), El Salvador (3 November 2010), Germany (23 December 2010), Mexico (2 March 2011), the Netherlands (15 March 2011), Portugal (28 January and 20 December 2010), the Republic of Korea (23 February 2011) and Switzerland (24 February 2011). The comments and observations received from those Governments are reproduced below, organized thematically, starting with general comments and continuing with comments on specific draft articles.

1 The text of the draft articles adopted on first reading is contained in *Yearbook... 2009*, vol. II (Part Two), para. 50. The text of the draft articles with commentaries thereto is contained in *ibid.*, para. 51. For its part, the text of the draft articles on responsibility of States for internationally wrongful acts with commentaries (hereinafter “the draft articles on responsibility of States”) is contained in *Yearbook... 2001*, vol. II (Part Two), p. 30, para. 77.

2 Comments and observations received from international organizations are contained in document A/CN.4/637 and Add.1, contained in the present volume.

3 *Yearbook... 2009*, vol. II (Part Two), para. 48.
A. **General comments**

**Austria**

1. Austria has always emphasized the complexity of this topic, which would require an in-depth analysis of the relations between international organizations and their member States, the relations between international organizations and third States or other international organizations as well as of the diversity of international organizations, including the scope of their competences. It must not be ignored that international organizations differ among themselves substantially in these fields, so that the question arises to what extent international organizations can be subjected to one uniform system of norms regarding their responsibility for internationally wrongful acts. Doctrine and practice have so far been divided on these issues.

2. One reason for these diversities results from the fact that States have founded international organizations for different purposes, so relations between international organizations and their member States vary accordingly. There is a great difference between international organizations established as discussion forums purely for conference purposes and organizations designed for the performance of activities such as peacekeeping operations. In the first case, responsibility would remain mostly with the member States, whereas in the second case the international organization itself would be the author of acts likely to raise the issue of responsibility.

3. The differences between States and international organizations with regard to their legal and political nature and their procedures demand that the utmost care be taken when it comes to elaborating a regime for responsibility. Whereas States are, in principle, independent actors on the international stage, the actions of international organizations are controlled by their member States. In addition, international organizations usually act vis-à-vis their member States. Member States may also act on behalf of an international organization. Therefore, questions of responsibility (and also liability) are closely linked to the specific *inter se* relations between organizations and their member States. Disregarding or levelling those specific relations carries the risk of leaving conceptual gaps.

4. Furthermore, a clear distinction could be made between the legal positions of member States, third States that have established relations with the international organization and third States that have explicitly refused to do so. In contrast to the law of State responsibility, this distinction is crucial for the law of international organizations because of their limited mandates and capacities and due to the question of the legal effects of their recognition.

5. Moreover, the need to distinguish between the responsibility of an international organization towards its member States and its responsibility towards third States has to be kept in mind. This leads to the question of the subjective or objective personality of international organizations. In its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ derived the right of the United Nations to bring claims against a non-member State from the Organization’s universal vocation. The question remains whether the same would apply to an organization that is not of a universal character. The commentary to the present draft articles does not reveal whether the Commission is of the view that all international organizations enjoy an objective legal personality so that any organization could invoke responsibility against any State or other organization.

6. Furthermore, it seems that responsibility under international law and responsibility under any other legal order are not always clearly distinguished. The cases quoted in the commentary sometimes deal with responsibility or liability under a domestic legal order such as the *International Tin Council* decision. Whether the arguments derived from these cases can be applied to responsibility under international law must be thoroughly explored before they can be referred to in the present context.

7. Irrespective of these fundamental questions, which require particular consideration, the method of translating the principles contained in the draft articles on responsibility of States to the responsibility of international organizations seems appropriate as a starting point. This approach allows for testing, one by one, whether and how the rules applied to States possessing full legal personality apply to organizations with limited international legal personality and functions that derive more or less directly from the will of members and non-member States. But as work on this topic has progressed, proposals for articles have increasingly raised doubts as to whether the principles of State responsibility apply to organizations without considerable further qualification. As a caveat, one should keep in mind that the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations has still not entered into force, 20 years after its adoption. One of the main reasons is lack of clarity on the scope of international organizations covered by that Convention.


**Chile**

1. International organizations are a key component of the current system of international law, in that they contribute actively to the preservation of international peace and security and have a positive impact in the different spheres in which they operate. For this reason, a body of norms that suitably and coherently regulates their international responsibility seems both necessary and unavoidable.

2. It is appropriate that the draft articles are based, in terms of structure and content, on the draft articles on responsibility of States, and Chile concurs with the decision of the Commission that the distinctive nature of international organizations necessitates the drafting of a separate body of norms that is specific to them.
CUBA

1. The draft articles on the responsibility of international organizations offer, for the first time, written regulations establishing theoretical proposals for progressive development that will inevitably generate conflicts of interpretation. Those proposals include the clauses relating to the concept of countermeasures, with the conditions and limits thereof; serious breaches of peremptory norms of international law; and the application of different forms of reparation for injury.

2. The text of the draft articles represents in and of itself a major effort to regulate this matter in a uniform manner. Cuba also considers that the draft achieved is fairly exhaustive, bearing in mind the complexity and innovative nature of the issue as well as the diversity of opinions regarding the legal institutions in question.

3. Concerning the settlement of disputes, Cuba recommends taking up once again the settlement procedure that was adopted with respect to the first reading text of the draft articles on responsibility of States for internationally wrongful acts, in 1996. A proposal for a mechanism to settle disputes relating to the interpretation of responsibility constitutes a guarantee of peaceful dispute settlement, essentially for underdeveloped countries, which end up as the victims when conflicts are resolved by the use of force.

CZECH REPUBLIC

1. One of the legal problems in the draft articles is the dividing line between the responsibility of an international organization and that of a member State. In other words, to what extent can international organizations incur responsibility for the acts of States and vice versa? The draft articles on the responsibility of international organizations attempt to answer this question.

2. What is beyond dispute is that an international organization must possess international legal personality distinct from that of its member States. Otherwise it would not be capable of incurring responsibility. However, the nature of the legal personality of international organizations is quite another question. In this context, it is only appropriate to recall the advisory opinion of ICJ on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, in which the Court noted:

International organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the principle of speciality.¹


GERMANY

Germany considers the present draft articles as adopted on first reading to be largely satisfactory. In mirrors the approach already taken by the Commission in the related field of State responsibility, the present draft puts into writing various important legal provisions on the responsibility of international organizations. Germany agrees that, on account of the peculiarities of international organizations when compared to States, a completely parallel approach to the one taken by the Commission when addressing the topic of State responsibility was not possible. As a consequence, some entirely new provisions were necessary, while others required some significant redrafting in order to be applied to international organizations. The topic is further complicated by the fact that the law governing the responsibility of international organizations appears to be much harder to pinpoint than the one for States, as international organizations provide less "general" practice, particularly on account of their limited and very different competencies. The subject matter of the Commission’s draft articles received an additional layer of complexity by the decision also to address a State’s responsibility in connection with the act of an international organization.

MEXICO

1. It has been suggested in the doctrine that the secondary rules of the present draft articles would be of little use given that there are insufficient primary rules applicable to international organizations. While the scope of States’ international obligations is much broader than that of international organizations, there are developments in international law that cannot be ignored. For example, international organizations that take decisions with a direct or indirect impact on human rights cannot be exempt from compliance with certain international human rights standards.

2. Given the increasing role of international organizations in the international arena and the growing impact of their activities on a wide range of issues at the global level and, in some cases, on the legal situations of individuals or entities within States, the question of their international responsibility is assuming greater practical importance. Consequently, Mexico considers that the law of responsibility of international organizations, together with that of responsibility of States for internationally wrongful acts, is a key element in strengthening the rule of law at the international level. The current draft represents an important step in that regard and the work of the Commission and the Special Rapporteur deserves Mexico’s recognition and gratitude.

3. It is clear that the current draft and the draft articles on responsibility of States are complementary. It is for this reason that Mexico welcomes the Commission’s approach in being guided, mutatis mutandis, by the parameters of the draft articles on responsibility of States. That complementarity, together with the scarcity of practice regarding the attribution of conduct and responsibility of international organizations, means that the draft articles on responsibility of States and the commentaries thereon are a natural guide for the current draft.

4. However, the diversity of types of international organizations and the wide range of their activities pose very specific challenges for international law, and for the topic of responsibility in particular. In general terms, Mexico considers that the Commission has responded well to these specific challenges of international organizations. In some draft articles, however, it would appear that the particular characteristics of international organizations and the way in which they differ from States deserve greater attention, or rather, greater clarity, in the respective commentaries.
Netherlands

1. Some Governments and academics have questioned the need to have a set of articles on responsibility of international organizations. There is limited practice, as is demonstrated by the reports of the Special Rapporteur and the comments given by international organizations. There are hundreds of international organizations, but only some 20 of them have sent comments, and these comments are at times extremely brief. So it seems pertinent to ask whether it is really necessary to elaborate rules on responsibility of international organizations.

2. The Netherlands is of the view that it is necessary and that such rules would contribute to the further development of the international legal order. In the 1960s, Roberto Ago, Chairman of the Sub-Committee on State Responsibility of the Commission, stated that it was “questionable whether such organizations had the capacity to commit international wrongful acts” and that “international organizations were too recent a phenomenon and the question of a possible international responsibility by reason of alleged wrongful acts committed by such organizations was not suited to codification.”1 However, in the twenty-first century this is no longer the case. The number of international organizations has increased considerably; their activities have multiplied and affect both international relations and the daily life of private individuals. Although it is of course true that they do not all commit internationally wrongful acts every day or even every year, at present there is increasing practice in which it is claimed that such acts have been committed by international organizations. It is generally agreed that international organizations have the capacity to act at the international level, within the scope of their powers. However, it cannot be excluded that they act wrongfully. Therefore, it is necessary to have a system in place, a set of general rules for this purpose, even though there is no extensive practice.

3. Alternatively, in the absence of such rules, it is likely that national and international courts that are confronted with claims against international organizations and their members would seek inspiration from the draft articles on responsibility of States, and would use those articles by analogy. They would have to do so in an ad hoc and improvised manner, each court taking its own decision whether and to what extent the articles on responsibility of States can be applied mutatis mutandis. Instead, it would be preferable for these courts to be able to benefit from the existence of general rules on responsibility of international organizations, drafted in an open and multilateral process. It is for these reasons that the Netherlands supports the work of the Commission on this topic and does not share the criticism that there is no need for the articles. Moreover, the absence of such articles may impede the future exercise of powers by international organizations, as well as the possible establishment of new international organizations whenever the need arises. The elaboration of rules on responsibility of international organizations is a necessary step in the development of the international legal order, in which an increasing number of activities are carried out by international organizations. It cannot be excluded that some of these activities amount to internationally wrongful acts, and it is no longer accepted that international organizations cannot be held accountable.

4. The Netherlands is of the opinion that the criticism that the Commission has all too often simply copied the draft articles on responsibility of States is unfounded. The decision of the Commission to take as a starting point the draft articles on responsibility of States deserves full support for three reasons. First, the draft articles on responsibility of States are sufficiently general to be suitable also to other international legal persons. Moreover, it has taken the Commission some decades and five Special Rapporteurs to arrive at a set of draft articles on responsibility of States. The Commission has therefore rightly decided, in preparing draft articles on the responsibility of international organizations, not to reinvent the wheel and to avoid restarting the discussion on complex responsibility issues where there was no need to do so. The third reason is the need to develop a single coherent body of rules on international responsibility. While it has taken the draft articles on responsibility of States as a starting point, the Commission has approached the issue of responsibility of international organizations with an open mind. International organizations have been invited to provide comments and inform it about their practice. The Special Rapporteur has carefully collected and analysed all available practice, as well as doctrine in the field. Often this has not resulted in draft articles that depart from the State responsibility articles. However, this has never happened without extensive prior analysis and discussion. Moreover, on various issues the Commission has concluded that the draft articles on responsibility of States had to be adjusted to fit international organizations, or has introduced new articles. The Commission and its Special Rapporteur have demonstrated that they have not treated the State responsibility articles as sacrosanct.

5. The Netherlands agrees that there is much diversity among international organizations. Some are universal, others have only a few members. Some perform general or political functions, others are very specific or technical. The cooperation in some organizations is of a purely intergovernmental nature, while it is supranational in the EU. Nevertheless, while such differences should not be denied, the Netherlands is of the opinion that they should not prevent the elaboration of general rules on responsibility of international organizations. It should not be forgotten that, while there is one single set of articles on responsibility of States, there exist considerable differences between States. In terms of size of population and territory, political power, economic strength and culture, countries such as China and the United States are fundamentally different from countries such as Andorra and Tuvalu. Furthermore, the draft articles on responsibility of international organizations are sufficiently general to cover the wide variety of existing international organizations. It is wrong to assume that the existing wide variety of international organizations should require a similarly wide variety of responsibility rules. As indicated in the definition of international organizations in draft article 2, the draft articles apply to organizations that possess international legal personality. As international legal persons, they are capable of bearing rights and obligations. To the

extent that they have obligations under international law, it cannot be excluded that they violate such obligations. If this happens, it must be possible to hold them responsible. This is true for any international organization having international legal personality. At the same time, both the State responsibility articles and the draft articles on the responsibility of international organizations recognize that there can be special regimes (lex specialis) of international responsibility rules. These provisions serve as a safety valve in cases where the general articles are felt to be too much of a straitjacket and where, therefore, special responsibility rules should apply.

PORTUGAL

1. There is no doubt that the principles of State responsibility are in general applicable to the responsibility of international organizations as regards the invocation of responsibility. Nevertheless, the draft articles continue to follow too closely those of State responsibility, in a way that may cause the work of the Commission to deviate from what should be its main objective: to deal with the specific problems that the issue of the responsibility of international organizations entails. The ongoing exercise can even give rise to incoherent solutions. Thus, Portugal finds this kind of approach to be unnecessary, repetitive and even counterproductive.

2. Portugal continues to advocate a more focused approach to the specific problems raised by the responsibility of international organizations in connection with State responsibility. The analysis should reflect the differences that exist between States and international organizations and the fact that, unlike with States, the competences and powers of international organizations, as well as the relationships between them and their members, vary considerably from organization to organization.

REPUBLIC OF KOREA

1. The Republic of Korea supports the Commission’s desire to establish a comprehensive framework for the law of international responsibility. The adoption of the draft articles on the responsibility of international organizations will enhance legal stability in this area.

2. Given the differences between States and international organizations, a separate set of draft articles is required rather than the wholesale application of the articles on responsibility of States. Such instrument should reflect the characteristics of international organizations.

3. However, it is difficult to understand some of the draft articles, as they are based on the scarce practice of international organizations. They would be easier to understand if the Commission included more information on practice in the commentaries. Article 20, for example, is about the right of self-defence as a circumstance precluding wrongfulness. Under article 21 of the State responsibility articles, wrongful acts of States can be precluded if the acts are taken as a lawful measure of self-defence taken in conformity with the Charter of the United Nations. However, self-defence of international organizations is referred to as self-defence under international law, in abstract terms, which leaves room for abuse.

SWITZERLAND

The phrase “responsibility of an international organization for an internationally wrongful act” is used several times in the text of the draft articles. However, the titles of Part Two, chapter IV, and Part Five refer to the responsibility of an international organization or of a State in connection with the act. Switzerland would prefer for uniform wording to be used throughout the text.

B. Specific comments on the draft articles

PART ONE

INTRODUCTION

Article 1. Scope of the present draft articles

CHILE

Chile agrees with the general concept expressed in paragraph (5) of the commentary, to the effect that responsibility is linked with a breach of an international obligation.

GERMANY

The clarification included in paragraph (10) of the commentary to draft article 1, according to which the present articles do not address issues relating to the international responsibility which a State may incur towards an international organization, is to be welcomed. This question indeed belongs to the field of State responsibility and therefore lies outside the scope of application of the draft articles on the responsibility of international organizations—irrespective of the fact that the articles developed on the responsibility of States do not address this matter, as they deal solely with inter-State relations. While it might be conceivable to close the gap left by the two sets of articles with respect to scenarios in which a State incurs responsibility towards an international organization by making use of an analogy to the articles on the responsibility of States, as the commentary envisages, this question falls outside the scope of the present draft.

Article 2. Use of terms

AUSTRIA

1. Austria supports the approach of the Commission to limit itself to intergovernmental organizations, whether formally based on a treaty or on another expression of common will. It would clearly be unrealistic to attempt to go beyond that and to include NGOs.

2. Although draft article 2 refrains from expressly “defining” international organizations it includes a “use of terms” which provokes some questions:

(a) First, it would be interesting to know whether entities that are created by international treaties but are rather embryonic in nature, such as treaty organs established to monitor the administration of treaties, in particular in the fields of human rights and environmental issues, or secretariats, should also fall under the scope of the draft articles.
If such entities conclude headquarters agreements and fail to comply with them, who should assume responsibility? Among the vast number of pertinent examples, mention can be made of the establishment of a permanent secretariat of the Alpine Convention in Innsbruck (Austria). A general trend has already emerged to regard them, in a practical sense, as international organizations;

(b) Secondly, the separate and additional requirement of “possessing its own international legal personality” appears problematic. Rather than being a precondition for being considered an international organization, “possessing international legal personality” seems to be a legal consequence of being an organization. There are diverging views among scholars on this question. The commentary itself and, in particular, the ICJ cases referred to in paragraphs (8), (9) and (11) of the commentary to draft article 2, however, seem to support the view that international organizations possess international legal personality as a result of being such organizations. If this is the case, the qualifier of possessing international legal personality cannot serve as a limitation on the number of international organizations falling within the purview of these draft articles. This is corroborated by the preamble to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which notes that “international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes”. For these reasons, this qualifier is redundant;

(c) Thirdly, as host to several international organizations, Austria has closely examined practical examples. The most pertinent is the case of OSCE. The Commission seems to acknowledge the nature of OSCE as an international organization and, consequently, as an international legal entity. Negotiations within OSCE to endow it with legal personality have demonstrated, however, that for the time being it is not an international organization within the scope of draft article 2. The fact that there is no constituent treaty does not necessarily imply that there is another “instrument governed by international law” establishing the international organization. The objections of members of OSCE go so far as to say that there is no constituent instrument whatsoever. Moreover, resolutions of OSCE are not governed by international law. A more pertinent example would be, in the view of Austria, the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, Agreement regarding the seat of the Commission (Vienna, 18 March 1997), United Nations, Treaty Series, vol. 1998, No. 34224, p. 3.

3. Draft article 2, subparagraph (c), defines the term “agent” as a person “through whom the organization acts”. However, this wording raises doubts as to whether it is a workable definition in the legal sense. If the conduct of an agent can be attributed to an international organization, the latter is acting “through this person”. In other words, the phrase “through whom the organization acts” identifies the legal consequence or result of the attribution of a conduct, but it does not define the term “agent”. For this reason, subparagraph (c) should be based on the full wording of the relevant definition given by ICJ in its advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations. Therefore, this draft article should be based on article 5 of the articles on responsibility of States for internationally wrongful acts, rather than on article 4. The definition could thus be formulated as follows:

“An ‘agent’ or ‘organ’ of an international organization is a person or entity that has been charged by that organization with carrying out, or helping to carry out, one of its functions, provided the agent or organ is acting in that capacity in the particular instance.”

BELGIUM

1. At the outset, Belgium notes that the definition of the term “agent” is imprecise and could lead to a proliferation of cases in which the responsibility of an international organization could be invoked for acts performed, for example, by a subcontractor.

2. Belgium also points out that there is no definition of the notion “organ”.

3. Belgium ventures to suggest to the Commission that it either redraft this provision, on the lines of the articles pertaining to the responsibility of States and, more particularly, articles 5 and 8; or that it specifies and limits the notion of “agent” by providing a commentary to the draft article or by amending paragraph (c) as follows:

“`Agent’ includes officials and other persons or entities through whom the organization acts directly and in accordance with its internal operating rules.”

CUBA

1. The definition of “international organization” is not in accordance with the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, or the need for coherence between rules of international law. The Vienna Convention specifies the intergovernmental nature of international organizations, whereas the draft articles broaden the scope of such organizations by including the term “other entities”, which should not form part of this definition.

2. Cuba considers that the definition of international organizations provided in the Vienna Convention should be maintained in order to achieve greater consistency and coherence among the international legal instruments relating to this issue.

CZECH REPUBLIC

The Czech Republic considers the “rules of the organization” to be a part of international law. However, the rules of the organization do not play exactly the same role in all draft articles on the responsibility of international
organizations. While in some instances their international nature is obvious (e.g. in the context of draft articles 4 and 9), elsewhere they have a role analogous to that played by internal law in the context of the rules on State responsibility (draft articles 5 and 31).

**MEXICO**

1. Mexico considers that the Commission rightly applied the criterion of “objective” legal personality, following the example of ICJ in its landmark case *Reparation for Injuries Suffered in the Service of the United Nations*.\(^1\) Furthermore, it fully agrees that the organization’s legal personality must be its own, i.e. distinct from that of its members, the corollary of which is that it does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members.\(^2\)

Both objective legal personality and the emphasis on the organization’s own personality are key premises for the functionality and effectiveness of the present articles, with regard to attribution of the conduct and responsibility of the organization and, where appropriate, of its members.

2. The question of international organizations being able to include “other entities”, in addition to States, among their members reflects to a considerable extent the current situation of international organizations by extending the scope of application *ratione personae* of the current draft beyond that of traditional intergovernmental organizations. Mexico considers this to be the right approach. However, it would appear that the draft has not gone far enough in this regard, particularly in the light of the respective commentaries. If the intention is to include hybrid or mixed organizations composed of States, other international organizations and private entities, as mentioned in the commentaries,\(^3\) then the exclusion of organizations established by instruments of internal law would leave outside the scope of application a series of hybrid organizations whose activities are conducted in the transnational arena and whose conduct has clear repercussions for international law. These issues clearly reflect the difficulties raised by the diversity of the existing types of international organizations.

3. That said, it is perfectly evident that the codification and development of rules on the responsibility of hybrid entities which, while established under national private law, operate transnationally, goes beyond the purpose and scope of the present draft. It might therefore be appropriate to consider the possibility of including explicit mention of those hybrid entities in the commentaries, specifically in paragraph (2) of the commentary to article 2, which mentions:

>The fact that an international organization does not possess one or more of the characteristics set forth in article 2, subparagraph (a), and thus is not within the definition for the purposes of the present articles, does not imply that certain principles and rules stated in the following articles do not apply also to that organization.\(^4\)

4. With regard to the statement that international organizations may be established by a treaty “or other instrument governed by international law”, it would be advisable to ask what would happen in the case of international organizations or entities established by resolutions or decisions, including when the entity in question does not consider the said resolution or decision to be a formal agreement and the said instrument is not governed by international law. An interesting case in this context is that of the Financial Action Task Force (FATF). According to its own definition, it is an intergovernmental body with 32 States and two international organizations as members, as well as a number of observer organizations. It is supported by a secretariat housed in the premises of OECD (of which FATF is not a member) and has a rotating presidency. It also has a monitoring mechanism “covering more than 170 jurisdictions”, provides for the suspension of its members in the event that they fail to comply with its recommendations and has even established a set of criteria for the application, by its members, of “countermeasures” against “non-cooperative countries or territories” outside its membership. Nonetheless, unlike some FATF-style regional bodies—such as the South American Financial Action Task Force on Money Laundering (GAFISUD), which was established in 2000 by a constitutive memorandum of understanding signed by 10 countries in the region—FATF was established not by an official instrument governed by international law, but by a declaration of the Group of Seven in 1988.

5. Hence, despite all the above-mentioned characteristics, a body such as FATF would not fall within the scope of the present articles. In view of the number and the growing importance of these types of quasi-official intergovernmental bodies and networks, it would be advisable for the Commission to consider mentioning them in the commentaries. That could be done, as with hybrid or mixed entities established by instruments of domestic private law, in paragraph (2) of the commentary to article 2.

\(^{4}\) GAFISUD founding Memorandum of Understanding, signed in Cartagena de Indias (Colombia), 8 December 2000.

**PORTUGAL**

Regarding the definition of “agent”, Portugal would prefer the wording proposed by the Special Rapporteur instead of the one adopted, since it is more precise. Moreover, the former is in line with the jurisprudence of ICJ as established in its 1949 advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, according to which [the Court understands the word “agent” in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions.\(^5\)]

\(^{5}\) I.C.J. Reports 1949, p. 177.

**SWITZERLAND**

Switzerland considers that the definition given for the term “rules of the organization” in article 2 (b) of the draft articles is not sufficiently precise to make its meaning

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\(^2\) *Yearbook ... 2009*, vol. II (Part Two), para. (10) of the commentary to art. 2.

\(^3\) *Ibid.*, para. (13).

\(^4\) *I.C.J. Reports* 1949, p. 177.
clear. In view of the importance of this concept to the draft, Switzerland believes that the meaning needs to be clarified.

**PART TWO**

**THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION**

**CHAPTER I**

**GENERAL PRINCIPLES**

**GERMANY**

1. Germany would like to direct the Commission’s attention to a passage in paragraph (1) of its commentary to the introduction of part two, chapter I, stating:

   The statement of general principles is without prejudice to the existence of cases in which an organization’s international responsibility may be established for conduct of a State or of another organization.

2. Paragraph (2) of the introductory commentary to Chapter II, by making reference to the passage just quoted, emphasizes:

   As was noted in the introductory commentary on Chapter I, the responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization. In these cases conduct would be attributed to a State or to another international organization. In the latter case, rules on attribution of conduct to an international organization are also relevant.

3. In this respect, a clarifying remark that highlights the kind of cases the Commission had in mind would be helpful. Is the Commission thinking (solely) of cases in which an international organization has expressly (for example, via a treaty clause) assumed such responsibility, or are there other conceivable scenarios where an international organization will incur international responsibility for conduct which cannot be attributed to it via the present draft articles? An international organization’s consent and express normative rules to the contrary, i.e. *lex specialis*, aside, Germany finds it hard to conceive of an international organization being held responsible for conduct which cannot be attributed to it.

**Article 3. Responsibility of an international organization for its internationally wrongful acts**

**CUBA**

The concept of “injury” should be included as an essential element in the definition of an internationally wrongful act of an international organization, since it is this element that determines the obligation of reparation, the cessation of the breach and the offer of guarantees of non-repetition to the injured party. Furthermore, draft article 33 establishes “injury caused” as an essential element in the concept of an obligation of reparation, which is inconsistent with the absence of the element of “injury” in the concept of an internationally wrongful act of an international organization.

**Article 4. Elements of an internationally wrongful act of an international organization**

**CHILE**

Chile believes that the actions of international organizations in a territory subject to the jurisdiction of a given State might be characterized as lawful under the law of that territory. As a result, it is still useful to include a provision similar to article 3 of the draft articles on responsibility of States.

**CUBA**

See the comment under draft article 3, above.

**CHAPTER II**

**ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION**

**GERMANY**

1. Germany would like to underscore the important finding included in paragraph (5) of the Commission’s introductory commentary to chapter II, according to which the draft articles, while not expressly addressing this matter, imply that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations.

2. Although this negative finding is, strictly speaking, not necessary in explaining the present draft, Germany welcomes the fact that the Commission has expressed its clear opinion on how the draft articles developed by it are to be read in relation to the important question of how to attribute responsibility in connection with military measures taken pursuant to an authorization of the Security Council, with the acting forces operating outside a chain of command that would link them to the United Nations.

**MEXICO**

Mexico welcomes the approach taken by the Commission under this heading. Paragraph (4) of the introductory commentary, which clarifies that dual or even multiple attribution of conduct cannot be excluded, is especially important. Although, as the Commission has indicated, it does not occur very frequently in practice, dual or multiple attribution of conduct is essential in order to ensure that attribution is not diluted among the various members of the organization and that the question of international responsibility is not evaded. In the light of potential human rights violations, it is very important to avoid such evasion of responsibility. Dual or multiple attribution is the correct approach in order to combat such evasion.

**Article 6. Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization**

**AUSTRIA**

1. Draft article 6 contains, in comparison to article 6 of the draft articles on responsibility of States, a different criterion for the attribution of conduct. The decisive
criterion in article 6 on State responsibility is the exercise of elements of governmental authority of the State at whose disposal the organ is placed. In the present draft article 6, the decisive criterion is only effective control over the conduct. Although the element of control is the basic reason for responsibility, it is nevertheless advisable to add to the criterion of control that of the exercise of functions of the organization in order to exclude situations in which the organization exercises a certain factual control, although the acts are attributable to States. A further justification for this addition is the different formulation of control as results from the practices of different international courts and tribunals. In this respect, it makes an attempt to combine article 6 with article 8 of the draft articles on responsibility of States. But even in article 8 of the articles on responsibility of States, which deals with the attributability of acts of private persons to States, control is not the only criterion, but is accompanied by others such as instruction and direction, terms that shed a certain light on the construction of the term “control”.

2. Furthermore, draft article 6 is limited to organs of a State or organs or agents of another international organization, but does not include private persons. But would the act of a private person acting under the effective control of an organization and exercising functions of the organization not entail the latter’s responsibility? What should be the reason to exclude the situation of private persons acting in such a way? If, for instance, a person in the service of an NGO acts under the effective control of the United Nations in the course of a peacekeeping operation and performs acts within the functions of the United Nations, such an act would certainly be attributable to the United Nations. It is difficult to see any distinction between such a case and the situation where a State organ is acting in such a manner. The Commission could consider whether private conduct could be included within the scope of this draft article.

BELGIUM

Belgium notes that the Commission, in its commentary to the draft article (paragraph 9), indicated its wish to distance itself from the decision of the European Court of Human Rights in the Behrami case, which applies the criterion of “ultimate authority and control”, rather than that of “effective control”, supported by the Commission, in establishing the responsibility of an organization following the conduct of an organ or an agent placed at its disposal by a State or another international organization. Belgium welcomes this position but ventures to suggest to the Commission that it indicate more explicitly in its commentary that it does not intend to follow the reasoning of the European Court of Human Rights on this issue.

1 Decision (Grand Chamber) of 2 May 2007 on the admissibility of application Nos. 71412/01 and 78166/01, paras. 29–33

CZECH REPUBLIC

It would be appropriate to require that in determining who has “effective control”, all factual circumstances of the case should be taken into account.

GERMANY

As regards paragraph (9) of the commentary to draft article 6, in which the decision of the European Court of Human Rights in Behrami and Behrami v. France and Saramati v. France, Germany and Norway

1 Decision (Grand Chamber) of 2 May 2007 on the admissibility of application Nos. 71412/01 and 78166/01, paras. 29–33

MEXICO

1. At the outset, Mexico expressed its clear preference that the criterion for attribution of the conduct of an organ or agent placed at the disposal of an international organization by a State or another international organization should be effective control over the conduct.

2. As clearly illustrated in the Commission’s commentary to article 6, especially with regard to recent jurisprudence, effective control over conduct should be understood as a factual criterion, in other words, as operational control over the specific conduct in question. The reference in the commentary to article 6 of the draft articles on responsibility of States, specifically to “exclusive direction and control”, is especially important in this context.

3. The current draft reflects new realities and trends in relation to international organizations, which is important and laudable. At the same time, it is striking that draft article 6 does not envisage the scenario of private actors placed at the disposal of an international organization. This is perfectly feasible and is likely to occur more frequently in the future. The Commission could consider the inclusion of private actors, both individuals and entities, under draft article 6.

SWITZERLAND

Article 6 refers to the notion of “effective control”. Despite the commentary provided by the Commission, which is relatively long and includes a wealth of examples, it would appear that one issue has not been addressed: the actual definition of “effective control”. Since this notion has been a subject of contention between ICJ (the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986,


2 Judgment, I.C.J. Reports 2007, p. 43.


and the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007) and the International Criminal Tribunal for the former Yugoslavia (the Tadić case), Switzerland would have liked to have some clarification. What are the criteria for presuming that an international organization has effective control over the organs or agents at its disposal? Is this the same reasoning as that defended by ICJ?
**Article 7. Excess of authority or contravention of instructions**

**Czech Republic**

Draft article 7 does not clearly point out the qualitative difference between an excess of authority by an organization as such (with regard to the specific nature of its legal personality) and an excess of authority by an individual organ or agent. Despite the present wording of the article, the Commission’s commentary tries to extend this attribution rule to both situations. This is highly disputable and the commentary contradicts itself in some instances. The key should be the interpretation of the words “in that capacity”. In cases where it must be evident to any entity (a State or an international organization) acting in good faith that certain conduct manifestly exceeds the scope of the legal personality, special and functional, of the international organization concerned, the organ’s ultra vires conduct should not be attributed to the organization.

**Switzerland**

In the context of acts committed by an international organization, or by one of its organs or agents, that exceed the authority of the former or the latter, Switzerland considers the element of good faith to be important. Switzerland therefore believes that it would be useful to add to article 38 (“Contribution to the injury”) a statement to the effect that where an international organization’s conduct is clearly wrongful—that is, where the member States or international organizations are in a position to be aware of it—the latter should so comport themselves as to limit the injury suffered and should not be able to seek reparation for an injury arising from such conduct. Such an addition would be particularly valuable where the international organization adopts a non-binding recommendation.

**Article 8. Conduct acknowledged and adopted by an international organization as its own**

**Chile**

Paragraph (5) of the commentary states that the rules of the organization govern the issue of which organ would be competent to acknowledge and adopt a conduct as its own. It is very possible, however, that the rules of the organization will not help in all cases. The rules of the organization will probably identify the functions of each organ and which organs have the power to bind the organization in international instruments, but the organization’s constituent instrument probably will not specify which organ is to take responsibility for the conduct of third parties. The rules on the powers of the various organs to conclude agreements or otherwise bind the organization could not be applied by analogy to cases involving the assumption of responsibility for the conduct of third parties. The organ acknowledging such conduct may occupy a middle rank in the organization’s hierarchy, and a decision needs to be taken as to whether statements by such organs can bind the organization’s responsibility or whether only its management organs can do so.

**El Salvador**

1. Draft article 8, whose wording is the same as that of article 11 of the draft articles on responsibility of States, regulates the possibility of attributing responsibility to an international organization for an act that may not, for whatever reason, be attributable to it initially. The cases in which an act is not attributable to an organization vary considerably, ranging from the commission of an act by an agent of the organization who has already been dismissed, to wrongful acts that are completely outside the jurisdiction of the organization concerned. It is not feasible, in a draft of this kind, to stipulate detailed provisions covering every possible scenario. El Salvador therefore supports the incorporation of a general rule, as the Commission has done, that covers a wide range of possible situations in which an organization is able to adopt an act as its own, provided that this act cannot be attributed through the ordinary channels.

2. Despite the appropriateness of establishing a general rule, El Salvador also considers it important to include in the commentary, which, being highly illustrative, is very useful for understanding legal norms and is particularly beneficial when conflicts arise as to the interpretation of those norms, an especially pertinent scenario, namely, de facto actions. By these, El Salvador means actions carried out by a person not authorized to act on behalf of the organization, in particular a person whose appointment is not lawful either because he or she has been suspended from duty or because the appointment has been terminated.

3. El Salvador notes that the only mention of such a scenario in the draft articles is a reference to the position taken recently by a WTO panel on European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, in which the panel accepted the European Communities’ explanation of what amounts to its sui generis domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, “act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general”.

Howevr, this example is not sufficient for dealing with a situation that comes under lex specialis rather than the general context of the draft articles. El Salvador believes that the Commission should consider this possibility, since the draft articles make no clear provision for such a scenario and it cannot be left out, given the complex structure of many international organizations.

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1 WTO, WT/DS174/R, 15 March 2005, para. 7.725. See also Yearbook ... 2009, vol. II (Part Two), para. (4) of the commentary to art. 63.

**Mexico**

1. Mexico agrees with the Commission that the criteria that guided its drafting and adoption of article 11 of the draft articles on responsibility of States are applicable mutatis mutandis to international organizations. Given that various international organizations are required, as
part of their functions, to address situations that do not involve their own conduct, the potential practical relevance of this draft article is considerable.

2. In the opinion of Mexico, it would be advisable for the commentary to address the temporal aspect more clearly. The commentary to article 11 of the draft articles on responsibility of States makes it clear that conduct is attributable where it has subsequently been acknowledged and adopted by a State as its own. Such a clarification would also be appropriate in the context of the present articles, particularly in the light of the ex post facto acknowledgement or adoption of conduct by international organizations, and would be of great practical relevance in this context.

3. It would also be appropriate to provide more in-depth commentary on the criteria that distinguish an organization’s acknowledgement and adoption of conduct as its own from mere support for that conduct.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 9. Existence of a breach of an international obligation

PORTUGAL

Regarding paragraph 2, the wording that has been adopted is clearer than in the previous draft. It is the understanding of Portugal that some of the “rules of the organization”, such as internal rules of a merely procedural or administrative nature, or private law rules that may govern the relations between the organization and international law subjects, do not constitute international law. In other words, the assertion that “in principle, rules of the organization are part of international law” is too vague a statement and is not compatible with the accuracy that should characterize the legal discourse.

CUBA

1. The requirement that the act would be wrongful if committed by the State or international organization providing the aid or assistance should be removed. The progressive development of a rule establishing that States and international organizations are duty-bound not to facilitate the commission of an act in breach of international law is proposed instead.

2. Cuba considers that a new provision of progressive development, relating to the attribution of responsibility to a State or international organization for its participation in the internationally wrongful act, should be introduced. This new provision should contain a presumption establishing that any State or international organization that aids another in the commission of a wrongful act does so with knowledge of the circumstances of the same.

Article 13. Aid or assistance in the commission of an internationally wrongful act

CUBA

1. The requirement that the act would be wrongful if committed by the State or international organization providing the aid or assistance should be removed. The progressive development of a rule establishing that States and international organizations are duty-bound not to facilitate the commission of an act in breach of international law is proposed instead.

2. Cuba proposes removing the requirement whereby the aid or assistance must have been provided with the intention of facilitating the commission of the violation and the violation must actually have been committed, or, as another variant, reversing the burden of proof through a presumption establishing that any entity that aids another to commit a wrongful act, knowing that to be the objective, does so in order that the wrongful act may be committed.

SWITZERLAND

While the commentary to article 13 refers to article 16 of the draft articles on responsibility of States, it is clear that the condition of intention is not mentioned in the text of either of those articles; it appears only in the commentary to article 16. Consequently, in view of the overriding importance of this condition, Switzerland believes it would be more appropriate to specify, in the commentary to article 13, that the commentary to article 16 of the draft articles on responsibility of States is also applicable.

Article 14. Direction and control exercised over the commission of an internationally wrongful act

BELGIUM

Belgium supports the text of the draft articles as formulated by the Commission, including its clear determination of the cumulative nature of the conditions of “direction and control”, which faithfully reflects article 8 of the draft articles on responsibility of States. At the same time, it would like to draw the Commission’s attention to an ambiguity inherent in the wording of paragraph (2) of its commentary to this provision, in which the Commission cites a passage from a French Government paper in the
Coercion, in the passage following this paragraph, is, in Germany’s opinion, rightly identified as having to amount to conduct which goes as far as to force the will of the coerced State. A binding decision as such hence does not constitute coercion in the sense of this article. As Germany understands it, this is precisely what the Commission intends to say when it points to “exceptional circumstances” in this context. If so, paragraph (3) of the commentary may, however, give rise to a misunderstanding and could therefore benefit from further clarification.

2. It is worth recalling another important difference between draft article 16, which expressly addresses the scenario of binding decisions being directed by an international organization to a member State, and draft article 15. While draft article 16—just as draft article 14 on “direction and control”, which, as the commentary to draft article 14 in paragraphs (3) and (4) identifies, might also be applicable in this context—includes the requirement of the act committed by the State having to be wrongful for the international organization, this requirement is not included in draft article 15. Draft article 15 focuses only on whether the coerced State (but for the coercion) infringes an obligation. If draft articles 14 and 16 hence correctly establish the principle that an international organization is required to focus solely on its own obligations and not to keep the obligations of all of its members in mind when adopting a binding decision, the consequence must be that a binding decision as such may not be subsumed under draft article 15 as “coercion”. Only where a binding decision is accompanied by additional and illegal action such as the threat or use of force may draft article 15 become applicable. Although this understanding can already be read out of the Commission’s commentary and the structure of the draft articles, a further clarifying remark might help in order to fully exclude any misunderstanding in this draft article’s area of application.

Article 16. Decisions, authorizations and recommendations addressed to member States and international organizations

1. The concept of draft article 16, paragraph 2 (b), should be reconsidered. It is doubtful as to whether this paragraph, in its present form, will contribute to clarifying the relationship between the responsibility of a member State acting wrongfully upon the authorization or recommendation of an organization and the responsibility of the latter organization. This is due to the fact that the concept of the reliance or non-reliance of a member State on the authorization or recommendation of its organization is rather vague. In order for an internationally wrongful act of a member State to create the responsibility of an organization authorizing or recommending it, a very close connection between the authorization or recommendation and the relevant act of the member State is required. This could, for instance, be established through the use of the expressions “in compliance with” or “in conformity with”. This wording would make an organization responsible for the above-mentioned non-binding acts only if the wrongfulness of the act committed by the member State was a direct consequence of the authorization or recommendation. Any wrongful act that is as such not necessary for the implementation of a related authorization or recommendation would thus not give rise to the responsibility of the organization.

2. Nevertheless, the question should be asked whether and to what extent an international organization should be held responsible for recommendations and authorizations at all, in particular as compared to binding decisions of the international organization. As to authorizations, could a mere authorization already generate international responsibility of the international organization since, in such a case, the international organization would become responsible for acts that are not attributable to it? The draft articles on responsibility of States do not provide responsibility for recommendations and authorizations.

Austria

1. Germany welcomes the Commission’s finding in paragraph (2) of its commentary to draft article 15, according to which

[...] the relations between an international organization and its member States or international organizations, a binding decision by an international organization (an) give rise to coercion only under exceptional circumstances.

Article 16

1. The concept of draft article 16, paragraph 2 (b), should be reconsidered. It is doubtful as to whether this paragraph, in its present form, will contribute to clarifying the relationship between the responsibility of a member State acting wrongfully upon the authorization or recommendation of an organization and the responsibility of the latter organization. This is due to the fact that the concept of the reliance or non-reliance of a member State on the authorization or recommendation of its organization is rather vague. In order for an internationally wrongful act of a member State to create the responsibility of an organization authorizing or recommending it, a very close connection between the authorization or recommendation and the relevant act of the member State is required. This could, for instance, be established through the use of the expressions “in compliance with” or “in conformity with”. This wording would make an organization responsible for the above-mentioned non-binding acts only if the wrongfulness of the act committed by the member State was a direct consequence of the authorization or recommendation. Any wrongful act that is as such not necessary for the implementation of a related authorization or recommendation would thus not give rise to the responsibility of the organization.

Belgium

1. Belgium believes that the claim that the international organization would be circumventing an international obligation if it itself had committed the internationally wrongful
2. Accordingly it proposes that this last section of the sentence, from the words “and would circumvent an international obligation”, should be deleted.

**CZECH REPUBLIC**

The purpose of draft article 16, as it is understood by the Czech Republic, is to ensure that international organizations do not escape responsibility in cases where a member State violates an international obligation while acting in compliance with a request contained in an act of the international organization. The case law of the European Court of Human Rights (in particular in Bosphorus) and the European Court of Justice (in particular in Kadi) is unequivocal, a fact which is reflected in the Commission’s commentary.

1 Bosphorus Hava Yollari Turizm ve Ticaret Anonin Şirketi (Bosphorus Airways) v. Ireland (Grand Chamber), judgment of 30 June 2005, No. 45036/98, Reports of Judgments and Decisions 2005-VI.

**GERMANY**

While generally welcoming a provision such as draft article 16, intended to hinder an international organization from evading its responsibility, Germany has considerable doubts as to whether the article is adequately precise in its wording. Draft article 16, in its paragraphs (1) and 2 (a), considers an international organization as having incurred responsibility in scenarios where it “circumvents” an international obligation. The term “circumvents” is, however, not clearly defined, and its precise meaning remains hard to grasp. While Germany would understand and support a reading which interprets an act of circumvention to mean an intentional *misuse* of an organization’s powers in order to evade responsibility, paragraph (4) of the commentary to draft article 16 stipulates:

*The existence on the part of the international organization of a specific intention of circumvention is not required. Thus, when an international organization requests its members to carry out a certain conduct, the fact that the organization circumvents one of its international obligations may be inferred from the circumstances.*

Were “circumvention” to be interpreted as “misuse” requiring an intentional circumvention, this would by no means render the second sentence of the commentary obsolete. Even where a “specific intention of circumvention” is considered necessary, it would remain fully permissible, and in fact even be necessary, to infer this intention by judging an organization’s conduct from the eyes of a reasonable observer taking full account of the circumstances of the case. The term “circumvent” would, however, in that case be more clearly defined.

**MEXICO**

1. This provision relates both to binding decisions of international organizations (art. 16, para. 1) and authorizations and recommendations of such organizations (art. 16, para. 2). The first situation is clear. The second offers a scenario that borders on incitement. Mexico is convinced that all possible steps must be taken to prevent and avoid evasión of responsibility, whether by members of the organization or by the organization itself, and that this should be the object and purpose of the present articles. In this regard, Mexico welcomes the rule set out in article 16, paragraph 2.

2. However, since there are no clear rules on incitement as a criterion for the attribution of responsibility except in specific cases established in treaties, such as incitement to genocide, Mexico considers that the responsibility of an organization derived from the conduct of one of its members when acting upon its recommendation or based on its authorization should be attributed on the grounds that the said conduct takes place pursuant to, not simply because of, that authorization or recommendation. The latter would appear to be a very vague criterion that could include incitement in general terms.

1 Yearbook ... 2001, vol. II (Part Two), p. 65, para. (9) of the commentary to chap. IV of the draft articles on responsibility of States.

**CHAPTER V**

**CIRCUMSTANCES PRECLUDING WRONGFULNESS**

**MEXICO**

1. Mexico is one of the States that has declared in previous discussions that the chapter on the circumstances precluding wrongfulness was one of the most difficult parts of the current draft because those circumstances are too similar to the corresponding rules in the draft articles on responsibility of States, whereas they are, in fact, very different. For example, the Mexican delegation mentioned during Sixth Committee discussions in 2004 that the Commission should consider that the essential interests of an organization could not, by definition, be equated with the essential interests of a State.

Mexico is pleased to note that article 24 has re-established this critical distinction, especially by defining “essential interest” as an interest “of the international community as a whole” (para. 1 (b)). Nonetheless, it could be difficult to identify in specific cases.

2. In general terms, Mexico continues to see practical difficulties with any mention of the circumstances precluding wrongfulness in respect of international organizations, especially in the cases of “necessity” (art. 24), countermeasures (art. 21) and “self-defence” (art. 20).


**Article 19. Consent**

**AUSTRIA**

1. One has to ask when consent given by an international organization to the commission of a given act by another organization constitutes a circumstance precluding wrongfulness of that organization’s conduct. Whereas
valid consent given by a State serves as a circumstance precluding wrongfulness according to the draft articles on responsibility of States, this issue is by no means so clear with respect to international organizations. First of all, the consent given by international organizations is not in all aspects comparable to consent given by States, particularly in view of the limited powers of international organizations as compared to States and the fact that if the rights of an organization are violated the rights of its members may also be affected.

2. In this context, a number of questions arise: does consent or authorization of a general nature provided in a non-binding resolution, such as a General Assembly resolution, amount to consent in the sense of the articles on responsibility of States? The qualification of the consent by the term “valid” does not solve the problem, as it is not clear whether a recommendation alone already constitutes consent. But if so, does such consent indeed override treaty obligations? On the one hand, it can be argued that a non-binding resolution could not constitute consent with the legal effect of precluding wrongfulness according to the articles on responsibility of States. On the other hand, if a resolution expressing consent is of a legally binding character, such consent given by an international organization may constitute not only a circumstance precluding wrongfulness, but also a matter of conflicting norms under international law. Hence, this article needs further clarification concerning the nature and the consequences of consent.

**Article 20. Self-defence**

**Austria**

It seems that the defence of an international organization’s mission that has its legal basis in a relevant international mandate is not included in the present wording of draft article 20. In addition, two further questions remain unanswered: first, is the international organization allowed to rely on (State-like) self-defence if a territory under its control and/or administration is being attacked? The commentary seems to give an affirmative answer. And secondly, is the international organization justified in defending its premises on the territory of the host State, either against attacks by the host State or any other State attacking the host State? Here again, it seems unclear whether the principles of international law embodied in the Charter of the United Nations justify such action. Due to the fact that international organizations usually operate within host States, these questions demand certain clarification, at least in the commentary.

**Czech Republic**

The concept of self-defence, which has been elaborated with regard to States but should be used also with regard to international organizations, seems especially difficult, although it is likely to be relevant only to the acts of a small number of organizations, such as those administering a territory or deploying an armed force. As regards these two examples, one cannot but agree with the former, since in such cases an international organization may exceptionally perform functions similar to that of a State (e.g. the United Nations Transitional Administration in East Timor or the United Nations Interim Administration Mission in Kosovo). As regards the latter example, the Commission itself puts it in a relative light by stating that the question of the extent to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission. However, if the entitlement to resort to force depends only on the primary rules concerning the mandate of the mission, the inclusion of self-defence in the draft articles on the responsibility of international organizations does not make much sense.

**Republic of Korea**

See the comment under general comments, above.

**Article 21. Countermeasures**

**Austria**

1. The Commission has stated that

2. Paragraph 2 of draft article 21 seems to refer to countermeasures against members of an international organization, be they States or international organizations. Austria supports the view that members of international organizations are treated differently from third parties, in particular when it comes to countermeasures, and would suggest that it be clarified that the qualifier “member” relates also to international organizations which are members of the organization in question.

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1 Para. (2) of the commentary to Part Four.


**Chile**

See the comment under article 51, below.

**Germany**

1. Germany is of the opinion that the question of countermeasures by international organizations against States should be excluded from the scope of the draft articles.
This conviction rests on the consideration that, notwithstanding the considerable EU practice, numerous questions are still unanswered with regard to the relationship between international organizations and non-member States. The relationship between an international organization and its members on the other hand is in the view of Germany by definition governed by the internal rules of the organization. As a general rule, there is hence no room for countermeasures between an international organization and its members. This, in the opinion of Germany, holds true not only for the question of countermeasures taken by member States against an international organization, but is especially valid as regards countermeasures taken by an international organization against its member States. In this respect, measures taken by an international organization against its members in accordance with its internal rules should in the eyes of Germany be clearly distinguished from countermeasures. It is more appropriate to regard them as sanctions governed by a specific set of rules. The latter is also true for sanctions imposed by the Security Council. Germany therefore disagrees with the approach now taken by the Commission including countermeasures in the draft articles.

2. If they are nevertheless included, Germany, in the light of the aforementioned, considers it necessary for the draft article and its commentary to clearly stipulate that countermeasures adopted by an international organization against its members must remain restricted to very exceptional circumstances. As emphasized above, as a general rule there is no room for such measures. The draft article may hence be commended for the fact that, in paragraph 2, it correctly states that an international organization may not take countermeasures against a responsible member. The draft article, however, allows for an exception under two conditions, both of which have to be fulfilled: the countermeasures may not be inconsistent with the rules of the organization, and no appropriate means are available for the international organization to induce compliance with the obligation of the responsible member State (or member international organization). In respect of the first prong of this exception, Germany considers it necessary for the commentary to make it very clear that countermeasures have to be deemed inconsistent with the rules of the organization unless there are clear indications that the internal rules of the organization (potentially also including sanctions) were not meant to exclusively govern the relationship between the organization and its members.

3. Unlike the relationship between States, which is first and foremost governed by general rules of international law, overridden only by lex specialis, where the latter has been specifically agreed upon or has otherwise developed, the relationship between an international organization and its members is created by the latter’s willful act. It is hence for an organization’s members to stipulate and precisely define the relationship between them and the newly created international legal entity, including the legal powers an international organization may resort to, should one of its members breach an existing obligation vis-à-vis the organization. In this area of lex specialis application, there is, in the opinion of Germany, simply no room to resort to general international law, apart from specific indications to the contrary. This should be made very clear either in the draft itself or in the commentary thereto.

1. If the issue of countermeasures is a controversial one insofar as States are concerned, it becomes even more problematic as regards international organizations. The issue of countermeasures raises, in the context of international organizations, very complex questions and may lead to certain paradoxes. Additionally, the recurrent use by the Special Rapporteur of examples based on the experience of the European Community and of WTO is possibly the least suitable test for the draft articles. This only indicates the existence of lack of practice on this matter and the difficulty in elaborating adequate, general and abstract legal solutions.

2. One should also be careful when distinguishing between countermeasures and similar measures. Whenever a distinction is being drawn between them, the source of the measure, its legal grounds, its nature and its purpose need to be taken into consideration. For instance, Security Council sanctions cannot be regarded as countermeasures. Furthermore, measures taken by an international organization in accordance with its internal rules against one of its members should not be considered as countermeasures.

Article 24. Necessity

Austria

1. The practice of international organizations makes it clear that the principle of necessity is of high practical relevance, at least in two specific areas: the principle of operational necessity is applied in the context of peacekeeping missions, whereas the principle of military necessity is applied in the context of peace enforcement missions (or military actions within peacekeeping missions). Both States and international organizations apply these principles.

2. Austria agrees that the principle of necessity should not be as widely invocable by international organizations as by States. It is conceivable that the reference to “essential interest of the international community as a whole” is designed to raise the threshold for excluding the wrongfulness of an act by an international organization. But the notion of such essential interest without further qualification lacks the necessary clarity. This problem could, however, be diminished if the principle of necessity were tied to the mandate of the organization.

3. Austria, therefore, would prefer it if the principle of necessity were invocable only if the act in question constitutes the only means for the organization to fulfil its mandate. The organization may then only invoke the principle of necessity vis-à-vis those (member) States that have agreed to or are bound by the organization’s mandate. It can clearly be argued that the mandate itself is, in both cases, the legal basis of the lawfulness of the action. If an international organization may rely on the operational necessity principle vis-à-vis third States, this may, indeed, be accepted if the mandate of the international organization pursues an essential interest of the international community as a whole. In any case, further considerations are necessary on the legal effects generated by the constituent instrument itself towards third States that did not recognize the acting international organization.
4. The international practice of NATO, the United Nations, OAS, *inter alia*, shows that international organizations consider the operational/military necessity principle as a rule based first and foremost on customary law.

**CUBA**

Cuba considers that the negative formulation of the draft article should be maintained. The current wording of paragraph 2 should also be retained. However, it believes that there is a need to explain what is meant by “essential interest”. While it should not include minor uses of force or the so-called “responsibility to protect”, it should cover safeguarding the environment and preserving the very existence of the State and its population at a time of public emergency.

**GERMANY**

There are good reasons for allowing necessity to be invoked by international organizations only under strict circumstances which take into account the special characteristic of international organizations as compared to States. Against this background, the restriction in draft article 24, paragraph 1(a), that international organizations may invoke necessity only where it “is the only means for the organization to safeguard against a grave and imminent peril an essential interest of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest” is, as such, understandable. It does, however, go too far, since international organizations are diverse in their respective functions and competencies. Not all organizations are concerned with protecting an essential interest of the international community, but they will usually protect a legitimate and possibly even essential interest of their members. A provision along the lines referred to in paragraph (4) of the commentary to article 24, according to which an international organization may invoke necessity where it is the only means for the organization to safeguard an essential interest of its member States, which the organization has the function to protect against a grave and imminent peril, is therefore to be preferred.

**PART THREE**

**CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION**

**CHAPTER I**

**GENERAL PRINCIPLES**

**Article 31. Irrelevance of the rules of the organization**

**MEXICO**

The irrelevance of the rules of the organization as justification for failure to comply with its obligations under international law is another case in which Mexico considers that the analogy with the corresponding rule for States, i.e. the irrelevance of internal law as justification for non-compliance, is problematic. Many have pointed out that the rules of the organization may be either internal rules or rules of international law. This normative inconsistency could give rise to serious problems in application of the present article.

**REPUBLIC OF KOREA**

Draft article 31 originates from article 27 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and from article 32 of the draft articles on responsibility of States, which forbids States from relying on their internal law as justification for failure to comply with their obligations. However, unlike States, international organizations act and have limited functional authority based on their constituent instruments and internal rules. The draft article should be reformulated so as to emphasize that international organizations cannot rely on their internal rules for the sole purpose of justifying their failure to comply with their international obligations.

**CHAPTER II**

**REPARATION FOR INJURY**

**Article 39. Ensuring the effective performance of the obligation of reparation**

**AUSTRIA**

1. In principle, Austria supports the idea of a provision that ensures that the organization is sufficiently equipped by its member States so as to enable it to compensate an injured party in accordance with chapter II of Part Three of the draft articles. Draft article 39 is obviously designed to serve that purpose in trying to bridge the discrepancy between the creation of an obligation for the collectivity of member States to provide the organization with the means to effectively compensate parties injured by its violation of international law and the interest in avoiding the implication of subsidiary responsibility for member States.

2. But international practice does not seem to support an obligation for member States to bear the financial consequences of an illegal or *ultra vires* act attributed to the international organization. Such an obligation implying the member’s responsibility under international law and thus “piercing the corporate veil” is difficult to accept. In Austria’s view, a provision such as draft article 39 would dilute the desired legal effects of codification. Furthermore, this provision is inconsistent with the system of the draft articles, as it is limited only to members of a responsible international organization. In case the draft articles are eventually adopted in the form of an international convention, draft article 39 would entail an additional systematic problem: a quasi-universal acceptance, or at least the acceptance by all members of the organization, would be required in order to effectively establish an actual duty of members to provide sufficient financial means for their organization to fulfill its obligations under this chapter.

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1 Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), advisory opinion of 20 July 1962, *I.C.J. Reports* 1962, p. 151 at pp. 162 et seq. and p. 167: “The Court agrees that … if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an ‘expense of the organization’.”
Moreover, the present wording of draft article 39 is placed outside the overall concept of the draft articles on the responsibility of international organizations. According to its wording ("are required to take"), draft article 39 does not clearly establish a legal obligation of member States to provide the responsible international organization with all necessary means to fulfil its obligation defined in draft article 30, that is, to make full reparation for the injury caused by the internationally wrongful act.

3. On the other hand, the member States that enable an international organization to act on the international plane are accepting the risk that this organization may violate international law. This risk cannot be left with the injured party. It is therefore reasonable that the risk has to be borne by the collectivity of the members, while the responsibility to compensate remains entirely with the organization.

4. Accordingly, Austria tends towards supporting the proposal set out in paragraph (4) of the commentary to draft article 39 to state expressly the obligation of the responsible international organization to take all appropriate measures in accordance with its rules in order to ensure that its members provide it with the means for effectively providing full reparation in accordance with draft article 39. The following reasons provide a basis for supporting this proposal:

(a) The proposal avoids the above-mentioned inconsistencies and shortcomings of the present wording of draft article 39;

(b) The raison d’être of the proposal is to commit the responsible organization to organize its budget in a manner which secures the satisfaction of an injured party. In other words, the organization would be obliged to make appropriate dispositions in its regular budget (or special accounts linked to the specific operation);

(c) This solution would at the same time oblige the members of an organization, through its organs and according to its internal rules, to provide for the means to meet the financial consequences of illegal activities or ultra vires acts to be attributed to their international organization. Thus, the risk that an international organization oversteps its legal framework is borne by the parties that have enabled the international organization to act in that manner, that is, the collectivity of members of the responsible organization. The proposal supports an all-embracing interpretation of the phrase “expenses of the organization”.

5. In the case that the responsible organization is dissolved before the compensatory payment is made, the proposal works towards the proper budgetary liquidation of outstanding liability.

1 Charter of the United Nations, Article 17, paragraph 2.

GERMANY

1. In respect of draft article 39 and the commentary thereto, Germany very much agrees with the Commission’s finding, as expressed in paragraph (2) of the commentary to the article, that no subsidiary obligation of a member of an international organization towards the injured party is considered to arise when the responsible organization is not in a position to make reparation. Germany by no means denies the general desirability of international organizations being able to fulfill their obligations, including secondary obligations such as those arising in connection with reparation for injury. However, regarding the question of whether there is a legal duty flowing from a rule of general international law for members of an international organization to take all appropriate means in order to provide the organization with the means to effectively fulfill its obligation to make reparation, Germany is clearly of the opinion that no such rule exists. As can be taken from paragraph (7) of the commentary to draft article 39, Germany apparently finds itself in good company with the prevailing majority within the Commission. The Commission is therefore to be commended for including an express reference to the rules of the organization within the present draft article, to which the commentary in paragraph (6) correctly points as the (only) basis of the requirement in question.

2. Germany, however, is worried by the article’s wording, which, as it stands and despite the commentary’s assertions to the contrary could be misunderstood as stipulating a general duty for States to ensure the effective performance of an international organization. The draft article, after all, considers members to be “required” to do so. That this “requirement” must be in line with “the rules of the organization” could be misconstrued as stipulating a general requirement which will merely be altered or abrogated where an international organization should have rules to the contrary. As Germany sees it and reads the commentary, this would clearly be an erroneous conclusion. Germany would therefore welcome a clarification within the draft article’s wording highlighting the fact that the “requirement” will only exist if and as far as provided by the rules or within those rules of the international organization. In this context, Germany would also like to caution the Commission against simply assuming any such requirement to be generally implied in the rules of international organizations, as the commentary in paragraph (6) appears to be doing, for cases where the rules are silent on the matter. Germany, in this context, considers it pivotal to focus on the actual agreement and the will expressed by the founding States (or other international actors). For example, unless a duty to finance an organization is expressly provided for in the rules of an international organization, a concrete obligation for each and every member cannot simply be read into the document.

3. Germany would also like to emphasize the fact, and would welcome a clarifying remark in the Commission’s commentary, that the requirement in question is in any event only one which merely concerns the internal relationship between an international organization and its members. Third parties cannot benefit from it, even where it is found to exist.

PORTUGAL

1. There are no grounds in international law on which members may have a joint liability towards the injured party when the responsible international organization has
no means to achieve full reparation. On the other hand, members are under the obligation to contribute to the international organization’s budget in order to bear the expenses incurred in the performance of its duties, in accordance with its constitutive treaty. The expenses incurred in complying with a reparation order are an example.

2. Draft article 39 cannot be read as imposing on members what could seem like an immediate obligation to make an extraordinary contribution in order to cover an expense that may arise following an internationally wrongful act by the international organization. That is not consistent with the autonomy and independence that characterize international organizations. It should be for the international organization’s budget to foresee this kind of expense, and it is up to members to ensure that it does so. The focus should be on the international organization itself and not on its members.

3. Thus, draft article 39 embodies a balanced solution when interpreted as imposing a general obligation on members of an international organization to provide it with the means for enabling the effective fulfilment of its obligations, including reparation. Furthermore, even if it merely clarifies the present wording, Portugal would support the proposal by the Special Rapporteur to include a new paragraph 2 in draft article 39.

**Republic of Korea**

Draft article 39 places too great of a burden, mostly financial, on member States. To reduce the unnecessary burden on members and ensure the efficient implementation of the responsibility of an international organization, the present formulation could remain, with an additional specification in the commentary that the responsibility of members is limited only to the respective international organization, and not towards an injured State or an injured international organization.

**Chapter III**

**Serious Breaches of Obligations under Peremptory Norms of General International Law**

**Article 40. Application of this chapter**

**Czech Republic**

Perhaps the most difficult and controversial question is whether an international organization can violate jus cogens and whether in such case the responsibility is incurred by the organization and/or its member States. The solution adopted by the Commission in draft articles 40 and 41 reflects the provisions of articles 40 and 41 of the articles on responsibility of States. However, the Commission’s commentary does not offer any examples of serious breaches of obligations under peremptory norms of general international law committed by international organizations. On the contrary, the only relevant examples of practice concern the duty of international organizations not to recognize as lawful a situation created by a breach of such obligation and the duty to cooperate to bring such breach to an end. These examples are certainly important; however, one might well question their relevance to the codification of the responsibility of international organizations, since they all concern the response of international organizations to breaches of peremptory norms committed by States.

**Part Four**

**The Implementation of the International Responsibility of an International Organization**

**Chapter I**

**Invocation of the Responsibility of an International Organization**

**Article 42. Invocation of responsibility by an injured State or international organization**

**Austria**

Austria understands that it is the intention of the Commission that the present draft articles deal only with the responsibility of international organizations as such and not with the conditions under which an international organization may invoke the responsibility of another subject of international law. However, it is necessary to point out that there will remain a gap in the regime of responsibility if the conditions for invocation of the responsibility of a State by an international organization are not addressed. In particular, since such situations arise rather frequently, as addressed, for example, by ICJ in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, it could happen that the issue of invocation of State responsibility by an international organization may escape any regulation, since it was also not considered in the articles on responsibility of States for internationally wrongful acts.

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**Article 44. Admissibility of claims**

**Austria**

The present text leaves open the question of whether an international organization can exercise functional protection on behalf of its officials who were injured by a different organization. In this context, the question arises as to under which preconditions international organizations may bring claims and take countermeasures against States or international organizations if the unlawful act is directed against an official of the respective organization.

**El Salvador**

1. This provision is worded in the same way as article 44 of the draft articles on responsibility of States and is designed to establish the conditions or general requirements that allow a claim for the commission of an internationally wrongful act to be admitted. Given the general nature of the draft articles, it makes sense to establish certain admissibility criteria for international claims in order to avoid unnecessary claims being made that could have been resolved earlier in a different sphere.
2. El Salvador notes that, in this provision, the Commission has opted for two specific admissibility criteria:
(a) conformity with applicable rules relating to nationality of claims; and (b) exhaustion of local remedies. As can be seen, the first criterion refers to rules of nationality, which would operate as a general condition for invoking international responsibility. The Commission itself made this clear in the commentary to the corresponding article in the draft articles on responsibility of States, when it said that “the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable”.

3. Although draft article 44 of the draft articles on responsibility of international organizations is, as already mentioned, worded in the same way as the equivalent article on responsibility of States, its wording and the corresponding commentary do not leave open the possibility of establishing exceptions to the nationality rule contained therein. This is worrying and has in fact been criticized by some legal theorists, who have said that it creates an obvious internal conflict within the draft articles, since the application of the nationality linkage would invalidate, for the protection of rights of individuals injured abroad, any attempt to invoke responsibility, even though it has already been recognized on other occasions that the invocation of a breach of a peremptory norm must take precedence over diplomatic protection.

4. In other words, El Salvador’s concern here is with the idea of the protection of human rights, and it seems inappropriate to make such protection conditional on fulfilling a nationality requirement, all the more so if one considers jus cogens rules, namely, peremptory norms of international law, which have derived from certain essentially human and universal values, the observance and application of which are viewed as absolutely necessary to the life and survival of the community.

5. Likewise, the inclusion of the requirement to comply with nationality rules, which is formulated in restrictive terms, manifestly contradicts draft articles 40 and 41, contained in chapter III of the draft articles, which regulate serious breaches of obligations under peremptory norms of general international law.

6. Given the above considerations, El Salvador proposes that draft article 44, paragraph (1), be reworded to establish that the requirement linked to questions of nationality is not applicable in all cases. This could be done by inserting the words “where appropriate”, or the phrase “when any applicable rule relating to nationality applies to a claim”, along the lines of draft article 44, paragraph (2). This would achieve the necessary internal consistency with other provisions, particularly those concerning peremptory norms of international law.

7. El Salvador fully supports draft article 44, paragraph (2), since, even though it establishes the exhaustion of local remedies as a general admissibility requirement, it can be deduced from its wording and the corresponding commentary that exceptions may be made to this requirement and that it is not enforceable in all cases. This means that if there are no available remedies or those that are available are not effective, the injured party will not have to fulfill this admissibility requirement.

8. This is precisely the trend followed by international courts. At the regional level, article 46 of the American Convention on Human Rights provides that admission by the Inter-American Commission on Human Rights of a petition or communication shall be subject to the remedies under domestic law having been pursued and exhausted in accordance with generally recognized principles of international law. However, the article also establishes three important exceptions, namely: when the domestic legislation does not afford due process of law for the protection of the right that has allegedly been violated; when the injured party has been denied access to the remedies under domestic law or has been prevented from exhausting them; and when there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. Moreover, the Inter-American Court of Human Rights has also ruled that prevention of the exhaustion of domestic remedies for reasons of indigence or a general fear in the legal community to represent the complainant are additional exceptions to the admissibility requirement.

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1 Yearbook ... 2001, vol. II (Part Two), p. 121, para. 77, para. (2) of the commentary to art. 44.

2 Inter-American Court of Human Rights, Exceptions to the Exhaustion of Domestic Remedies, advisory opinion OC-11/90, 10 August 1990, Series A, No. 11, para. 42.

Article 47. Plurality of responsible States or international organizations

Germany

Germany would like to question the validity of the assessment contained in draft article 47, paragraph (2). The commentary to this draft article in its paragraph (3) assumes that [w]hether responsibility is primary or subsidiary, an injured State or international organization is not required to refrain from addressing a claim to a responsible entity until another entity whose responsibility has been invoked has failed to provide reparation. Subsidiarity does not imply the need to follow a chronological sequence in addressing a claim.*

Germany has trouble understanding the last sentence. How can it be squared with the wording of draft article 47, paragraph (2), according to which “subsidiarity… may be invoked insofar as the invocation of the primary responsibility has not led* to reparation”?

Article 48. Invocation of responsibility by a State or an international organization other than an injured State or international organization

Czech Republic

While most of the rules on the implementation of the international responsibility of international organizations do not pose major problems, draft article 48 is an exception: an organization may invoke responsibility...
only if the interest of the international community underlying the obligation breached is included among the functions of the international organization. In practice there will presum-ably be disputes as to whether or not the functions of the given organization will justify a certain entitlement.

GERMANY

Germany would like to stress its appreciation for the solution adopted in the Commission’s draft article 48, paragraph 3, according to which an international organization other than an injured organization is entitled to invoke the responsibility of another international organization in the case of a breach of an obligation which is owed to the international community as a whole only if safeguarding the interest of the international community underlying the obligation breached is included among the functions of the international organization invoking responsibility. This view is shared by several countries, while others apparently favour a more general entitlement. Germany considers the approach chosen by the Commission favourable to the alternative because despite the impact of obligations erga omnes on the international community as a whole, it appears to be too far-reaching to grant an entitlement to all international organizations, regardless of the functions entrusted to them by their members. After all, unlike States, international organizations do not have general legal competence but only functional competencies limited to the performance of their respective mandates and purposes.

CHAPTER II

COUNTERMEASURES

CHILE

Chile is in favour of the inclusion of a chapter on countermeasures, since there is no reason why an international organization which breaches an international obligation should be exempted from the adoption of countermeasures by an injured State or international organization to induce it to comply with its obligations.

Article 50. Object and limits of countermeasures

AUSTRIA

1. As already stated with regard to draft article 21, Austria is of the view that the conditions under which an international organization is entitled to resort to countermeasures against States should be further explored. There seems to be an inconsistency in that draft article 21 addresses countermeasures undertaken by international organizations against States, while draft article 50 does not relate to countermeasures by international organizations against States.

2. The distinction between member States and non-member States as well as the scope of the personality of the organization are fundamental in the context of countermeasures. In the view of Austria, it would first be necessary to analyse these aspects in more detail before any conclusion can be drawn. Moreover, in the view of Austria, an international organization may resort to countermeasures only if such measures are in conformity with its constituent instrument. In other words, international organizations are not competent to take countermeasures merely by virtue of the fact that they enjoy a certain international legal personality. Rather, an international organization must be endowed with the competence to take such measures under its rules.

CHILE

Countermeasures need to be restricted so as not to prejudice the exercise by international organizations of their functional competence. This issue appears to be resolved by draft article 50, paragraph 4. However, defining the restrictions on countermeasures on the basis of such broad, imprecise wording may prove very difficult, rendering the application of countermeasures unworkable in practice.

GERMANY

Despite Germany’s doubts as to the inclusion of the topic of countermeasures in the draft (see the comments on draft article 21), the Commission is to be commended for agreeing on the principle contained in paragraph 4 of draft article 50, according to which

[c]ountermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

While countermeasures by definition involve the non-performance by the injured State or international organization of one of its obligations vis-à-vis the international organization, it is necessary (also in view of the fact that international organizations enjoy only limited competencies) to limit the permissibility of countermeasures in order for their impact not to reach a level which renders an organization incapable of fulfilling its mandate as a whole. Paragraph 4 of draft article 54 effectively addresses these concerns.

Article 51. Countermeasures by members of an international organization

CHILE

1. As to whether an injured member of a responsible international organization may take countermeasures against that organization, Chile believes that this should, in principle, be possible, without prejudice to the application of the rules of the organization as lex specialis. Accordingly, it is in agreement with this provision and with the requirements established in draft article 51.

2. When the rules of the organization do not, explicitly or implicitly, regulate the question of countermeasures in relations between an international organization and its members, the general rule should be to permit the imposition of such measures. Accordingly, draft article 51 should be drafted positively in order to state more clearly the general rule applicable in cases where there are no rules of the organization that expressly decide the application of countermeasures. The same comment applies to article 21.
GERMANY

1. In line with what has been said on draft article 21, which addresses the topic of countermeasures taken by an international organization, Germany would like to express its concern also in respect of draft article 51. Germany is of the opinion that the relationship between an international organization and its members—just as vice versa, that of a member (State) and the organization—is governed fully by the internal rules of the organization. As a result, there is, as a general rule, no room for countermeasures between a member State and an international organization.

2. Germany is therefore sceptical at best as to whether the draft article adopted by the Commission can be said to adequately reflect the legal relationship between a member State and an organization in respect of countermeasures. To be precise, the draft article is to be commended for its wording, which emphasizes that an injured member “may not take countermeasures against that organization”. It is, in Germany’s view, in addition admissible to turn to an organization’s internal legal structure in order to identify whether there is, as an exception to the rule, any room left for countermeasures, as does draft article 51, paragraph (a).

Where Germany might disagree with the Commission is on how to treat cases (probably the vast majority) where the rules of the organization are silent on whether countermeasures are allowed or not. For these scenarios, the commentary in paragraph (3) currently states:

When the rules of the organization do not regulate, explicitly or implicitly, the question of countermeasures in the relations between an international organization and its members, one cannot assume that countermeasures are totally excluded* in those relations.

The Commission is hence inclined to allow (at least limited) countermeasures where the organization’s rules are silent. Here, in the eyes of Germany, the Commission might want to be more careful. The legal relationship between a member and its organization must first and foremost be governed by the organization’s rules, which, after all, were carefully carved out and agreed upon precisely for this very task. If this is the case, there is a strong argument to be made that the rules are meant to exclusively govern the legal relations between the newly set up organization and its members. The commentary should hence in Germany’s eyes be altered to make it, at a minimum, very clear that the exception under subparagraph (a), according to which countermeasures may not be inconsistent with the rules of the organization, has to be read as requiring a clear indication that the rules were not meant to fully regulate their subject matter, that is, the legal relationship between a member State and the organization. Where such an indication within the rules (or at least their travaux préparatoires) is missing, everything militates for the assumption that countermeasures must be deemed inconsistent with the organization’s internal structure as set up by and reflected in its rules.

Article 52. Obligations not affected by countermeasures

EL SALVADOR

1. Countermeasures are actions designed to induce a State or international organization which is responsible for an internationally wrongful act to comply with its obligations. Generally speaking, both legal theory and international case law confirm their validity, the main case law being the 1928 Naußlaua and 1930 Cysne arbitrations, while, more recently, countermeasures were recognized by ICJ in its 1997 judgment in the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) case. Thus, although practice concerning countermeasures taken against international organizations is scarce, El Salvador believes that the Commission was right to decide to include such measures in the draft articles.

2. Although countermeasures have been strongly criticized, from an objective standpoint they must be recognized as having both positive and negative aspects. Among the former, it must be noted that “countermeasures, or ‘self-help’, are a necessary part of any legal system, like the international system, that lacks strong ‘vertical’ enforcement… instead, States and other actors rely on a combination of other mechanisms such as countermeasures to win respect and compliance for these duties”. Such measures are a form of self-protection, since it is the affected State that must react.

3. As already indicated, however, the use of countermeasures may also have negative aspects and drawbacks, such as abuses in their nature or duration that could have a serious impact on a State’s population and also entail a high risk of retaliation, thereby exacerbating existing conflicts. Unilateral assessment of the wrongfulness of an act is also questionable, as it could easily give rise to the establishment of subjective criteria for the adoption of countermeasures.

4. An evaluation of these positive and negative aspects shows that it is impossible to rule out the use of countermeasures in the international sphere, but also that in order to ensure their oversight and efficacy, definite limits must be set so that their shortcomings can be rectified and their disproportionate use avoided.

5. To respond to this need, draft article 50 envisages a number of exceptional situations in which the use of countermeasures is not allowed, basically because their application would affect obligations that cannot be suspended, and they cannot be adopted in any circumstances, not even as a way of forcing compliance with such an obligation.

6. For all these reasons, El Salvador recognizes the importance of including draft article 52 in its entirety in the draft articles on responsibility of international organizations, thereby permitting the establishment of definite limits to a practice of taking countermeasures that is, at present, far from uniform and, in many cases, excessive.

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2 Responsabilité de l’Allemagne en raison des actes commis postérieurment au 31 juillet 1914 et avant que le Portugal ne participe à la guerre (Cysne) [Responsibility of Germany for acts committed after 31 July 1914 and before Portugal took part in the war], ibid., p. 1052.
7. The above comments notwithstanding, El Salvador believes that an exhaustive analysis of the scope of paragraph 1 (b) of article 52, under which “obligations for the protection of fundamental human rights” would be a limiting factor on countermeasures, is needed to make its application more effective.

8. Some authors—and likewise the Commission⁵—in-interpret its scope as relating to a category of rights, within the context of human rights, which cannot be derogated from in any circumstances, even in time of war or public emergency. As already stated, the existence of a public emergency does not authorize States to breach their legal obligations under humanitarian law or international human rights law, for such obligations have binding effect in all kinds of circumstances of time and place.

9. In this connection, it may be noted that many human rights treaties, both universal and regional, have listed essential rights from which no derogation is possible. For instance, article 4, paragraph 2, of the International Covenant on Civil and Political Rights states that no derogation may be made from articles 6 (right to life), 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment), 8 (paragraphs 1 and 2) (prohibition of slavery or servitude), 11 (imprisonment on the ground of inability to fulfill a contractual obligation), 15 (no punishment without law), 16 (recognition as a person before the law) and 18 (freedom of thought, conscience and religion). Similarly, article 2, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establishes that

[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Article 15 of the European Convention on Human Rights likewise establishes that

[n]o derogation from article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from articles 3 [prohibition of torture], 4 (paragraph 1) [prohibition of slavery or servitude] and 7 [no punishment without law] shall be made.

The Inter-American system establishes a longer list, in that article 27 of the American Convention on Human Rights includes, among rights from which derogations may not be made, political rights, the rights of the child, the right to protection of the family and the right to a name and nationality.

10. It may thus be concluded that there is no uniformity as to the minimum rights that must be respected in all circumstances. This makes the category of “fundamental human rights” a rather imprecise one, and this imprecision could leave room for discretion in the adoption of countermeasures. This lack of precision, which shows that the term is being applied erroneously, combined with the fact that human rights in general could obviously be excluded, is incompatible with recent advances in the area of human rights, according to which everyone must be able to exercise certain universal and inalienable rights or powers that are inherent in his or her dignity. This recognition of the centrality of human rights, which, in the words of Augusto Cançado Trindade, currently a judge at ICJ, corresponds to a “new ethos of our times”, presupposes protection of the human person in all circumstances against all manifestations of arbitrary power and concern for his or her living conditions in keeping with the new spirit of our age, in which the process of humanizing international law involves attending more directly to the attainment of higher shared goals and values. It is incongruous to include among those values the private interests of States or international organizations that allow the adoption of countermeasures.

11. In view of the foregoing, El Salvador proposes that the term “fundamental human rights” be replaced by “human rights”. This would permit not only recognition of their basic characteristics and the advances made thus far in this area, but also the adoption of a term whose scope certainly presents fewer difficulties, since it would cover a broader and more homogeneous category of rights as expressed in the various regional and universal human rights instruments.

Article 56. Measures taken by an entity other than an injured State or international organization

CUBA

The current formulation should be deleted and replaced by a formulation referring to the collective security system envisaged in the Charter of the United Nations.

CZECH REPUBLIC

The most problematic article in this chapter is draft article 56.

PART FIVE

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF AN INTERNATIONAL ORGANIZATION

Article 57. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

BELGIUM

Belgium supports the draft article as worded by the Commission but considers that, in its commentary, the Commission is only listing extreme cases and is not sufficiently clear on the principles enabling a State to determine with exactitude the moment with effect from which its responsibility may be invoked. Belgium suggests, in particular, that the Commission should specify at an earlier stage in the commentary to draft article 57 the precise reasons why the participation of a State member in a decision-making process which could lead to the commission of an internationally wrongful act does not fall within the purview of draft article 57.

CZECH REPUBLIC

Draft articles 57 to 59 mirror draft articles 13 to 15. Since the commentary offers practically no examples, the provisions were presumably adopted “just in case”.

⁵ See the draft articles on responsibility of States for internationally wrongful acts, Yearbook..., 2001, vol. II (Part Two), p. 132, para. (6) of the commentary to art. 50.


**Article 58. Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization**

**Austria**

The relationship between two States with regard to direction and control exercised by a State over the commission of an internationally wrongful act by an international organization is considerably different from the relationship between a State and an international organization of which it is a member. Does this mean that a State that has the power to prevent an international organization from committing an internationally wrongful act, for instance due to its capacity to block decisions through a de facto or de jure veto power, incurs responsibility for such act if it fails to prevent it? Here again, the character of an international organization, its function, its powers and its internal rules of decision-making make a decisive difference in clarifying the “repartition” of international responsibility for a wrongful act between a State and an organization.

**Article 59. Coercion of an international organization by a State**

**Austria**

The specific nature of international organizations should be taken into account before applying the law of State responsibility. In nearly every field of activity, international organizations are highly dependent on the willingness of their member States to cooperate. A member State may refuse to contribute to the budget; it may withdraw its national contingent or veto a necessary extension of the mandate. These may all be cases of coercion in a broader sense. But do all these cases trigger the member State’s responsibility? International practice does not support this view. In any case, because of the multilayer inter se relations between an international organization and its members, these qualifiers and the term “coercion” need some clarification within the legal text. The qualifier “knowledge”, in subparagraph (b), hardly seems sufficient to establish the necessary link in order for the State to become responsible for the act of an international organization. There must be a direct link between the coercive act of the State and the activity of the international organization.

**Article 60. Responsibility of a member State seeking to avoid compliance**

**Austria**

This draft article raises the question of how States can become responsible for acts which they did not influence, since the legal effects of a member State’s influence on acts of an international organization are already addressed in draft articles 57 to 59. Moreover, the basic question of how decisions by majority vote where States voting in favour or against a certain decision are not identified (show of hands) can be treated in this regard. Would a State which casts a negative vote in a show-of-hands procedure and which is overruled by the majority (if majority decisions are possible) also be held responsible under these draft articles? Or should these articles apply only to situations where the voting pattern of individual member States can be clearly identified?

**Belgium**

1. Belgium believes that the principle underpinning this provision is worth following but that the draft text, as currently worded, is not satisfactory since:

   – It does not adequately reflect the jurisprudence of the European Court of Human Rights which it claims to be reflecting;

   – It includes subjective elements which it is not appropriate to introduce and which could severely impede application of the draft article in question.

Belgium therefore proposes that the Commission either redraft this provision or give a better explanation in its commentary of what it understands by this text. In particular, if the Commission had intended to introduce a (primary) obligation of States members to refrain from circumventing their international obligations through an international organization of which they are members, this should be indicated much more clearly by the provision or by the commentary.

2. Belgium also wonders whether the Commission should not indicate much more clearly that draft article 60 only applies in the event of abuse of a right, abuse of the separate legal personality of an international organization or bad faith.

3. Lastly, Belgium supports the Commission in its reference¹ to the jurisprudence established by the European Court of Human Rights in the Bosphorus² case but doubts whether the draft text adequately reflects this jurisprudence. In addition, it draws the Commission’s attention to certain decisions in case law subsequent to the Bosphorus case which establish the responsibility of the State on the grounds of lacunae in the internal procedures of the international organization. These decisions, in Belgium’s view, go well beyond the mere jurisprudence of the Bosphorus case and undermine the principle of the limited responsibility of States members. The European Court of Human Rights appears to have acknowledged that damage may arise from the attribution of an act of an international organization to its States members simply by virtue of their being members of that organization or of their participation in its decision-making processes or in the performance of an act of the organization. At the same time, Belgium believes that it would be very useful for the Commission to indicate clearly its position on these issues.

¹ Para. (4) of the commentary to article 60.
² Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland (Grand Chamber), judgment of 30 June 2005, No. 45036/98, Reports of Judgments and Decisions 2005-VI.

**Czech Republic**

By establishing an international organization and endowing it with competences and immunities, a State cannot absolve itself of responsibility for a breach of its own obligations.
1. The Commission is to be commended for incorporating an element of "misuse" into draft article 60 as Germany reads it, according to which a State member of an international organization will incur international responsibility if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to a subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

As Germany considers it a legitimate goal to hinder States from evading their responsibility by sidestepping their obligations, draft article 60, as to its underlying aim, is to be supported. However, as States members and an international organization are separate legal entities with their own international personalities and may hence undertake different obligations of their own which, as such, have to be kept apart, and draft article 60 in addition applies "whether or not the act in question is internationally wrongful for the organization", it is essential to make sure that a State will not be held responsible simply because the organization performs a task which the State may not have been allowed to perform itself. States may not use force in their international affairs, to name an example; they may, however, through the Security Council, support a decision to use force against another State should a threat to the peace exist. It is therefore essential to restrict draft article 60 in its scope of application to cases where a State would "misuse" the organization (as a shield) in order to evade its own responsibility. The present draft acknowledges this concern when it requires a State having to seek to avoid compliance with its own obligation by taking advantage of the organization.

2. This being said, Germany is worried about the draft article’s commentary, as it does not provide adequate guidance as to when a State will be taken to have avoided compliance with an international obligation. The commentary, in paragraph (2), provides an interpretation which is hardly in line with the draft article’s wording when it expressly rules out a State’s specific intention of circumvention as a requirement by saying:

As the commentary on article 16 explains, the existence of a specific intention of circumvention is not required. The reference to the fact that a State “seeks to avoid complying with one of its own international obligations” is meant to exclude that international responsibility arises when the act of the international organization, which would constitute a breach of an international obligation if done by the State, has to be regarded as an unwitting result of prompting a competent international organization to commit an act. On the other hand, the present article does not refer only to cases in which the member State may be said to be abusing its rights.

The restriction to scenarios where a State misuses (or abuses) its powers as, in the eyes of Germany, expressed by the present article’s wording is therefore dissolved via its commentary. It is, however, hard to understand how a State may “seek to avoid compliance” without thereby acting with a “specific intention of circumvention”. That the latter will indeed have to be proved by making reference to the circumstances of the case is true, but touches upon a different point. While the commentary rules out the requirement of a State’s specific intention to evade its responsibility, at the same time it remains incapable of providing any guidance on how to distinguish between scenarios where a State can be said to evade its responsibility and others where it merely makes adequate use of its powers within the organization. The three conditions listed by the commentary—that is, the organization’s competence in relation to the subject matter of an international obligation of a State, the fact that the act if committed by the State would infringe an obligation, and, finally, that the State prompted the organization to act via a “significant link” (commentary, paragraph (7))—do not solve the above-mentioned problem. In the opinion of Germany, it is essential to restrict draft article 60 to scenarios of misuse, where a State’s action within the organization is taken precisely in order to dodge an existing legal obligation. While such an interpretation is in line with the draft article’s wording, it is therefore rather the present commentary with which Germany has an issue.

MEXICO

Mexico welcomes this draft article, which it considers to be of great importance and a vital aspect of the object and purpose of the current draft.

Article 61. Responsibility of a State member of an international organization for the internationally wrongful act of that organization

AUSTRIA

It is hard to understand how “subsidiary responsibility” emerges from mere acceptance or conduct inducing reliance since “subsidiary responsibility”, as referred to in paragraph 2, in particular, is an unusual concept in international law that requires a clear indication of its relation to the original responsibility.

CZECH REPUBLIC

State practice as well as case law shows that member States are not as a rule held responsible for the wrongful acts of international organizations. The first exception (in paragraph 1 (a)), i.e. the case when the State accepts responsibility, is on the whole acceptable. Rather more questionable is the second exception (paragraph 1 (b)), mainly because of the considerable lack of clarity. In this case, the condition for incurring responsibility is not implicit consent, but the existence of circumstances that have led the injured party to rely on the State’s responsibility for the conduct of an international organization. The Commission’s commentary does not throw much light on the issue.

GERMANY

1. Draft article 61 remains in line with the Commission’s systematic approach of positively identifying cases where a State might incur international responsibility instead of stating a negative and residual rule for cases in which, according to the draft, a State’s responsibility does not arise. While Germany continues to support this approach, it very much welcomes the clear position expressed by the Commission in paragraph (2) of its commentary, according to which
Germany would like to expressly underscore this finding, as it is indeed of utmost importance.

2. Turning to paragraph 1 (a) of draft article 61, which considers a member State’s responsibility for an act of an international organization to arise where “it has accepted responsibility for that act”, Germany would like to highlight an important passage in the Commission’s commentary. The latter, in paragraph (7), refers to Lord Ralph Gibson’s opinion in the International Tin Council case, according to which an acceptance of responsibility might be included in an organization’s “constituent document”. Germany very much agrees with the Commission when it emphasizes that member States would then incur international responsibility towards a third party only if their acceptance produced legal effects in their relations to the third party. It could well be that member States only bind themselves towards the organization or agree to provide the necessary financial resources as an internal matter.

Any acceptance within the meaning of draft article 61, paragraph 1 (a), will necessarily have to have been expressed vis-à-vis the party invoking a State’s responsibility. Here, in Germany’s view, particular care must be used in order to determine whether an international organization’s constituent treaty can really be interpreted as a treaty conferring rights on third States within the meaning of draft article 36 of the Vienna Convention on the Law of Treaties. From Germany’s experience, it is true to say that usually this will not be the case; an organization’s founding States (or other subjects of international law) normally do not intend for the organization’s constituent document to be invocable also by third parties.

3. In respect of paragraph 1 (b), according to which a member State’s responsibility for the act of an international organization may be triggered where the State “has led the injured party to rely on its responsibility”, Germany proposes the inclusion of at least an additional qualifier within that paragraph. After all, the mere fact that a State has simply led another State to place reliance on the former’s responsibility—i.e. that there is a causal link—cannot suffice to hold the former State responsible under international law. Surely responsibility cannot arise unless such reliance is in addition to be termed “legitimate” in the light of the circumstances of the case. Germany would therefore prefer the paragraph to, for example, read at least: “It has led the injured party to legitimately rely on its responsibility.”

4. While the draft article might thereby be said to address a sensible cause, the legal basis for such an obligation of reparation, even in the scenario of legitimate reliance, is not perfectly clear to Germany. Is the Commission invoking estoppel in this regard? Then the paragraph would have to refer to detrimental reliance. Germany would therefore welcome it if the Commission could explain the underlying dogmatic construction on which draft article 61, paragraph 1 (b), is based, in more detail.

5. Among the relevant “factors” which have been put forward in order to assess whether a State has led the injured party to rely on its responsibility, paragraph (10) of the commentary to draft article 61 mentions the “small size of membership”. This “factor”, however, is in Germany’s eyes highly problematic, as it may not be considered indicative, let alone sufficient to trigger legitimate reliance. The commentary in this respect acknowledges that it is important to refer to “all the pertinent factors” which have to be “considered globally” and correctly emphasizes that there is “clearly no presumption that a third party should be able to rely on the responsibility of member States” (paragraph (10)). In Germany’s view, the finding that membership as such does not entail responsibility combined with the fact that an international organization enjoys its own international legal personality means that the commentary, does not, however, go far enough: there is not only no presumption of liability, there is even a presumption against such liability. Accordingly, a third party will usually not be able to rely on the responsibility of member States. Germany would consider it best to either alter the commentary accordingly or, probably the easiest solution to avoid confusion, to simply strike the reference to the size of membership out of the commentary to draft article 61.

PART SIX

GENERAL PROVISIONS

Article 63. Lex specialis

BELGIUM

Belgium is surprised at the very extensive scope of this provision, which, as it stands, could render the draft articles entirely pointless. Belgium is of the view that only a relative effect should be accorded to the particular “domestic” rule adopted by the organization. In particular, the principle set out in draft article 63 should only apply to the rules of an organization pertaining to its external responsibility, and exclude those pertaining to the organization’s responsibility towards its own members. Belgium ventures therefore to suggest that the Commission either delete this provision, or explicitly limit its scope, both in the text of the provision and in its commentary, by replacing, for example, the end of the provision, from the words “are governed by special rules of international law” with “are governed by special rules of the organization applicable to the relations between the international organization and its members”.

CZECH REPUBLIC

Draft article 63 is fully acceptable for the Czech Republic when special rules (including the rules of the organization) are supplementing general rules, especially if they regulate the implementation of responsibility. Such rules may also regulate relations of responsibility between an organization and its member States. However, they should never preclude the responsibility of an international organization, unless it is attributed to a member State. It would also be undesirable for the Czech Republic
to allow the setting of double standards—to have different yardsticks for different organizations, or even for a single organization, depending on the dispute settlement body (e.g. WTO, the European Court of Human Rights or the European Court of Justice).

**Germany**

Paragraph (1) of the commentary to draft article 63 refers to the possibility that special rules relating to international responsibility might not only supplement but replace in full the more general rules contained in the present draft. As already mentioned, in connection with countermeasures (see the comment on draft article 21), Germany is convinced that the relationship between an international organization and its member States is indeed exclusively governed by the internal rules of that organization. While the draft articles as adopted on first reading fall short of fully reflecting this position, Germany is pleased to note that the Commission has left room for an interpretation on a case-by-case basis by allowing the rules of an international organization (rightly listed in article 63 as a possible source of *lex specialis*) to fully replace the draft’s general rules.

**Mexico**

1. Given the great diversity in the types and functions of international organizations, the *lex specialis* rule is of considerable practical importance in the context of the current draft. In this regard, the Commission is invited to consider the possibility of including other examples in the commentary in order to give a broader overview of the specific situations that article 63 seeks to regulate.

2. In this respect, it would be appropriate to mention the system of responsibility of the International Seabed Authority for damage arising out of wrongful acts in the exercise of its powers and functions, established in article 22 of annex III to the United Nations Convention on the Law of the Sea. Article 139 of the Convention, which deals with damage caused by an international organization, is also relevant.

**Article 66. Charter of the United Nations**

**Portugal**

Portugal would like to convey its doubts on whether to include draft article 66. According to Article 4 of the Charter of the United Nations, international organizations cannot become parties to the Charter. So, the position of international organizations *vis-à-vis* the Charter is not as easy to assess as it is in the case of States. Nonetheless, the inclusion of a provision that reflects the content of article 59 of the articles on responsibility of States deserves further consideration.
# Comments and observations received from international organizations

**[Original: English]**

**[14 and 17 February 2011]**

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Introduction

1. At its sixty-first session, in 2009, the International Law Commission adopted, on first reading, the draft articles on the responsibility of international organizations. The text of the draft articles adopted by the Commission on first reading is reproduced in Yearbook ..., 2009, vol. II (Part Two), para. 50. The text of the draft articles with commentaries thereto is reproduced in Yearbook ..., 2001, vol. II (Part Two), p. 30, para. 77.
the draft articles to Governments2 and international organizations for comments and observations, requesting also that such comments and observations be submitted to the Secretary-General by 1 January 2011. The Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed a communication, dated 13 January 2010, to 51 international organizations and entities bringing to their attention the first reading text of the draft articles on the responsibility of international organizations, and inviting their comments in accordance with the request of the Commission.

2. As at 17 February 2011, written comments had been received from the following 22 entities (dates of submission in parentheses): UNIDROIT (19 December 2010); NATO, OSCE (20 December 2010); European Commission (22 December 2010); OECD (23 December 2010); World Bank (29 December 2010); IMF (5 January 2011); CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO and WTO (joint submission of 11 January 2011); ILO (individual submission of 20 January 2011); Council of Europe (24 January 2011); and the United Nations (17 February 2011). Those comments are reproduced below, organized thematically, starting with general comments and continuing with comments on specific draft articles. In a submission dated 12 January 2011, the Asian Development Bank indicated its support for the comments of the World Bank of 29 December 2010.

Comments and observations received from international organizations

A. General comments

COUNCIL OF EUROPE1

1. The Council of Europe has had so far no specific practice regarding wrongful acts under international law involving the organization’s responsibility. In these circumstances, any possible comments would not be based on relevant experience of breaches of international obligations and would have to be rather theoretical in nature. In addition, the Council of Europe has never been confronted with problems in relation to the ius gestionis.

2. The Council of Europe welcomes the fact that the present draft articles draw inspiration from the draft articles on responsibility of States and considers this approach as a wise starting point.

3. The Council of Europe looks forward to future discussions of the draft articles by the Commission which would permit to explore further the draft articles’ applicability to different international organizations, taking into account the variety of their respective natures and the specificity of the legal system governing the different international organizations: the constituent treaty, the headquarters agreement and general international law.

1 The Council of Europe attached a summary of the relevant case law of the European Court of Human Rights, available for consultation in the Codification Division of the Office of Legal Affairs.

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO AND WTO

1. The main concerns of these organizations relate to: the excessive alignment of the draft articles with the articles on responsibility of States; the uncertainty as to the scope of the draft articles, in particular with regard to the responsibility of States vis-à-vis that of international organizations; the ambiguous interplay of the lex specialis principle with the role devoted to the “rules of the organization” and the appearance of not having sufficiently taken into account the different types of existing international organizations with very diverse structures, functions and mandates; the limited attention paid to the special situation of international organizations in relation to the obligation to compensate; and the solutions proposed in respect of ultra vires acts of an agent or organ of an international organization.

2. The methodology followed by the Commission is a source of concern mainly from two points of view: first, the draft articles are based on a very limited body of practice—largely originating from the activities of very few international organizations; second, they take limited account of the special situation of international organizations compared with that of States in regard to responsibility under international law in general and, more particularly, to reparation. These issues originate from the method followed by the Commission, which retained the articles on responsibility of States as the point of departure for its draft articles on the responsibility of international organizations even though the two situations are extremely different and raise largely distinct legal issues. International organizations and States have very different legal personalities and the Commission’s approach risks creating practical problems since the specific characteristics of international organizations are only taken into account in a limited manner. In particular, the fact that international organizations act necessarily within the territory of States, and the fact that they exercise their mandates through the principle of speciality should receive more consideration by the Commission.

3. The Commission should have followed a more practical approach and only focused on areas where there is a space for rules common to all international organizations, where there is practice upon which to base such rules and where there is a practical need for codification or progressive development of international law arising from the activities and experience of international organizations.

4. It could also be envisaged, at least if the draft articles were eventually to be adopted in the form of an international convention, to provide for a mechanism analogous to the one embodied in the Convention on the privileges and immunities of the specialized agencies, whereby the standard clauses and annexes were first submitted to the approval of the international organizations concerned before being opened to acceptance by member States.
Moreover, a practice has developed under the same Convention to subject the deposit of reservations to the consent of concerned agencies. An even clearer option to safeguard the interests of international organizations would be that the latter may become parties to an international convention dealing with the responsibility of international organizations and creating obligations for them as was the case with the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

**EUROPEAN COMMISSION**

1. A principal general comment which has been highlighted throughout previous comments is the need for the draft articles to allow sufficient room for the specificities of the EU. Most multilateral conventions today are open for the EU to become a Contracting Party, alongside States. The significant impact which the EU has on international treaty practice and law is due to its special characteristics, as a regional (economic) integration organization. The Union’s member States have transferred competences and decision-making authority on a range of subject matters to the Union, which as a result participates in the international arena on its own behalf and in its own name. The large number of international treaties concluded by the EU forms part of EU law. These agreements are binding not only on the EU’s institutions but also on its member States. Moreover, unlike traditional international organizations, the EU acts and implements its international obligations to a large extent through its member States and their authorities, and not necessarily through “organs” or “agents” of its own. Consequently, there are significant differences between traditional international organizations on the one hand, and organizations such as the EU, on the other hand, a regional (economic) integration organization which has important law-based foreign relations powers that have a tendency to develop over time.

2. Because of the regularity with which it is admitted to participate in multilateral treaties alongside States, the EU has, as a regional (economic) integration organization, shaped treaty law and practice in a significant manner. Yet the foregoing is currently reflected only to a very limited extent in the draft articles on the responsibility of international organizations as they stand now. This is a concern as the EU is the international organization which is potentially most impacted by the draft rules of responsibility of international organizations. No other international organization is in that situation. For now, the EU remains unconvinced that the latter acts are not covered by the draft articles, some examples quoted in the documents remain ambiguous. One of the main arguments of the Special Rapporteur in favour of the international responsibility of international organizations was that ICJ stated in the advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, that the United Nations may be required to bear responsibility for the damage arising from “such act”: It is important to recall that “such act” refers to statements considered defamatory by two commercial companies, which are normally violations of national law. As they are committed by the United Nations or its agents acting in their official capacity, the immunity from legal process applies but “the act” for which international organizations may be required to bear responsibility are still those that violated national law and not internationally wrongful acts.

3. When international organizations act within the national legal systems, including when they do not honour provisions. For such cases the question remains whether there is a sufficient basis for the International Law Commission to propose the rule in question.

3. In view of these comments, the European Commission considers that the International Law Commission should give further thought as to whether the draft articles and the commentaries, as they stand now, are apt for adoption by the Commission on second reading or whether further discussion and work is needed.

**ILO**

1. The draft articles rely excessively on the articles on responsibility of States. It is considered that a parallelism between States and international organizations regarding the question of responsibility is not justified in the light of important differences between the two subjects of international law. While States exercise general jurisdiction, international organizations exercise jurisdiction specific to the competencies granted—explicitly or implicitly—by their constituent instruments.

2. International organizations, contrary to States, act necessarily within the territory of several States. As a consequence, many constituent instruments of international organizations contain a provision on jurisdictional personality and legal capacity of international organizations within member States. Some examples are article 39 of the Constitution of the International Labour Organization; article 9, section 2, of the Articles of Agreement of the International Monetary Fund; chapter 9, article 27, of the Constitution of the International Organization for Migration; article 5 of the International Agreement on Olive Oil and Table Olives; article 5 of the European Patent Convention, and so forth.

3. It is important to distinguish between acts committed by international organizations that are internationally wrongful, which represent a violation of international law, and those that are wrongful under national law. While the Commission makes clear that the latter acts are not covered by the draft articles, some examples quoted in the documents remain ambiguous. One of the main arguments of the Special Rapporteur in favour of the international responsibility of international organizations was that ICJ stated in the advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, that the United Nations may be required to bear responsibility for the damage arising from “such act”:

4. When international organizations act within the national legal systems, including when they do not honour

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1. With the entry into force on 1 December 2009 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, the areas of integrated Union policies have further been expanded (with the exception of the Common Foreign and Security Policy); see the categories and areas of Union competences listed in arts. 2–6 of the Treaty on the Functioning of the European Union.

1. Para. (3) of the commentary to draft article 1.

a commercial contract or a peacekeeper drives incorrectly, that is, commit acts that are contrary to law, these violations of law do not represent acts that are internationally wrongful. They are simple violations of national law that are covered by the immunity from legal process. If this immunity were waived, international organizations would be subject to the jurisdiction of national courts. Consequently, such examples cannot serve directly as a basis for consideration of the topic under discussion by the Commission but only serve to support the general principle that international organizations may be required to bear responsibility for the damage arising from acts considered wrongful under national law. ILO would therefore urge the Commission to review the examples quoted in the commentaries, such as a car accident in Somalia quoted in paragraph (5) of the general commentary to chapter II of Part Two or situations leading to compensation by the United Nations quoted in the commentary to draft article 35.

IMF

1. The primary concern of IMF is one of approach and the Commission’s reliance on the articles on responsibility of States in preparing the draft articles. IMF believes this approach to be misguided for two reasons.

2. First, there is a fundamental difference between a State and an international organization. Unlike States, international organizations do not possess a general competence.1 Rather, an organization’s legal competence is circumscribed by its constituent document which, along with the rules and decisions adopted thereunder, constitutes the lex specialis. The organization’s responsibility for actions taken towards its members should be determined by assessing whether it has acted in accordance with this legal framework or has otherwise breached a peremptory norm of international law or another obligation that it has voluntarily accepted. In their present form, the draft articles wrongly suggest that an international organization can incur responsibility with respect to its members even when it is in compliance with its constituent instrument, peremptory norms, and other obligations it has specifically accepted. This approach is not consistent with the principle lex specialis derogat legi generali.

3. Secondly, many of the draft articles do not lend themselves to universal application. There are significant differences between the legal frameworks of different international organizations and it is very difficult to formulate principles that apply to all such organizations. While States all possess the same attributes, international organizations have different purposes, mandates and powers. The draft articles fail to take these differences into account and, as a result, include provisions that would appear to be of limited relevance for at least some international organizations (e.g. the international financial institutions). IMF questions whether it is appropriate to include such provisions within the draft.

4. There would also appear to be many features of the draft articles that go beyond generally accepted views on the responsibility of international organizations. IMF recognizes that article 1, paragraph 1, of the Commission’s Statute provides that the “Commission shall have for its object the promotion of the progressive development of international law and its codification”. While the Commission has not provided guidance on the extent to which the draft articles constitute the codification or the progressive development of international law, it is clear that the majority are an attempt at progressive development.2 This point should be made explicit in the commentary.

1 In its advisory opinion Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ stated that “international organizations ... do not, unlike States, possess a general competence, but are governed by the ‘principle of specialty’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them” (I.C.J. Reports 1996, p. 78, para. 25).

NATO

1. NATO would like to express a general concern that the draft articles and associated commentary do not always appear fully to contemplate the specific situation of organizations in which, owing to the nature of the activity in which it is engaged or other factors, the member States retain virtually all decision-making authority and participate on a daily basis in the governance and functioning of the organization.

2. The following comments relate to the structure of the organization, its decision-making procedures and its practice with respect to claims. NATO is an international organization within the meaning of draft article 2 (a) of the draft articles, and as such a subject of international law. It possesses international legal personality as well as treaty-making power.

3. The North Atlantic Council is the principal policy and decision-making institution of the Alliance. The Council consists of representatives of all member States of the Alliance, meeting together in permanent session. The Council most frequently meets at the level of permanent representatives, who are stationed at NATO headquarters, but also meets, normally twice per year, at the level of foreign or defence ministers and less frequently, at the level of Heads of State and Government. The Council acts with the same authority and powers of decision-making, and its decisions have the same status and validity, at whatever level it meets.

4. NATO decisions are taken on the basis of consensus, after discussion and consultation among the representatives of member States. There is no voting or majority decision. All member nations of the Alliance have an equal right to express their views at the Council, and decisions are not made until all nations are prepared to join consensus in their support. Decisions are thus the expression of the collective will of the sovereign member States, arrived at by common consent and supported by all. Each member State retains full responsibility for its decisions, and is expected to take those measures necessary to ensure that it has the domestic legal and other authority required to implement the decisions which the Council, with its participation and support, has adopted. The principle of consensus decision-making is applied throughout.
the Alliance, reflecting the fact that it is the member States that decide and that each of them is or has full opportunity to be involved at every stage of the decision-making process. This principle is applied at every level of the organization; all member States may, and as a matter of practice do, participate on an equal basis in all committees and other subordinate bodies within NATO.

5. With regard to NATO missions, each NATO or NATO-led operation requires a mandate from the North Atlantic Council. It is in the power of the nations represented in the Council to decide on NATO-led operations on their own authority but, in practice, its decisions are normally made on the basis either of relevant resolutions of the United Nations Security Council or in response to the request of a specific State or group of States seeking NATO participation or support. Each mandate indicates the purpose and aim of the operation. NATO nations agree in the North Atlantic Council on the exact content of a given mission and request from the NATO military authorities information on the military requirements to successfully carry out the mission. Following a decision by the North Atlantic Council to initiate a NATO-led operation, the NATO military authorities establish an operational plan that must in turn be approved by the Council. This operational plan includes, inter alia, rules of engagement (including provisions on the use of force), jurisdiction and claims. Both the mandate of the North Atlantic Council and the military operational plan normally expressly reaffirm the nation’s intention to execute the operation with full respect for applicable international public law, including international humanitarian law and, as appropriate, principles and norms of international human rights law.

6. With respect to contractual claims that might arise in the framework of a NATO operation or other activity, it should be noted that a standard arbitration clause is included in all contracts to which the Organization is a party. Disputes that might arise in the framework of a contractual relationship, if not settled amicably, may be submitted to arbitration in accordance with the terms of this provision.

7. Finally to be noted, but perhaps of most direct relevance to the question of legal responsibility, are the NATO procedures for settlement of claims. The procedures applicable to claims arising among NATO member States are set forth in article VIII of the Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces. Through the Agreement among the States Parties to the North Atlantic Treaty and the Other States participating in the Partnership for Peace regarding the Status of their Forces, its provisions also apply, mutatis mutandis, to all States participating in the Partnership for Peace programme.

8. In the event of operations conducted in conjunction with States which are neither members of NATO nor participants in the Partnership for Peace programme, claims provisions are normally contained in a status or similar agreement entered into between NATO and that State or States, and covering participating non-NATO States as well as NATO member States.

9. The NATO claims provisions and procedures have been implemented successfully by NATO and its member States for some six decades, in conjunction with NATO partners for a shorter but significant period of time, and have served as a model for similar relationships elsewhere in the international community.

**OECD**

1. The draft articles on responsibility of States may not always be applicable to international organizations, and therefore should not constitute the basis for the drafting of the articles on their responsibility. Indeed, while international organizations have international legal personality, they do not possess, unlike States, a general competence and are instead limited by the scope of their mandate as reflected in their constituent instruments. Thus, OECD shares the view that the Commission should consider explaining in its commentaries the extent to which the draft articles may or may not be regarded as codifying existing law on the basis of actual practice.

2. The current draft articles do not identify the mechanism for their enforcement nor the entities that would be responsible for their interpretation. Would the Commission anticipate an international body or a domestic court to have this general competence over organizations? As recalled by IMF, both approaches could be inconsistent with the constituent instruments of some international organizations that precisely identify interpretation or enforcement mechanisms for certain issues such as dispute settlement.

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1 See *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, p. 22, para. 6, general remarks.

**UNIDROIT**

1. The purposes of UNIDROIT are to examine ways of harmonizing and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law. To that end, UNIDROIT prepares drafts of laws and conventions with the object of establishing uniform internal law; prepares drafts of agreements with a view to facilitating international relations in the field of private law; undertakes studies in comparative private law; follows projects already undertaken in any of these fields by other institutions with which it may maintain relations as necessary; organizes conferences and publishes works which the Institute considers worthy of wide circulation. UNIDROIT also exercises the function of depositary of some of the instruments adopted under its auspices and undertakes a number of information and technical assistance activities.

2. Apart from decisions taken by its organs on purely institutional or financial matters (approval of the budget, assessment of contributions, appointment of agents), UNIDROIT does not take decisions binding on its member States. Instruments adopted under its auspices only bind those States that have accepted, ratified or acceded to them. Furthermore, UNIDROIT is not a member of any other organization, nor is any other organization a member of UNIDROIT.

3. UNIDROIT has examined the draft articles carefully and has come to the conclusion that the activities...
of UNIDROIT are not likely to offer occasion for acts or omissions that involve the type of responsibility that the draft intends to regulate.

**United Nations**

1. The United Nations Secretariat notes that full recognition of the “principle of speciality” is fundamental to the treatment of the responsibility of international organizations. As ICJ observed in its advisory opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict:

International organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.1

It is, therefore, of the essence that in transposing the full range of principles set forth in the draft articles on responsibility of States mutatis mutandis to international organizations, the Commission should be guided by the specificities of the various international organizations: their organizational structure, the nature and composition of their governing organs, and their regulations, rules and special procedures—in brief, their special character. The Secretariat notes that, while some effect is given to the principle through the application of draft article 63 on lex specialis, the principle of “speciality” cuts across many of the Secretariat’s comments.

2. In this connection, it would be the Secretariat’s preference that a general introduction preface the specific commentaries to the rules, and that, like the general introduction to the commentary to the draft articles on responsibility of States, it would set out the principles which guided the Commission in codifying or developing the international law rules or guiding principles on responsibility of international organizations. These principles should include, among others, an explanation of the differences between States and international organizations, and of the differences between international organizations (the principle of speciality), the dichotomy between primary and secondary rules, and the distinction between international law rules and the internal rules of the organization. In this connection, the Secretariat also suggests that such an introduction make clear that any references to primary rules in the commentary is without prejudice to the content or applicability of such rules to international organizations.

3. Another aspect in which the law of responsibility of international organizations differs from that of States is in the extent of practice that is available from which the Commission can discern the law. In this respect, the Secretariat notes that the Commission has acknowledged in the commentary to a number of draft articles that practice to support the proposed provision is limited or non-existent. A general introduction to the commentaries could make this point and explain the consequences for the character of the draft articles.

4. In cases where the Commission has not yet had access to existing practice, the Secretariat has sought to provide it with additional information with respect to any such relevant practice involving the United Nations.

5. The scope of the Secretariat’s review is limited to 26 draft articles of particular interest to the United Nations. This review has been conducted in the light of existing practice, which, while not necessarily exhaustive, is nonetheless indicative. In some cases, the practice is consistent with the proposed rule; in others, it contradicts it; and in still others, the practice has been inconsistent or its legal qualification controversial or not articulated. Much of the practice of the Organization that is discussed relates to peacekeeping operations and, in respect of some draft articles, to the manner in which the Organization addresses private claims by individuals or other non-State entities. While such claims are not the subject of these draft articles, this practice has been included for whatever assistance it might provide the Commission.

6. The absence of supportive practice of the Organization, however, is not always conclusive, and in some cases the Secretariat expresses support for the inclusion of a rule as a guiding principle for the possible development of future practice. But where the lack of practice is due to the intrinsic character of the Organization or where the analogy from State responsibility does not appear to be supported, the Secretariat questions the propriety of including the rule, or including it as formulated, in the draft articles.

**World Bank**

1. In its initial report, the Commission’s Working Group on Responsibility of International Organizations clarified that the term “responsibility”, as used both in this project and in the earlier one on State responsibility, refers only to the “consequences under international law of internationally wrongful acts”. From this, it follows that the draft articles are secondary rules, with no attempt on the part of the Commission to define the content of the international obligations which, once breached, give rise to responsibility. Defining the content of these obligations belongs in fact to primary, not secondary, rules. Moreover, given the diversity among international organizations with respect also to the different legal sources of their international obligations, it would practically be impossible for the Commission to elaborate rules of responsibility that would take into account the obligations incumbent on international organizations as a result of primary rules.

2. To avoid the risk that the Commission’s draft articles and accompanying commentaries may offer the pretext for invoking imaginary primary obligations of international organizations, the Commission may want to consider stating expressly, in its commentaries to the general principles (chapter I of Part Two), that all references to primary obligations, either in the draft articles or in the accompanying commentaries, are mere examples and do not reflect any finding by the Commission on such primary obligations, a task which does not belong to the Commission for the purposes of this project.

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3. While the commentaries to a good number of the draft articles contain clear warnings regarding the scarcity of available practice (hence the use of such terms as “similarly,” “analogy,” “would seem”), it may be appropriate for the Commission to consider explaining, in its commentary, the extent to which it regards the draft articles as codifying existing law and, whenever this is the case, identify relevant instances of actual practice.

B. Specific comments on the draft articles

PART ONE

INTRODUCTION

Article 1. Scope of the present draft articles

COUNCIL OF EUROPE

The Council of Europe looks forward to further consideration by the Commission of the correlation between the scope of the application of the draft articles as contained in their draft article 1 (international responsibility for an act that is wrongful under international law) and the commentaries referring frequently to the ius gentium.

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO AND WTO

1. These organizations share some concerns regarding the scope of the draft articles. In particular, they find it difficult to understand why the Commission has included provisions concerning some issues related to the responsibility of States in relation to that of international organizations while excluding others. Either, having in mind the distinct legal personality of international organizations, the Commission should have adhered to the title of the topic entrusted to it, which is limited to “responsibility of international organizations”; otherwise, it should have followed consistently a more flexible approach by including in the draft articles all the aspects of State responsibility related to international organizations (including the responsibility of States vis-à-vis international organizations).

2. Unfortunately, the draft articles do not choose consistently between these two approaches: on the one hand, in paragraph (10) of the commentary to draft article 1, the Commission explains that “The present articles do not address issues relating to the international responsibility that a State may incur towards an international organization” (see also draft article 18). On the other hand, however, several articles do address such issues, explicitly or by implication (in particular, draft articles 1, para. 2; 32, para. 2; 39, 49 and 57–61).

3. The Commission should follow this second approach and deal with all aspects of the responsibility of States related to international organizations. Contrary to what the Commission states in the aforementioned commentary to draft article 1, it does not appear that the articles on State responsibility effectively cover all issues related to the responsibility of States in connection with international organizations. If that were the case, it should be formally stated in a provision of the draft articles rather than solely in a commentary. Nevertheless, these organizations have doubts that this is the case and are of the view that the approach initiated in the draft articles listed above should be completed in order to definitely and comprehensively address the interaction of the responsibility of States and international organizations under international law. Should the draft articles deal with the responsibility of States vis-à-vis international organizations as suggested here, these organizations urge the Commission and the Special Rapporteur to give due consideration to the different positions of member States of an international organization and non-member States.

C. Specific comments on the draft articles

ILO

1. Draft article 1 provides that the draft articles “apply” to the international responsibility of an international organization. The question that this formulation triggers is on what legal basis the draft articles are intended to “apply”. If the intention is to propose a new international treaty, the first question is who should be invited to negotiate and finally conclude that treaty. Should it be a treaty concluded only by international organizations, or only by States, or by both? If the draft articles are to be ratified only by States, the relationship between the existing constituent instruments and the new treaty needs to be addressed thoroughly. If the draft articles are to “apply” to international organizations as a matter of treaty law, it would appear to be more appropriate that these organizations and not only States become bound by these provisions. This would, in that case, represent a new legal obligation for which international organizations would need to obtain the consent of their supreme organs, normally those composed of most if not all of their member States. In this case, international organizations should be at least permitted to fully participate in the process of elaborating such a treaty, and their comments should carry greater weight in the deliberations of the Commission. One may want to find some inspiration in the way international organizations had been involved in the elaboration and implementation of the Convention on the privileges and immunities of the specialized agencies, or preferably, the way they can become bound by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

2. If the idea is that the draft articles codify existing customary law, they would need to rely on both general practice and opinio juris. From the examples quoted by the Commission, it is difficult to detect any general practice. Furthermore, the views expressed by international organizations reflect not only the lack of opinio juris but rather a clear opposition to the existence of any customary law in the field except for a very narrow set of norms that may be recognized as ius cogens in international law. The draft articles do not thus appear to represent a codification of the existing law and their transformation into legally binding norms could be done only through an international treaty with an important level of involvement of international organizations.

3. Even if draft articles are only to be endorsed by the United Nations General Assembly, it is important that they are developed “under general rules of international law,
under [the organizations’] constitutions or under international agreements to which [the organizations] are parties”, as ICJ put it in the advisory opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt.1

4. Furthermore, it may be prudent to see what result may arise from the practical implementation of the draft articles on responsibility of States before proceeding with the debate on the responsibility of international organizations. Nine years after their adoption by the Commission, those articles still remain under consideration by the General Assembly, with no call for an international treaty to be negotiated.

1 I.C.J. Reports 1980, p. 73, at pp. 89–90, para. 37.

Article 2. Use of terms

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO and WTO

These organizations are unsure about the role which the “rules of the organization”—as defined in draft article 2, subparagraph (b),1—are called to play in the draft articles. They have difficulty in particular in understanding how the emphasis put on the rules of the organization is articulated with the principle of the irrelevance of the rules of the organization expressed in draft article 31.

1 Several advisers had concerns in respect of the definition of the “rules of the organization”, which they considered as incomplete and proposed that a hierarchy among the rules of organization should be in draft article 2 or, at least, stressed in its commentary.

EUROPEAN COMMISSION

The European Commission notes that draft article 2, subparagraph (c), refers to the term “agent” without, however, defining this. It might be appropriate for the Commission to re-examine this definition and perhaps to link it with draft article 5, which sets out a general rule of attribution relating to the conduct of an “organ” or an “agent”.

ILO

1. The definition of “international organizations” proposed by the Commission in draft article 2 adds to the existing definitions that the members of organizations could be “other entities”. This addition does not seem to add a significant element to what is already covered by the first part of the definition, which seems broad enough to include different possibility of membership of entities other than States. The variation in membership does not appear to have any impact on the issue of responsibility of international organizations. ILO notes that an organization already suggested deleting this text.1 ILO, however, fully supports the idea of not using the expression of “intergovernmental organization”, considering that it does not accurately reflect the tripartite structure of the members’ representation within ILO.

2. Previous comments of ILO2 had already presented certain reservations regarding the wide definition of term “agent”. The Commission used only the last part of the definition of this term given by ICJ. By doing this, important qualifications such as “charged by an organ of the Organization”3 were lost, leaving it open for an entity external to the organization to determine if the organization acted through a person or entity other than its officials. Such an approach disregards the rules of the organization and the finding can be even contrary to those rules in situations where agreements are made between parties that expressly exclude agency relationships. The understanding of “agent” proposed in the draft articles does not exist in the current practice of international organizations to ILO’s knowledge, nor in general principles of agency law, and would trigger a considerable change in the way organizations act, leading to excessively cautious behaviour to the detriment of discharge of their mandates. For example, the term “agent” should not cover external collaborators (consultants) or subcontractors such as companies or non-governmental organizations that may be contracted to assist in performing some institutional tasks. A clause excluding liability of the organization for acts of external collaborators or service providers has been systematically included in contracts concluded by ILO.

3. The Commission may also want to pay attention to the situation of State representatives performing temporarily functions for the organization but in their national capacity, such as the chairpersons of meetings and organs; the members of various bodies, such as the Commission itself, or judges of administrative and international criminal tribunals. Should all these persons be considered as agents that could trigger the responsibility of the organization concerned?

4. ILO raised in its 20064 comments the issue of “entities”, such as private companies. In the light of an increased trend of private–public partnership in international organizations, such a wide definition of “agent” may have far-reaching negative consequences for further development of such new trends.


OSCE

In paragraph (4) of the commentary to draft article 2, the Commission appears to consider that OSCE, though not established by treaty, fulfils the two criteria provided for in draft article 2, subparagraph (a), defining international organizations. For the time being, there is no consensus among the OSCE participating States that OSCE should fulfil either of the two listed conditions: whether OSCE possesses its own legal personality, or whether the founding documents of OSCE (in the first place the Helsinki Final Act and the Charter of Paris for a New Europe) are governed by international law. These issues are currently under discussion by the deliberative and decision-making
bodies of OSCE, and the OSCE secretariat stands ready to inform the Commission on the progress or finalization of these deliberations.

**United Nations**

1. As regards the definition of “international organization” in draft article 2, subparagraph (a), and in particular the composition of international organizations, in the recent practice of the United Nations the Secretariat has considered two international tribunals, the Special Court for Sierra Leone and the Special Tribunal for Lebanon, as international organizations. Both tribunals were established by agreement between the United Nations and the Governments of Sierra Leone and Lebanon, respectively, and both enjoy international legal personality and a limited treaty-making power. In the view of the Secretariat, therefore, a (single) State and an international organization can, by agreement, establish an international organization.

2. Draft article 2, subparagraph (b), raises the difficulty of the double nature of the “rules of the organization”, both as internal rules and rules of international law. While in its commentary to draft article 2 of the draft articles on the law of treaties between States and international organizations or between international organizations, of 1982, the Commission acknowledged the difficulty and concluded “There would have been problems in referring to the ‘internal law’ of an organization, for while it has an internal aspect, this law also has in other respects an international aspect”, there is little discussion of this difficulty in the present draft articles. As presently defined, and subject to draft article 9, the “rules of the organization”, whether internal rules or rules of international law, could entail the international responsibility of the organization.

3. The Secretariat questions the propriety of transposing the definition of the “rules” under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations to the field of international responsibility. It is furthermore of the view that the broad definition of the “rules of the organization”, which includes instruments extending far beyond the constituent instruments of the organization, not only increases greatly the breadth of potential breaches of “international law” obligations for which the organization may be held responsible, but also, and more importantly, subject to draft article 9, could extend them to breaches of internal rules as well.

4. To fully appreciate the impact of the proposed definition on the scope of application of the draft articles to the United Nations, the Secretariat wishes to provide the Commission with a brief description of the United Nations instruments that would typically fall within the current definition of the “rules of the organization”, and the nature of which, depending on the rule in question, may be either international or internal:

   (a) The constituent instrument of the United Nations is the Charter of the United Nations. While most of its provisions are international in character, certain provisions, such as Article 101, also constitute internal law of the Organization;

   (b) “Decisions” and “resolutions” are normally understood as decisions and resolutions of the principal organs of the United Nations, such as the General Assembly, the Security Council and the Economic and Social Council. Some decisions or resolutions of Principal Organs, such as international conventions adopted by the General Assembly, are international law in character, while others, such as resolutions adopting the Staff Regulations and Rules of the United Nations or the Financial Regulations and Rules, constitute internal law of the Organization;

   (c) “Acts of the organization” consist of a variety of very different instruments, that is, decisions and resolutions of all organs, including the Secretariat (Secretary-General’s bulletins and other administrative issuances), exchange of letters between and among heads of United Nations organs, judicial decisions and rulings of United Nations-based international tribunals and internal United Nations tribunals, international agreements concluded between the Secretary-General and States or other international organizations, as well as contractual arrangements of all kinds.

5. A number of areas of activities of the United Nations have developed almost entirely through practice, most notably the establishment and conduct of peacekeeping operations and the conduct of business of principal and subsidiary bodies of the Organization (i.e. election of office holders, voting procedures, etc.).

6. The definition of the “rules of the organization” as presently formulated fails to distinguish between internal and international rules for the purpose of attributing responsibility to an international organization, within the meaning of draft article 9. Many of the instruments which would be included within the definition may, depending on their content, be considered either internal or international in character, with very different implications for the international responsibility of the organization. It is, therefore, the Secretariat’s recommendation that this important distinction be reflected in the definition of the “rules”, to make clear that a violation of the rules of the organization entails its responsibility, not for the violation of the “rule”, as such, but for the violation of the international law obligation it contains.

7. Concerning draft article 2, paragraph (c), the definition of an “agent” is based on a passage in the 1949 advisory opinion of ICJ on Reparation for Injuries Suffered in the Service of the United Nations, in which the Court expressed its understanding of the word “agent” to mean:

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3 Yearbook... 1982, vol. II (Part Two), p. 21, commentary to draft article 2, paragraph (25).
Any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.3

8. The proposed definition omits, however, the qualifying preceding clause from the advisory opinion of ICJ: “any person who … has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions”5. In its commentary to draft articles 5 and 7, the Commission notes that the term “agent” is “intended to refer not only to officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization”6 and that “organs and agents are persons and entities exercising the functions of the organization”7. The nature of the functions performed, however, is not an express element of the Commission’s definition.

9. In order to carry out its functions, the Organization acts through a wide variety of persons and entities in different ways. These may range from staff members carrying out core functions of the United Nations to individual or corporate contractors providing goods and services, whose functions are incidental or ancillary to the “functions of the Organization”. This wide range of persons and entities, which goes far beyond the original categories of “staff” as envisaged by the Charter of the United Nations, or “officials” and “experts on mission” under the Convention on the Privileges and Immunities of the United Nations, has evolved in the 60-year practice of the Organization. These developments reflect the exponential growth in the number, diversity and complexity of United Nations mandates. Thus, the Organization routinely enters into partnerships and other collaborative arrangements with entities such as Governments and NGOs, and engages contractors to provide goods and services.

10. The following illustrate some of the different categories of persons and entities “through whom the organization acts”, whether or not they carry out its mandated functions:

(a) Persons— including staff members; officials other than Secretariat officials; United Nations Volunteers; experts (including those designated by United Nations organs, special rapporteurs, members of human rights treaty bodies, members of commissions of inquiry, members of sanctions expert panels, United Nations police, military liaison officers, military observers, consultants, persons on non-reimbursable loans and gratis personnel); individual contractors; and technical cooperation personnel;

(b) Entities—including those bodies which perform functions on behalf of the Organization or provide goods and services at its request. For example, the United Nations regularly enters into commercial agreements with private companies to provide goods and services. Under the “General Conditions of Contract”, appended to the contracts concluded for the provision of goods and services, it is stipulated that

The Contractor shall have the legal status of an independent contractor vis-à-vis the United Nations, and nothing … shall be construed as establishing … the relationship of employer and employee or of principal and agent. The officials, representatives, employees or subcontractors of each of the Parties shall not be considered in any respect as being the employees or agents of the other Party, and each Party shall be solely responsible for all claims arising out of or relating to its engagement of such persons or entities.8

The contract also requires the contractor to indemnify, hold harmless and defend the United Nations in respect of any claims regarding any acts or omissions of the contractor or any subcontractor employed by them in the performance of the contract. While such contracts may not be opposable vis-à-vis third parties, they set forth the position of the Organization as to the nature of the relationship between the parties.

11. The United Nations also routinely uses “executing agencies” and “implementing partners” to carry out certain aspects of its activities. UNDP regularly uses “executing agencies” to carry out aspects of its programmes of assistance. Under the UNDP Standard Basic Assistance Agreement, “executing agencies” are to be given privileges and immunities and are defined to include specialized agencies and IAEA. They are given the status of an “independent contractor”. “Implementing partners” may include NGOs and governmental bodies. Both UNDP and OCHA enter into agreements with NGOs to perform certain activities. Under the “Standard Project Cooperation Agreement between UNDP and an NGO”, it is specified that NGO personnel shall not be considered employees or agents of UNDP, and that UNDP does not accept any liability for claims arising out of the activities performed under the agreement. The agreement also requires that the NGO shall indemnify and hold harmless UNDP from all claims.

12. It is the view of the Secretariat that the broad definition adopted by the Commission could expose international organizations to unreasonable responsibility and should thus be revised. In the practice of the Organization, a necessary element in the determination of whether a person or entity is an “agent” of the Organization depends on whether such person or entity performs the functions of the Organization. However, while the performance of mandated functions is a crucial element, it may not be conclusive and should be considered on a case-by-case basis. Other factors, such as the status of the person or entity, the relationship and the degree of control that exists between the Organization and any such person or entity, would also be relevant. As indicated above, at least in some contexts, even persons and entities who perform functions that are also performed by the Organization, may not be regarded as “agents” by the Organization, but rather as partners who assist the Organization in achieving a common goal.

13. In the view of the Secretariat, the definition of an “agent” in the draft articles should, at the very least, differentiate between those who perform the functions of an international organization, and those who do not perform such functions. As such, the definition should include as an essential element the test of whether the person or entity performs the “mandated functions of the organization”. However, as noted above, this may not necessarily be determinative of the issue.

6 Commentary to draft article 5, para. (3).
7 Commentary to draft article 7, para. (2).
8 United Nations, General conditions of contract: contracts for the provision of goods and services, para. 1.2.
14. Accordingly, the Commission is encouraged to consider further the practice of the United Nations and other international organizations so as to identify the circumstances which must apply in making a determination that a person or entity is an "agent" of an international organization in any particular case. This may assist in achieving greater clarity concerning the characteristics required for such a determination for the purposes of the draft articles.

**World Bank**

The draft articles contain no definition of an “organ”, while they provide, in draft article 2 (c), a definition for “agent”. The current text may be improved. In particular:

(a) As the Commission has not defined the term “organ”, does the definition of an “agent” include also organs? On the one hand, one would be induced to give a negative answer to this question by the Commission’s use of the expression “organ or agent” (thus clearly distinguishing the two terms) in several draft articles; on the other hand, one may be tempted to give a positive answer to the same question by the Commission’s remark that “[t]he distinction between organs and agents does not appear to be relevant for the purposes of attribution of conduct to an international organization”. To avoid any misunderstanding on this point, the World Bank would deem it preferable that the Commission provide, in the draft articles, a definition of an “organ” by reference to the rules of the organization, by analogy with the definition of the term provided in the articles on responsibility of States.

(b) As to the definition of an “agent”, the World Bank understands that the term “includes” has been preferred to “means” as a way also of addressing the concern that attribution of conduct not be unduly restricted. However, for the sake of certainty, the World Bank’s definite preference is for the use of the term “means” instead of “includes” in any definition of both “agent” and “organ”.

1 See para. (5) of the commentary to draft article 5.
2 Article 4, para. 2 (“Conduct of organs of a State”).

**Part Two**

**The Internationally Wrongful Act of an International Organization**

**Chapter I**

**General Principles**

**Article 4. Elements of an internationally wrongful act of an international organization**

**European Commission**

1. The European Commission notes that the ILC decided not to include into the project a provision equivalent to draft article 3 of the articles on responsibility of States (“Characterization of an act of a State as internationally wrongful”). The reasons for not including an equivalent provision in the draft on responsibility of international organizations have been set out in the commentaries to draft article 4, in particular, in paragraphs (4) and (5). In relation to the second sentence of article 3 of the draft articles on responsibility of States, these commentaries state that the internal rules of an international organization cannot be sharply differentiated from international law. However, while this comment may be correct for traditional international organizations, they do not appear to correspond to the situation of the EU. It is a general interpretation in the latter, including in its judicial practice, that its internal order is separate from international law.

2. Already in the landmark case Van Gend en Loos v. Nederlandse Administratie der Belastingen (Netherlands Inland Revenue Administration), the Court of Justice of the European Union held that the Treaty on the European Economic Community established a new legal order which is distinguished from general international law:

The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.¹

3. More recently, in Commission of the European Communities v. Ireland (the “Mox Plant” case), the Court of Justice of the European Union underlined, in an infringement proceeding involving the United Nations Convention on the Law of the Sea:

An international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures.²

Further, in the Kadi and Al Barakaat appeals judgment of 3 September 2008, the Court of Justice of the European Union held that even the Charter of the United Nations could not prevail over constitutional rules set out in the founding treaties of the EU (“the European Union’s primary law”), relating to the general principles of EU law which includes the protection of fundamental rights.³

4. It follows that the relationship between the EU and its member States is not governed by international law principles, but by European law as a distinct source of law. This may also have repercussions on potential conflicts between EU law and the international agreements of the member States, either concluded with third States or between themselves, insofar as such agreements touch upon matters governed by EU law.⁴ For example, under EU law, the international legal principle of “pacta sunt servanda” applies to international agreements entered into with non-EU member States, but not necessarily to agreements concluded between EU member States as EU law has primacy.

⁴ See article 351 (2) of the Treaty on the Functioning of the European Union.
5. The EU does not contest that there are international organizations that are undoubtedly more “permeable” to international law than the EU, and that for these more traditional international organizations, the commentaries set out in paragraphs 4 and 5 of draft article 4 may be relevant. However, the commentaries should make clear that they do not apply to the EU.

ILO

Draft article 4 provides that an internationally wrongful act may exist in the case of omission. On this point, the difference between States and international organizations seems important. While the decision of a State to act depends on its own organs, and can therefore be justified as the basis of responsibility in case of omission to act, the situation of international organizations is different. Its executive organs act upon a mandate given by governing organs composed of States. The organization itself cannot act without the will of member States, and the ability of member States to make decisions depends on compromise that is difficult to reach. Should the United Nations be held responsible for a failure of the Security Council to perform its assigned function regarding international peace and security? The question of omission when put in the context of what should have been an appropriate decision to act is a concept unsuitable for most if not all decisions taken by an international organization; in such context, draft article 58 would impede a finding of responsibility on the part of the organization. Furthermore, where decisions to act have already been taken by governing organs and an alleged omission occurs at the hand of the executive organs, the act would violate the internal rules of the organization and the matter would be governed under lex specialis (draft article 63).

CHAPTER II

ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

Article 5. General rule on attribution of conduct to an international organization

OECD

Draft article 5 is based on a functional criterion of attribution in that the official is acting as “agent” of the organization. Such criterion should be determined, in the view of OECD and in line with the comments previously mentioned by IMF,1 with the criteria used to determine whether or not the conduct of OECD officials constitutes an act performed in their official capacity that would fall within the purview of the immunities of OECD. Indeed, the respect of an organization’s immunity provided for in its constituent instruments or within its agreements on immunities is essential to the fulfillment of its mission as it protects the organization from proceedings in national courts that may have diverging views on its international obligations. However, the draft articles and accompanying commentaries as currently drafted could be interpreted as overriding the organization’s constituent instruments or immunities agreements.


UNITED NATIONS

1. In paragraph (5) of the introductory commentary to chapter II on Attribution of conduct to an international organization, the Commission makes the following point, otherwise self-evident:

The present articles do not point to cases in which conduct cannot be attributed to the organization. For instance, the articles do not say, but only imply, that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations.

While this statement would not otherwise call for any comment on the part of the United Nations, in the light of the recent jurisprudence of the European Court of Human Rights—which attributed to the United Nations responsibility for conduct of military forces operating under national or regional command and control—the Secretariat wishes to comment in some detail on the principles and practice of United Nations peacekeeping operations, which have developed over the past six decades.


2. In the practice of the United Nations, a clear distinction is made between two kinds of military operations: (a) United Nations operations conducted under United Nations command and control, and (b) United Nations–authorized operations conducted under national or regional command and control. United Nations operations conducted under United Nations command and control are subsidiary organs of the United Nations. They are accountable to the Secretary-General under the political direction of the Security Council. United Nations–authorized operations are conducted under national or regional command and control, and while authorized by the Security Council, they are independent of the United Nations or the Security Council in the conduct and funding of the operation. Having authorized the operation, the Security Council does not control any aspect of the operation, nor does it monitor it for its duration. Its role following the authorization of the operation is limited to receiving periodic reports through the lead nation or organization conducting the operation.

3. In determining the attributability of an act or an omission of members of a military operation to the United Nations, the Organization has been guided by the principle of “command and control” over the operation or the action in question. Its position on the scope of its responsibility for the operational activities of military operations, including for combat-related activities, was set out in the report of the Secretary-General on the financing of the United Nations Protection Force and other peacekeeping operations, according to which:1

17. The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations. Where a Chapter VII-authorized operation is conducted under national command and control, international responsibility for the activities of the force is vested in the State or States conducting the operation. …

18. In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation.

4. Questions about attribution of responsibility to a United Nations or a United Nations-authorized operation have arisen in the practice of the United Nations in only two cases: the operation in the Republic of Korea, and the Somalia operation. But while the operation in the Republic of Korea was conducted under national command and control, in the case of Somalia, the simultaneous or consecutive deployment of two operations—a United Nations and a United Nations-authorized operation—and the proximity in time and place between the two have given rise to questions about attribution of responsibility for damage or injury caused in the course of either operation.

5. The operation in the Republic of Korea in the 1950s was the first United Nations-authorized operation. Conducted under United States unified command, it reported periodically, through the United States Government, to the Security Council. Claims against the operation were settled by the Unified Command or, as the case may have been, by the participating States pursuant to bilateral agreements concluded between the United States and the participating States. While the United Nations cannot say with confidence that all such claims were settled and compensated for by the Unified Command, it can say with certainty that none were settled by the United Nations.

6. In Somalia, between 1992 and 1994, a number of United Nations and United States-led operations were deployed for the most part simultaneously and within the same area of operation. They maintained a separate command and control structure, including in the conduct of joint or coordinated operations. Claims commissions established by either operation settled third-party claims according to whether the United Nations or the United Nations-authorized operation had effective command and control over any given operation.

7. The practical arrangements put in place for settling third-party claims in Somalia, where multiple operations were conducted sequentially or simultaneously, reflect the principle that each State or organization is responsible for damage caused by forces under its command and control, regardless of the fact that in both cases the Security Council, as the “source of authority”\(^4\), had either mandated or authorized the operation. In settling a large number of third-party claims for damage caused by forces under its command and control, the United States as well as other States contributing troops have accepted responsibility and liability in compensation. In the case of Somalia, as in that of the Republic of Korea, while the United Nations cannot attest to the settlement of all such claims by the United States, it can confirm that no such claims were attributed to the United Nations, or otherwise compensated by the Organization.

8. The principle that responsibility is entailed where command and control is vested is now reflected in a host of recently concluded bilateral agreements and arrangements between the United Nations and Member States cooperating with United Nations operations under separate command and control structure. Such agreements contain provisions to the effect that each participant will be solely responsible for handling third-party claims in respect of death, personal injury or illness caused by its personnel or agents, or for loss or damage to third-party property to the extent that such claims arise from or in connection with, acts or omissions of that party or of its personnel or agents.\(^4\)

9. The recent jurisprudence of the European Court of Human Rights, beginning with the Behrami and Saratambi joint cases,\(^5\) disregarded this fundamental distinction between the two kinds of operation for purposes of attribution. In attributing to the United Nations acts of a United Nations-authorized operation International Security Force in Kosovo (KFOR) conducted under regional command and control, solely on the grounds that the Security Council had “delegated” its powers to the said operation and had “ultimate authority and control” over it,


\(^5\) ECHR, Behrami and Behrami v. France and Saratambi v. France, Germany and Norway, application Nos. 71412/01 and 78166/01. The Behrami and Saratambi cases were followed by a string of cases in which the question of attribution was similarly decided by the European Court. Kasumaj v. Greece, application No. 6974/05, 5 July 2007; Gagic v. Germany, application No. 31446/02, 28 August 2008; Beric v. Bosnia and Herzegovina, application No. 36357/04, 16 October 2007.
the Court disregarded the test of “effective command and control” which for over six decades has guided the United Nations and Member States in matters of attribution.

10. Consistent with the long-standing principle that responsibility lies where command and control is vested, the responsibility of the United Nations cannot be entailed by acts or omissions of those not subject to its command and control. Since the early days of peacekeeping operations, the United Nations has recognized its responsibility and liability in compensation for acts or omissions of members of its peacekeeping operations, and by the same token, it has refused to entertain claims against other military operations—notwithstanding the fact that they were authorized by the Security Council. This practice has been uniform, consistent and without exception.

Definition of an “organ”

11. Draft article 2 provides no definition of an “organ”. This omission is presumably based on the assumption that, as in the case of article 4, paragraph (2), of the draft articles on responsibility of States, an “organ” is that which the rules of the organization determine it to be, or that no distinction between an “organ” or an “agent” is necessary or relevant for the purpose of attribution of conduct to an international organization.

12. In the view of the Secretariat, “an agent” and “an organ” are not necessarily interchangeable. While an “agent” may or may not be contractually linked to the United Nations, an “organ” must maintain an “organic link” to the Organization to be considered as such by the Organization. A diversity of entities that are currently either “institutionally linked” to the United Nations or serviced by it, or otherwise established by agreement between the United Nations and a Member State pursuant to a mandate by a principal organ, are not considered United Nations organs, notwithstanding the degree of assistance to, or control over such entities. The Secretariat would thus favour a definition of an “organ” to read: “[a]ny entity which has that status in accordance with the rules of the organization”.

Article 6. Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

European Commission

1. The key provision proposed is an “effective control” standard, which is ultimately predicated on factual control, and follows equivalent articles from the articles on responsibility of States. The European Commission notes that the commentaries to this draft article are largely devoted to United Nations practice and to a discussion of the case law of the European Court of Human Rights. As the commentators show, the latter court has by now rendered several further judgments confirming the controversial line adopted earlier in Behrami and Saramati, and with which the Special Rapporteur, the ILC and many academics disagree.

2. Regardless of the merits of the disagreements, the question must be asked whether the international practice is presently clear enough and whether there is identifiable opinio juris that would allow for the proposed standard of the International Law Commission (which thus far has not been followed by the European Court of Human Rights) to be codified in the current draft. There is no doubt that this remains a controversial area of international law, in relation to which one can expect a steady stream of case law not only from the European Court of Human Rights, but also from domestic courts, in addition to voluminous academic writings.

3. Part of the reasoning behind the rule set out in draft article 6 and the commentary thereto may be the perception that international organizations tend to “escape” accountability for international wrongs. It should be noted that as far as the EU is concerned, pursuant to express

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6 Article 4, para. 2, provides that “an organ includes any person or entity which has that status in accordance with the internal law of the State”.

7 For example, human rights treaty bodies, or secretariats of environmental conventions.


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1 Para. (4) of the commentary to draft article 31.

ECHR, Behrami and Behrami v. France and Saramati v. France, Germany and Norway, 2 May 2007, on the admissibility of application Nos. 71412/01 and 78166/01.
provisions of the founding treaties, the EU’s institutions are fully accountable vis-à-vis each other and EU member States for acts and failure to act. In addition, non-EU States may by virtue of express provisions in international agreements concluded with the EU have the possibility of seizing EU courts with cases of alleged breaches of the agreement by the EU. Such agreements may also provide for participation of non-EU contracting parties to preliminary reference proceedings, which is one of the main activities of the Court of Justice of the European Union. Moreover, the EU has standing before several dispute settlement bodies (including the WTO dispute settlement bodies and ITLOS) which allow non-EU States to bring proceedings against EU acts. In addition, unlike other international organizations, the EU does not invoke jurisdictional immunity when EU acts are challenged by private parties, as long as this is done in EU courts. Any natural or legal person (regardless of nationality or residence) may institute proceedings against a decision addressed to him or her which is of direct and individual concern.

2 See articles 260, 263 and 265 of the Treaty on the Functioning of the European Union.

3 See, for instance, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded between the EU, Switzerland and other EFTA States, which provides in, Protocol 2, art. 2, that non-EU States may participate through statements of case or written observations in proceedings concerning preliminary reference proceedings referred to by courts of EU member States to the European Court of Justice.

4 The EU invokes jurisdictional immunity when it is challenged in courts of non-EU States. The immunity invoked is based on the principle of functionality: namely, immunity that encompasses all acts needed for the execution of the official functions and activities of the organization. Insofar as Common Foreign and Security Policy actions are concerned, specific provisions included in status-of-forces agreements concluded by the EU deal with immunity from civil and criminal proceedings in foreign courts and procedures for settlement of claims against the EU.

5 The competence of the Court of Justice of the EU, in accordance with arts. 263 and 265 of the Treaty on the Functioning of the European Union, encompasses exclusive jurisdiction to decide on the legality of acts of the European institutions that produce legal effects (or for failure to act). The jurisdiction of the Court is however excluded with respect to acts adopted under the Common Foreign and Security Policy provisions, with certain limited exceptions: see art. 275 of the Treaty on the Functioning of the European Union.

ILO

Draft article 6 does not seem to take into account the fact that there are two modalities in the law of international civil services under which national officials are put at the disposal of international organizations. These two modalities, formerly defined as “loan” and “secondment”, distinguish clearly the level of responsibilities for acts of such officials, denying any responsibility for their acts under the arrangement of “loan”. ILO has already presented its comment on this issue and respectfully requests the Commission to take into account the 2006 ILO comments regarding draft article 5.


UNITED NATIONS

1. The test of “effective control” proposed by the Commission is a factual test of actual control over the conduct in question, and is to be applied in the relationship between the organization and the lending State, or in the case of United Nations operations, between the United Nations and troop-contributing States. In the latter case, conditioning the attribution of an act of a national contingent to the United Nations on the degree of the “effective control” over the act or conduct in question implies, in fact, that, where the lending State continues to exercise operational control over the imputed act, responsibility should be attributed to the lending State and not to the receiving organization.

2. In the practice of the United Nations the test of “effective command and control” applies “horizontally” to distinguish between a United Nations operation conducted under United Nations command and control and a United Nations-authorized operation conducted under national or regional command and control. In contrast, the test of “effective control” proposed by the Commission would apply “vertically” in the relations between the United Nations and its troop-contributing States to condition the responsibility of the Organization on the extent of its effective control over the conduct of the troops in question.

3. It has been the long-established position of the United Nations, however, that forces placed at the disposal of the United Nations are “transformed” into a United Nations subsidiary organ and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, “effective”. In the practice of the United Nations, therefore, the test of “effective control” within the meaning of draft article 6 has never been used to determine the division of responsibilities for damage caused in the course of any given operation between the United Nations and any of its troop-contributing States. This position continued to obtain even in cases, such as United Nations Operation in Somalia (UNOSOM II), where the United Nations command and control structure had broken down.

4. In this connection, the Secretariat notes that the residual control exercised by the lending State in matters of disciplinary and criminal prosecution, salaries and promotion for the duration of the operation, is inherent in the institution of United Nations peacekeeping, where the United Nations maintains, in principle, exclusive “operational command and control” and the lending State such other residual control. However, as long as such residual control does not interfere with the United Nations operational control, it is of no relevance for the purpose of attribution.

5. Mindful of the realities of peacekeeping operations but keen to maintain the integrity of the United Nations operation vis-à-vis third parties, the United Nations has struck a balance, whereby it remains responsible vis-à-vis third parties, but reserves the right in cases of gross negligence or willful misconduct to revert to the lending State. Under the memorandum of understanding between the United Nations and the [participating State] contributing resources to [the United Nations peacekeeping operation]:

The United Nations will be responsible for dealing with any claims by third parties where the loss or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this MOU. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims.  

6. For a number of reasons, notably political, the United Nations practice of maintaining the principle of United Nations responsibility vis-à-vis third parties in connection with peacekeeping operations and reverting as appropriate to the lending State is likely to continue. The Secretariat nevertheless supports the inclusion of draft article 6 as a general guiding principle in the determination of responsibilities between the United Nations and its Member States with respect to organs or agents placed at the disposal of the Organization, including possibly in connection with activities of the Organization in other contexts.

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2 Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual) (A/C.5/60/26), chap. 9, art. 9. In another context, administrative instruction ST/AI/1999/6 on gratis personnel provides in section 13, on third-party claims, as follows: “The United Nations shall be responsible for dealing with claims by third parties where the loss of or damage to their property, or death or personnel injury was caused by the actions or omissions of the gratis personnel in the performance of services to the United Nations under the agreement with the donor. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the gratis personnel provided by the donor, the donor shall be liable to the United Nations for all amounts paid by the United Nations to the claimants and all costs incurred by the United Nations in settling such claims.”

Article 7. Excess of authority or contravention of instructions

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO and WTO

The rules applicable to ultra vires acts of an organ of a State in draft article 7 of the articles on responsibility of States cannot be transposed automatically to those of an agent or an organ of an international organization which can only be held responsible within the framework of the principle of speciality. At least, a better balance should be struck, on the one hand, between attribution of ultra vires acts and the protection of third parties who rely on the good faith of agents or organs acting beyond their mandate, and, on the other hand, on the principle of speciality and the fact that an organ or an organ acting ultra vires operate beyond the mandate and functions entrusted to an international organization by its members. Due account should be taken in this respect of internal mechanisms and rules. The rules and established practices applicable to privileges and immunities of international organizations and their agents, for example, might constitute a check on the nature of the acts in question.

UNITED NATIONS

1. In paragraph (4) of its commentary to draft article 7, the Commission notes that the “key element for attribution” in respect of ultra vires acts “is the requirement that the organ or agent acts ‘in that capacity’”, namely, in its official capacity. It explains that “[t]his wording is intended to convey the need for a close link between the ultra vires conduct and the organ’s or agent’s functions”. The commentary further notes that the practice of the United Nations is consistent with the principle.

2. There appears to be scant practice concerning actual claims against the Organization in respect of alleged ultra vires acts by its organs or agents. The practice identified by the United Nations requires a strong link between the impugned act or omission and the official functions of the organ or agent (see the discussion in connection with draft article 2, subparagraph (c), above). There is practice to suggest that when an organ or an agent identified as such by the Organization acts in its official capacity and within the overall functions of the Organization, but outside the scope of its authorization, such act may nevertheless be considered an act of the Organization.

3. As the wording of the draft article is intended to convey the “need for a close link between the ultra vires conduct and the organ’s or agent’s functions”, the Secretariat recommends that the word “official” be inserted to make it clear that the organ or agent must be acting in an official rather than a private capacity at the time of the commission of the ultra vires act.

4. In this connection, the Secretariat notes that the 1986 opinion quoted by the Commission does not reflect the consistent practice of the Organization. In 1974, the Office of Legal Affairs advised the Field Operations Service as to whether the United Nations Emergency Force (UNEF) Claims Review Board was authorized to handle and settle claims in respect of tortious acts committed during the Force members’ off-duty periods. It advised that “there may well be situations involving actions by Force members off duty which the United Nations could appropriately recognize as engaging its responsibility”, and made a distinction between off-duty acts of Force members in circumstances closely related to the functions of the Force member (i.e. the use of a Government-issued weapon), and actions entirely unrelated to the Force member’s status as such. Accordingly, the test for the attribution of the act was whether it related to the functions of the Organization, irrespective of whether the Force member was on or off duty at the time.

5. The limited practice of the United Nations in the context of responsibility for ultra vires acts suggests that, at a minimum, the text of draft article 7 should be modified so as to provide that attribution in any such case could exist only where an organ or agent “acts in an official capacity and within the overall functions of the organization”. In addition, the United Nations recommends that the Commission give additional consideration to the question of whether the standard for attribution in respect of such acts should be the same for agents as for organs of the organization, in the light of the fact that an agent may have a more remote institutional link to the organization than an organ.

6. In the interest of clarity, the United Nations also recommends that the Commission not include in the commentary the excerpt of the legal opinion from the 1986 United Nations Juridical Yearbook concerning on-duty and off-duty acts in peacekeeping operations.

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1 In para. (9) of the commentary to art. 7 and footnote 128.
Article 8. Conduct acknowledged and adopted by an international organization as its own

EUROPEAN COMMISSION

In paragraph (3) of the commentaries to draft article 8, reference is made to a statement of the European Community in a World Trade Organization case (European Communities-Customs Classification of Certain Computer Equipment). This statement is cited in support of the proposition that practice does not always clearly distinguish between acknowledgment of attribution of conduct or of responsibility to an international organization. However, the reference to this statement appears misplaced. In relation to the WTO case referred to, the EU declared that it was ready to assume the entire international responsibility for all measures in the area of tariff concessions because it was exclusively competent for the subject matter concerned and thus the only entity in a position to repair the possible breach, namely, the only entity to ensure possible restitution under the WTO rules for dispute settlement.

UNITED NATIONS

1. In paragraph (1) of the commentary, “acknowledgment” and “adoption” of conduct by an organization are cumulative conditions for the attribution of conduct not otherwise attributable to the Organization through its agent or organ. The Commission explains that attribution is based “on the attitude taken by the organization with regard to certain conduct”, but leaves open the question of the competence of the organization or of any of its agents or organs to acknowledge or adopt the conduct in question, the form of the acknowledgement, and whether the act of acknowledging should be made in full knowledge of the unlawful character of the conduct, and of the legal and financial consequences of such acknowledgment. These questions would have to be clarified for the draft article to have any practical effect for the United Nations.

2. The Secretariat is unaware of any case in which any United Nations organ has acknowledged or adopted conduct not otherwise attributable to it, or that as a consequence thereof has agreed to assume responsibility or liability in compensation. It furthermore submits that there is little likelihood that such admission would be made by an intergovernmental organ, or, if it were made, that it would be respected by the political organ having the budgetary authority to authorize the compensation.

3. In the practice of the United Nations Secretariat, ex gratia payment is the only case where the Secretary-General is authorized to make payment without recognizing the responsibility of the Organization (in fact, it is conditional upon recognition that there is no responsibility), if he considers such payment nevertheless to be in the interest of the Organization. Rule 105.12 of the Financial Rules and Regulations provides in this respect:

Ex gratia payments may be made in cases where, although in the opinion of the Legal Counsel there is no clear legal liability on the part of the United Nations, payment is in the interest of the Organization. The approval of the Under-Secretary-General for management is required for all ex gratia payments.

4. The underlying assumption of rule 105.12 is that, while the conduct itself may be attributed to the United Nations, the responsibility is not. It has been the consistent view of the Office of Legal Affairs that an ex gratia payment cannot be made if responsibility is legally entailed, in which case, compensation should be paid as a matter of obligation.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 9. Existence of a breach of an international obligation

EUROPEAN COMMISSION

1. Paragraph 2 of draft article 9 raises again the questionable generic assumption that the “rules of the international organization” belong to the sphere of international law. For the reasons set out above,1 the EU does not accept the proposition that its internal law forms part of this sphere. It would request that this be made clear in the commentaries. 2

2. In addition, the rule set out in draft article 9, paragraph 2, does not appear coherent with the later draft articles. The inconsistency is apparent when comparing draft article 9 with the first sentence of draft article 31. The latter provides that an international organization cannot rely on its internal law (“its rules”) as justification for failing to comply with the draft articles on the content of the international responsibility. Consequently, the draft articles, as they currently stand, appear to state that the rules of the international organization should be considered irrelevant for the establishment of the content of the responsibility of the organization, and later on for the remedies, but not for the existence of the breach. This is inconsistent and there appears to be no support for this in the constituent instruments of many international organizations.

3. Moreover, paragraph (9) of the commentaries to draft article 9 erroneously cites the case of Parliament v. Council;2 for the proposition that an international organization may be bound by an obligation to achieve a certain result irrespective of whether the necessary conduct will be taken by the organization itself or by one or more of its member States. The European Commission would note in this regard that the Court of Justice of the European Union case in question was not concerned with the boundary between the “inner” and “outer” sphere, but with a “mixed agreement”. These are agreements that cover subject matters that fall both under EU and the national competence of the EU member States and are hence concluded by both the EU and all its member States together, in casu the Fourth ACP-EEC Convention. In such a specific case, involving “bilateral” cooperation between the EU and its member States on the one hand and the non-EU States on the other, all the treaty obligations bind both the EU and its member States irrespective of the exact internal delimitation of competences. In sum, this case does not bring clarification to the rule currently set out in draft article 9.

1 See the comments of the European Commission under draft article 4.
1. Draft article 9, paragraph 1, is identical to article 12 of the articles on responsibility of States with obvious modifications. Paragraph 2, however, is an entirely new provision. Draft article 9 does not distinguish between international law rules and the internal law of the international organization in characterizing conduct as unlawful, or for the purposes of attributing responsibility to the international organization.

2. The Commission states in paragraph (4) of its commentary, “For an international organization most obligations are likely to arise from the rules of the organization”, and that it is “preferable to dispel any doubt that breaches of these obligations are also covered by the present articles. The wording in paragraph 2 is intended to include any international obligation that may arise from the rules of the organization”.

3. In the debate over the nature of the “rules of the organization”, the Commission did not take a stand. In paragraph (6) of its commentary, it stated:

Paragraph 2 does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply.

The Secretariat takes this to mean that only breaches of international law obligations contained in the rules, and not breaches of the rules as such, would be considered breaches of an international obligation within the meaning of draft article 9. The question of whether any given rule entails an international obligation depends on the nature, object and purpose of the rule in question, and on whether it is intended to give rise to an international legal obligation. The Secretariat recalls in this connection that many of the rules of the Organization, including resolutions of its political organs, may not give rise to international law obligations.

4. The question of whether a violation of a rule of the organization amounts to a breach of an international law obligation cannot be determined in the abstract, but rather on a case-by-case basis. The United Nations, therefore, endorses the current text of draft article 9, paragraph (1), and suggests that the commentary be revised to clarify the distinction between international law and internal rules of the organization.

WORLD BANK

1. Pursuant to paragraph 1 of draft article 9, an international organization breaches an international obligation when its act is not in conformity with what that obligation requires, “regardless of its origin and character”. Paragraph 2 of the same draft article then adds that the scope of paragraph 1 “includes the breach of an international obligation that may arise under the rules of the organization”. However, paragraph (5) of the commentary to draft article 9 acknowledges that the legal nature of the rules of the organization “is to some extent controversial” and, in any event, it remains open to question “whether all the obligations arising from the rules of the organization are to be considered as international obligations”. This is why paragraph (6) of the commentary expressly clarifies that paragraph 2 does not attempt to express a clear-cut view on the issue [and] simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply.

2. Precisely because the World Bank agrees with the Commission in its cautious approach to this important point, it thinks that the clarification provided in the commentary would be better reflected by the deletion of paragraph 2 from draft article 9. In fact, paragraph 1 already states that a breach is a breach regardless of the origin and character of an obligation binding an international organization, thus clearly implying that this origin may also be in the rules of the organization. On the contrary, retaining paragraph 2 may wrongly lead to the unsubstantiated conclusion (expressly denied in the Commission’s commentary) that the breach of any rule of the organization is necessarily a breach of an international obligation.

CHAPTER IV

RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

EUROPEAN COMMISSION

1. In paragraph (4) of the introductory commentary, reference is made to cases before international tribunals or other bodies for the proposition that the question of the international organization’s international responsibility has not been examined on ratione personae grounds. It is not clear to the European Commission that this comment is entirely well placed here. In addition, it should be noted that all but one of the cases referred to relate to actions involving the EU and its member States before the European Court of Human Rights. In this regard, it should be pointed out that the cases that have been dismissed at the level of the former European Commission of Human Rights do not have the same legal authority as judgments of the European Court of Human Rights. Furthermore, the picture given by these decisions of the former European Commission of Human Rights and the judgments of the European Court of Human Rights appears much more nuanced than would appear from the current introductory text to chapter IV of the draft. Applications directed against the EU as an organization have been declared inadmissible ratione personae (Confédération Française Démocratique du Travail1). However, the former European Commission of Human Rights did not dismiss applications involving an EU act as inadmissible ratione personae, when those applications were directed against one or all the EU member States and not against the EU as such (Senator Lines2; Emesa Sugar3). In addition, the

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1 Confédération Française Démocratique du Travail v. the European Communities, application No. 8030/77, decision of 10 July 1978 on the admissibility of the application, European Commission of Human Rights, Decisions and Reports 13, p. 231.

2 Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, application No. 56672/00, decision of 10 March 2004, Reports of Judgments and Decisions, 2004-IV, p. 331.

3 Emesa Sugar v. the Netherlands, application No. 62023/00, decision of 13 January 2005.
European Court of Human Rights has held that an EU member State can be held responsible for acts of primary EU law (Matthews⁴) and for national implementation act of EU secondary law, irrespective of the nature of the EU act and of the fact whether the member State enjoys discretion or not (Cantoni⁵; Bosphorus⁶).

2. It should also be noted that the EU is currently negotiating its accession to the European Convention on Human Rights as mandated by article 6, para. 2, of the Treaty of the European Union. Upon the EU’s accession applications to the European Court of Human Rights, involving the EU as an organization will no longer be declared inadmissible on ratione personae grounds—provided that the impugned act or omission is itself imputable to the EU.

Article 13. Aid or assistance in the commission of an internationally wrongful act

EUROPEAN COMMISSION

Since aid or assistance is often used in a financial context, it would seem desirable that this draft article and its interpretation be kept as narrow as possible so as not to turn it into a disincentive for development aid by international organizations. Given that the threshold for the application of the rule seems low (knowledge), one should add in the commentary some limitative language (intent) in line with the commentaries of the draft articles on responsibility of States.

ILO

The wording of subparagraph (a), which comes from the draft articles on responsibility of States, may need to be further clarified to determine whether the expression “knowledge of circumstances” refers to the knowledge of the organization that it is committing an internationally wrongful act.

UNITED NATIONS

1. The Secretariat is unaware of any case in which the United Nations has assisted a State or another international organization in the commission of an internationally wrongful act, or where its international responsibility was otherwise invoked in connection with the behaviour of the recipient of its assistance. Recently, however, the possibility of United Nations aid or assistance being used to facilitate the commission of unlawful acts arose in the case of the United Nations Mission in the Democratic Republic of the Congo (MONUC).

2. Established by Security Council resolution 1279 (1999), MONUC was mandated both to protect civilians and to support Government forces in their operations to disarm foreign and Congolese armed groups.¹ In the

⁵ Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi (Bosphorus Airways) v. Ireland (Grand Chamber), judgment of 30 June 2005, No. 45036/98, Reports of Judgments and Decisions 2005-VI.

wishes to underscore the fundamental difference between States and international organizations, whose aid and assistance activities in an ever-growing number and diversity of areas often constitute their core functions.

6. It is precisely because of its wide-ranging scope of assistance activities, and of the difficulty of monitoring the final destination or use of such aid or assistance, that the condition for imputing responsibility to the Organization in connection with any such aid or assistance, namely, knowledge of the circumstances of the wrongful act, becomes all the more important. It is the understanding of the Secretariat that knowledge of the circumstances of the wrongful act should be taken to include knowledge of the wrongfulness of the act, and requests that this be reflected in the commentary.

7. The Secretariat suggests that the clarification provided in the commentary to the draft articles on responsibility of States be added also in the context of the articles on responsibility of international organizations. In so doing, the Commission may wish to consider revising the commentary or the draft article itself, to clarify that responsibility would arise not for the wrongful act itself, but for the organization’s own conduct that has caused or contributed to the internationally wrongful act; that the assistance should be intended for the wrongful act; that the act should actually be committed, and that such assistance should be a significant factor leading to the commission of the act.

**World Bank**

1. The World Bank is not at all convinced that applying to international organizations the provision, found in the draft articles on responsibility of States, on aid and assistance in the commission of an internationally wrongful act “is not problematic”, as the Commission’s commentary to draft article 13 suggests. Actually, if not strictly confined to its proper scope, this provision is worrisome and may create a dangerous chilling effect for any international financial institution providing economic assistance to eligible borrowers and recipients. If the source of draft article 13 on the responsibility of organizations is article 16 in the project on State responsibility, then it is assumed that the clarification given in paragraph (4) of the commentary to article 16 of the draft articles on responsibility of States applies likewise to draft article 13.

2. The assumption of the World Bank would seem to find support in footnote 66 of the Commission’s commentary to the draft articles on the responsibility of international organizations, where it is written:

To the extent that provisions of the present articles correspond to those of the articles on the responsibility of States, reference may also be made, where appropriate, to the commentaries on those earlier articles.

Even if this footnote remains in the commentary after the second reading (and, a fortiori, if it disappears from the final commentary), the World Bank asks the Commission to consider expressly indicating, in its commentary to draft article 13, that organizations providing financial assistance do not, as a rule, assume the risk that assistance will be used to carry out an international wrong, as the commentary to the draft articles on responsibility of States clearly provides.

**Article 14. Direction and control exercised over the commission of an internationally wrongful act**

**United Nations**

1. The rule on “direction and control” finds its parallel in article 17 of the draft articles on responsibility of States. An illustration of the principle in relation to international organizations or an example of “joined exercise” of “direction and control”, in the view of the Commission, is the argument made by France in the case of the *Legality of Use of Force (Yugoslavia v. France)* before the ICJ, whereby “NATO [was] responsible for the ‘direction’ of KFOR, and the United Nations, for ‘control’ of it”.

2. In paragraph 7 of its commentary to article 17 of the draft articles on responsibility of States, the Commission noted “the term ‘controls’ refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern”, and that “the word ‘directs’ does not encompass mere incitement or suggestion but rather connote actual direction of an operative kind”. An example of “direction and control” exercised by an international organization “in certain circumstances” is a binding decision leaving no discretion to the State or the organization to which it is addressed to carry out the conduct mandated by the resolution.

3. The Secretariat knows of no practice supporting the rule on “direction and control” within the meaning of draft article 14, as commented upon by the Commission, and doubts the propriety of applying it by analogy from the articles on responsibility of States. Many aspects of this rule, in particular, the threshold for “direction and control”, its nature, and the means by which it can be exercised by international organizations, remain unclear. Unlike States, the United Nations does not, as in fact it cannot, control and direct a State by means normally available to States (military, economic, diplomatic). To the extent that “direction and control” takes the form of a binding resolution, it is difficult to envisage a single resolution controlling or directing a State. Finally, a binding resolution which would meet the condition referred to above, that is, one which would exert “operational control” over the commission of an internationally wrongful act, has never been encountered in the six-decade practice of the Organization.

4. It would be the Secretariat’s preference that the argument made by France in the *Legality of Use of Force (Yugoslavia v. France)* case before ICJ not be included as an example of “direction and control”. Not only is the statement controversial, as it has never been judicially determined, but in using it, the Commission may be seen as endorsing the argument that the United Nations had exercised control over the International Security Force in Kosovo (KFOR), which was not the case.

5. In the light of the foregoing, the Secretariat has serious doubts about the existence of “certain circumstances” in which a binding decision could constitute “direction

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2 Commentary to draft article 14, para. (3).
and control” within the meaning of draft article 14, and is of the view that the draft article has little practical effect for the Organization.

**WORLD BANK**

1. As to the requirement of “knowledge”, the World Bank would appreciate a clear indication, in the commentary to both this draft article and the previous one on “aid and assistance”, that this is actual (not presumed) knowledge, as in fact the Commission had indicated in paragraph (9) of its commentary to article 16 in the draft articles on responsibility of States.

2. As to “direction and control”, what are they? As a result of an agreement between an international financial institution and a borrower or recipient, direction and control for the implementation of project or programme activities are never really ceded, because the responsibility for implementation remains with the borrower or recipient, while the international financial institution engages at most in the exercise of oversight. Oversight is neither “control” nor “direction”, though. As the commentary to the corresponding provision in the draft articles on responsibility of States appropriately points out, control “refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight”. An express clarification to this effect in the commentary to draft article 14 would be critical to an accurate understanding of the text and to assuage any possible concern on the meaning and effect of such a provision.

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**Article 15. Coercion of a State or another international organization**

**UNITED NATIONS**

1. In paragraph (2) of its commentary to draft article 15, the Commission points out:

Between an international organization and its member States or international organizations, a binding decision by an international organization could give rise to coercion only under exceptional circumstances.

It reproduces the commentary to the draft articles on responsibility of States and its description of coercion as follows:

Coercion... has the same essential character as *force majeure*... Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. 1

2. It is the view of the Commission that the only means of coercion available to an international organization are binding resolutions, and that “coercion” within the meaning of draft article 15 must be akin to *force majeure*, leaving no choice to the coerced State or organization but to comply. “Coercion”, in the view of the Commission, can only occur “under exceptional circumstances”, but no example, however theoretical, is provided by the Commission for such circumstances.

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3. The Secretariat knows of no practice supporting the rule on “coercion”, and doubts the likelihood of its occurrence within the meaning of draft article 15. In the realities of the Organization, the probability of adopting a binding resolution by the Security Council which would meet the conditions of draft article 15—namely, a resolution not only binding a State to commit an international wrongful act, but through “coercion” having the effect of *force majeure*—is virtually non-existent. From the perspective of the Secretariat, therefore, this draft article, as with draft article 14, is likely to have little effect, if any, on the practice of the Organization.

**Article 16. Decisions, authorizations and recommendations addressed to member States and international organizations**

**EUROPEAN COMMISSION**

In its previous contributions, 1 the EU has commented that to hold that an international organization in a certain way in a certain situation is responsible for the conduct of a State or another international organization appears to go too far. It remains the case that the commentary cites no authority for such a rule. Furthermore, the entire draft article and the commentaries thereto appear to be inspired by the European Court of Human Rights judgment in the *Bosphorus case.* 2 It should be noted in this regard, as mentioned above, that the EU is currently negotiating its accession to the European Convention on Human Rights.

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**ILO**

Draft article 16 makes reference, not only to decisions and authorizations, but also to recommendations. It would appear that recommendations are—by their nature—non-binding acts and that for an internationally wrongful act to be committed as a consequence of a recommendation there needs to be an intervening act—the decision of the State or another international organization to commit that act. The chain of causation would be thus broken.

**OECD**

A wrongful act committed by a member country while implementing a decision or recommendation of an organization cannot be attributed to such organization, absent the direction or control of the organization regarding the act itself. Thus, the member country alone should be responsible for the manner in which it implements, or not, the decision or recommendation. It is understood that an organization shall not, through a decision or a recommendation, request a member country to breach any of the latter’s international obligations. In other words, as stated by IMF, 3 the identification of a certain objective by an international organization, which the member country decides to achieve by breaching its international obligations, can neither result in a breach of such obligations by the organization, nor in attribution to its responsibility.

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2 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi (Bosphorus Airways) v. Ireland* (Grand Chamber), judgment of 30 June 2005, No. 45036/98, Reports of Judgments and Decisions 2005-VI.
1. Draft article 16 addresses the case of an international organization trying to influence its members to achieve a result that it could not have lawfully achieved, and thus circumvent its international obligations. Proof of intent, according to the Commission, is not required.

2. The draft article distinguishes between binding and authorizing resolutions. A binding resolution entails the responsibility of the organization at the time of its adoption; an authorizing resolution entails its responsibility when the act is actually committed, and if committed because of that authorization or recommendation. The Commission adds in that connection that, while an international organization might be responsible for acts committed by States acting on the basis of an authorization, it would not be responsible “for any other breach that the member State or international organization to which the authorization or a recommendation is addressed might commit”.\(^1\)

It finally concludes that draft article 16 may overlap with draft articles 14 and 15, but is nevertheless necessary to cover situations in which the conduct of a member State to which a decision is addressed is not unlawful.

3. The examples set out below do not fall within the ambit of article 16, namely, of a binding resolution “tainted” with initial illegality, adopted to circumvent an obligation of an international organization. They are nevertheless provided as an indication of the practice of the United Nations when claims were received in respect of binding resolutions.

4. The United Nations has on occasion received claims for damages resulting from the implementation of a Security Council sanctions regime. In cases where claims were submitted for financial loss or damage, or for costs otherwise incurred in implementing Security Council enforcement measures, the Secretariat has rejected the responsibility of the Organization and maintained the position that in carrying out enforcement measures under Chapter VII of the Charter of the United Nations, States are responsible for meeting the costs of their implementation actions.

5. In the two cases brought to the attention of the Office of Legal Affairs in the mid-1990s, the legality of the Security Council resolution was not questioned. In the first, a claim was brought by an airline company for compensation for additional costs resulting from the re-routing of its passenger aircraft to avoid flying over Libyan territory. The claimant argued that Security Council resolution 748 (1992) imposed an “embargo” on Member States and prohibited their flights over Libyan airspace. The Secretariat response was, firstly, that no such prohibition had been imposed under the resolution, and, secondly, that

\[\text{under international law it is clear that if the Security Council takes action under Chapter VII of the Charter, individuals or corporate entities that suffer financial loss as a consequence of such action do not have a claim against the United Nations.}\] \(^2\)

6. The second case concerned a claim for the reimbursement of costs of carrying out an arms embargo imposed by the Security Council in resolution 733 (1992) on Somalia (i.e. the costs of discharging the cargo and reloading it after the completion of the search at the request of a State). The Secretariat responded:

The responsibility for carrying out embargoes imposed by the Security Council rests with Member States which are accordingly responsible for meeting the costs of any particular action they deem necessary for ensuring compliance with embargo.\(^3\)

7. In the Kadi case decided before the European Court of Justice, the Court held that its judicial review was not of the legality of the Security Council resolution under international law, but that of its implementing Regulation within the EU legal order. Its conclusion was premised on the assumption that States remain free to choose the particular model of implementation of Security Council resolutions in their domestic legal order, and that giving effect to Security Council resolutions must be in accordance with “the procedure applicable in that respect in the domestic legal order of each Member of the United Nations”.\(^4\)

8. In attributing responsibility to international organizations for their binding and non-binding resolutions adopted in breaches of their international obligations, draft article 16 has no parallel in the draft articles on responsibility of States. The cumulative conditions that it sets, including in particular the requirement that the decision imputing responsibility to the organization must be in circumvention of its international obligation (namely, in violation of the international obligations of the organization but not in that of any of the obligations of its member States), makes its application in the realities of international organizations, highly unlikely. At the same time, the Secretariat notes that, at least in respect of the proposal to extend responsibility to international organizations in certain cases in connection with recommendations that they may make to States or other international organizations, this would appear to extend the concept of responsibility well beyond the scope of previous practice with respect to either States or international organizations, and suggests that the Commission reconsider this point.

9. The Secretariat wishes to note that in imposing sanctions regimes the Security Council often makes allowance for breaches of contractual arrangements previously concluded between the States concerned. Thus, for example, paragraph 24 of Security Council resolution 687 (1991) imposes a ban on the sale and supply of arms and related material, technology and other training or technical support to Iraq. In paragraph 25 thereof, the Security Council “[called] upon all States and international organizations to act strictly in accordance with paragraph 24, notwithstanding the existence of any contracts, agreements, licences or any other arrangements”\(^5\).

\(^1\) Para. (12) of the commentary.


10. The Secretariat suggests the deletion of the words “albeit implicitly” from paragraph (12) of the commentary. This is not only because United Nations governing organs do not operate on the basis of “implied” authorizations or recommendations, let alone binding resolutions, but also, if not mainly, because of the difficulty of proving an “intent” to authorize absent clear, specific language to that effect.

11. If there is to be a rule imputing responsibility to the Organization for its binding and authorizing resolutions, it would be the Secretariat’s preference that draft articles 14, 15 and 16 be reconsidered independently of their parallel articles in the draft articles on responsibility of States with a view to drafting a single overarching draft article on the legal consequences of resolutions of all kinds adopted in breach of the Organization’s international obligations and their consequences for the responsibility of the Organization. Any such rule should respect the practice of international organizations in this area. It should, in particular, and as indicated in draft article 66, be without prejudice to the Charter of the United Nations.

CHAPTER V
CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 19. Consent

UNITED NATIONS

1. In its commentary to draft article 19, the Commission notes that the principle that consent precludes the unlawfulness of conduct is generally relevant in the case of an international organization when such consent is given “by the State on whose territory the organization’s conduct takes place”.1 It cites the examples of a United Nations commission of inquiry conducting an investigation, or a United Nations verification or monitoring mission deployed in a State’s territory.2

2. The Secretariat is of the view that in these examples the consent of the host State is not necessarily a circumstance precluding the wrongfulness of conduct, but rather a condition for that conduct, as it is, in fact, a condition for the deployment of any United Nations presence in a State’s territory (i.e. a United Nations conference, a United Nations Office, a peacekeeping operation (other than an operation under Chapter VII of the Charter of the United Nations), a political mission, a commission of inquiry or any other judicial or non-judicial accountability mechanism). A State’s consent for the presence of the United Nations or for the conduct of its operational activities in its territory is thus the legal basis for the United Nations deployment, without which the conduct would not take place.

3. In traditional peacekeeping operations where consent has been withdrawn before the end of the mandate, the withdrawal of the United Nations operation has usually followed suit. The case of the United Nations Emergency Force (UNEF) in 1967 is the most notable example. A more recent case is that of Eritrea, which in 2008 demanded the withdrawal of the United Nations Mission from its territory. In its resolution 1827 (2008), adopted on 30 July 2008, the Security Council “regretted that Eritrea’s obstructions towards the United Nations Mission in Ethiopia and Eritrea (UNMEE) reached a level so as to undermine the basis of the Mission’s mandate and compelled UNMEE to temporarily relocate from Eritrea”, and decided “to terminate UNMEE’s mandate effective on 31 July 2008”.

4. The Secretariat recalls that in the practice of the United Nations there are no instances of an unlawful act or conduct of the Organization consented by, or remedied by consent of, the “injured” entity. In suggesting the deletion of the examples given by the Commission, for the reasons explained above, the Secretariat has no objection to maintaining a broadly conceived rule applicable to any kind of State’s consent to an unlawful act by an international organization, as an element precluding wrongfulness. However, the understanding is that the act itself must be unlawful or already in breach of an international obligation for the responsibility of the international organization to be precluded by the consent of a State or another international organization.

5. The Secretariat is mindful of the fact that similar examples are provided by the Commission in its commentary to the draft articles on responsibility of States. It nevertheless emphasizes the difference in this regard between States and international organizations. Unlawful acts of States in territories of other States are quite often possible without the consent of the territorial State—for the most part because of territorial proximity. In the case of the United Nations, however, access to a territory of a State is conditioned upon a mandate by its political organs, and is virtually impossible without the consent of the host State.

Article 20. Self-defence

UNITED NATIONS

1. In its commentary, the Commission notes that self-defence is an exception to the prohibition on the use of force; that its applicability to international organizations is likely to be relevant to only those international organizations “administering a territory or deploying an armed force”,1 and that the “extent to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission”.2

2. The Secretariat’s comments on the draft article do not address cases of “self-defence” outside the context of armed conflict in which peacekeeping forces are engaged. Rather, they are limited to the use of force in self-defence in response to attacks against a United Nations operation in a situation of armed conflict.

3. The use of force in self-defence in situations of armed conflict has not been uncommon in the practice of peacekeeping operations. Some of the most recent examples are the cases of the United Nations Protection Force (UNPROFOR) in Bosnia and Herzegovina, United Nations Operation in Somalia (UNOSOM), United Nations

1 Para. (2).
2 Para. (3).
Organization Mission in the Democratic Republic of the Congo (MONUC), the United Nations Mission in the Sudan (UNMIS) and the African Union/United Nations Hybrid Operation in Darfur (UNAMID). In the long practice of peacekeeping operations, including United Nations transitional administrations, however, there has never been a case where the responsibility of the Organization was invoked for the illegal (or “aggressive”) use of force (jus ad bellum). However, the Organization has accepted liability in respect of certain types of damages incurred in the course of military operations, whether offensive or defensive in nature (jus in bello), normally through a third-party claims process implemented through the respective peacekeeping mission.

4. While the Secretariat considers that the measure of self-defence—its nature, content and scope of application—is essentially a question of the primary rules of international law, it conceives that it could also operate as a circumstance precluding wrongfulness and should thus be included in the text of the draft articles.

**Article 21. Countermeasures**

**United Nations**

1. The institution of countermeasures\(^1\) as applicable to States is not easily transferable to international organizations. While countermeasures taken by States are intrinsically unlawful (but for the fact of the initial wrongfulness), countermeasures taken by international organizations are situated somewhere in the seam between legality and illegality, as they must be “not inconsistent” with the rules of the organization. Countermeasures undertaken by international organizations, therefore, cannot be specifically allowed, but they cannot be specifically prohibited either. The rules of the organization must be silent on the matter for the measure to be “not inconsistent” with the rules, and thus qualified as a “countermeasure” within the meaning of the draft articles of the Commission. The question of what effect, if any, the silence of the rules has on the permissibility or otherwise of the measure, remains debatable.

2. In the practice of the United Nations, while decisions have occasionally been made to achieve a result other than by means expressly provided for under the Charter of the United Nations, none has been qualified as a countermeasure. One such example was the exclusion of South Africa at the time of apartheid, from participation in meetings of the General Assembly and in conferences convened by it. In a legal opinion on the “Procedures for the suspension of a Member State from an organ open to general membership—Article 5 of the Charter”, the United Nations Legal Counsel expressed the view that any State upon admission to membership is entitled to expect that its obligations will not be increased and its rights not be curtailed “except in the manner expressly laid down in the Charter”; that the only procedure by which a State might be denied the rights and benefits of membership are those laid down in Articles 5, 6 and 19 of the Charter of the United Nations, and

3. The principle that the exercise of powers or the employment of means not expressly provided for under the Charter of the United Nations (to achieve a result other than by the means provided for) are inconsistent with the Charter of the United Nations, was applied by the Office of Legal Affairs in subsequent years in other different contexts (i.e. rejection of the credentials of South Africa\(^2\) or the case of the non-representation of the Federal Republic of Yugoslavia\(^3\)). Based on the foregoing, it is highly likely that the questions of what legal effect should be attributed to the silence of the rules, and whether “not inconsistent with” necessarily means “not illegal”, will remain debatable.

4. In applying by analogy the institution of countermeasures to the relations between international organizations and their member States, little account was taken of the fact that the process leading to the adoption of countermeasures by international organizations is fundamentally different from the process leading to the adoption of countermeasures by States. When taken by States, countermeasures are considered “unilateral acts” both in defining the presumed illegality of the initial act, and in the choice of the response. Countermeasures taken by international organizations, on the other hand, are the result of a multilateral, all-inclusive and, in the case of the United Nations, virtually universal process. It is a “centralized process” unlike the “decentralized” system of States’ countermeasures. The question of what effect, if any, should be given to such a system of countermeasures in legalizing the measure, or legitimizing it, has been overlooked.

5. Equally overlooked is the principle of “cooperation and good faith” guiding the relations between the Organization and its Member States,\(^4\) against which the institution of countermeasures should also be examined when it is applied by analogy from States.

6. The lack of practice that is a distinctive feature of a significant number of the draft articles, characterizes also and perhaps more particularly, those on countermeasures, where even a hypothetical example of countermeasures is difficult to envision.

7. In the practice of the United Nations, no measure taken, whether against a State or an organization, has ever been qualified as a countermeasure. Nevertheless, certain authors suggest that some instances could be considered countermeasures, such as the decision by the General Assembly to reject the credentials of South

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\(^1\) Given the universal character of the United Nations, in which all States are presently members, the Secretariat has limited its comments to countermeasures taken by the Organization against its Member States.


\(^3\) A/8160.

\(^4\) A/47/485, annex.

\(^5\) Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, advisory opinion, I.C.J. Reports 1980, p. 93, para. 43.
Africa in response to its policies of apartheid;\(^6\) the expulsion of South Africa from the Universal Postal Union in 1979; the rejection of the credentials of Israel by IAEA in 1982 in the aftermath of the raid on the Osiraq reactor; the denial of ILO cooperation assistance for Myanmar in 1999 in response to its practice of forced labour; the suspension in 1962 of Cuba from membership in OAS; and the suspension of Egypt from the Organization of the Islamic Conference in 1979 in the aftermath of the peace agreement with Israel. In none of these cases, however, were the measures adopted qualified as countermeasures.

8. In the view of the Secretariat, the number and complexity of the conditions put on an injured international organization in the pursuit of countermeasures within the meaning of the draft article, may make it virtually impossible for it to meet them. The injured organization is required to show that the measure taken is not inconsistent with the rules of the organization, that it is otherwise in accordance with the conditions set out in draft articles 50 to 56 and other unspecified "substantive and procedural conditions required by international law", and that it had no other means to induce compliance but through the measure taken.

9. The Secretariat agrees with the Commission’s conclusion that

\[\text{sanctions, which an organization may be entitled to adopt against its members according to its rules, are per se lawful measures and cannot be assimilated to countermeasures.}\]

10. Because of the fundamental differences between international organizations and States, the nature of the relationship between an international organization and its member States, the different processes leading to the adoption of countermeasures by States and by international organizations and the lack of relevant or conclusive practice, the Secretariat recommends that the chapter on countermeasures not be included in the draft articles on the responsibility of international organizations.

\(^6\) The legality of the measure under the rules of the Organization, however, was debatable. While some defended the legality of the measure, others argued that the action by the General Assembly interfered illegally with South Africa’s rights of membership in the United Nations, and thus in violation of the Charter of the United Nations. See Dugard, “Sanctions against South Africa: An international law perspective”. See also Dopagne, \textit{Les contre-mesures des organisations internationales}, pp. 91–95.

\(^7\) Para. (3) of the commentary to draft article 21.

\textbf{Article 24. Necessity

\textbf{UNITED NATIONS

1. Drawn by analogy from draft article 25 of the draft articles on responsibility of States, “necessity” as a circumstance precluding wrongfulness must be the only means available for an international organization to safeguard against a grave risk threatening the interest of the international community. The plea of “necessity” can only be invoked by the organization whose function it is to protect the interest in peril. However, the examples given by the Commission hardly evidence an act to safeguard an interest of the international community against an imminent peril.

2. The United Nations has not as yet encountered a situation of “necessity” within the meaning of article 24. The concept of “operational necessity” which developed in the context of peacekeeping operations is of course a very different concept of “necessity”, in the nature of the obligation breached, the interest protected and the “grave” peril against which it is safeguarded. Drawn by analogy from the concept of “military necessity” applicable in times of armed conflict, the concept of “operational necessity” applies to the non-military activities of the United Nations force, as a circumstance precluding liability for property loss or damage caused in the ordinary conduct of the operation and in pursuit of the force mandate.

3. The 1996 report of the Secretary-General on the financing of the peacekeeping operations redefined the concept of “operational necessity” and circumscribed its lawful contours. In striking a balance between the operational necessity of the United Nations force and respect for private property, the Secretary-General placed the following conditions on the United Nations invocation of “operational necessity” as a circumstance precluding liability:

\begin{itemize}
  \item[(a)] There must be a good-faith conviction on the part of the force commander that an “operational necessity” exists;
  \item[(b)] The operational need that prompted the action must be strictly necessary and not a matter of mere convenience or expediency. It must also leave little or no time for the commander to pursue another, less destructive option;
  \item[(c)] The act must be executed in pursuance of an operational plan and not the result of a rash individual action;
  \item[(d)] The damage caused should be proportional to what is strictly necessary in order to achieve the operational goal.\(^1\)
\end{itemize}

4. While in the practice of the United Nations there has never been a situation where “necessity”, within the meaning of article 24, has arisen as a circumstance precluding responsibility, the eventuality that such a situation may occur in the future practice of the Organization, including its temporary administration and peacekeeping operations, cannot be excluded. The Secretariat, therefore, supports the inclusion of the rule on “necessity” in the proposed draft articles.


\textbf{PART THREE

\textbf{CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

\textbf{CHAPTER I

\textbf{GENERAL PRINCIPLES

\textit{Article 29. Cessation and non-repetition

\textbf{UNITED NATIONS

1. With respect to subparagraph (b) of the draft article, paragraph (4) of the commentary to article 29 states that}
“[e]xamples of assurances and guarantees of non-repetition given by international organizations are hard to find”. In fact, the commentary provides no example of an assurance or guarantee of non-repetition provided by an international organization. The commentary continues, however, that “should an international organization be found in persistent breach of a certain obligation—such as that of preventing sexual abuses by its officials or members of its forces—guarantees of non-repetition would hardly be out of place”.

2. The Secretariat questions whether, in view of the complete absence of cited practice with respect to the provision of assurances and guarantees of non-repetition by international organizations, it is appropriate for the Commission to conclude that an obligation to offer such assurances and guarantees exists at the present time, and suggests that the Commission reconsider the inclusion of this subparagraph in draft article 29.

3. The Secretariat also suggests that the Commission reconsider the sentence in the commentary with respect to the prevention of sexual abuses by officials of an international organization or members of a force of such an organization. The subject is indeed an important one that has received substantial attention by the United Nations and other international organizations, and an off-hand reference to the subject that seems to suggest a “hardly out of place” standard for the requirement of assurance and guarantees of non-repetition in this context may not reflect the complexity of the issue.

Article 30. Reparation

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO and WTO

These organizations are concerned that limited attention seems to have been paid by the Commission to the special situation of international organizations in relation to the obligation to compensate. If international organizations are “under an obligation to make full reparation for the injury caused by the internationally wrongful act”, this could lead to excessive exposure taking into account that international organizations in general do not generate their own financial resources but rely on compulsory or voluntary contributions from their members. This could be unrealistic because, if the internationally wrongful act of an organization causes major damage, the organization might not have the funds to provide full compensation or, conversely, the payment of compensation could compromise its activities and mandates.

ILO

1. In order to determine the existence of practice, the Commission and its Special Rapporteur quoted, in particular, the examples of jurisprudence of the administrative tribunals, used to support the proposals regarding possible reparations by international organizations for internationally wrongful acts, which are not relevant for the discussion on the responsibility of international organizations under general international law. Administrative tribunals have been created as a part of the “rules of the organization” and have been given different mandates by each “parent” organization. For example, the reinstatement of an official, as a measure that can be ordered by an administrative tribunal, does not exist in the statutes of all administrative tribunals. ILO therefore considers that such a practice is not relevant for the discussion on the responsibility of international organizations under general international law. It is also important to distinguish between acts committed by international organizations that are internationally wrongful, namely, being violations of international law, and those that are wrongful under national law.

2. Another potential problem with examples quoted by the Special Rapporteur is the unique situation of the EU. Examples of responsibility of organizations that are themselves members of other organizations, such as the EU, and therefore subject to judicial or quasi-judicial organs of the latter organizations, would not necessarily amount to the practice applicable to all other “traditional” international organizations. The Commission may want to review the examples that led to some conclusions of the Commission in order to ensure that they apply only to such narrow situations.

3. The criterion of “full reparation”, may lead to ideas requiring international organizations to maintain a contingency fund or have a large amount of insurance in order to ensure solvency in the event of such liabilities, or another type of mechanism for member States to contribute to pay such liabilities when and if they arise. International organizations are—in principle—not profit-generating and cannot rely on a tax system to finance their operations. They have to rely on funds allocated to them. If they were to provide funds for contingent obligations such as a possible compensation, they would have reduced funds for fulfilling their original mandates. By imposing such a parallel obligation on international organizations, the Commission risks limiting effectively their future operations. The requirement of “full reparation” may lead, in the case of compensation, to the disappearance of the international organization concerned. The Commission may want to consider some limits in the duty to compensate, as was done in the case of satisfaction.


UNITED NATIONS

1. In applying the principle of full reparation to international organizations, the International Law Commission recognizes the inadequacy of financial resources often available to international organizations to respond in cases of international responsibility. In this connection, it suggests that compensation offered ex gratia by international organizations is not necessarily due to abundance of resources, but rather to their reluctance to admit their international responsibility.

2. The Secretariat notes that, in the practice of the Organization to date, compensation would appear to be the only form of reparation, although restitution and satisfaction remain possible forms of reparation.

1 Paras. (3) and (4) of the commentary to draft article 30.
3. By its resolution 52/247, of 26 June 1998, the General Assembly adopted certain financial and temporal limitations on third-party liability resulting from peacekeeping operations. They include claims arising from: (a) personal injury, illness or death; (b) damage to property; and (c) non-consensual use of privately owned premises, unless such claims are precluded as a result of “operational necessity”.

4. Under the above-mentioned resolution, the payment of compensation is subject to the following limitations:

(a) Compensable types of injury or loss are limited to economic loss, such as medical and rehabilitation expenses, loss of earnings, loss of financial support, transportation expenses associated with the injury, illness or medical care, as well as legal and burial expenses;

(b) No compensation is payable by the United Nations for non-economic loss, such as pain and suffering or moral anguish, as well as punitive or moral damages;

(c) Except in exceptional circumstances, and subject to requisite approval (including approval by the General Assembly), the amount of compensation payable for injury, illness or death must not exceed a maximum of $50,000, provided, however, that within such limitation, the actual amount is to be determined by reference to local compensation standards;

(d) Compensation for loss or damage to personal property shall cover the reasonable costs of repair or replacement;

(e) The payment of compensation is excluded in the event of operational necessity.

5. The above financial limitations do not apply to claims of gross negligence or wilful misconduct, or in particular areas, such as vehicle accidents and aircraft accidents, where the United Nations has made arrangements for commercial insurance to cover third-party claims for personal injury or death.

6. In order to ensure the opposability of such limitations to third parties, the United Nations concludes agreements with Member States in whose territories peacekeeping missions are deployed, and includes in such agreements provisions for the application of such financial and temporal limitations on third-party liability.

7. In addition to peacekeeping operations, financial limitations on the liability of the United Nations are prescribed in regulation 4, adopted by the General Assembly in its resolution 41/210 of 11 December 1986 for the United Nations Headquarters district in New York. The regulation aims at placing “reasonable limits on the amount of compensation or damages payable by the United Nations in respect of acts or omissions occurring within the Headquarters district”. Accordingly, compensation for economic loss cannot be paid in excess of the limits prescribed under the Rules Governing Compensation to Members of Commissions, Committees or Similar Bodies in the Event of Death, Injury or Illness Attributable to Service with the United Nations, and for non-economic loss in an amount not exceeding $100,000.

8. The Secretariat is of the view that the obligation to make reparation, as well as the scope of such reparation, must be subject, in the case of the United Nations, to the rules of the organization, and, more particularly, to the lex specialis rule within the meaning of draft article 63.

### Article 31. Irrelevance of the rules of the organization

**Council of Europe**

Draft article 31 may give rise to certain hesitations as it would seem difficult to hold an international organization responsible for provisions contained in its constituent treaty which are wrongful under international law. The meaning of the word “rules” in paragraph 1 of the draft article would benefit from further clarification.

**European Commission**

As commented above in relation to draft article 9, it is not consistent for the draft articles to state, on the one hand, that a responsible international organization may not rely on its internal law (“its rules”) to justify its failure to comply with its obligations (draft article 31, para. 1) and, on the other hand, state that a breach of the internal law of the organization may amount to a breach of international law (draft article 9, para. 1).

**ILO**

The rules of organizations should not be compared to the internal rules of States, as was done in draft article 31 where the Commission makes a simple parallel to the principle that a State may not rely on its internal law as a justification for failure to comply with its obligations. It remains important to clarify whether the “rules of the organization” are part of international law or represent a sui generis system. In the situation described by draft article 31, one can detect a conflict of norms on the same level rather than the hierarchy of norms that was justified in the context of State responsibility. One can even imagine the precedence of constituting instruments. For example, if an international organization under the decision of its organs refrains from providing technical assistance to a member State with which it has a valid treaty, would it be a conflict of two international obligations at the same level or should the obligation that prevails be the one derived from the constituent instrument of the organization? Should the rules of the organization preclude illegality of breach of another international obligation and provide a sufficient justification for not making reparations? Or should the responsibility be of a purely objective nature, which means that an organization would be responsible for having breached an international obligation even if its governing bodies requested it to act in that way? Chapter V of the draft articles does not seem to adequately address this question.

**United Nations**

1. The Secretariat reiterates the importance of the dual nature of the rules of the organization and the distinction to be made between the rules of international law and the internal law of the organization. The Secretariat also notes that, in the case of the United Nations, whose “rules” include the Charter of the United Nations, reliance on the
latter would be a justification for failure to comply, within the meaning of draft article 31, paragraph 1.

2. The Secretariat considers that paragraph 2 of draft article 31, read in conjunction with the Commission commentary, in particular paragraphs (3) and (4) thereof, addresses its concerns that in the relations between the Organization and its Member States, the rules of the organization on the forms of reparation, including limitations of its third-party liability, should apply as part of the more general rule of *lex specialis*.

**Article 32. Scope of the international obligations set out in this Part**

**United Nations**

1. In paragraph (5) of its commentary to draft article 32, paragraph (2), the Commission provides two examples of significant areas in which rights accrue to persons other than States or organizations. The first concerns breaches by international organizations of their obligations under international law concerning employment, and the second concerns breaches by peacekeepers which affect individuals. The Commission goes as far as stating that, while the consequences of these breaches with regard to individuals are not covered in the draft articles, “certain issues of international responsibility arising in this context are arguably similar to those that are examined in the draft”.

2. The Secretariat recommends the deletion of paragraph (5) of the commentary, as it may create the misconception that the rules contained in the draft article apply with respect to entities and persons other than States and international organizations. The Secretariat notes that the terms and conditions of employment are governed by the internal rules of the Organization and their violation would therefore not entail the international responsibility of the Organization. The Secretariat also notes that in the practice of peacekeeping operations, claims against the Organization have been, with few exceptions, of a private law nature. Finally, the Secretariat notes that under article VIII, section 29, of the Convention on the privileges and immunities of the United Nations, the Organization is duty-bound to provide alternative modes of settlement to address disputes of a private law character.

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For example, United Nations Staff Regulations and Rules.

1 For example, United Nations Staff Regulations and Rules.

**CHAPTER II**

**REPARATION FOR INJURY**

**Article 35. Compensation**

ILO

See the comment under draft article 30, above.

**Article 36. Satisfaction**

ILO

As regards satisfaction as one of the possible forms of reparations by international organizations, there is a difference between the responsibility of States and that of international organizations. While the customary rule of international law as to who represents a State in international relations is well established, this is not obvious for international organizations, especially as different organs may be at the origin of the internationally wrongful act that needs to be repaired. Examples quoted by the Special Rapporteur and the Commission demonstrate that there is confusion in this field. While executive heads are a visible part of an organization, they are rarely empowered in the constituent instrument to represent the organization in such matters. It would thus seem important to add a qualifier at the end of the second paragraph of draft article 36, such as “made in accordance with the rules of the organization concerned” or a reference to a “competent organ”.


**United Nations**

1. In the commentary, the Commission refers to pronouncements made by the United Nations Secretary-General in connection with the report of the independent inquiry into the acts of the United Nations during the 1994 genocide in Rwanda, and his report on the fall of Srebrenica expressing “regret” and “remorse” at the failings of the United Nations.

2. Without in any way attempting to qualify the nature of those expressions of regret in relation to events still loaded with heavy moral and political implications, the Secretariat wishes to reiterate that, in the words of the Commission, those “examples... do not expressly refer to the existence of a breach of an obligation under international law”,

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1 Paras. (2) and (3).
2 Report of the Secretary-General pursuant to General Assembly resolution 53/35: The fall of Srebrenica (A/54/549), para. 503.
3 Para. (1) of the commentary.

**Article 37. Interest**

**United Nations**

1. The Commission states in its commentary that the rules on interest “are intended to ensure application of the principle of full reparation” and that “similar considerations in this regard apply to international organizations”.

2. As a matter of policy, the United Nations generally does not pay interest. Consistent with the United Nations Financial Regulations and Rules, and with appropriations made by the United Nations General Assembly, the Organization pays for goods and services received by it from commercial contractors. In its contracts with commercial vendors, therefore, the United Nations typically excludes the payment of interest. Accordingly, the United Nations has paid interest in rare instances only, for example, on the basis of adjudications by arbitral tribunals.

3. The Secretariat considers that this draft article, like others in this part, should be subject to the “rules of the organization” and the principle of *lex specialis* within the meaning of article 63 of the present draft articles.

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1 Para. (1).
Article 39. Ensuring the effective performance of the obligation of reparation

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO AND WTO

Draft article 39 is a step in the right direction but it does not go far enough. Since the draft articles are largely an exercise in progressive development of international law, this could be a unique occasion to state the obligation of member States to provide sufficient financial means to organizations with regard to their responsibility.

European Commission

The rule proposed in draft article 39 appears to be primarily based on one precedent, namely, the Tin Council case. As far as the EU is concerned, there would appear to be no need for the draft articles to include such a generic rule. In any event, it should be noted that the EU has a budget line providing a contingency reserve to deal with unforeseen circumstances.


ILO

Paragraph (3) of the commentary to draft article 30 regarding reparations clearly states that international organizations may not have all the necessary means for making the required reparations, especially due to the inadequacy of financial resources. This commentary is, however, disregarded in the light of the explanation that inadequacy cannot exempt a responsible organization from the legal consequences resulting from its responsibility under international law. While the general principle may be acceptable, its practical application in terms of compensation seems problematic. In this context, draft article 39 is welcome as an innovative approach, but may need to be reinforced even further. The requirement for member States to act in accordance with the rules of the organization seems, however, redundant.

Part Four

The Implementation of the International Responsibility of an International Organization

Chapter I

Invocation of the Responsibility of an International Organization

Article 42. Invocation of responsibility by an injured State or international organization

European Commission

The EU has standing before several international dispute settlement bodies, allowing non-EU States to bring proceedings against it (e.g. WTO dispute settlement bodies and ITLOS). In addition, non-EU States may have by virtue of express provisions in international agreements concluded with the EU the possibility of seizing EU courts with cases of alleged breaches of the agreement by the EU. Furthermore, as mentioned above, when the EU accedes to the European Convention on Human Rights, non-EU States will be able to bring applications against the EU on the basis of the “inter-State” provisions of the Convention.

OSCE

The conjunction “and” in the phrase “the position of all the other States and international organizations” in subparagraph (b) (ii) should be replaced by “or”.

Article 44. Admissibility of claims

OSCE

A reference to the functional character of claims of an international organization against another international organization or State based on the criterion of “agent” (draft article 2 (c)) could be added in draft article 44, preferably before paragraph 2.

United Nations

1. In its commentary to the draft article, the Commission acknowledges that effective remedies within international organizations exist in only a limited number of international organizations, and notes that “local remedies” within the meaning of draft article 44 include such other remedies available before arbitral tribunals, national courts or administrative bodies when the international organization has accepted their competence to examine claims.1

2. From the perspective of the Secretariat, it is essential to clarify at the outset that the reference to “exhaustion of local remedies” should not be read to suggest any obligation on the part of international organizations in any context to open themselves up to the jurisdiction of national courts or administrative bodies. The Commission makes reference, for example, to the applicability of paragraph 2 in the context of “the treatment of an individual by an international organization while administering a territory”.2 The Secretariat notes, however, that insofar as the United Nations is concerned, when it has acted as an interim territorial administrator, no remedies in local courts or administrative bodies were available to private persons with respect to actions taken by the Organization. In fact, the applicable rules have provided for a general immunity from the jurisdiction of local courts and tribunals. It is conceivable that the reference to “exhaustion of local remedies” in this context could create confusion and the Secretariat suggests that it be made clear that no contradiction with the immunity regime of the United Nations or other organizations as appropriate is intended by the reference to local remedies.

1 Para. (9).
2 Para. (6).
3. At the same time, however, the Secretariat notes that the Organization’s practice supports two conclusions with respect to such “available and effective” remedies as it has created: first, where the Organization has created an “available and effective remedy”, that remedy provides the only process available for the consideration of matters falling within the scope of the remedy; and, second, any decision resulting from such a process is regarded as final and binding in character.

4. Two types of “available and effective remedies” created by the Organization can be identified to illustrate the Organization’s practice. First, there is the internal justice system available for United Nations staff members in all matters relating to their conditions of service. As presently restructured, it consists of a two-tiered system of administration of justice (United Nations Dispute Tribunal and United Nations Appeals Tribunal) to hear cases against the Secretary-General in appeal of an administrative decision alleged to be in non-compliance with the terms of appointment or contract of employment.3

5. Second, there are the procedures established in cases of disputes of a private law character between the Organization and third parties, the establishment of which are mandated under article VIII, section 29, of the Convention on the privileges and immunities of the United Nations. These procedures would include those established to address claims arising in the context of United Nations peacekeeping and other missions, including cases in which the Organization has acted as a temporary territorial administrator, and contractual terms providing for recourse to final and binding arbitration in respect of claims arising under the contract.

6. Finally, the Secretariat notes, in respect of draft article 49 as it applies to draft article 44, paragraph 2, that the practice of the United Nations is uniform with respect to persons or entities other than States that, where “available and effective remedies” are provided by the United Nations, there is no possibility of recourse to the Organization except through the procedures provided.


Article 47. Plurality of responsible States or international organizations

In relation to draft article 47, reference is made to the comments made above in relation to paragraph (9) of the commentaries to draft article 9. The Court of Justice of the European Union case Parliament v. Council4 is correctly discussed here as an example of a “mixed” agreement, where on the EU side not only the EU but also its member States are parties. It is worth noting also that while both the EU and all its member States are members of the WTO, most disputes are entirely directed and enforced against the EU only.


Chapter II

COUNTERMEASURES

Article 50. Objects and limits of countermeasures

EUROPEAN COMMISSION

In relation to the commentaries set out in paragraph (4), it should be pointed out that WTO operates a specific regime of “countermeasures” under articles 21 and 22 of the Disputed Settlement Understanding. To the extent that these countermeasures are authorized by treaty, it is arguable that these do not provide genuine examples of countermeasures under general international law.

OSCE

OSCE agrees with the possibility of countermeasures by or against international organizations, which ought to be distinguished from sanctions that an organization may impose on its members in accordance with its internal rules. The relevant provisions of the draft articles (draft articles 21 and 50–56) apply only to the former category of actions. Some specific countermeasures concerning the non-performance of obligations owed to other international organizations or States may, however, ultimately affect third parties, for example, the beneficiaries of a programme jointly implemented by two or more international organizations and States, which is common in OSCE. In this context, the cessation of the (funding of the) implementation of such a project, as a countermeasure against a partner, may also affect the State where the project is being implemented or the final beneficiaries of the project. While the draft articles address the impact that countermeasures may have on the targeted entity (see draft article 53), it may also be useful to address the issue of the impact of countermeasures on non-targeted entities. A specific explanation in the commentary may cover this issue.

UNITED NATIONS

The Secretariat notes that draft article 50, paragraph (1), does not contemplate the possibility of countermeasures taken by an injured international organization against a State or a member State, but only against an international organization. This appears to be inconsistent with the text of draft article 21. The same comment applies to draft article 54.

Article 51. Countermeasures by members of an international organization

EUROPEAN COMMISSION

Draft article 51, subparagraph (a), again raises the question, referred to above, of the status under international law of the internal law of an organization. It is very doubtful that this draft article could be applied to the EU so as to allow for the hypotheses of countermeasures under international law between the organization and its member States. This is demonstrated in part by the case law of the Court of Justice of the European Union discussed in paragraph (6) of the commentaries, where it is correctly stated that the existence of judicial remedies within the EU appears to exclude EU member States from resorting to countermeasures against the EU.
**Article 52. Obligations not affected by countermeasures**

**UNITED NATIONS**

1. In its commentary to paragraph 1, subparagraph (a), of draft article 52, the Commission suggests:

   The use of force could be considered a countermeasure taken against an international organization only if the prohibition to use force is owed to that organization.¹

   The Secretariat is of the view that the prohibition on the use of force should be stated unequivocally both in the text of the draft article and in the commentary.

2. The Secretariat also recommends that, if maintained, paragraph 2 (b) of draft article 52 should be redrafted to reflect accurately the privileges and immunities enjoyed by international organizations. In addition to agents, premises, archives and documents, it should include property, funds and assets, as these are particularly vulnerable to countermeasures when situated in the territory of the injured State. The Commission may wish to consider the following formulation of paragraph 2 (b) to read as follows:

   “To respect the applicable privileges and immunities of agents of the responsible international organization, its property, funds and assets as well as the inviolability of the premises, archives and documents of that organization.”²

³ Para. (1) of the commentary.

**Article 53. Proportionality**

**UNITED NATIONS**

In its commentary to draft article 53, the Commission states that when an international organization is injured it would be for the organization and not for its member States to take the countermeasures as a means to prevent an excessive impact.¹ In the realities of the United Nations, however, the distinction between the Organization and its Member States for this purpose is not always self-evident. If ever adopted, countermeasures would most likely be taken by means of a resolution and, as such, would be implemented by the Member States of the Organization.

¹ Para. (4).

² Para. (10) of the commentary to draft article 2.

³ See, for example, opinion 2/91 of 19 March 1993 of the European Court of Justice, European Court Reports 1993, p. 1-01061.

**PART FIVE**

**RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF AN INTERNATIONAL ORGANIZATION**

**ILO**

1. ILO expressed its reservations as to what appear to be a joint responsibility of States and international organizations already in its 2006 comments.¹ In determining the right of the United Nations to make an international claim, the starting point for ICJ was the argument that the organization occupied a position in certain aspects in detachment from its members. It is difficult to reconcile this position with the position of the Commission:

   A distinct legal personality does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members.²

   Unless the organization itself authorizes its members to act on its behalf (“through the medium of the Member States”) as, for example, when due to the impossibility for the organization to accept the international obligation,³ or where shared liability is provided by treaty, there seems to be no clear reason why, for example, member States should be held liable for decisions taken by the organization bodies, particularly as they may be (and usually are) taken by a (majority) vote.

2. The notions of aid and assistance (draft article 57), and even more direction and control (draft article 58), not to mention “coercion” (draft article 59), seem to deny the distinct legal personality of international organizations. The justification of piercing the “organization veil” cannot be found in the commentaries of the Commission and a parallelism between the corresponding articles on responsibility of States does not appear to be helpful in distinguishing between a participation in the decision-making process of an organization according to its pertinent rules, and the situations envisaged by the draft articles. The impact that “the size of the membership” and “the nature of the involvement” may have in this context requires further clarification.

3. It would appear that a distinction between members and non-members—or at least in what capacity States act in each situation—may be important in the situations foreseen in draft articles 57 to 59. Member States both act within international organizations and have an external legal relationship with them. Multiple layers of relationship between an international organization and its member States do not seem to be adequately taken into consideration. For example, member States contribute financially to the activities of the organizations not only (or even less and less) through their contributions to the regular budget, but also through their voluntary contributions, either budgetary or extrabudgetary. The responsibility in this type of relationship is based on both lex specialis of internally adopted rules and general treaty law.


² Para. (10) of the commentary to draft article 2.

³ See, for example, opinion 2/91 of 19 March 1993 of the European Court of Justice, European Court Reports 1993, p. 1-01061.

**Article 60. Responsibility of a member State seeking to avoid compliance**

**EUROPEAN COMMISSION**

Reference is made to the comments in connection with draft article 16, above. The improvements made in the drafting of the present draft article compared to earlier versions appear welcome. As for the question of “intent”, the notion of “seeking to avoid” compliance does require establishment of intent, even if this intent can be inferred from the circumstances, as set out in paragraph (7) of the commentary.
Article 61. Responsibility of a State member of an international organization for the internationally wrongful act of that organization

European Commission

1. The European Commission considers that draft article 61, paragraph 1 (a), should read: “(a) It has in conformity with the rules of the organization accepted responsibility for that act.”

2. It seems doubtful whether the concept of “reliance” referred to in draft article 61, paragraph 1 (b), is a workable concept. The commentary at paragraph (9) as a whole does not seem to support such a rule. It appears to be based on a single arbitration award, Westland Helicopters, which could support the rule but appears to have been rendered in fairly exceptional circumstances.

3. On the whole, the main issue that draft article 61 raises is the question of “permeability” of international organizations vis-à-vis international law. The text of the draft articles and the commentaries as they stand appear to suggest to third States that there is legal uncertainty as regards where precisely the border lies.

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PART SIX

GENERAL PROVISIONS

Article 63. Lex specialis

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO and WTO

The interplay of the lex specialis principle in relation to the role devoted in the draft articles to the “rules of the organization” is ambiguous. These organizations can accept that a single text covers all issues of responsibility involving international organizations. But, if this is so, special attention should be paid to the principle of speciality, which is one of the main factors differentiating the legal personality of international organizations from that of States. They therefore suggest the inclusion, in the introductory provisions of the draft articles, of an express provision specifying that the responsibility of international organizations is defined by the principle of speciality. The organizations are concerned that, if the draft articles follow the same course as the draft articles on responsibility of States and are left entirely to utilization by Governments, judicial bodies and other interpreters, their heavy reliance on the latter articles may make them unenforceable in practice or lead international organizations to be treated increasingly like States from the point of view of their responsibility under international law, with unpredictable long-term consequences.

European Commission

1. There are ample reasons for assuming that the EU is an international organization that is unlike other more traditional international organizations. The special features of the EU are many and can be summarized as follows:

   - EU member States have transferred competences (and therefore decision-making authority) on a range of subject matters to the EU. The overall dividing line between competences of the member States and of the EU is subject to continuous development, in accordance with rules set out in the founding treaties and the case law of the Court of Justice of the European Union.

   - In many cases the EU is able to act in the international sphere in its own name. It can become a member of an international organization, where the constitutional rules of the latter so allow; it can conclude bilateral treaties on behalf of the EU with non-EU States and non-EU entities; it can become a party to multilateral agreements in its own name and on its own behalf; and it can also become a party to international legal proceedings on its own behalf. In cases where the EU is unable to exercise its competence in the international sphere, because of lack of standing at the “receiving end” (particularly when international treaties and organizations do not allow for international legal subjects other than States to become party), the EU may have to continue to use the vehicle of acting through its member States. However, in such cases, EU member States do not act on their own behalf but on behalf and in the interest of the EU.

   - The special character of the EU as a result of the transfer of powers has implications for the freedom of EU member States to act in the international sphere; the EU acts to a large extent through its member States, rather than just through its own “organs” and “agents” as classical international organizations.

   - The EU member States and their authorities are obliged to carry out binding decisions and policies adopted by the EU according to the EU’s internal rules. This requires special rules of attribution and responsibility in cases where EU member States are in fact only implementing a binding rule of the international organization. In other words, the EU exercises normative control of the member States who then act as Union agents rather than on their own account when implementing Union law.

   - In areas of EU competence only the EU may be able to undo breaches of international law that have their root cause in the EU rules or practices; individual member States may be powerless to do so.

   - The transfer of powers to the EU from EU member States in a range of subject matters means that the EU may act in the international sphere (a) on its own

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1 See Treaty on European Union, art. 4, para. (3), second and third subparagraphs:

“The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts or institutions of the Union.

“The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.”
behave towards the exclusion of its member States; (b) through the vehicle of its member States; and (c) sometimes along with its member States, where the latter retain competences on subject matters alongside the EU (either on a transitional or permanent basis).

– The rules regarding the transfer of powers are set out in the founding treaties of the EU and the jurisprudence of the EU’s highest court, the Court of Justice of the European Union. It is the interpretation of the EU judicature that this set of internal EU rules governing the relationship between the EU as an organization and its member States is more of a constitutional nature rather than qualified as international law. The Court of Justice of the European Union has in a series of cases taken the view that international law can permeate the EU’s internal constitutional order only under the conditions set by the latter; and that no international treaty can upset the constitutional division of powers between the EU and its member States.

2. While the EU may currently be the only such organization that exhibits all the special internal and external features that have been described above, other regional organizations may sooner or later be in a position to make similar claims. To the extent that the draft articles, even taking account of the commentaries, at present do not adequately reflect the situation of regional (economic) integration organizations such as the EU, it would seem particularly important for the draft to explicitly allow for the hypothesis that not all of its provisions can be applied to regional (economic) integration organizations (“lex specialis”).

ILO

1. This is a key provision of the draft articles and the Commission may wish to consider giving it a greater prominence in the overall structure. The attempts aimed at progressive development of international law should not have an adverse impact on the existing law. States’ behaviour in a variety of international organizations very often differs. In fact, the rules of organizations are rarely identical and this may demonstrate that States do not necessarily wish to have a uniform set of rules applicable to all international organizations. Thus, the task of creating uniformly applicable rules for their responsibility becomes very complex, even with the caveat of draft article 63.

2. While there may be some value in arguments that the issue of the responsibility of a non-member State might have been better dealt with by the draft articles on responsibility of States, the relationship between member States and the organization (including the situations described in draft articles 61 and 62) should be analysed in the light of the internal legal system of each organization, as created by the constituent instrument and developed further by the organization’s internal rules and practice. These rules represent lex specialis and the relationship between the member State and the international organization should not be subject to general rules of international law for the issues regulated by the internal rules. The scope of draft article 63 has therefore to be understood broadly, not just as relevant to the determination of responsibility of an international organization, but also as pre-empting any general international law rules on responsibility where they coexist, following the principle lex specialis derogat lege generali. In that line of reasoning, the Commission may wish to revisit also paragraph 2, of draft article 9. ILO has already made extensive comments on this provision in its 2006 comments.1


IMF

While IMF is encouraged by the inclusion of draft article 63 in the draft and its recognition of the primary importance of lex specialis, it believes that much greater clarity is needed with respect to the scope of this provision and the extent to which it qualifies other provisions. The provision itself and the related commentary should be rerafted to make it clear that, as noted above, the responsibility of an international organization for actions taken towards its members will be determined by reference to the organization’s constituent instrument, and the rules and decisions adopted thereunder, along with peremptory norms of international law and other obligations that the organization has voluntarily assumed. Clarifying the scope and implications of draft article 63 will be critical as the Commission commences its second reading of the draft articles, and IMF strongly encourages the Commission to take the opportunity to do so.

NATO

With reference to the phrase “special rules of international law, including rules of the organization applicable to the relations between the international organization and its members”, it may be observed that the fundamental internal rule governing the functioning of the organization—that of consensus decision-making—is to be found neither in the treaties establishing NATO nor in any formal rules and is, rather, the result of the practice of the organization.

OECD

1. The constituent instruments and internal rules and procedures of international organizations are the primary source of obligations from which their responsibility is derived and should be assessed. Draft article 63 is a key provision. Indeed, the draft articles on responsibility of international organizations should not apply if the conditions, content or implementation of responsibility are governed by “special rules of international law, including rules of the organization applicable to the relations between the international organization and its members”. OECD shares the view that the legality of an international organization’s act and the mechanism of responsibility should be primarily determined on the basis of its constituent instruments, internal rules and procedure.

2. The responsibility of an international organization can only be challenged when an act is clearly in breach of its constituent instruments, internal rules and procedures, or if in accordance with them, is in breach of peremptory norms.

3. The Commission, in its second reading, should revisit both the draft articles and the accompanying commentaries in such a way so that there may be no doubt on the
prevailing centrality of *lex specialis* and the residual character of the general rules on the responsibility of international organizations. This contention is supported by the fact that the very purpose of special law is to supersede general rules, except if the matter at stake is governed by a peremptory norm.

4. In applying the principle of *lex specialis*, OECD supports the role of international organizations in creating internal definitions for certain terms. It notes in particular that a definition of the term “organ” is lacking within the draft articles. However, owing to the diversity of international organizations, OECD does not advocate for a generic definition, but instead considers that the internal rules of each international organization govern with respect to defining an “organ” of that organization.

**OSCE**

As international organizations do not possess general competence and therefore operate under the principle of speciality, it is important to acknowledge the fact that in several cases the specific rules of each organization would supersedethe general ones provided for in the draft articles. Therefore, it is proposed that the Commission consider the possibility to include the relevant draft article 63 (*Lex specialis*) in Part One (Introduction) of the draft articles, as a new draft article 3. With the exception of the presence of a peremptory norm of general international law, the *lex specialis* rule is key to resolving potentially conflicting characterization of any act of an international organization as “wrongful or not” under general international law *vis-à-vis* the internal law of the said international organization.

**United Nations**

1. In its commentary to draft article 63, the Commission explains that specialized rules may supplement or replace the general rules set out in the draft articles, in whole or in part. The Commission notes that the draft article is modelled on article 55 of the draft articles on responsibility of States, and is designed to make it unnecessary to add to many of the draft articles a proviso such as “subject to special rules.” While the commentary focuses almost exclusively on the attribution to the European Community of the conduct of its member States when they implement binding acts of the Community, there is little discussion of how it may apply to international organizations not of a supranational character.

2. The most notable examples of *lex specialis* in the practice of the United Nations include the principle of “operational necessity”, which precludes responsibility for property loss or damage caused in the course of United Nations peacekeeping operations under the conditions set out by the Secretary-General and endorsed by the General Assembly (see the comments on draft article 24), and the temporal and financial limitations adopted in the same resolution for injury or damage caused in the course of the same operations. Resolution 52/247 of 26 June 1998 on third-party liability: temporal and financial limitations sets temporal and financial limitations on the liability of the United Nations in respect of third-party claims arising out of United Nations peacekeeping operations, and as such prevails over the duty to provide full reparation under draft article 33. The resolution specifies, *inter alia*, that “no compensation shall be payable by the United Nations for non-economic loss” (para. 9 (b)), and that the amount of compensation payable for injury, illness or death of any individual, including for medical and rehabilitation expenses, loss of earnings, loss of financial support etc., “shall not exceed a maximum of 50,000 United States dollars” (para. 9 (d)). Pursuant to paragraph 12 of General Assembly resolution 52/247, the Secretary-General consistently includes the limitations on liability in the status-of-force agreements concluded between the United Nations and the States where peacekeeping operations are deployed.

3. The Secretariat supports the inclusion of draft article 63 on *lex specialis*.

**World Bank**

1. If only one considers (a) the quasi-universal membership of the Bretton Woods institutions (the IMF and IBRD) and, in any event, the fact that international financial institutions operate, as a rule, within their member countries; (b) the comprehensive “rules of the organization” of international financial institutions; and (c) the detailed provisions, contained in their financial agreements, on the consequences deriving from the breach of primary obligations, it becomes evident that the occasions for resorting to rules on responsibility other than special law are quite rare (if at all) within the context of the operations of international financial institutions.

2. The draft articles contain, in draft article 63 on *lex specialis*, what is probably its key provision. While the current formulation of draft article 63 may certainly be improved, as the comments of other international organizations have suggested, its crucial role within the scheme of the draft articles is undisputable. On this basis, the World Bank takes the liberty of strongly encouraging the Commission, when proceeding to its second reading, to revisit both the draft articles and the accompanying commentaries in such a way that there may not be any doubt on the centrality of *lex specialis* and the residual character of the general rules on the responsibility of international organizations.

3. In paragraph (6) of the commentary to draft article 63, the Commission indicates that the draft article in question is “designed to make it unnecessary to add to *many* of the preceding articles a proviso such as ‘subject to special rules’”. Why this reference to “many” preceding rules instead of a reference to them all, save for the preservation of the effects of peremptory norms of *jus cogens*? In other words, which other draft articles on general rules, other than those on *jus cogens*, are not qualified by special law? The World Bank has difficulties thinking of any.
4. In paragraph (5) of the commentary to draft article 4, one reads:

It would be questionable to say that the internal law of the organization always prevails over the obligation that the organization has under international law towards a member State.

Again, as the internal law of the organization is, as a rule, the most significant component (when not the whole) of lex specialis, will not a special rule prevail over all international obligations other than those deriving from jus cogens? The World Bank cannot think of any dispositive (as opposed to peremptory) norm that would constitute an exception, precisely because, on any matter that is not governed by a peremptory norm, a general obligation is qualified and superseded by special law, this being the very purpose of special law. The World Bank therefore encourages the Commission to reconsider the above-mentioned sentence, by either deleting or qualifying it by preserving the prevailing role of special law.

5. The World Bank encourages the Commission, in its second reading, to ensure that the expression “international law” (which is not defined in the draft articles) be used with a uniform meaning throughout the text, and that it also take due account of any applicable special law. For example, does the expression “under international law” have one and the same meaning in the current text of draft article 4, subparagraph (a), on the elements of an internationally wrongful act and draft article 5, paragraph (1), on the conduct of an organ or agent as an act of the organization? And, if so, is “international law” meant to encompass, in both draft articles, both general international law and any applicable special law?

**Article 66. Charter of the United Nations**

**United Nations**

1. In paragraph (1) of the commentary to the draft article, the Commission notes that the reference to the Charter of the United Nations includes not only obligations stated in the Charter, but also those flowing from binding decisions of the Security Council which similarly prevail over other obligations under international law pursuant to Article 103 of the Charter. In paragraph (3) of its commentary, the Commission notes further:

The present article is not intended to affect the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the United Nations.

2. Paragraph (3) of the commentary is unclear as to whether it is intended to exclude the United Nations from the scope of application of draft article 66. Since Article 103 of the Charter of the United Nations affects the responsibility of the Organization in the same way that it affects the responsibility of States and other international organizations, the Secretariat suggests that the statement in paragraph (3) of the commentary either be revised to clarify its intent, or be deleted.

3. As the constituent instrument of the United Nations, the Charter of the United Nations also constitutes the “rules of the organization” within the meaning of draft article 2, subparagraph (b). Unlike other organizations, however, which under draft article 31 may not rely on their rules as a justification for failure to comply with their international obligations, the United Nations could invoke the Charter of the United Nations and Security Council resolutions—to the extent that they reflect an international law obligation—to justify what might otherwise be regarded as non-compliance.

4. The Secretariat notes that, in its commentary to article 59 of the draft articles on responsibility of States, the Commission stated:

The articles cannot affect and are without prejudice to the Charter of the United Nations. The articles are in all respects to be interpreted in conformity with the Charter.

The Secretariat recommends that the same statement be included in the present context as well.

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1 Yearbook ... 2001, vol. II (Part Two), p. 143, para. (2) of the commentary to art. 59.
EFFECTS OF ARMED CONFLICTS ON TREATIES

[Agenda item 4]

DOCUMENT A/CN.4/644

Note on the recommendation to be made to the General Assembly about the draft articles on the effects of armed conflicts on treaties, by Mr. Lucius Caflisch, Special Rapporteur

[Original: English]
[18 May 2011]

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Multilateral instruments cited in the present document

Source

Ibid., No. 973, p. 287.
Ibid., vol. 1155, No. 18232, p. 331.

A. The types of recommendations the Commission may make

1. The International Law Commission’s main activities unquestionably are the progressive development of international law and its codification.1 These activities include the preparation of draft conventions.2 The preparation of such conventions is not an immutable objective, as is shown by article 23 of the Commission’s statute.

2. Under that provision, the Commission may make the following types of recommendations to the United Nations General Assembly:3

– To take no action, the Commission’s report having been published already;
– To take note of or adopt the Commission’s report by resolution;
– To recommend the draft articles to Members with a view to negotiating and concluding a general convention;
– To convoke a conference to elaborate a convention.

The difference between the last two possibilities seems to be that in the former case the initiative is taken by Member States, whereas in the latter the initiative belongs to the Organization.

3. In practice, however, intermediary types of recommendations have emerged. In certain situations, the
Commission has at least partly moved away from the convention pattern. It has done so where the nature of the “product” so warranted, e.g. the draft statute for an international criminal court asked for by the General Assembly. In other instances, the Commission resolved that the result of its work was not to take the form of a convention because of its limited scope or for other reasons. This was the case for the second part of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, for the guiding principles applicable to unilateral declarations of States capable of creating legal obligations, and for the conclusions of the Study Group on the fragmentation of international law, which the Commission asked the General Assembly to “endorse” or which it “commended to the attention” of the Assembly. Regarding the nationality of natural persons in relation to the succession of States, the Commission suggested that the draft articles “be adopted in the form of a declaration”.

4. In two recent instances, the Commission has formulated very specific and special proposals. Regarding the international responsibility of States (2001), it recommended that the General Assembly “take note” of its draft articles on responsibility of States for internationally wrongful acts, annex them to its resolution 56/83 of 12 December 2001, and envisage the convocation of a conference at a later stage. Concerning the draft articles on transboundary aquifers (2008), the Commission suggested that the General Assembly take note of its draft articles and append them to its resolution; that it recommend them to Members “without prejudice” to their future adoption in treaty or any other appropriate form; that it encourage Members to conclude bilateral or regional treaties; and that it place this item on the agenda of its next session with a view to having it examined and, in particular, to discussing the form to be given to the draft articles.

5. These are welcome developments. While it remains true that the preparation of conventions for the progressive development of international law and for its codification is and must remain one of the main objectives of the Commission’s activity, the focus on convention-making seems inappropriate, for instance, when the Commission has elaborated “guidelines” or codes of conduct, i.e. texts of an advisory character, or when a text has not been prepared by the Commission as a whole, as was the case for the principles on fragmentation, or possibly also when, on account of a variety of circumstances, it appears that States would not be overly keen to adopt a general convention on the matter. In such cases, a failed attempt to conclude a codification treaty might cause considerable harm, whereas a more circumspect approach—such as that followed by the Commission in respect of the international responsibility of States—may prove far more effective.

6. In the Special Rapporteur’s view, the greater part of the draft articles, as adopted on second reading on 17 May 2011, find their origin or justification in rules belonging to related fields of international law (law of treaties, law relating to the use of force). This suggests that many of the draft’s provisions should be non-controversial; this is not true, however, of the core of the draft, namely, draft articles 1 to 7 and the annex. To this one should add that, unlike the 1985 resolution of the Institute of International Law on the Effects of Armed Conflicts on Treaties, the present text extends to internal conflicts—a largely untouched domain calling for the progressive development of the law rather than codification.

C. Analysis

7. At least part of the field—the effects of international armed conflicts—has been well travelled by both practitioners and academics. If the subject had been limited to that aspect, a codification of the relevant rules might have been possible—but perhaps of little interest.

8. To this, it must be added that the Commission’s draft articles contain a large number of procedural prescriptions and references to rules in other areas of international law which also appear largely accepted and, therefore, would seem to suggest the conclusion of a treaty. It could furthermore be argued that draft article 3, which states that the existence of an armed conflict does not ipso facto terminate or suspend treaty rights and obligations, together with the criteria and categories indicated in articles 4 to 7 and the annex, could provide a solid basis for such a conventional instrument.

9. A third reason for envisaging the convocation of a conference is the eternal quest for stability of international law. This is particularly true regarding the relationship between treaties and armed conflicts—of which there are a sizeable amount at the present time. A further indication favouring the conclusion of a general convention is that in situations of armed conflict, it is the innocent bystanders—the civilians—who are likely to suffer most. To protect them, the Geneva Convention relative to the Protection of Civilian Persons in Time of War was concluded; and it would appear desirable to ensure the survival of the rights enjoyed by them as a result of the treaties concluded by their State, or the speedy restoration of these rights once the conflict is over. These objectives might best be served by a general convention, which would make it possible to preserve a maximum of the peacetime status quo, to restore such a status speedily, and to protect the rights of individuals from neutral States.

10. There are also arguments, however, which suggest that no conference should be planned for the immediate future.

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7 Ibid., p. 177, para. 251.
9 Ibid., para. 44.
12 Yearbook ... 2010, vol. II (Part Two), para. 375.
13 Yearbook ... 2011, vol. II (Part Two), para. 100.
14 Ibid., vol. I, 3099th meeting.
15 Institute of International Law, Yearbook, Session of Helsinki, 1985, vol. 61, Part II, p. 278.
11. A first argument against the immediate holding of a codification conference is that the Commission’s draft articles are not limited to the impact of international armed conflicts on treaties, but cover internal conflicts as well. While there may have been in the past non-international conflicts which generated some practice regarding their effects on treaties, it could be difficult to identify a firm and coherent body of rules on that issue. Whatever may have been said and done in this respect needs strengthening by the progressive development of international law. It seems unlikely that at the present time a large majority of States would be prepared to accept an extension of the existing rules on international conflicts to non-international ones.

12. Armed conflict—international or not—is a cause of anxiety and stress for the States involved. They may find it difficult—except, possibly, in the realm of international humanitarian law—to submit to legal rules regarding the fate of their treaties, especially if they are required to do so beforehand.

13. In situations of internal conflict, the question of their effects on treaties arises between the belligerent State and a third country toward which it has treaty obligations. Such situations are not unlike those where, on account of a temporary impossibility of performance or a fundamental change of circumstances, treaties come to an end or are suspended (articles 61 and 62 of the Vienna Convention on the Law of Treaties). To be sure, there will be situations where the belligerent State will be at least temporarily unable to perform some of its treaty obligations on account of the conflict (e.g. the granting of landing rights on airports that have fallen into rebels’ hands). But will third States be prepared to accept, in advance, rules which make it easier for States participating in an internal conflict to terminate or suspend their treaty obligations?

14. The example of the draft articles on responsibility of States for internationally wrongful acts shows that the “success” of a set of draft articles is not contingent upon an immediate attempt at transforming that draft into treaty law. What is more, any failure of such an attempt—through the absence of any agreement at all, or an insufficient number of ratifications—may discredit the work of the Commission on the subject. The authority of the latter’s work will be undermined by a failure to reach an agreement because the terms on which agreement was sought proved unacceptable; and they did prove unacceptable—this would be the inference—because the Commission did not do its work properly. This is not, of course, the only reason to oppose the conclusion of a convention. As has been pointed out (see para. 12 above), States may be reluctant to limit their freedom of action in time of conflict by subscribing rules on the continuity or otherwise of their treaty rights and obligations.

15. Mindful of these reasons, and the necessity not to jeopardize the work on the effects of armed conflicts on treaties, the Special Rapporteur encourages the Commission to move cautiously, as it did for the draft articles on responsibility of States for internationally wrongful acts, and to request the United Nations General Assembly to: (a) take note of the draft articles on the effects of armed conflicts on treaties and to append them to its resolution; and (b) suggest the convocation of a diplomatic conference at a later stage.

16. This prudent way of approaching the matter may enable Member States to familiarize themselves with the issues examined and the rules proposed and, above all, to convince themselves that the adoption of a set of treaty provisions on the matter examined by the Commission is both necessary and in their best interest. Moreover, the absence of such provisions at the present time will not bar the actors—States and their courts—from applying as of now the rules elaborated by the Commission.
**A. Introduction**

1. At the sixty-second session of the International Law Commission, in 2010, the Drafting Committee left open the issue of the list of categories of treaties that exhibit a very high likelihood of applicability on the basis of implication from their subject matter.\(^1\) In the present note, the Special Rapporteur will make some observations and suggestions in this regard.

2. A number of solutions are possible in relation to the current version of article 5 and the annex to the draft articles. One solution, first advanced by the preceding Special Rapporteur, would be to incorporate the list into the draft articles as article 7.2. The list and the commentary thereto could also be placed at the end of the draft articles.\(^2\) This was done in the 2008 version of the draft. A third solution would be to incorporate the list and the commentary thereto into article 5. Lastly, a fourth solution would be to include it as an annex to article 5.

3. Of these solutions, the last two are undeniably the most attractive and most realistic. The present Special Rapporteur tends to prefer the fourth solution, as indicated previously in his first report,\(^3\) for several reasons. First, there is a significant body of practice on the subject, which is in itself a justification for taking account of it in some form other than an annex to the draft articles. Second, including the list as an annex to article 5 facilitates the implementation of this provision. The article highlights the criterion of the treaty’s subject matter as potentially implying that it continues in operation, though without establishing an irreversible presumption; or, as stated in the memorandum by the Secretariat, the list encompasses the categories of treaties that exhibit a “very high likelihood of applicability”\(^4\). This likelihood must be considered in detail, in part because the name of a treaty does not always correspond to its subject matter; meaning that treaties nominally belonging to one of the categories on the list may not in fact come under that heading; it is therefore preferable to describe the list as “indicative”. In other cases, a treaty that does in fact meet the conditions for appearing on the list includes provisions that do not come under the category concerned and thus do not benefit from the likelihood implied by the list.

4. The solution recommended above is in the nature of a “compromise” in relation to the other possibilities. In the debates in the Commission’s plenary meetings in 2010, it seemed to have garnered a substantial majority. This is another reason to prefer it, even though adjustments to the contents of the list and/or the commentaries thereto may be called for. A third reason is the one adduced by the present Special Rapporteur in his first report, namely that this solution offers a greater degree of normativity than if the list were consigned to the commentary to article 5.\(^5\)

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\(^{1}\) The effect of armed conflict on treaties: an examination of practice and doctrine, memorandum by the Secretariat, A/CN.4/550 and Corr.1–2 (available from the Commission’s website, documents of the fifty-seventh session; the final text will be published as an addendum to *Yearbook ...* 2005, vol. II (Part One)), paras. 18–36.


\(^{4}\) Memorandum by the Secretariat (footnote 1 above), para. 18.

\(^{5}\) *Yearbook ...* 2010, vol. II (Part One), document A/CN.4/627, para. 64.
B. Difficulties inherent in the contents of the annex

5. In paragraph 3 above, reference was made to the difficulty that may arise from the fact that a treaty’s title may not correspond—or not correspond completely—to its subject matter. It goes without saying that the characterization of a treaty, i.e., the process of determining whether it may be classified in one particular category or another, must be done on the basis of the real subject matter of the treaty and its provisions. This process may well show that certain treaty provisions come under one of the categories appearing on the list, while other provisions do not come under any of them. This diversity may be accounted for, to some extent, by the separability of treaty provisions envisaged in article 10 of the draft articles.

6. Another difficulty is the fact that the draft articles aspire to regulate the effects on treaties of not only international but also internal armed conflicts. Some have criticized this ambition, asserting that the Commission should not have ventured into this territory or that it should have done so in a different way. This view, in turn, has prompted the objection that today the problems caused by non-international armed conflicts are much more significant than those arising from international armed conflicts and that it would be regrettable if the Commission were to ignore them. It is true, however, as noted by Graham, that “[t]he problem of the effect of a revolution [sic] on treaties … has not received adequate discussion … there remains a void in International Law in this respect”. Even if there were no legal void, contrary to Graham’s statement, the practice in this area would in any case be sparse and difficult to identify. This being the case, there is no harm in extending the scope of the draft articles to situations of this type; but it must be understood that in so doing the Commission will be introducing into the draft articles a significant element of development, rather than codification, of international law.

7. The issue of the continued operation of treaties is sometimes considered without regard to whether it was in fact raised by an armed conflict, be it international or internal. This was the case, for example, when the Netherlands suspended all bilateral treaties during the turmoil in Suriname in 1982. In the Case Concerning Oil Platforms, ICJ found that the Treaty of Amity, Economic Relations, and Consular Rights of 15 August 1955 between the United States and Iran (Islamic Republic of) was still in force and could therefore serve as a basis for its jurisdiction, but was there really an armed conflict between the two countries? In the case of Military and Paramilitary Activities in and against Nicaragua, ICJ considered that the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua was still in force; and this was confirmed by the fact that the United States subsequently denounced the Treaty under its terms. But was there really an armed conflict between the two States? In many cases, it may thus be wondered which factor gave rise to the problem of an agreement’s survival: was it in fact an armed conflict or, on the contrary, other grounds for termination or suspension (such as temporary or permanent impossibility of performance or a fundamental change of circumstances)?

8. Another difficulty is that, according to traditional practice and doctrine, the issue was essentially whether a treaty (or parties to a treaty) continued in operation or became automatically invalid in case of international armed conflict. Today a treaty’s lack of continuity may take two forms: abrogation or mere suspension, a far less dramatic consequence of the outbreak of armed conflict and one that facilitates a return to the status quo ante when the conflict has ended.

9. These questions, including the determination of the exact scope of existing doctrine and practice and of how their value should be assessed, are compounded by the question of how these elements have been presented; they have been based on doctrine and, with regard to practice, on that of English-speaking countries (the United Kingdom and the United States). Some Commission members have criticized this presentation and called on the Special Rapporteur to include supplementary elements, including judicial elements, and to ensure that this imbalance is removed from the commentaries to the relevant articles.

C. The way forward

10. In drafting the commentaries, the Special Rapporteur will heed this call as far as possible, in part by putting the role of doctrine in perspective. Doctrine is (or should be) only a reflection, systematization and synthesis of practice, but often it mainly reflects the personal opinions and preferences of its authors. At the same time, it is not possible to ignore doctrine completely, in view of the role it plays in the area dealt with by the draft articles.

11. With the help of the Secretariat and a number of colleagues, the Special Rapporteur will undertake supplementary research concerning, inter alia, the decisions of national jurisdictions, so as to accentuate the draft articles’ basis in jurisprudence. It should, however, be noted that the memorandum by the Secretariat, in particular, seems to be quite comprehensive, so that criticisms concerning the insufficiency of references to practice, particularly in case law, may be aimed more at the presentation than at the basis of the draft articles. At this stage of the work, the Special Rapporteur does not believe that the supplementary research to be undertaken will yield dramatic results. In any event, these results will be integrated into the commentaries to the articles to which they relate.

12. As to the different categories of treaties listed in the annex, the Special Rapporteur has no wish to make any changes except, possibly, to add treaties embodying rules of

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* Memorandum by the Secretariat (footnote 1 above), para. 90.


* Nicaragua v. United States of America, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 392 and 442. See also the memorandum by the Secretariat (footnote 1 above), para. 72.

* Nicaragua v. United States of America, Judgment, I.C.J. Reports 1986, dissenting opinion from Judge Jennings, pp. 528, 538 and 539. See also the memorandum by the Secretariat (footnote 1 above), para. 72.
jus cogens. In his first report, he had nonetheless dismissed this idea, explaining that peremptory norms in a treaty will survive in time of armed conflict, as will rules of jus cogens that are not embodied in treaty provisions; otherwise they would not be rules of jus cogens. Thus the inclusion of this category of treaties does not seem essential.11


13. What has just been said is undoubtedly still true: the proposed addition is not essential. But it would perhaps make it possible to spell out a point that is worth clarifying: that rules of jus cogens, whether treaty-based or customary, will survive anything, even armed conflicts. It should nonetheless be specified that as a general rule such treaties will contain, alongside peremptory norms, other provisions that will not necessarily continue in operation.
EXPULSION OF ALIENS

[Agenda item 5]

DOCUMENT A/CN.4/642

Seventh report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur

[Original: French]
[4 May 2011]

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Source
international Covenant on Civil and Political Rights (New York, 16 December 1966)
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HAYES, Debra and John Ransom

MONTERO-PIERDE-TUDELA, Esther

Introduction

1. The topic of the expulsion of aliens gave rise to much debate in the Sixth Committee during the sixty-fifth session of the General Assembly. Comments by States that spoke on the topic often went beyond the scope of the relevant portion of the report of the International Law Commission on the work of its sixty-second session, in 2010, and frequently covered matters that the Commission had already dealt with in its previous sessions. Thus, on many issues, there was a gap between the comments made and the current stage of work on the topic.

2. These observations, as well as several recent comments by some States, were reviewed by the Commission’s secretariat and transmitted to its members.1 It did not seem necessary to the Special Rapporteur to reproduce them here. It does, however, seem useful to provide an overview of the most important developments in the area since the close of the sixty-second session of the Commission in order to determine whether they confirm the analyses provided in the previous reports of the Special Rapporteur and the positions taken by the Commission on the topic or whether, on the contrary, trends or new practice can be identified.

3. Furthermore, in the light of the considerable number of reports on the topic and the draft articles contained therein that the Special Rapporteur has already submitted, the various proposals for new or revised draft articles he has made during the Commission’s discussion of previous reports, and the fact that the Drafting Committee on the topic has yet to report to the Commission as a whole, it seemed necessary to restructure the entire set of draft articles that the Special Rapporteur has proposed to date, both those that have already been discussed by the Commission and those that it has yet to consider, in order to facilitate its continued work. This restructuring proposal is, of course, without prejudice to the work that has already been done by the Drafting Committee.

4. This report will therefore be devoted, on the one hand, to a description of the principal recent developments on the issue (chap. I) and, on the other, to a restructured summary of the entire set of draft articles (chap. II).

Chapter I

Principal recent developments on the issue

5. The question of the expulsion of aliens has been a key political issue in some countries, particularly in Europe, since the most recent session of the Commission; this emphasizes both the timeliness and the sensitive nature of the topic. However, the ICJ judgment of 30 November 2010 in the Ahmadou Sadio Diallo case2 is of greater interest as it addresses several aspects of the issue.

A. Several national developments

6. The interim period between the sixty-second and the sixty-third sessions of the Commission, in 2010 and 2011, included both the adoption by the people and cantons of Switzerland of the people’s initiative “Expulsion of foreign criminals (the expulsion initiative)” and the French Parliament’s consideration of draft legislation on immigration, integration and nationality.

1. Switzerland: Adoption by the people and cantons of the people’s initiative of 15 February 2008: “Expulsion of foreign criminals (the expulsion initiative)”

7. This initiative, which purported to modify the Swiss Constitution, was adopted by the people and cantons of Switzerland in a referendum held on 28 November 2010.3

3 See the 17 March 2011 decision of the Federal Council reporting on the outcome of the 28 November 2010 referendum (FF 2011 2593).
The new provision of the Constitution calls for automatic revocation of the residency permit by the competent Swiss authorities and for the expulsion from Swiss territory of aliens convicted of murder, rape, aggravated sexual assault or any other form of violence such as robbery, trafficking in persons, drug trafficking and burglary, as well as social security or social assistance fraud. In addition, the expulsion order includes a ban on entry into Switzerland for 5 to 15 years and, in the case of repeat offenders, up to 20 years. While this amendment to the Constitution has been in force since 28 November 2010, the date on which it was adopted by the people and the cantons, a transitional provision of the Constitution gave Parliament five years to establish and supplement the list of relevant offences and enact criminal legislation concerning unlawful entry into Swiss territory. The Federal Councillor who heads the Federal Department of Justice and Police subsequently established a working group, consisting of members of the initiative committee and representatives of the competent authorities of the Confederation and the cantons, which is responsible for resolving the remaining issues and drafting implementing legislation that the Department can submit to the Federal Council; the goal is to develop a proposed solution for implementation of the initiative in a manner consistent with the Constitution and with the international law by which Switzerland is bound. The working group met for the first time on 26 January 2011 and was to submit a report containing proposals by June 2011. Ultimately, however, it will be for the Swiss Parliament to decide how the text of the initiative will be implemented through legislation.

8. It should be stressed that the new provision of the Constitution purports to limit the discretionary power currently enjoyed by the competent administrative authorities by providing for automatic revocation of the residency permit of an alien convicted of any of the offences in question and for automatic expulsion as a result of the said revocation. In that connection, it will be recalled that the accessory penalty of expulsion that criminal judges were authorized to impose under article 55 of the old Penal Code—which was abolished when the new Penal Code entered into force on 1 January 2007—was not automatic. That provision stated that any alien sentenced to penal servitude or a prison term could be expelled for a period of 3 to 15 years and that in the event of a subsequent conviction, the alien could be expelled for life; it had a particularly broad scope since it covered all custodial sentences, whatever their length. Thus, as has been noted, the great majority of the prison population was subject to an expulsion order. However, criminal judges could order expulsion only on a case-by-case basis; the courts had limited the legal framework for expulsion by stating that it must be proportionate to the length of the original sentence and that it required a specific review of the situation of the person in question. In addition, the expulsion order had to include adequate justification and the judge had to display a degree of restraint, particularly where convicted persons were long-time residents of Switzerland, had families and no longer had close ties with their countries of origin.

9. The constitutional amendment of 28 November 2010 is therefore a step backward even by comparison with the former legislation, which, moreover, had already been criticized as establishing a “double punishment” by combining the original penalty of imprisonment with an accessory penalty of expulsion that was sometimes even more onerous than the original sentence. The Special Rapporteur is not aware whether any other country has adopted legislation requiring the automatic expulsion of convicted aliens. It might nevertheless be wondered whether, by adding this “double punishment”, the legislation does not violate several principles of international law, such as non-discrimination on grounds of origin or nationality or the principle of equality, including equality before criminal law, that is enshrined in both domestic and international law.

2. France: Draft Legislation on Immigration, Integration and Nationality

10. On 30 July 2010 in Grenoble, with emotions running high at the inauguration of the new prefect of the Department of Isère after violence had broken out in a working-class neighbourhood earlier in the month, claiming casualties among the police, French President Nicolas Sarkozy declared:

We’re going to reassess the grounds for the deprivation of French nationality. I accept my responsibilities. Deprivation of nationality should be possible where anyone of foreign origin deliberately threatens the life of a police officer, a soldier, a gendarmerie officer or any other public servant. French nationality must be earned and those who hold it must show themselves worthy. Anyone who fires on a law enforcement official is no longer worthy to be French.5

5 See Montero-Pérez-de-Tudela, “L’expulsion judiciaire des étrangers en Suisse: La récidive et autres facteurs liés à ce phénomène”.

7 See Hayes and Ransom, “Double punishment: An issue for Probation”.

11. The aforementioned draft legislation was prepared on the basis of this statement. While the draft does not concern the expulsion of aliens as such, its relevance to the topic is evident since the sole purpose of the deprivation of nationality is to make it possible to expel the person in question. Article 3 of the draft legislation concerns the “possibility of deprivation of French nationality for the perpetrators of murder or of wilful acts of violence leading to the unintentional death of a public servant”. Under French law, deprivation of nationality is a specific type of loss of nationality, defined in articles 25 and 25-1 of the Civil Code. It is characterized by the seriousness of the grounds for, and the effects of, its imposition. Similar to an administrative penalty for defamation of or disloyalty to France, it is the inverse of the prohibition on the acquisition or reinstatement of French nationality for aliens convicted of a crime or misdemeanour that undermines the fundamental interests of the nation, or of a terrorist act.6

12. As Buffet notes in his report on the draft legislation, “[i]n reality, deprivation of nationality is possible only in the case of foreign-born French citizens who gained French nationality by acquisition—in other words, who, having been born in France and resided there for a sufficient length of time, gained citizenship upon coming of age, as opposed to persons of French origin who were granted French nationality automatically—in other words, who were born French. In principle, there can be no distinction among French citizens on grounds of origin or of the manner in which it was acquired. Article 22 of the Civil Code states that ‘a person who has acquired French nationality enjoys all the rights and is bound to all the duties attached to the status of French, from the day of that acquisition.’” Furthermore, article 1 of the French Constitution states that “[France] ensures the equality of all citizens before the law, without distinction of origin, race or religion”.7

13. Thus, according to Buffet, “the procedure for the deprivation of nationality calls into question two constitutional principles: the principle of equality, since it provides for different treatment of French citizens depending on whether they acquired citizenship or were granted it at birth, and the principle of the necessity of punishment if the deprivation of nationality is interpreted as an administrative penalty.”8 Exceptions to these principles have been made only in the context of counter-terrorism; the other cases of deprivation of nationality have concerned either persons convicted, in France or abroad, of an offence defined as a crime under French law and resulting in a sentence of at least five years’ imprisonment,9 or persons convicted of an offence defined as a crime or misdemeanour that undermines the internal or external security of the State.10

14. Concerning the principle of equality, the Constitutional Council ruled:

In relation to the law governing nationality, persons having acquired French nationality and persons who enjoy French nationality by birth are in the same situation; however, in view of the avowed objective of combating terrorism, it is in order to provide that for a limited period the administrative authorities may deprive a person of French nationality without the resultant difference in treatment being a violation of the principle of equality.11

As Buffet notes, “[t]hus, the Constitutional Council confirmed the principle that there can be no discrimination among French citizens on the basis of the manner in which they became French and indicated that there were only two conditions under which that principle could be violated: the violation must be justified on grounds of public interest, and the period of time during which an individual who had become French may be deprived of that nationality must be time-limited”. Concerning the principle of the necessity of punishment, the Council stressed that “given the serious intrinsic gravity of offences of terrorism, it is not contrary to article 8 of the Declaration of Human and Civic Rights for the legislature to provide for such penalty”.12 This limits the grounds for deprivation of nationality to the most serious forms of conduct or those which are most contrary to the allegiance to the nation that is expected of French citizens.

15. Buffet continues: “These constitutional requirements are, moreover, expanded and supplemented by some of France’s international commitments.” While the European Convention on Human Rights poses no principled obstacle in that regard,13 this is not true of the European Convention on Nationality. Of course, France is not bound by this Convention since it has signed but not yet ratified it. Moreover, in response to the European Commission against Racism and Intolerance report on France, issued on 15 June 2010, the Government [of France] stated that it currently had no plans to ratify that Convention...”14 However, while it was decided to leave the question of France’s ratification open, it should be borne in mind that although “article 7 of the Convention does not preclude the existence of a deprivation-of-nationality procedure as a penalty for ‘conduct seriously prejudicial to the vital interests of the State Party’; the explanatory report annexed to the Convention explains that the wording, taken from [article 8 of] the Convention on the Reduction of Statelessness, ‘notably includes treason and other activities directed against the vital interests of the State concerned (for example, work for a foreign secret service) but would not include criminal offences of a general nature, however serious they might be’ ”.15

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8 The Constitution’s limitations on criminal procedure apply not only to sentences handed down by a court, but to any other penalty of a punitive nature, even where the law has entrusted a non-judicial authority with responsibility for its imposition (Constitutional Council Decision No. 88-248 DC, 17 January 1989, paras. 35–42, Recueil des décisions du Conseil constitutionnel 1989, p. 18).
9 There were 14 instances of such deprivation between 1973 and 2010 or, specifically, between 1989 and 1998 (see Senate, footnote 8 above).
10 There were seven instances of such deprivation between 1973 and 2010 or, specifically, between 1999 and 2010 (ibid.).
12 Ibid.
14 See Senate report (footnote 8 above), p. 58.
16. According to Buffet’s argument, another international constraint stems from European law. While the right to a nationality does not, in principle, fall within the competence of the EU, the Court of Justice of the European Union, in a preliminary ruling on a case brought before it by a German court, stated that, in fact, “it is not contrary to EU law, in particular to article 17 EC, for a member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality has been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality”\(^{18}\). The European Court of Justice based its jurisdiction in the case on the fact that by granting its nationality to the person in question, the State conferred on that person the EU citizenship enjoyed by all its nationals. By withdrawing it, the State caused the person to lose the benefit of that status as defined by article 17 of the Treaty establishing the European Community; such withdrawal must therefore respect the principles of European law:

> When examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.\(^{19}\)

17. In short, as the Rapporteur of the Senate Legal Committee has summarized,

> these various courts require that the deprivation of nationality procedure should be subject to three conditions:

- The penalty for the offences of which the person in question is guilty must be in the public interest and time-limited;
- It must be consistent with the principle of the necessity of punishment; and
- It must be proportionate to the seriousness of the offence.\(^{20}\)

18. Murder or wilful acts of violence leading to the unintentional death of a public servant cannot be said to undermine the fundamental (or “essential”) interests of France in such a way as to justify derogation from the principle of equality that is guaranteed both by the French Constitution and by the international legal instruments to which France is a party. Similarly, with respect to the principle of the necessity of punishment, there is no justification for the claim that the penalty of deprivation of nationality, imposed in this case for the sole purpose of expulsion, is more appropriate than the penalties normally envisaged as punishment for such offences.

19. Thus, in the light of the foregoing analysis, the French Senate rightly refused, on 3 February 2011, to extend the penalty of deprivation of French nationality to include citizens who had been naturalized for less than 10 years and had caused the death of a public servant.

B. Judgment of ICJ of 30 November 2010 in the Diallo case

20. The judgment rendered by ICJ on 30 November 2010 in the Diallo case, in which the Republic of Guinea opposed the Democratic Republic of the Congo, is a milestone not merely for its juridical quality—which is, when all is said and done, remarkable, despite the arguability of one of its most important aspects—but above all because it is the very first decision of the Court that deals with the issue of the expulsion of aliens. Its importance for that topic, which the Commission has been considering for the past five years, is clear since it addresses no fewer than seven legal questions raised by the issue of the expulsion of aliens: the notion of conformity with the law; the obligation to inform aliens detained pending expulsion of the reasons for their arrest; the obligation to inform aliens subject to expulsion of the grounds for that expulsion; prohibition of the mistreatment of aliens detained pending expulsion; the obligation for the competent authorities of the State of residence to alert, without delay, the consular authorities of the State of origin to the detention of their national; the property rights of aliens subject to expulsion; and recognition of the responsibility of the expelling State and its provision of compensation.

21. The Special Rapporteur has addressed all these questions in his various reports. In light of the judgment of 30 November 2010, it appears that on all these points, the Court confirms the analyses made in the context of the Commission’s work on the topic.

1. Conformity with the law\(^{21}\)

22. On this issue, Guinea alleged that there had been a breach of article 13 of the International Covenant on Civil and Political Rights and of article 12, paragraph 4, of the African Charter on Human and Peoples’ Rights. The Court stated:

> It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with “the law”, in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law.\(^{22}\)

2. Obligation to inform aliens detained pending expulsion of the reasons for their arrest\(^{23}\)

23. On this point, Guinea argued that at the time of Mr. Diallo’s arrests, particularly in 1995 and 1996, he had not been informed of the reasons for those arrests or of the charges against him, omissions that in its view constituted a violation of article 9, paragraph 2, of the Covenant.


\(^{19}\) Ibid., para. 56.

\(^{20}\) See Senate report (footnote 8 above), pp. 59–60.


\(^{22}\) I.C.J. Reports 2010 (see footnote 2 above), p. 663, para. 65. On the two important issues—procedural guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment—the Court concluded that “the expulsion of Mr. Diallo was not decided in accordance with law” (ibid., p. 666, para. 72).

24. The Court makes the general observation that this obligation to inform, which arises from the provisions of article 9, paragraphs 1 and 2, of the Covenant and of article 6 of the African Charter, applies

in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued […] The scope of these provisions is not, therefore, confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory. In this latter case, it is of little importance whether the measure in question is characterized by domestic law as “expulsion” or a “refoulement”.24

25. In short, the Democratic Republic of the Congo failed in its obligation to inform Mr. Diallo of the expulsion decree issued against him. Moreover, on the day on which he was actually expelled, “he was given the incorrect information that he was the subject of a ‘refoulement’ on account of his ‘illegal residence’”, which confirms that “the requirement for him to be informed, laid down by article 9, paragraph 2, of the Covenant, was not complied with on that occasion”.25

3. **Obligation to provide grounds for the expulsion**26

26. While the Court considers that “an arrest or detention aimed at effecting an expulsion decision taken by the competent authority cannot be characterized as ‘arbitrary’, within the meaning of the [provisions of the Covenant and the African Charter]”,27 it can

but find not only that the decree itself was not reasoned in a sufficiently precise way […] but that throughout the proceedings, the Democratic Republic of the Congo has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo’s expulsion […] Under these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.28

27. Having recognized that Guinea was justified “in arguing that Mr. Diallo’s right to be ‘informed, at the time of arrest, of the reasons for his arrest’—a right guaranteed in all cases, irrespective of the grounds for the arrest—was breached”, ICJ added:29

The Democratic Republic of the Congo has failed to produce a single document or any other form of evidence to prove that Mr. Diallo was notified of the expulsion decree at the time of his arrest on 5 November 1995, or that he was in some way informed, at that time, of the reason for his arrest. Although the expulsion decree itself did not give specific reasons, as pointed out above (see paragraph 72), the notification of this decree at the time of Mr. Diallo’s arrest would have informed him sufficiently of the reasons for that arrest for the purposes of article 9, paragraph 2, since it would have indicated to Mr. Diallo that he had been arrested for the purpose of an expulsion procedure and would have allowed him, if necessary, to take the appropriate steps to challenge the lawfulness of the decree. However, no information of this kind was provided to him; the Democratic Republic of the Congo, which should be in a position to prove the date on which Mr. Diallo was notified of the decree, has presented no evidence to that effect.30

4. **Prohibition of mistreatment of aliens subject to expulsion**31

28. Guinea maintained that the prohibition of ill-treatment of any detainee had been violated, invoking the provisions of article 7 and of article 10, paragraph 1, of the International Covenant on Civil and Political Rights and of article 5 of the African Charter on Human and Peoples’ Rights. Without siding with this party to the dispute, since Guinea had failed “to demonstrate convincingly that Mr. Diallo was subjected to such treatment during his detention”32 ICJ affirmed that “there is no doubt … that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on all States in all circumstances, even apart from any treaty commitments”.33

5. **Obligation to alert, without delay, the consular authorities of the State of origin of aliens being detained pending expulsion**34

29. According to Guinea, the provisions of article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, which requires the competent authorities of the alien’s State of residence, if the alien so requests, to “inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner”, had nonetheless been ignored when Mr. Diallo was arrested in November 1995 and January 1996, since he was not informed “without delay” of his right to seek assistance from the consular authorities of his country.35

30. The Democratic Republic of the Congo denied these allegations, arguing that first, “Guinea had failed to prove that Mr. Diallo requested the Congolese authorities to notify the Guinean consular post without delay of his situation”; second, that “the Guinean Ambassador in Kinshasa was aware of Mr. Diallo’s arrest and detention”; and, third, that Mr. Diallo had been “orally informed … immediately after his detention of the possibility of seeking consular assistance from his State”.36

31. However, citing its precedent in the _Avena_ case,37 ICJ noted that it was for the organs of the State that proceeded with the arrest


34. See _Yearbook ... 2010_, vol. II (Part One), document A/CN.4/625 and Add.1–2, paras. 73–210.


36. _Ibid.,_ para. 82.

37. _Ibid.,_ p. 670, para. 84.

38. _Ibid._


41. _Ibid.,_ para. 87.


44. _Ibid.,_ paras. 93 and 94.

45. _Avena and Other Mexican Nationals (Mexico v. United States of America)_ , Judgment, _I.C.J. Reports 2004_, p. 46, para. 76.
to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect. [...] Moreover, the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights “without delay”. 38

32. Moreover, as for its assertion that Mr. Diallo had been orally informed of his rights, the Democratic Republic of the Congo had not presented the “slightest piece of evidence to corroborate it. [...]” Consequently, the Court finds that there was a violation by the DRC of article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations. 40

6. Obligation to respect the property rights of aliens subject to expulsion 41

33. This issue has been the subject of long, careful consideration by ICJ, and with reason; it was at the heart of the dispute. Nonetheless, the Court’s ruling is not above criticism on this point.

34. Guinea has further contended that Mr. Diallo’s expulsion, given the circumstances in which it was carried out, “violated his right to property, guaranteed by article 14 of the African Charter on Human and Peoples’ Rights, because he had to leave behind most of his assets when he was forced to leave the Congo”. 42 Specifically, Guinea contended that the Democratic Republic of the Congo had breached its international obligations by depriving [Mr. Diallo] of the exercise of his rights of ownership, oversight and management in respect of the companies which he founded in the DRC and in which he was the sole associé; [by] preventing him in that capacity from pursuing recovery of the numerous debts owed to the said companies both by the DRC itself and by other contractual partners; and [by] expropriating de facto Mr. Diallo’s property. 43

35. The Special Rapporteur will not consider the complaints based on the alleged violation of the rights relating to the gérance, the right to oversee and monitor the management and the right to property of Mr. Diallo over his parts sociales in his companies, which the Court easily dismissed on the basis—particular in the case of the last of these rights—of its 1970 judgment in the Barcelona Traction case. 44

36. As mentioned by ICJ in its Judgment of 24 May 2007, 45 Guinea maintains that “in fact and in law it was virtually impossible to distinguish Mr. Diallo from his companies (I.C.J. Reports 2007 (II), p. 604, para. 56)”. 46

37. After carefully considering these arguments, ICJ did, in fact, conclude that “Mr. Diallo was … directly or indirectly, fully in charge and in control” 47 of his companies and that he was “the only gérant acting for either of the companies, both at the time of Mr. Diallo’s detentions and after his expulsion”. 48 But it indicated, as it had done in its judgment of 24 May 2007, that Congolese law accords SPRLs (private companies with limited liability), which Mr. Diallo’s companies were, independent legal personality distinct from that of its associés, particularly in that the property of the associés is completely separate from that of the company, and in that the associés are responsible for the debts of the company only to the extent of the resources they have subscribed. Consequently, the company’s debts receivable from and owing to third parties relate to its respective rights and obligations. As the Court pointed out in the Barcelona Traction case: “So long as the company is in existence the shareholder has no right to the corporate assets” (I.C.J. Reports 1970, p. 34, para. 41). This remains the fundamental rule in this respect, whether for an SPRL or for a public limited company (I.C.J. Reports 2007 (II), p. 606, para. 63). 49

38. Having reached the foregoing conclusion, ICJ recalled that “claims relating to rights which are not direct rights held by Mr. Diallo as associé have been declared inadmissible by the Judgment of 24 May 2007; they can therefore no longer be entertained.” 50 The Court therefore maintained “the strict distinction between the alleged infringements of the rights of the two SPRLs at issue and the alleged infringements of Mr. Diallo’s direct rights as associé of these latter (see I.C.J. Reports 2007 (II), pp. 605–606, paras. 62–63). The Court understands that such a distinction could appear artificial … It is nonetheless well-founded.” 51 Based on this distinction, with respect to Mr. Diallo’s right to take part in general meetings and to vote, it concluded, astonishingly, even after recalling that Congolese Legislative Order No. 66-341 of 7 June 1966 obliged corporations having their administrative seat in the Democratic Republic of the Congo to hold their general meetings on Congolese territory, that “no evidence has been provided that Mr. Diallo would have been precluded from taking any action to convene general meetings from abroad, either as gérant or as associé”. 52

39. This argument is specious and, in any case, unconvincing, 53 since ICJ itself had recalled the conditions of Mr. Diallo’s expulsion from the Democratic Republic of the Congo. Of what use would it have been for Mr. Diallo to convene from abroad a general meeting that would have to be held on Congolese territory in the knowledge that he could not reside in the country and would therefore be unable to take part in person in that meeting? Moreover, the Court admitted, at a later point in its judgment, that “the DRC, in expelling Mr. Diallo, has probably impeded him from taking part in person in any general meeting, but, in the opinion of the Court, such
hindrance does not amount to a deprivation of his right to take part and vote in general meetings”. Here, the argument is that Mr. Diallo could have been represented at such meetings. But how could he seriously do so when he was “directly or indirectly, fully in charge and in control” of his companies, of which, as the Court itself acknowledged, he was the “only gérant”?

40. Regardless of the Court’s reasoning on this matter, it appears to assume, at least implicitly, that an expelled alien’s property rights must be protected by the expelling State.

7. **Recognition of responsibility and reparation**

41. ICJ recognized, on several points, the responsibility of the Democratic Republic of the Congo for internationally wrongful acts related to the expulsion of Mr. Diallo from that country. It stated:

Having concluded that the Democratic Republic of the Congo has breached its obligations under Articles 9 and 13 of the International Covenant on Civil and Political Rights, Articles 6 and 12 of the African Charter on Human and Peoples’ Rights, and Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations (see paragraphs 73, 74, 85 and 97 above), it is for the Court now to determine, in light of Guinea’s final submissions, what consequences flow from these internationally wrongful acts giving rise to the DRC’s international responsibility.

57 Regardless of the Court’s reasoning on this matter, it appears to assume, at least implicitly, that an expelled alien’s property rights must be protected by the expelling State.

In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea’s claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation.

42. Thus, this judgment of 30 November 2010 supports, with the force of the authority attached to the decisions of ICJ, the legal bases of the draft articles proposed by the Special Rapporteur in his third, fifth and sixth reports.

54 Ibid., p. 682, para. 126.
CHAPTER II

Restructured summary of the draft articles

I. General provisions

Draft article 1. Scope of application


Draft article 2. Definitions


Draft article 3. Right of expulsion


Draft article 4. Grounds for expulsion


II. Cases of prohibited or conditional expulsion

Draft article 5. Non-expulsion of a national


Draft article 6. Non-expulsion of refugees


Draft article 7. Non-expulsion of stateless persons


Draft article 8. Prohibition of collective expulsion


Draft article 9. Prohibition of disguised expulsion


Draft article 10. Expulsion in connection with extradition

– See draft article 8 (Yearbook ... 2010, vol. II (Part One), document A/CN.4/625 and Add.1–2, para. 72); and

– new proposal by the Special Rapporteur (Yearbook ... 2010, vol. II (Part Two), footnote 1299).

III. Fundamental rights of persons subject to expulsion

A. General provisions

Draft article 11. Respect for the dignity and human rights of aliens subject to expulsion

– See draft articles 8 and 10 (Yearbook ... 2009, vol. II (Part One), document A/CN.4/611, paras. 50 and 72) and the revised version thereof as reflected in draft articles 8 and 9, reproduced in ibid., document A/CN.4/617.

– See also draft article B (Yearbook ... 2010, vol. II (Part One), document A/CN.4/625 and Add.1–2, para. 276) and the revised version thereof (ibid., vol. II (Part Two), footnote 1290).

Draft article 12. Non-discrimination

– See draft article 14 (Yearbook ... 2009, vol. II (Part One), document A/CN.4/611, para. 156) and the revised version thereof as reflected in draft article 10, reproduced in ibid., document A/CN.4/617.

Draft article 13. Vulnerable persons

– See draft article 12 (Yearbook ... 2009, vol. II (Part One), document A/CN.4/611, para. 127) and the revised version thereof as reflected in draft article 13, reproduced in ibid., document A/CN.4/617.

B. Protection required in the expelling state

Draft article 14. Protection of the lives of aliens subject to expulsion

– See draft article 9 (Yearbook ... 2009, vol. II (Part One), document A/CN.4/611, para. 67) and the revised version thereof as reflected in draft article 11, reproduced in ibid., document A/CN.4/617.

Draft article 15. Respect for the right to family life

– See draft article 13 (Yearbook ... 2009, vol. II (Part One), document A/CN.4/611, para. 147) and the revised version thereof as reflected in draft article 12, reproduced in ibid., document A/CN.4/617.

C. Protection in relation to the receiving state

Draft article 16. Return to the receiving State of the alien being expelled


Draft article 17. State of destination of expelled aliens

Draft article 18. Ensuring respect for the right to life and personal liberty in the receiving State of aliens subject to expulsion

– See draft article 9, paragraph 1 (Yearbook ... 2009, vol. II (Part One), document A/CN.4/611, para. 67) and the revised version thereof as reflected in draft article 14, reproduced in ibid., document A/CN.4/617.

Draft article 19. Protection of aliens subject to expulsion from torture and inhuman or degrading treatment in the receiving State

– See draft article 11 (Yearbook ... 2009, vol. II (Part One), document A/CN.4/611, para. 120) and the revised version thereof as reflected in draft article 15, reproduced in ibid., document A/CN.4/617.

IV. Procedural rules

Draft article 20. Scope of the present rules of procedure

– See draft article A1 (Yearbook ... 2010, vol. II (Part One), document A/CN.4/625 and Add.1–2, para. 316) and the revised version (ibid., vol. II (Part Two), footnote 1300).

Draft article 21. Conformity with the law


Draft article 22. Procedural rights of aliens facing expulsion


V. Legal implications of expulsion

Draft article 23. Protection of the human rights of aliens subject to expulsion in the transit State

– See draft article 16 (Yearbook ... 2009, vol. II (Part One), document A/CN.4/617).


– See draft article F1 (Yearbook ... 2010, vol. II (Part One), document A/CN.4/625 and Add.1–2, para. 520).

Draft article 24. Right of return of unlawfully expelled aliens


Draft article 25. Protecting the property of aliens facing expulsion


Draft article 26. Responsibility of the expelling State


Draft article 27. Diplomatic protection

THE OBLIGATION TO EXTRADITE OR PROSECUTE
(AUT DEDERE AUT JUDICARE)

[Agenda item 6]

DOCUMENT A/CN.4/648

Fourth report on the obligation to extradite or prosecute (aut dedere aut judicare),
by Mr. Zdzislaw Galicki, Special Rapporteur

[Original: English]
[31 May 2011]

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Convention for the suppression of unlawful acts against the safety of civil aviation (Montreal, 23 September 1971)


Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York, 14 December 1973)

Convention on the physical protection of nuclear material (Vienna, 26 October 1979)

International Convention against the taking of hostages (New York, 17 December 1979)


Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984)

Convention for the suppression of unlawful acts against the safety of maritime navigation (Rome, 10 March 1988)

International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989)


International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)

Constitutive Act of the African Union (Lomé, 11 July 2000)


Source


Ibid., vol. 1125, No. 17512, p. 3.

Ibid., vol. 78, No. 1021, p. 277.

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Introduction

1. The International Law Commission, at its fifty-seventh session, in 2005, decided to include the topic “The obligation to extradite or prosecute (aut dedere aut iudicare)” in its programme of work.1 At its fifty-eighth and fifty-ninth sessions, in 2006 and 2007 respectively, the Commission received and considered the preliminary2 and second3 reports of the Special Rapporteur.

2. At the sixtieth session, in 2008, the Special Rapporteur presented his third report,4 which was considered by the Commission together with comments and observations received from Governments.5 The third report of the Special Rapporteur was aimed at continuing the process of formulation of questions addressed both to States and to members of the Commission on the most essential aspects of the topic. The questions were intended to enable the Special Rapporteur to draw final conclusions regarding the main issue of whether the obligation to extradite or prosecute (aut dedere aut iudicare) exists under customary international law.

3. At its 2988th meeting, on 31 July 2008, the Commission decided to establish a Working Group on the topic under the chairpersonship of Alain Pellet. The mandate and membership of the Working Group was to be determined at the sixty-first session, in 2009.6

4. At the sixty-first session, in 2009, the Commission had before it the last portion of comments and observations received from Governments.7 At the same session, an open-ended Working Group on the obligation to extradite or prosecute (aut dedere aut iudicare) was re-established under the chairpersonship of Alain Pellet.8 Culminating from its discussion, a general framework for consideration of the topic, with the aim of specifying the issues to be addressed, was drawn up. The Commission subsequently took note of the oral report presented by the Chairperson of the Working Group.

5. The Working Group proposed the following general framework for the Commission’s consideration of the topic: (a) the legal bases of the obligation to extradite or prosecute; (b) the material scope of the obligation to extradite or prosecute; (c) the content of the obligation to extradite or prosecute; (d) the relationship between the obligation to extradite or prosecute and other principles; (e) the conditions for the triggering of the obligation to extradite or prosecute; (f) the implementation of the obligation to extradite or prosecute; and (g) the relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal.9

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6 Yearbook ... 2008, vol. II (Part Two), para. 315.
8 Ibid., vol. II (Part Two), para. 22.
9 Ibid., para. 204.
CHAPTER I

Consideration of the topic at the sixty-second session of the Commission (2010)

6. At its sixty-second session, in 2010, the Commission reconstituted the Working Group on the obligation to extradite or prosecute (aut dedere aut judicare), which, in the absence of its Chairperson, was presided over by Enrique Candioti. At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report presented by the temporary Chairperson of the Working Group.10

7. The Working Group continued its discussions with the aim of specifying the issues to be addressed to further facilitate the work of the Special Rapporteur. It had before it a survey of multilateral conventions which may be of relevance for the Commission’s work on the topic, prepared by the Secretariat,11 together with the general framework elaborated by the Working Group in 2009.

8. The survey identified more than 60 multilateral instruments, at the universal and regional levels, that contain provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders. It proposed a description and a typology of the relevant instruments in the light of those provisions, and examined the preparatory work of certain key conventions that have served as models in the field, as well as the reservations made to the relevant provisions. It also pointed out the differences and similarities between the provisions in different conventions and their evolution.

9. On the basis of the survey, overall conclusions were offered as to (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition under the various conventions; and (c) the conditions applicable to prosecution under the various conventions.12

10. The Working Group also had before it a working paper prepared by the Special Rapporteur on the bases for discussion in the Working Group on the topic,13 containing observations and suggestions based on the general framework prepared in 2009 and drawing upon the survey by the Secretariat. In particular, the Special Rapporteur drew attention to questions concerning (a) the legal bases of the obligation to extradite or prosecute; (b) the material scope of the obligation; (c) the content of the obligation; and (d) the conditions for the triggering of the obligation.

11. The Working Group affirmed the continuing relevance of the general framework agreed upon in 2009. It was recognized that the Secretariat survey had helped to elucidate aspects of the general framework, had helped to clarify issues concerning the typology of treaty provisions, differences and similarities in the formulation of the obligation to extradite or prosecute in those provisions and their evolution, under the rubric “the legal bases of the obligation to extradite or prosecute” of the general framework.

12. It was also noted that, in seeking to throw light on the questions agreed upon in the general framework, the multilateral treaty practice on which the Secretariat survey had focused needed to be complemented by a detailed consideration of other aspects of State practice (including but not limited to national legislation, case law and official statements of governmental representatives).

13. In addition, it was pointed out that, insofar as the duty to cooperate in the fight against impunity seemed to underpin the obligation to extradite or prosecute, a systematic assessment, based on State practice, needed to be made of the extent to which that duty could elucidate, as a general rule or in relation to specific crimes, work on the topic, including work in relation to the material scope, the content of the obligation to extradite or prosecute and the conditions for the triggering of that obligation.

14. The Working Group reaffirmed, taking into account the practice of the Commission in the progressive development of international law and its codification, that the general orientation of future reports of the Special Rapporteur should be towards presenting draft articles for consideration by the Commission, based on the general framework agreed upon in 2009.

CHAPTER II

Discussions in the Sixth Committee during the sixty-fifth session of the General Assembly

A. General comments

15. Several delegations reiterated the importance that they attached to the topic and its relevance in the fight against impunity,14 and expressed concern that relatively little progress had been made so far.15 It was hoped that the Commission would make substantial progress thereon at its sixty-third session, in 2011.16 In that context, some

10 Yearbook ... 2010, vol. II (Part Two), paras. 335 and 336.
12 Ibid., chap. II.
14 Official Records of the General Assembly, Sixty-fifth Session, Sixth Committee, Slovenia, 20th meeting (A/C.6/65/SR.20), para. 40; Colombia, ibid., para. 76; Hungary, 21st meeting (A/C.6/65/SR.21); Austria, 25th meeting (A/C.6/65/SR.25); Portugal, ibid.; Sri Lanka, 26th meeting (A/C.6/65/SR.26), para. 47; Netherlands, ibid., para. 49; Cuba, ibid., para. 54; and Spain, ibid., para. 73.
15 Austria, ibid., 19th meeting (A/C.6/65/SR.19); Belgium, 20th meeting (A/C.6/65/SR.20), para. 31; Slovenia, ibid., para. 40; Libyan Arab Jamahiriya, 21st meeting (A/C.6/65/SR.21), para. 24;
delegations considered that the general framework elaborated by the Working Group in 2009 continued to be relevant for the Commission’s work. The cautious approach by the Special Rapporteur and the Working Group was also commended and the need for a thorough review of State practice was emphasized.

16. While several delegations welcomed the survey prepared by the Secretariat, it was also suggested that it be expanded to include other aspects of State practice, such as national legislation. For that purpose, reference was made to the comments made by States at the request of the Commission.

17. While some delegations expressed support for the formulation of draft articles on this topic, based on the general framework, the appropriateness of such an endeavour, and the extension of the obligation to extradite or prosecute beyond binding instruments containing such an obligation, was also questioned.

B. Legal bases of the obligation

18. Some delegations considered that the question concerning the legal bases of the obligation to extradite or prosecute, and the content and nature of such obligation, in particular in relation to specific crimes, merited further examination. Other delegations reiterated their position that the obligation could not yet be regarded as a rule or principle of customary law.

19. It was pointed out that the relevant treaty terms must govern both the crimes in respect of which the obligation arises and the question of implementation. The view was also expressed that the question of a possible customary norm in this area should only be considered after a careful analysis of the scope and content of the obligation under existing treaty regimes, and that any examination thereof required a broader range of reporting by States on relevant practice.

20. Some delegations expressed support for the examination of the duty to cooperate in the fight against impunity as underpinning the obligation to extradite or prosecute.

C. Conditions for the triggering and implementation of the obligation

21. The view was expressed that the Commission should examine the conditions for the triggering of the obligation to extradite or prosecute, the conditions of extradition, and the question of surrendering an alleged offender to an international court or tribunal (the “third alternative”), when the State concerned was unable or unwilling to proceed with prosecution. It was also suggested that the Commission examine the question of when the obligation might be regarded as satisfied in situations where it proved difficult to implement, for example, for evidentiary reasons.

D. Relationship with other principles

22. While the view was expressed that the obligation to extradite or prosecute had to be clearly distinguished from the principle of universal jurisdiction, some delegations considered them to be inextricably linked. In that context, it was suggested that the Special Rapporteur take into account the report prepared by Secretary-General on the basis of comments and observations of Governments on the scope and application of the principle of universal jurisdiction. The relationship between the Commission’s work on the obligation to extradite or prosecute and on other topics on its long-term programme of work, in particular the issue of extraterritorial jurisdiction, was also highlighted.

Chapter III

Sources of the obligation to extradite or prosecute

23. The main problem on which the Special Rapporteur would like to concentrate in this report is the question of principal sources of the obligation to extradite or prosecute. Already in the preliminary report, he identified such sources as international treaties, international custom and general principles of law, as well as national
legislation and practice of States. Among these sources, as it was established subsequently, the leading position is taken by international treaties and international custom, since these are the most important and generally applicable sources of international law. Consequently, the present report will limit itself to these two sources of the obligation aut dedere aut judicare.

24. In the proposed general framework for the Commission’s consideration of the topic “The obligation to extradite or prosecute”, prepared and agreed upon by the Working Group in 2009 (see para. 5 above), it is recommended that the legal bases of the obligation to extradite or prosecute be the first problem to be considered. Within this problem, the Working Group identified a set of more detailed questions, including the following: (a) the obligation to extradite or prosecute and the duty to cooperate in the fight against impunity; (b) the obligation to extradite or prosecute in existing treaties: typology of treaty provisions; differences and similarities between those provisions, and their evolution (cf. conventions on terrorism); (c) whether and to what extent the obligation to extradite or prosecute has a basis in customary international law; (d) whether the obligation to extradite or prosecute is inextricably linked with certain particular “customary crimes” (e.g. piracy); and (e) whether regional principles relating to the obligation to extradite or prosecute may be identified.

25. The Working Group suggested that a final determination on questions (c), (d) and (e) above might only be possible at a later stage, in particular after a careful analysis of the scope and content of the obligation to extradite or prosecute under existing treaty regimes. It might also be advisable to examine the customary nature of the obligation in relation to specific crimes.

A. Duty to cooperate in the fight against impunity

26. The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments. For instance, Article 1, paragraph 3, of the Charter of the United Nations clearly lists among the purposes of the United Nations:

To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

27. The general duty to cooperate was confirmed as one of the principles of international law in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations in the following terms:

States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences.

28. The positive approach to the said duty is also clearly expressed in the Rome Statute of the International Criminal Court. In the preamble to the Statute, the States parties affirm that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”, and that the parties are “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.

29. The duty to cooperate in the fight against impunity, as a sui generis primary source of the obligation aut dedere aut judicare, appeared in the leading position among the legal bases of the obligation to extradite or prosecute proposed by the Working Group of the Commission in 2009 (see paras. 5 and 24 above). It was confirmed again in 2010 in the discussions of the Working Group, in which it was stated that “the duty to cooperate in the fight against impunity seemed to underpin the obligation to extradite or prosecute”.

30. Impunity itself has been a matter of legal analysis. The question of the duty to cooperate in the fight against impunity appears in international relations in various aspects, either (a) as a universal problem, or (b) as a question of regional application, or (c) as a matter connected with particular kinds of crimes.

31. An interesting example of formulating such a duty on a regional basis (Council of Europe) and concerning particular crimes (human rights violations) may be found in the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted by the Committee of Ministers on 30 March 2011.

32. Though the said guidelines concentrate on eradicating impunity for serious human rights violations, they include rules applicable to other categories of the most serious international crimes. Guideline XII, on international cooperation, states that:

International cooperation plays a significant role in combating impunity. In order to prevent and eradicate impunity, States must fulfil their obligations, notably with regard to mutual legal assistance, prosecutions and extraditions, in a manner consistent with respect for human rights… and in good faith. To that end, States are encouraged to intensify their cooperation beyond their existing obligations.

33. Such cooperation is recognized by some States as their international obligation. For instance, in its commentary submitted to the Commission in 2009, Belgium stated:

Belgium considers that all States must cooperate in suppressing certain extremely serious crimes—particularly crimes of international humanitarian law (crimes against humanity, genocide and war

36 For example, the updated set of principles for the protection and promotion of human rights through action to combat impunity, submitted to the Commission on Human Rights on 8 February 2005 (E/CN.4/2005/102/Add.1), defined impunity as “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims”.
37 Council of Europe, CM/Del/Dec(2011)1110, 4 April 2011.
crimes)—since such crimes pose a threat, both qualitatively and quantitatively, to the most fundamental values of the international community. This contribution to the suppression effort may take the form of direct prosecution of the alleged perpetrators of such crimes or of extradition of those responsible to any State that wishes to prosecute them.  

34. It is indisputable that the fight against impunity for the perpetrators of serious international crimes is a fundamental policy of the international community. The efforts to combat impunity for the perpetrators of serious crimes are conducted, in general, using two methods.

35. The first method relates to establishing international tribunals, which has been the case since the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East (Tokyo Tribunal) in the aftermath of the Second World War. This method is limited, because international tribunals necessarily have limited jurisdiction. They cannot address the problems of impunity in general, but only those aspects of it which are covered by their mandate as specified in their statutes. Even if this mandate is quite general, as in the case of the International Criminal Court, the actual extent to which impunity will be combated still depends on the voluntary decision of States to become party to the Statute.

36. The second method reflects the limited nature of international criminal tribunals. The remaining problems of impunity are addressed through the exercise of jurisdiction by national courts. This is reflected in the fact that the multiplication of international criminal tribunals over the past 15 years has not caused any decline in the activities of national courts in this field. Quite the contrary, the growth of international criminal jurisdiction has been accompanied by the equally remarkable growth of national criminal jurisdiction to address international crimes, including those committed extraterritorially.

37. It has to be added that the duty to cooperate in the fight against impunity has been already considered by some States and by the doctrine as a customary rule creating a clear obligation for States. As was stated before ICJ by Eric David in the case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) on 7 April 2009:

That rule, which obliges States to combat impunity or to bring to trial the perpetrators of crimes under international law—the expressions may vary—is not only contained in the texts I mentioned yesterday and which I have just recalled [i.e., international treaties]; it is to be found in almost 40 resolutions adopted by the Security Council since 2003.

38. As concerns the content of the right invoked by Belgium, Eric David rightly stated that this right is the right for Belgium to see States fulfil their obligation to prosecute or extradite the perpetrator of a crime under international law. This right is ultimately nothing more than the transposition into law by the international community of a fundamental moral and social value which has now become a legal requirement—not to let some of the very gravest of crimes go unpunished.  

**Article 2. Duty to cooperate**

In any case, independently of which category of the mentioned methods is going to be applied—international tribunals or internal courts—it seems that the duty to cooperate in the fight against impunity may be realized in the best and most effective way by the application of the principle aut dedere aut judicare.

40. Summing up the above considerations, it can be said that the provisions dealing with the duty of States to cooperate in the fight against impunity may be added as an introductory article when codifying the principle aut dedere aut judicare. These two kinds of provisions seem to be closely interrelated:

“Article 2. Duty to cooperate

“1. In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with competent international court and tribunals, in the fight against impunity as it concerns crimes and offences of international concern.

“2. For this purpose, the States will apply, wherever and whenever appropriate, and in accordance with these draft articles, the principle to extradite or prosecute (aut dedere aut judicare).”

**B. The obligation to extradite or prosecute in existing treaties**

41. Already in the preliminary report, the Special Rapporteur placed international treaties first on the list of the sources of the obligation to extradite or prosecute. Simultaneously, he remarked that a preliminary task in future codification work on the topic in question would be to complete a comparative list of relevant treaties and formulations used by them to reflect this obligation.

42. At the same time, a first classification of those treaties was proposed by the Special Rapporteur, differentiating two categories:

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42 As ICJ emphasized in the case of Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), the functionally and temporarily limited immunity of the Minister for Foreign Affairs of the Democratic Republic of the Congo was not the same as according impunity to that official, because the number of ways of prosecuting him remained intact (Judgment, *I.C.J. Reports* 2002, p. 3, paras. 60 and 61).

43 ICJ, CR 2009/10, para. 11.
Substantive treaties, defining particular offences and requiring their criminalization and the prosecution or extradition of offenders, as well as procedural conventions, dealing with extradition and other matters of legal cooperation between States.47

1. VARIETY OF POSSIBLE CLASSIFICATIONS OF INTERNATIONAL TREATIES ESTABLISHING THE OBLIGATION AUT DEDERE AUT JUDICARE

43. There is no legally binding classification of treaties or their formulations reflecting the obligation to extradite or prosecute. Various classifications and a catalogue of international treaties are, however, available in doctrinal or other non-governmental research works. Some of them may be taken into account by the Commission in its codification task.

(a) Bassiouni and Wise classification

44. A comprehensive catalogue may be found, as mentioned in the preliminary report, in the well-known book of Bassiouni and Wise, Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law, published in 1995. Annexed to this work, a rich collection of international criminal law instruments establishing a duty to extradite or prosecute has been gathered, classified into numerous categories and commented on by those two authors. Their classification is based generally on differentiation between substantial and procedural treaties, although there is a certain lack of proportion in the number of conventions considered substantial (24) and procedural (6). The first category includes conventions dealing with such crimes as:

1. the prohibition against aggression,
2. war crimes,
3. unlawful use of weapons,
4. crimes against humanity,
5. the prohibition against genocide,
6. racial discrimination and apartheid,
7. slavery and related crimes,
8. the prohibition against torture,
9. unlawful human experimentation,
10. piracy,
11. aircraft hijacking and related offences,
12. crimes against the safety of international maritime navigation,
13. use of force against internationally protected persons,
14. taking of civilian hostages,
15. drug offences,
16. international traffic in obscene publications,
17. protection of national and archaeological treasures,
18. environmental protection,
19. theft of nuclear materials,
20. unlawful use of the mails,
21. interference with submarine cables,
22. counterfeiting,
23. corrupt practices in international commercial transactions
24. mercenarism.48

45. The second category, that of procedural conventions, comprises three clusters of conventions elaborated under the auspices of three international organizations: the United Nations, the Council of Europe and OAS.

46. This catalogue, though intended to cover all categories of treaties concerned, has become non-exhaustive, not including, for instance, the most recent counter-terrorism treaties, as well as conventions on the suppression of various international or transnational crimes.49

(b) Amnesty International classifications


48. Eight years later, in 2009, Amnesty International published another memorandum,51 this time devoted to the presentation of the obligation to extradite or prosecute in the context of the work of the Commission. Although the substantial scope of this memorandum is narrower and limited to the question of the obligation aut dedere aut judicature, selected treaties are not classified substantially, but territorially in four groups: international treaties (24), and selected treaties adopted under the auspices of OAS (7), the Council of Europe (3) and the African Union (3).

49. This presentation of Amnesty International is lacking more developed or comparative analysis of selected treaties, instead of which it gives more information of a technical nature, like reservations, declarations, signatures and ratifications. There are also quoted provisions of the treaties dealing directly with universal jurisdiction and the obligation to extradite or prosecute.

50. One year later, in 2010, Amnesty International produced another report,52 dealing this time mainly with the

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49 See, for example, the United Nations Convention against Transnational Organized Crime and its Protocols, or the International Convention for the Suppression of Acts of Nuclear Terrorism. See also the Council of Europe Convention on the Prevention of Terrorism, which in article 18 provides for the obligation to “extradite or prosecute,” although it does not deal directly with acts of terrorism, but only with offences connected with terrorism.
51 Amnesty International, International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicature).
52 Amnesty International, Universal Jurisdiction: UN General Assembly should support this essential international justice tool.
question of universal jurisdiction, but also containing valuable information concerning the principle *aut dedere aut judicare* and continuing the presentation and analysis of appropriate international treaties made in the previous report of 2009. In chapter III of the 2010 report, entitled “The widespread acceptance of universal jurisdiction and the obligation to extradite or prosecute”, the authors of the report gave a more recent review of ratified treaties “with *aut dedere aut judicare* obligations to exercise jurisdiction over foreigners suspected of committing certain crimes abroad against other foreigners”53 (combined with universal jurisdiction). The review of ratifications of some of these treaties indicated how widespread such acceptance is:

- 194 States have ratified the Geneva Conventions of 12 August 1949, which provide for universal jurisdiction with regard to those war crimes in international armed conflict defined as grave breaches;

- 107 States are party to the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention) (1973), which provides for universal jurisdiction for conduct amounting to apartheid;

- 170 States ratified the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), which provides for universal jurisdiction over grave breaches of that protocol;

- 167 States are party to the International Convention against the Taking of Hostages (Hostage Taking Convention) (1979), providing for the obligation to extradite or prosecute;


- 147 States are party to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Convention against Torture) (1984), which provides for universal jurisdiction, if the state decides not to extradite the person concerned to another State;

- 164 States have ratified the International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention) (1997), which provides for the obligation to extradite or prosecute;

- 146 States have ratified the United Nations Convention against Corruption (Corruption Convention) (2003), which provides for the obligation to extradite or prosecute;

- 19 States are party to the International Convention for the Protection of All Persons from Enforced Disappearance (Disappearances Convention) (2006), which provides for universal jurisdiction, unless the State extradites to another State or surrenders the person to an international criminal court whose jurisdiction it has recognized.54

51. At the end of the said report, Amnesty International recommended that States participating in the discussion in the Sixth Committee in October 2010 should make the following points in support of universal jurisdiction as an essential tool to enforce international justice, showing simultaneously a close relationship of this rule with the principle *aut dedere aut judicare*:

It is vital that all States uphold their commitment to universal jurisdiction, a long-established rule of international law, and reaffirm the duty of every State to exercise its jurisdiction over those responsible for crimes under international law, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances.

Under the related obligation to extradite or prosecute (*aut dedere aut judicare*) a State is required either to exercise jurisdiction (which would necessarily include exercising universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime.55

(c) *Mitchell classification*

52. Another valuable and current attempt to classify international conventions or treaties containing the *aut dedere aut judicare* clause was made by Mitchell.56 The author starts her work with the chapter entitled “Sources of the *aut dedere aut judicare* obligation”, in which “conventions or treaties” take a leading position. This chapter is divided into two main parts, “Multilateral treaties” and “Extradition treaties”, although this classification uses two rather incompatible criteria (number of parties and substance of treaty).

53. Analysing the two categories of treaties, the author notes that several writers have suggested that extradite or prosecute clauses appear in at least 70 international criminal law conventions (recalling the book of Bassiouni and Wise quoted above).57

54. In annex 1 to the said publication, the author decided to recall and quote just 30 multilateral conventions and 18 regional conventions dealing with the obligation in question. As in the case of the research done by Amnesty International, Mitchell considers the first convention containing an extradite or prosecute clause to be the International Convention for the Suppression of Counterfeiting Currency, which provided for two important obligations:

First, that where a State’s domestic law did not allow the extradition of nationals, nationals returning to their State after committing a crime under the Convention “should” be punishable in the same manner as if the crime had been committed in that State;

Secondly, foreigners who commit an offence under the Convention abroad and are now in a country whose domestic legislation recognises the extra-territorial application of criminal law “should” be punished as if the crime had occurred within that State, provided that there had been a request made for the offender’s extradition that had been refused for reasons not connected with the offence.58

55. These were the beginnings of the modern treaty approach to the question of the obligation *aut dedere aut judicare*. The last (universal) treaty recalled by Mitchell is the International Convention for the Protection of All Persons from Enforced Disappearance. Its extradite or prosecute clause (art. 9, para. 2) says that each State party shall take

57 But, on the other hand, she rightly observes that not all of these treaties in fact introduce an alternative obligation in question: “Whilst there may well be over 70 international treaties that require the parties to ‘proscribe, prosecute or punish’ particular conduct (Bassiouni and Wise, footnote 48 above, p. 8), considerably less than 70 of these require States to elect either to extradite or to prosecute offenders present on their territory. For example, the Genocide Convention does contain obligations for States to prosecute (where the genocide occurred on its territory) and to extradite (articles 3–6, and article 7 respectively), but these are not an *aut dedere aut judicare* obligation, where a State is required to do one or the other. (So, if a person accused of committing genocide elsewhere is present on a State’s territory, that State may be obliged to extradite him or her to a requesting State with whom it has an existing extradition treaty or other extradition arrangements but is not obliged to prosecute, whether or not an extradition request is made.)” (*ibid.*, p. 9, footnote 10).
such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

56. As concerns the “conventions or treaties” dealing with the obligation in question and concluded in the period between 1929 and 2006, Mitchell points out certain conventions which, in her opinion, have played the most important role in the process of modern formulation of the aut dedere aut judicare obligation. Among them, she noticed that

[the four Geneva Conventions of 1949 all include an identical form of the extradite or prosecute clause in respect of grave breaches, obliging High Contracting Parties to enact legislation necessary to provide effective penal sanctions for those committing grave breaches regardless of nationality, and to search for, and prosecute, offenders. As an alternative, the State may elect to “hand such persons over for trial” to another High Contracting Party, provided that the other State has made out a prima facie case.]

57. The author also stresses that the best known version of the aut dedere aut judicare clause was first drafted for the Convention for the suppression of unlawful seizure of aircraft, which provides:

Article 4 (2): Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article VIII to any of the States mentioned in paragraph 1 of this Article.

Article 7: The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

58. This formula has been applied, “more or less word for word”, in 15 further multilateral conventions.

(d) Commission secretariat classification

59. The most recent study, prepared by the secretariat of the Commission in June 2010, aims at assisting the Commission by providing information on multilateral conventions which may be of relevance to its future work on the present topic. It should be recalled, in this respect, that the Working Group highlighted this issue in section (a) (ii) of the proposed general framework, which refers to “the obligation to extradite or prosecute in existing treaties”.

60. The Secretariat conducted an extensive survey of multilateral instruments, both at the universal and regional levels, which resulted in the identification of 61 multilateral instruments that contain provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders.

61. Chapter I of the study proposes a typology of the relevant instruments in the light of those provisions, and examines the preparatory works of certain key conventions that have served as models in the field, as well as the reservations made to the relevant provisions. It also points out the differences and similarities between provisions in different conventions and their evolution.

62. Chapter II proposes some overall conclusions regarding: (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition; and (c) the conditions applicable to prosecution.

63. The annex contains a chronological list of the conventions found by the Secretariat to contain provisions combining extradition and prosecution and reproduces the text of the pertinent provisions.

64. The typology proposed by the Secretariat, with a view to providing a comparative overview of the content and evolution of the relevant provisions in conventional practice, divides the conventions including such provisions into four categories:

(a) The International Convention for the Suppression of Counterfeiting Currency and other conventions following the same model;

(b) The Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I);

(c) Regional conventions on extradition; and

(d) The Convention for the suppression of unlawful seizure of aircraft and other conventions following the same model.

65. This classification combines chronological and substantive criteria. First of all, it roughly reflects an evolution in the drafting of provisions combining the options of extradition and prosecution, which is useful for understanding the influence that certain conventions (such as the International Convention for the Suppression of Counterfeiting Currency of 1929 or the Convention for the suppression of unlawful seizure of aircraft of 1970) have exercised over conventional practice and how such provisions have changed over time. Secondly, the classification highlights some fundamental similarities in the content of provisions pertaining to the same category, thus facilitating a better understanding of their precise scope and of the main issues that have been discussed in the field.

66. However, it must be pointed out at the outset that this classification, while revealing some general tendencies in the field, should not be understood as reflecting a separation of the relevant provisions into rigid categories. Conventions pertaining to the same category are often very different in their content, and drafting techniques adopted by certain conventions have sometimes been followed by conventions belonging to a different category.

67. In chapter I of the study, under each of the categories mentioned in paragraph 64 above, the Secretariat identifies one or more key conventions that have served as models in the field and provides a description of the

mechanism for the punishment of offenders provided therein, their relevant preparatory works and reservations affecting the legal effect of the provisions combining the options of extradition and prosecution.

68. Chapter I further lists other conventions that belong to each category and describes how these conventions have followed, or have departed from, the original model, with information about the relevant aspects of preparatory works and reservations.

69. Chapter II of the study, entitled “Conclusions”, aims at recapitulating the main variations of clauses which may be of relevance to the study of the topic as found in the various instruments, following three thematic issues:

(a) The relationship between extradition and prosecution resulting from the clause (which reveals the overall structure and logic of that clause). Under this aspect, the relevant provisions contained in multilateral conventions may be classified into two main categories: (i) those clauses which impose an obligation to prosecute ipso facto when the alleged offender is present in the territory of the State, which the latter may be liberated from by granting extradition; and (ii) those clauses for which the obligation to prosecute is only triggered by the refusal to surrender the alleged offender following a request of extradition (clauses imposing an obligation to prosecute only when extradition has been requested and not granted);

(b) The conditions applicable to extradition;

(c) The conditions applicable to prosecution.

It then proposes some general conclusions arising from the examination of the previous work of the Commission on related topics and the conventional practice with respect to the obligation to extradite or prosecute.

2. ARTICLE 3. TREATY AS A SOURCE OF THE OBLIGATION TO EXTRADITE OR PROSECUTE

70. The third draft article proposed by the Special Rapporteur in his third report\(^6\) dealt with treaties as a source of the obligation to extradite or prosecute. This suggestion had already been made by the Special Rapporteur in the second report, and since it was not opposed either in the Commission or in the Sixth Committee, it seems that the text of the first paragraph of that draft article could be as follows:

“Article 3. Treaty as a source of the obligation to extradite or prosecute

1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.”

71. However, taking into account the variety and differentiation of provisions concerning the obligation in question, contained in particular treaties (see paras. 43–69 above), it seems useful to add a second paragraph concerning practical realization and application of the said obligation by individual States. Paragraph 2 could read as follows:

“The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a... crime against humanity.”

72. The review presented above of various classifications of international treaties containing appropriate clauses and formulating the obligation in question, as well as the growing number of such treaties, supports the formal confirmation of this first and most applied legal basis of the obligation to extradite or prosecute.

73. The conventional rights invoked by States before international courts in connection with this obligation seem also to be the most useful legal tool applied by the parties to any dispute. Such is the situation in the case Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) before ICJ (see paras. 37–38 above).

C. Principle aut dedere aut judicare as a rule of customary international law

74. Although the formula contained in the title of the present section has been questioned by many scholars, as well as by numerous States, it seems to have gained a significant number of supporters in recent years. As has been pointed out in the doctrine:

In principle, the duty to extradite or prosecute can also be established by customary international law. Customary international law, which is just as binding upon States as treaty law, arises from a general and consistent practice of States followed by them from a sense of legal obligation referred to as opinio iuris. In recent years, several leading scholars including C. Bassiouni, L. Sadat, C. Edelenbos, D. Orentlicher, and N. Roht-Arriaza have argued that there is a customary international law duty to prosecute persons accused of crimes against humanity.\(^6\)

75. Those invoking a customary international law obligation to prosecute or extradite usually quote the Declaration on Territorial Asylum of 1967 as the earliest international recognition of a customary law obligation to prosecute perpetrators of crimes against humanity. Article 1, paragraph 2, of the Declaration provides:

The majority of members stressed that the draft declaration under consideration was not intended to propound legal norms or to change existing rules of international law, but to lay down broad humanitarian and moral principles upon which States might rely in seeking to unify their practices relating to asylum.\(^6\)

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\(^6\) Scharf, “Aut dedere aut indicare”, paras. 6 and 7.

\(^6\) Resolution 2312 (XXII) of the General Assembly, 14 December 1967.

77. This language suggests that, from the outset, the General Assembly resolutions and other non-binding international instruments concerning the prosecution of crimes against humanity were meant to be aspirational only, and not intended to create any legal duties.69

D. Customary character of the obligation in the discussions held in the Sixth Committee during the sixty-third session of the General Assembly (2008)

78. Although the question of the possible customary nature of the obligation aut dedere aut judicare has been discussed in the Sixth Committee at all sessions of the General Assembly since 2006, including the sixty-fifth session (see para. 18 above), there was especially rich and fruitful discussion on this subject in the Sixth Committee in 2008.

79. Some delegations considered that the source of the obligation to extradite or prosecute was not limited to international treaties and was customary in nature, notably for serious international crimes.70 Among the crimes referred to in this context by some delegations were piracy,71 slave trade, apartheid, terrorism, torture, corruption, genocide, crimes against humanity and war crimes.72

80. Other delegations were of the contrary view that the obligation did not exist beyond the provisions of international treaties.73 It was indicated, in this regard, that the customary character of the obligation could not necessarily be inferred from the existence of customary rules prohibiting specific international crimes.74 According to some delegations, a customary rule might be in the process of emerging in the field.75 It was also noted that, in any event, the obligation would be applicable to a limited category of offences.76

81. Many delegations supported further study by the Commission of the question of the possible customary source of the obligation and the crimes covered by it.77 It was noted that, for this purpose, the Commission should rely on a systematic survey of the relevant State practice,78 including international treaties,79 domestic legislation80 and both national and international judicial decisions.81 While some delegations argued that a perceived lack of information from Governments should not delay the work of the Commission,82 others urged the Commission to allow sufficient time to receive and evaluate information from Governments.83

E. Customary basis of the rights invoked before ICJ

82. The most comprehensive presentation of the customary grounds of the obligation aut dedere aut judicare was made by Eric David in the aforementioned case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) in 2009 before ICJ. His statement of 6 April 2009 on the customary basis of the rights invoked by Belgium seems to be so important that it is worth being fully quoted here:

19. The rule judicare vel dedere is a rule of customary international law expressed by the United Nations General Assembly and the International Law Commission. In its resolution 3074 (XXVIII), adopted by the United Nations General Assembly, with no dissenting votes, on 3 December 1973, the Assembly proclaims:

“1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.” (Emphasis added.)

20. Likewise, the International Law Commission states in Article 9 of its Draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996:

“Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 or 20 [war crimes] is found shall extradite or prosecute that individual.” (Emphasis added.)

21. The preamble to the Statute of the International Criminal Court confirms the foregoing: the States Parties to the Statute (and, as already noted this morning, that is the case for both Senegal and Belgium), those States affirm

“that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation” (fourth considerandum);

They further declare (also in the preamble) that they are “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes” (fifth considerandum). Lastly, the States Parties to the Statute recall “that it is the duty of every

69 Scharf (footnote 66 above), para. 8.
71 Islamic Republic of Iran, ibid., 24th meeting (A/C.6/63/SR.24), para. 68.
73 Germany, ibid., 22nd meeting (A/C.6/63/SR.22), para. 58; Republic of Korea, 23rd meeting (A/C.6/63/SR.23), para. 26; United Kingdom, ibid., para. 68; Malaysia, ibid., para. 81; United States, ibid., para. 88; Israel, 24th meeting (A/C.6/63/SR.24), para. 74; and Jamaica, ibid., para. 79.
74 Germany, ibid., 22nd meeting (A/C.6/63/SR.22), para. 59; and Islamic Republic of Iran, 24th meeting (A/C.6/63/SR.24), para. 47.
75 Romania, ibid., 24th meeting (A/C.6/63/SR.24), para. 83.
76 United Kingdom, ibid., 23rd meeting (A/C.6/63/SR.23), para. 68; and Canada, 24th meeting (A/C.6/63/SR.24), para. 66.
77 Hungary, ibid., 20th meeting (A/C.6/63/SR.20), para. 33; Finland, 22nd meeting (A/C.6/63/SR.22), para. 57; Netherlands, ibid., para. 65; Republic of Korea, 23rd meeting (A/C.6/63/SR.23), para. 26; Japan, ibid., para. 43; Mexico, ibid., para. 58; United Kingdom, ibid., para. 68; New Zealand, 24th meeting (A/C.6/63/SR.24), para. 13; Italy, ibid., para. 23; Cuba, ibid., para. 29; Poland, ibid., para. 58; Argentina, ibid., para. 69; and Portugal, 25th meeting (A/C.6/63/SR.25), para. 89.
78 ibid., para. 89.
79 United Kingdom, ibid., 23rd meeting (A/C.6/63/SR.23), para. 89; Poland, 24th meeting (A/C.6/63/SR.24), para. 58; and Argentina, ibid., para. 69.
State to exercise its criminal jurisdiction over those responsible for international crimes” (sixth considerandum).

These excerpts from the preamble [to the Statute] of the International Criminal Court are significant: it is clear that, by the dignified and formal words of the States, they are attempting to express what they understand to be the opinio juris of the international community, i.e., the obligation to prosecute alleged perpetrators of war crimes, crimes against humanity and crimes of genocide, all of which being crimes targeted by the Statute of the International Criminal Court (arts. 6–8).

In repeating the same idea—combating impunity—three times, the States simply wish to express the force and incontestable scope of the customary rule calling for prosecution of alleged perpetrators of the crimes referred to above.

22. In addition to these rules stand the conventional rules which I enumerated a few moments ago, because there can be no doubt that the 1949 Geneva Conventions and the 1984 Convention against Torture also express customary international law. Obviously, the Court does not need any reminding, for example, that it has called the Geneva Conventions “intransgressible principles of international customary law” (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (II), p. 257, para. 79). Similar reasoning could be adopted in respect of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Moreover, Senegal, like Belgium, recognizes that genocide, war crimes and crimes against humanity are criminal offences customary in nature, because it is set out in the statement of grounds for the Senegalese law which I cited a few moments ago and which brings these crimes within the Senegalese Penal Code that this represents the “incorporation of international rules of conventional and customary origin”, rules which, according to the same statement of grounds, have the “character of jus cogens” (these are not my words but those in the statement of grounds for the Senegalese law).

23. In short, (…) as does conventional international law, customary international law requires States to prosecute or extradite perpetrators of the crimes under international law which I have referred to. Given that this obligation is based on customary international law towards all other States, Belgium has rights which are the corollary to Senegal’s customary obligation in the case of Mr. Hissène Habré: that is to say, and I beg the Court’s forgiveness for repeating myself once again, the right to see Senegal directly try Mr. Hissène Habré or, failing which, the right to have him extradited.84

83. Furthermore, a more condensed opinion may be found, formulated by Belgium in its Application of 19 February 2009 instituting proceedings in the same case, where the customary basis of the obligation to prosecute or to extradite Hissène Habré is invoked.85


85 Paragraph 12 of the Application of Belgium contains the following statement:

“Under customary international law, Senegal’s failure to prosecute Mr. H. Habré, or to extradite him to Belgium to answer for the crimes against humanity which are alleged against him, violates the general obligation to punish crimes under international humanitarian law which is to be found in numerous texts of secondary law (institutional acts of international organizations) and treaty law.

“The crimes alleged against Mr. H. Habré can be characterized as including crimes against humanity. At the time when Mr. H. Habré was President of Chad (1982–1990), a policy of widespread human rights violations was carried out against political opponents, members of their families and members of certain ethnic groups: the Hadjerai in 1987 and the Zaghawa in 1989. According to a report by the National Committee of Enquiry of the Chadian Ministry of Justice (1992), over 40,000 persons were summarily executed or died in detention.

“Such acts correspond to the definition of crimes against humanity, namely murders and acts of torture ‘committed as part of a widespread or systematic attack directed against any civilian population’; these defining elements of crimes against humanity reflect customary international law as expressed, for example, by the Statute of the International Criminal Court (ICC) (Article 7), by which Senegal and Belgium have been bound since 2 February 1999 and 26 June 2000, respectively.

F. Identification of categories of crimes and offences which could be classified as those originating the customary obligation aut dedere aut judicare

84. There are various classifications of crimes under international law or crimes under national law of international concern. The international element of these crimes creates a possibility for their international suppression. This suppression may be connected both with the possibility of application of universal jurisdiction and with the applicability of the obligation aut dedere aut judicare to them.

85. When the basis for the application of the said obligation is of a conventional nature, the situation seems to be relatively simple, though the application in practice may depend on the existence or non-existence of particular treaty conditions, such as a prior extradition request before exercising universal jurisdiction. In the observations submitted by Belgium to the Commission in 2009, there is even a specific classification of such treaties which differentiates between those containing an aut dedere aut judicare clause in the classic sense of the word and those containing a judicare vel dedere clause.86

86 On the other hand, it is much more complicated and difficult to find and prove the existence of a customary basis for the obligation in question, in regard both to an obligation in general and to specific, limited categories of crimes. Since, as has already been seen in previous reports, it is rather difficult in the present situation to prove the existence of a general international customary obligation to extradite or prosecute, one should rather concentrate on identifying those particular categories of crimes which may create such a customary obligation, recognized as binding by the international community of States, though limited as to its scope and substance.

87. As mentioned in previous reports, there have been numerous attempts to identify such crimes of international concern which could be recognized as giving a sufficient customary basis for the application of the principle aut dedere aut judicare. What is also important is the necessity of differentiating between ordinary criminal offences—criminalized under national laws of States—and a “qualified” form of such offences or crimes, namely in different ways as international crimes, crimes of international
concern, grave breaches, crimes against international humanitarian law, etc. These last crimes, in particular, possessing a combination of additional elements of international scope or a special grave character, may be considered as giving a sufficient customary basis for the application of the obligation aut dedere aut iudicature.

88. The question arises whether such “internationalization” of crimes gives them the right to be subordinated to the obligation “to extradite or prosecute”, with all consequences. In looking for the answer to this question, one may take into account the following opinion expressed by Schabas:

The result of the recognition of an offence as an international crime is that it imposes duties upon the States with respect to investigation, prosecution and extradition. This is sometimes expressed with the Latin expression aut dedere aut iudicature.89

89. An interesting attempt to identify such specific categories of crimes has been made by the Commission, which in article 9 of its Draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996, qualified certain kinds of crimes as those which, being committed, originate the necessity of exercising the obligation to extradite or prosecute. The said draft article provided that:

The State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual.90

90. Another important step towards identifying other possible customary bases for the application of the principle aut dedere aut iudicature was taken with the adoption of the Rome Statute of the International Criminal Court in 1998. Apart from stressing in its preamble the need for the legal classification of crimes within the jurisdiction of the Court. Among these crimes are: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.

91. The first three categories of crimes, following to a great extent the model elaborated by the Commission in the aforementioned Draft Code of 1996 (see para. 89 above), may be recognized as a good directory of customary rules appropriate to serve as bases for the obligation to extradite or prosecute. For that purpose, however, it seems that the crimes in question (genocide, crimes against humanity and war crimes) should possess specific characteristics, provided in articles 6 to 8 of the Statute, in addition to the general criminal law description of each offence.91

G. Jus cogens as a source of a duty to extradite or prosecute

92. Some commentators have suggested that the international law concept of jus cogens may also create a duty to extradite or prosecute. Thus, pursuant to the jus cogens concept, States are prohibited from committing crimes against humanity and an international agreement between States to facilitate commission of such crimes would be void ab initio. Furthermore, there is growing recognition that all States have a right to prosecute or entertain civil suits against the perpetrators of jus cogens crimes who are later found on their territory. From this, some commentators take the next logical step and argue that the concept of jus cogens also creates a duty to extradite or prosecute those who have committed crimes against humanity.92

93. To some extent, support for this view can be found in the advisory opinion rendered by ICJ on 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. In that case the Court stated:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.93

94. Although without any doubt there are certain norms in the realm of international criminal law which have reached the status of jus cogens norms (such as the prohibition of torture), which are based not only on treaty regulations but also on customary recognition, there are, however, some doubts whether the obligation aut dedere aut iudicature deriving from such peremptory norms also possesses characteristics of jus cogens. There are differences of opinion among scholars concerning this interdependence.

H. Article 4. International custom as a source of the obligation aut dedere aut iudicature

95. On the basis of the presentation and analysis made in sections D to G of this chapter, above, the Special Rapporteur proposes to add the following draft article to the set of draft articles concerning the obligation aut dedere aut iudicature:

"Article 4. International custom as a source of the obligation aut dedere aut iudicature"

"1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law.

97 Schabas, The UN Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, p. 158.
99 "Article 6: Genocide ... 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.
"Article 7: Crimes against humanity ... 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

90 Schabas, The UN Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, p. 158.
91 "Article 6: Genocide ... 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.
"Article 7: Crimes against humanity ... 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.
92 Schabas, The UN Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, p. 158.
94 "Article 6: Genocide ... 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.
"Article 7: Crimes against humanity ... 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.
95 "Article 6: Genocide ... 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.
"Article 7: Crimes against humanity ... 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.
96 Schabas, The UN Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, p. 158.
97 Schabas, The UN Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, p. 158.
99 "Article 6: Genocide ... 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.
"Article 7: Crimes against humanity ... 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.
"Article 8: War crimes. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. 2. For the purpose of this Statute, 'war crimes' means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention."
“2. Such an obligation may derive, in particular, from customary norms of international law concerning serious violations of international humanitarian law, genocide, crimes against humanity and war crimes.

“3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (jus cogens), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2.”

96. The list of crimes and offences covered by paragraph 2 seems to be still open and subject to further consideration and discussion.
PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

[Agenda item 7]

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Fourth report on the protection of persons in the event of disasters,
by Mr. Eduardo Valencia-Ospina, Special Rapporteur

[Original: English/French]
[11 May 2011]

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Convention (I) for the pacific settlement of international disputes

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(The Hague, 18 October 1907) Ibid., p. 151.

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International Covenant on Civil and Political Rights (New York, 16 December 1966)

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Inter-American Convention to Facilitate Disaster Assistance (Santiago, 7 June 1991)

Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere, 18 June 1998)

Framework Convention on civil defence assistance (Geneva, 22 May 2000)

ASEAN Agreement on Disaster Management and Emergency Response (Vientiane, 26 July 2005)


Source


Ibid., No. 973, p. 287.

Ibid., vol. 1125, No. 17512, p. 3.

Ibid., No. 17513, p. 609.

Ibid., vol. 213, No. 2889, p. 221.

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Protection of persons in the event of disasters

Introduction

A. Comments by Governments

1. At the sixty-second session of the International Law Commission, in 2010, the Special Rapporteur submitted his third report on the protection of persons in the event of disasters. In that report, he provided an overview of the comments of States and IFRC, made in the Sixth Committee of the General Assembly, on the work undertaken by the Commission thus far. He then examined the principles that inspire the protection of persons in the event of disasters, in its aspect related to persons in need of protection, and the question of the responsibility of the affected State. The report contained proposals for three further draft articles on humanitarian principles in disaster response (art. 6), human dignity (art. 7) and the primary responsibility of the affected State (art. 8).

2. The Commission considered the third report at its 3054th to 3057th meetings, from 1 to 4 June 2010, and referred all three draft articles, 6 to 8, to the Drafting Committee.

3. Also at the 3057th meeting, the Commission provisionally adopted draft articles 1 to 5, which had been considered at its previous session, as submitted to the plenary in the report presented by the Chairperson of the Drafting Committee on 30 July 2009. Commentaries to draft articles 1 to 5 were likewise adopted by the Commission at its 3072nd meeting, on 2 August 2010. The text of draft articles 1 to 5, with commentaries, was reproduced in the report of the Commission on the work of its sixty-second session.

4. The Drafting Committee, in the light of the discussion held in plenary, considering that the three draft articles proposed by the Special Rapporteur in his third report embodied distinct concepts which merited separate treatment, provisionally adopted the following four additional draft articles: humanitarian principles in disaster response (art. 6); human dignity (art. 7); human rights (art. 8); and role of the affected State (art. 9).

5. The four new draft articles were submitted to the plenary in a comprehensive report presented by the Chairperson of the Drafting Committee at the 3067th meeting of the Commission, on 20 July 2010. Owing to the lack of time for the preparation and adoption of the corresponding commentaries, the Commission, at that meeting, took note of draft articles 6 to 9 as provisionally adopted by the Drafting Committee. The text of the four draft articles was reproduced in a Commission document and in the aforementioned report of the Commission on the work of its sixty-second session.

6. In October and November 2010, at the sixty-fifth session of the General Assembly, the Sixth Committee considered the third report of the Special Rapporteur and the debate thereon held in the Commission, with particular attention being given to the nine draft articles on the protection of persons in the event of disasters already elaborated within the Commission. Some States addressed draft articles 1 to 5, together with commentaries, as adopted by the Commission, as well as draft articles 6 to 9, provisionally adopted by the Drafting Committee. Other States limited their comments to draft articles 6 to 8, as originally proposed by the Special Rapporteur. States welcomed the progress made by the Commission in a short time and once again stressed the importance and timeliness of the topic.

7. Regarding the general scope of the topic, support was expressed for the emphasis in the commentary to draft article 1 on the rights and obligations of States in relation to persons in need of protection, as well as for the inclusion of the pre-disaster phase, involving disaster risk reduction, prevention and mitigation activities, as suggested in paragraph (4) of the commentary. The view was also expressed that the scope ratione personae of the draft articles should be focused on natural persons, not including legal persons. It was suggested that provision should be made for the various issues and responsibilities that could arise for assisting and transit States.

8. With respect to the purpose in draft article 2, support was expressed for the phrase “adequate and effective response”, which was considered essential to the protection of persons in disaster situations; the phrase “with full respect for their rights” was likewise endorsed as being a reference that comprised not only basic human rights, but also acquired rights.

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Footnotes:

6 Yearbook ... 2010, vol. II (Part Two), footnote 1334.
7 The summary of the discussion in the Sixth Committee appearing below (paras. 7–25) inevitably resembles the Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fifth session (A/C.4/638), paras. 75–95. Nevertheless, its inclusion has been deemed useful since, unlike the Secretariat’s, it identifies by name the States making statements, with reference to the corresponding records of the Sixth Committee.
9 Thailand, ibid., 23rd meeting (A/C.6/65/SR.23), para. 71. See also Cuba, ibid., para. 94; and Poland, ibid., para. 99. IFRC stated that “treating the role of civil society actors in disaster response only in a secondary manner, as paragraph (3) of the commentary to draft article 1 indicated, would leave a critical gap”, ibid., 25th meeting (A/C.6/65/SR.25), para. 47.
10 Ireland, ibid., 24th meeting (A/C.6/65/SR.24), para. 53.
11 Ibid.
9. Some States agreed with delimiting the definition of disaster so as to exclude other serious events that might disrupt the functioning of society. Concern was expressed that draft article 3 set too high a threshold with the requirement of a "serious" disruption of the functioning of society and therefore could exclude disasters that did not "shake the society as a whole," thereby not entailing the Government’s obligation to protect. It was also noted that if "widespread loss of life, great human suffering and distress, or large-scale material and environmental damage" were only three possible outcomes among others, the words "inter alia" should precede them. It was further suggested that the notion of "humanitarian response" also be defined.

10. The view was expressed that draft article 4 on the relationship with international humanitarian law should be construed as permitting the application of the draft articles in situations of armed conflict to the extent that existing rules of international law did not apply. It was also noted that it would be valuable for the future work to continue to take into account the distinction to be made depending on whether an armed conflict existed in the event of a disaster.

11. With regard to the duty to cooperate set out in draft article 5, support was expressed for the reference to cooperation with international and non-governmental organizations; the Commission was called upon to consider developing provisions that would deal with the particular issues arising in respect of cooperation with such organizations.

12. Agreement was expressed by several States with the inclusion of the principles of humanity, neutrality and impartiality in draft article 6, since those principles embodied elements that were useful in clarifying the underpinnings of third-State conduct with respect to a disaster that occurred in another State, albeit encompassing a significant measure of overlap. It was proposed that the Commission consider including a reference to the principle of independence, the principle of non-interference in internal affairs of States and the principle of non-discrimination.

13. The view was expressed that the principle of humanity was an important and distinct guiding principle. It was also noted that it was not clear what was covered by the principle of humanity, which might be confused with the idea of human dignity set out in draft article 7, and therefore it was proposed that the Commission clearly elaborate the relationship between draft articles 6 and 7. It was further suggested that it was preferable to locate it in a declaratory part of the instrument, such as the preamble.

14. Some States agreed that the principle of neutrality was of particular importance so as to ensure that those providing assistance carry out their activities with the sole aim of responding to the disaster in accordance with humanitarian principles and not for purposes of interfering in the domestic affairs of the affected States. The concern was expressed by some States that the principle of neutrality was closely connected with armed conflict and therefore could cause confusion and unnecessary complications, since even if construed more broadly, neutrality presupposed the existence of two opposing parties, which was not the case in the context of disasters. It was also noted that, in the absence of armed conflict, impartiality and non-discrimination would cover the same ground as neutrality.

15. It was stressed that the principle of impartiality was important and, concerning its proportionality component, it was asserted that the response to a disaster should be in proportion both to the practical needs of affected regions and peoples and to the capacity of affected States for providing their own relief and receiving relief from others.

16. Support was expressed for the inclusion in draft article 6 of the principle of non-discrimination. It was emphasized that the differential treatment of persons who were in different situations, mainly the particularly vulnerable, did not amount to discrimination.

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15 Switzerland, ibid., 22nd meeting (A/C.6/65/SR.22), para. 36; and El Salvador, ibid., 23rd meeting (A/C.6/65/SR.23), para. 64.

16 Switzerland, ibid., 22nd meeting (A/C.6/65/SR.22), para. 36; and Thailand, ibid., 23rd meeting (A/C.6/65/SR.23), para. 72; see also Ireland, ibid., 24th meeting (A/C.6/65/SR.24), para. 54.

17 Switzerland, ibid., 22nd meeting (A/C.6/65/SR.22), para. 36.


19 France, ibid., para. 84.

20 El Salvador, ibid., para. 64. Compare with Cuba, ibid., para. 94; and Colombia, ibid., 20th meeting (A/C.6/65/SR.20), para. 74 (noting that disasters arising as a result of armed conflict should not be included in the scope of the draft articles of the Commission).

21 Finland on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), ibid., 22nd meeting (A/C.6/65/SR.22), para. 32.

22 Monaco, ibid., 23rd meeting (A/C.6/65/SR.23), para. 88; Cuba, ibid., para. 94; and Ireland, ibid., 24th meeting (A/C.6/65/SR.24), para. 54. See also Islamic Republic of Iran, ibid., para. 37. IFRC stated that “problematic in the work on the draft articles was the fact that no distinction was drawn between domestic and international disaster response”, ibid., 25th meeting (A/C.6/65/SR.25), para. 48.

23 Switzerland, ibid., 22nd meeting (A/C.6/65/SR.22), para. 37; Greece, ibid., para. 50; Czech Republic, ibid., 23rd meeting (A/C.6/65/SR.23), para. 24; Monaco, ibid., para. 87; Poland, ibid., para. 100; and Islamic Republic of Iran, ibid., 24th meeting (A/C.6/65/SR.24), para. 37.

24 Czech Republic, ibid., 23rd meeting (A/C.6/65/SR.23), para. 24; Thailand, ibid., para. 70 (focus on the principle of independence); Russian Federation, ibid., para. 56 (focus on the principle of non-interference in internal affairs of States); Hungary, ibid., 21st meeting (A/C.6/65/SR.21), para. 33; Ireland, ibid., 24th meeting (A/C.6/65/SR.24), para. 55; and India, ibid., 25th meeting (A/C.6/65/SR.25), para. 35 (focus on the principle of non-discrimination).

25 Netherlands, ibid., 23rd meeting (A/C.6/65/SR.23), para. 44.

26 France, ibid., para. 84.

27 Greece, ibid., 22nd meeting (A/C.6/65/SR.22), para. 50.

28 Switzerland, ibid., para. 37; China, ibid., para. 62; Pakistan, ibid., 24th meeting (A/C.6/65/SR.24), para. 57; and Sri Lanka, ibid., 26th meeting (A/C.6/65/SR.26), para. 43. See also Russian Federation, ibid., 23rd meeting (A/C.6/65/SR.23), para. 56.

29 Portugal, ibid., para. 11; and Ireland, ibid., 24th meeting (A/C.6/65/SR.24), para. 55. See also Austria, ibid., 23rd meeting (A/C.6/65/SR.23), para. 38.

30 Estonia, ibid., para. 68; and Monaco, ibid., para. 87. See also Austria, ibid., para. 38.

31 China, ibid., 22nd meeting (A/C.6/65/SR.22), para. 63.

32 Hungary, ibid., 21st meeting (A/C.6/65/SR.21), para. 33; and Indonesia, ibid., 24th meeting (A/C.6/65/SR.24), para. 68.

33 France, ibid., 23rd meeting (A/C.6/65/SR.23), para. 84.
17. Some States concurred with draft article 7 on human dignity, reaffirming the relevance of the obligation to respect and protect the inherent dignity of the human person in the context of disaster response. It was, nevertheless, pointed out that the concept was not entirely quantifiable in legal terms and served more as an overarching concept that should be taken into account in such situations. Other States argued that human dignity might not be a human right per se, but rather a foundational principle on which the edifice of all human rights was built. While it was proposed to cover the principle by a reference in the preamble, others preferred retaining it in the text. It was further suggested that the draft articles include a principle that would make it a requirement to protect the interests of the affected society, such as its main values and way of life.

18. Some States agreed with draft article 8, as provisionally adopted by the Drafting Committee. In that connection, it was recalled that a temporary derogation from some human rights obligation might at times be necessary so as to ensure prompt and efficient rescue activities in emergency situations. It was also suggested that a reference to human rights be made instead in the preamble to the draft articles.

19. Draft article 9 was provisionally adopted by the Drafting Committee on the basis of paragraph 1 of draft article 8, proposed by the Special Rapporteur in his third report. In that connection, many States agreed with the assertion in the text that the primary responsibility for the protection of persons and provision of humanitarian assistance on an affected State’s territory lay with that State. It was noted that the primacy of the affected States in the provision of disaster relief assistance was based on State sovereignty and flowed from the State’s obligation towards its own citizens. As a practical matter, the State where the disaster had taken place was best placed to assess its needs in disaster response on its territory and in the facilitation, coordination, direction, control and supervision of relief operations. It was also suggested that the Commission include a specific mention of the principles of sovereignty and non-intervention.

20. Support was expressed for the version of draft article 9, as provisionally adopted by the Drafting Committee, and in particular the reference to the affected State’s “duty” to ensure the protection of persons and provision of disaster relief, rather than its “responsibility.” The concern was expressed that it was not clear what the content of the duty would be in legal terms, to whom it would be owed and what it would entail in practice.

21. Paragraph 2 of draft article 8, as proposed by the Special Rapporteur in his third report and referred to the Drafting Committee, concerned the consent of the affected State. In this regard, a number of States agreed with the proposition that external assistance could be provided only with the consent of the affected State. It was also said that States retained the right to decide whether to invite other States to participate in relief activities in the light of the gravity of the disaster and its own rescue and relief capacities.

22. Nonetheless, it was asserted that it was important to strike a balance between State sovereignty and human rights protection. It was suggested that when an affected State failed to protect persons in the event of a disaster because it lacked either the capacity or the will to do so, the affected State should seek assistance from other States and international organizations in accordance with draft article 5. In terms of a further view, a State should bear responsibility for its refusal to accept assistance, which could constitute an internationally wrongful act if such a refusal violated the rights of the affected persons under international law. It was felt that caution should be taken in making such characterizations, which could have adverse consequences for international relations and justify intervention in an affected State.

23. It was held that the question of consent to the activities of private and non-governmental actors deserved further discussion. It was also noted that non-governmental organizations and other bodies needed simply to...
comply with the internal laws of the affected State.55 The view was also expressed that, irrespective of any consent required, the international community might also have a certain responsibility, at least to offer assistance.56

24. The Commission was advised to adhere closely to actual State practice.57 In that connection, it was suggested that it continue compiling and studying national legislation, international agreements and the practice not only of States but of non-State actors as well in order to elucidate the legal and practical aspects of the topic.58 It was also suggested that the Commission interact closely with international organizations and non-governmental organizations operating in the field.59

25. Regarding the form of the Commission’s work, it was stated that non-binding guidelines, a guide to practice or a framework of principles addressed to all actors would have more practical value and enjoy widespread acceptance.60

26. By written communications, dated, respectively, 5 and 17 January 2011, Cuba and El Salvador transmitted their comments on the work accomplished thus far by the Commission, as reflected in its report on the sixty-second session. Those communications will be circulated as internal documents of the Commission.

B. Related developments

27. In 2010, some 373 natural disasters killed more than 296,800 people, affecting nearly 208 million others and costing nearly US$110 billion, according to the Centre for Research on the Epidemiology of Disasters of the Catholic University of Louvain.61 The increasing frequency and magnitude of natural disasters—including most recently the earthquake and tsunami in Japan, floods in Colombia and elsewhere, and storms in the United States—have led States, intergovernmental and non-governmental organizations and academic institutions to turn their attention to the role of law at all stages of a disaster situation. In this connection, several international meetings have been convened to focus on different aspects of the subject, following the conclusion of the sixth-second session of the Commission in 2010. The Special Rapporteur has been invited to and participated in some of those meetings, including most recently the consultation on Disaster Prevention and Recovery organized by the Conflict Prevention and Peace Forum under the auspices of the United Nations International Strategy for Disaster Reduction (New York, March 2011) and the symposium on “Rebuilding after the storm: the role of law in development post natural disasters” (Harvard Law School, November 2010), where he was a featured speaker. The Special Rapporteur will also be a featured speaker in January 2012 at the seminar on “Responding to the challenges of natural and industrial catastrophes: new directions for international law”, organized by the Hague Academy of International Law.

Chapter I

Responsibility of the affected State to seek assistance where its national response capacity is exceeded

28. The Drafting Committee, having established that an affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory (see draft article 9), the Special Rapporteur will now consider the duties of an affected State when the magnitude or duration of a disaster exceeds the limits of that State’s response capacity.

29. In determining the appropriate response of an affected State to a disaster that overwhelms its national response capacity, it is necessary to reiterate the core principles of State sovereignty and non-intervention. ICJ has characterized mutual respect for territorial sovereignty between independent nation States as an essential foundation of international relations.52 The guiding principles annexed to General Assembly resolution 46/182 affirmed that in the context of disaster response, “the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations”. Consequently, implementation of international relief assistance is contingent upon the consent of the affected State, as the Special Rapporteur recognized in his third report by proposing paragraph 2 of draft article 8, which was subsequently referred to the Drafting Committee.

30. The Special Rapporteur reaffirms that the authorities of an affected State have primary responsibility for assisting the victims of disasters that occur within their territory. As outlined in draft article 9, paragraph 2, provisionally adopted by the Drafting Committee, an affected State has the primary role in the direction, control, coordination and

57 France, *ibid.*, para. 86.
62 Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 9 April 1949, I.C.J. Reports 1949, p. 4 (noting that “between independent States, respect for territorial sovereignty is an essential foundation of international relations”).
63 General Assembly resolution 46/182 of 19 December 1991, annex, guiding principles, para. 3 (“humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country”). See also the ASEAN Agreement on Disaster Management and Emergency Response, art. 3, para. 1 (noting that “external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party”).
supervision of the provision of disaster relief and assistance. The primacy of an affected State stems both from its sovereign prerogatives and its responsibility towards the affected population within its territory. This latter basis is reflected in the resolution on humanitarian assistance adopted by the Institute of International Law at its Bruges session in 2003, which states:

The affected State has the duty to take care of the victims of disaster in its territory and has therefore the primary responsibility in the organization, provision and distribution of humanitarian assistance. As a result, it has the duty to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses.64

31. The core principles of sovereignty and non-intervention and the requirement of State consent must themselves be considered in the light of the responsibilities undertaken by States in the exercise of their sovereignty.65 These obligations may be owed both horizontally, to other States in the international community, or vertically, to populations and individuals within a State’s territory and control. Within the present topic, particular attention should be paid to the duties of States under international human rights instruments and customary international human rights law to provide protection to those persons within their territory. The scope of an affected State’s duties towards persons affected by disasters and the interaction of these duties with the core principles of sovereignty and territorial integrity and the requirement of State consent to the provision of international aid, form the basis of the current inquiry.

A. Responsibility of the affected State towards individuals on its territory

32. Paragraph 1 of draft article 9 of the provisionally adopted draft articles stipulates that an affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. The draft article affirms the primary importance of obligations undertaken by a State in respect of persons within its borders. As outlined by the Special Rapporteur in his preliminary report, a number of human rights are implicated in the context of a disaster, including the right to life, the right to food, the right to health and medical services, the right to the supply of water, the right to adequate housing, clothing and sanitation, and the right to be free from discrimination.66

33. By way of example, an analysis of one of the implicated rights is useful in articulating the nature of an affected State’s duties. The International Covenant on Economic, Social and Cultural Rights (art. 11) states that in pursuance of the right to food:

The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

The Committee on Economic, Social and Cultural Rights notes in General Comment No. 12 on the right to adequate food that if a State party maintains that resource constraints make it impossible to provide access to food to those in need:

The States has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations . . . A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.67

The General Comment clarifies that the “appropriate steps” to be taken by a State in the fulfilment of its obligations include seeking international assistance where domestic conditions are such that the right to food cannot be realized. It is relevant that this step is engaged where a State itself asserts that it is unable to carry out its obligations. The General Comment thus reflects that recourse to international support may be a necessary element in the fulfilment of a State’s obligations towards individuals where it considers that its own resources are inadequate to meet protection needs.

34. Specific references to rights in the event of disasters are made in the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of Persons with Disabilities. Under article 23 of the African Charter, States shall take “all appropriate measures” to ensure that children seeking or holding refugee status, as well as those who are internally displaced due to events including “natural disaster” are able to “receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties”. The wording “all appropriate measures” recalls the reference to “appropriate steps” in article 11, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights.

35. The Convention on the Rights of Persons with Disabilities refers to the obligation of States towards disabled persons in the event of disasters:

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

The phrase "all necessary measures" may be considered to encompass recourse to possible assistance from the international community in the event that an affected State’s national capacity is exceeded. Such an approach would cohere with the guiding principle of humanity as applied in the international legal system. ICJ affirmed in the Corfu Channel case (merits) that elementary considerations of humanity are considered to be general and

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65 S.S. Wimbledon, P.C.I.J. Series A, No. 1, p. 25 (1923), noting that the Court “declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.”
67 Official Records of the Economic and Social Council, Twentieth and Twenty-first Sessions, Supplement No.2, annex V, General Comment No. 12, p. 102, para. 17.
well-recognized principles of the international legal order, “even more exacting in peace than in war”. Draft article 6, provisionally adopted by the Drafting Committee, affirms the core position of the principle of humanity in disaster response.

B. Cooperation

36. The duty to cooperate is also relevant to an affected State’s responsibilities in the event that the effects of a disaster exceed its national capacity. Draft article 5, provisionally adopted by the Commission, affirms:

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

The draft article recognizes that the duty to cooperate is incumbent upon not only third States, but also affected States where such cooperation is appropriate. This approach is also implicit in the report of the independent expert on human rights and international solidarity submitted to the Human Rights Council by the High Commissioner for Human Rights:

The obligations related to international assistance and cooperation are complementary to the primary responsibility of States to meet their national human rights obligations. International cooperation rests on the premise that developing countries may not possess the necessary resources for the full realization of rights set forth in human rights conventions and conventions. There is a shared responsibility for development met by States’ national obligations and the obligations of international cooperation, facilitating global implementation.

This approach is also reflected in article 3, paragraph 3, of the Declaration on the Right to Development, in which the General Assembly notes:

States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observance and realization of human rights.

37. Comments by a number of States support the link between the duty to cooperate and the responsibilities of an affected State in the event that its national capacity is overwhelmed. Finland, on behalf of the Nordic countries, commented during the discussion in the Sixth Committee on the 2008 report of the Commission that “if the affected State was unable to provide the goods and services required for the survival of the population, it must cooperate with other States or organizations willing and able to do so”. This position was also taken in a statement made on behalf of the Nordic countries before the Sixth Committee in October 2010, in which it was noted that “[w]hen the affected State does not have the capacity or the will to protect and provide relief to the persons affected by the disaster, it should seek assistance from other States and international organizations in accordance with draft article 5 in order to fulfil its obligations.”

38. The Special Rapporteur reiterates that cooperation should not be interpreted in such a way as to diminish the prerogatives of a sovereign State within the international legal regime. The guiding principles annexed to General Assembly resolution 46/182 shed light on the relationship between the core principles of sovereignty and non-intervention, and the appropriate measures to be taken by a State in the fulfillment of its international responsibilities. The principles reaffirm that any humanitarian assistance should be provided “with the consent of the affected country and in principle on the basis of an appeal by the affected country”. While reiterating the central importance of State consent to any grant of international assistance, the Secretariat memorandum notes that the guiding principles also appear to support an implicit duty on affected States to engage in international cooperation where an emergency exceeds its response capacity. In paragraph 5 of the annex, the General Assembly notes:

The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws.

The framing of resolution 46/182 therefore draws attention to two distinct considerations. First, the prerequisite of State consent to any provision of assistance, and second, a potential responsibility to seek international assistance where national capacity is overwhelmed. The former directs attention towards the core requirements of territorial integrity and the horizontal obligations of States within the international legal regime. The latter directs attention rather towards an affected State’s responsibilities towards its population.

39. The foregoing instruments suggest that the “internal” aspect of sovereignty, reflected in an affected State’s primary responsibility towards persons within its territory, may encompass a duty to seek external support where national response capacities are overwhelmed. As the General Assembly notes in resolution 45/100 of 14 December 1990:

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68 Judgment of 9 April 1949, I.C.J. Reports 1949, p. 22, noting that “[t]he obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approach of British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war.”

69 Draft article 6 reads: “Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable” (Yearbook ... 2010, vol. II (Part Two), footnote 1334).

70 Ibid., para. 330.

71 A/HRC/9/10, para. 21.

72 General Assembly resolution 41/128 of 4 December 1986, annex.

73 Official Records of the General Assembly, Sixty-third Session, Sixth Committee, Finland on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), 22nd meeting (A/C.6/65/ SR.22), para. 53.

74 Finland, on behalf of the Nordic countries, ibid., Sixty-fifth Session, 22nd meeting (A/C.6/65/5/R.22), para. 31.

75 See footnote 63 above.

76 “Protection of persons in the event of disasters”, memorandum by the Secretariat (A/CN.4/590 and Add.1–3) (available from the Commission’s website, documents of the sixtieth session; the final text will be published as an addendum to Yearbook ... 2008, vol. II (Part One)), para. 57 and first footnote of this paragraph.
The abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity.77

This position was recently reaffirmed in the Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters:

States have the primary duty and responsibility to provide assistance and protection to persons affected by natural disasters. In doing so, they are obliged to respect the human rights of affected persons and to protect them from violations of their rights by private actors (e.g. individuals and groups committing crimes) as well as from dangers arising from the disaster (e.g. secondary impacts of natural disasters).78

The centrality of the principle of human dignity to this topic is affirmed in draft article 7, provisionally adopted by the Drafting Committee.79 Draft article 7 affirms the duty held by States, competent international organizations and relevant non-governmental organizations to respect and protect the inherent dignity of the human person when responding to disasters.

C. Formulations of a specific duty to seek assistance

40. The foregoing suggests that where the national capacity of a State is exhausted, seeking international assistance may be an element of the fulfilment of an affected State’s primary responsibilities under international human rights instruments and customary international law.

41. The Secretariat, in its memorandum on the topic at hand, recognized a movement towards greater recognition of a positive duty on affected States to request assistance, at least where the affected State’s response capacity is overwhelmed by a disaster.80 This duty has been incorporated into non-binding international instruments addressing disaster relief. The principle appears in a resolution on humanitarian assistance adopted by the Institute of International Law at its Bruges session in 2003. Its article III, paragraph 3, reads:

Whenever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or de facto control, it shall seek assistance from competent international organizations and/or from third States.81

42. Similarly, the international disaster response law guidelines of IFRC state that

[i]f an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons.82

A third formulation is incorporated in the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines), which note that “if international assistance is necessary, it should be requested or consented to by the Affected State as soon as possible upon the onset of the disaster to maximize its effectiveness”83

43. The formulations of the duty in the 2003 Bruges resolution of the Institute of International Law and the international disaster response law guidelines of IFRC share common attributes that can be linked to the foregoing discussion. First, a duty to seek international assistance only arises in cases where national incapacity is demonstrated. This prerequisite emphasizes that the duty to seek assistance arises out of an affected State’s primary duty to provide protection to persons within its territory under international human rights law instruments and customary law. Second, the duty is framed as a duty to “seek” rather than a duty to “request” assistance.

44. The Special Rapporteur considers that a duty to “seek” assistance is more appropriate than a duty to “request” assistance in this context. A request for assistance carries an implication that an affected State’s consent is granted upon acceptance of that request by a third State. The Secretariat memorandum reflects that a duty to request assistance may constrain a State’s “ability to decline offers of assistance”.84 In contrast, the Special Rapporteur considers that a duty to “seek” assistance implies a broader, negotiated approach to the provision of international aid. The term “seek” implies the initiation of a process through which agreement may be reached. As such, the Special Rapporteur is of the opinion that a duty to seek assistance both ensures the protection of populations and individuals of concern, and is coherent with the core requirement of State consent. Consequently, the Special Rapporteur is of the opinion that a duty to seek assistance, rather than a duty to request assistance, provides the best foundation for this topic.

45. In the light of the foregoing it is possible to propose the following wording for a draft article.

“Draft article 10. Duty of the affected State to seek assistance

“The affected State has the duty to seek assistance, as appropriate, from among third States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations if the disaster exceeds its national response capacity.”

46. This phrasing is a composite drawn from the 2003 Bruges resolution of the Institute of International Law (art. III, para. 3), IFRC guideline 3.2 and General Assembly resolution 46/182. It also echoes the appropriate scope of cooperation encompassed in draft article 5, provisionally adopted by the Commission.85 The term “seek” is adopted in the light of the discussion above. The reference to “national response capacity” echoes the reference to a State’s “response capacity” in resolution 46/182.86

77 Sixth preambular paragraph.
79 See footnote 5 above.
80 Memorandum by the Secretariat (A/CN.4/590 and Add.1–3) (footnote 76 above), para. 57.
81 Institute of International Law, “Humanitarian assistance”, p. 270.
82 IFRC, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, guideline 3.2, p. 12 (Geneva, 2008).
84 Memorandum by the Secretariat (footnote 76 above), para. 65.
86 See paragraph 5 of the guiding principles annexed to General Assembly resolution 46/182, noting that “[t]he magnitude and duration of many emergencies may be beyond the response capacity of many affected countries”.
and “national coping capacities” in the international disaster response law guidelines of IFRC.

47. The term “assistance” reflects the broad ambit of operational aspects in the provision of humanitarian protection. As such, it underscores an affected State’s right to determine the scope and type of assistance that is best suited to the fulfillment of its responsibilities under international human rights law and customary international law. Humanitarian assistance has been defined in the 2003 Bruges resolution as all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and fulfilment of the essential needs of victims.97

48. The draft article stresses that a duty to seek assistance arises only when the national response capacity of a State is exceeded. As noted during discussion of draft article 2 in the second report of the Special Rapporteur, not all disasters are considered to overwhelm a nation’s response capacity.98 As such the present draft article will only be applicable to a subset of disasters as defined in draft article 2.

49. The Special Rapporteur considers that the Government of a State will be in the best position to determine the severity of a disaster situation and the limits of its national response capacity. This position is in line with the “margin of appreciation” principle adopted in the European Court of Human Rights, which holds that “the national authorities enjoy a wide margin of appreciation under article 15 [of the European Convention on Human Rights] in assessing whether the life of their nation is threatened by a public emergency”.99 A recognition of the central role of an affected State in determining that its national capacity has been exceeded is also consistent with the core principle articulated in the annex to General Assembly resolution 46/182 that “humanitarian assistance should be provided with the consent of the affected countries and in principle on the basis of an appeal by the affected country”.100

50. The Special Rapporteur finds this formulation to be consistent with comments made by States in the Sixth Committee, recorded in the 2008 report of the Commission on the work of its sixtieth session, that “if an affected State cannot discharge its obligation to provide timely relief to its people in distress it must have an obligation to seek outside assistance”,101 and reiterated in the Sixth Committee’s discussion in 2010 on the report of the Commission on the work of its sixty-second session.102

CHAPTER II

Duty of the affected State not to arbitrarily withhold its consent to external assistance

51. As a starting point, the Special Rapporteur wishes to emphasize that in most cases of disaster response there is a willingness on the part of the affected State to allow for assistance and access in order to succor the victims, particularly in cases where the authorities were unable to cope with the disaster situation and there existed a clear need to bring relief to those affected by the disaster.103 This is not to say that such a general practice is conclusive of a legal obligation to allow for external assistance.

52. Consent is the expression of the will of the sovereign who permits activities on its territory that may otherwise constitute violations of the principle of non-intervention. Consent thus also has a main role to play in the acceptance or refusal of humanitarian assistance in disasters. As a matter of international law, the affected State has a right to refuse an offer. However, this right is not unlimited. In his third report, the Special Rapporteur underscored that sovereignty also entails obligations.104

53. There have been several examples in which the position of persons affected by a disaster worsened owing to the denial that the situation constituted a disaster or because the appropriate relief or offers thereof were not consented to or consented to after an extended period of time. All these factors, whatever the reasons behind them, contributed to the aggravation of an already vulnerable situation. The General Assembly has therefore made it abundantly clear in its resolutions 43/131 of 8 December 1988105 and 45/100 of 14 December 1990106 that the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity.

54. Assistance to persons affected by the disaster is indispensable, especially if the inability or unwillingness of the affected State to respond adequately and effectively jeopardizes, or even violates, the rights and dignity of those affected. Since consent to assistance is sanctioned by international law, rather than disregarding it, a limitation on its exercise also grounded in international law may be justified. A suggestion to this effect has been made in the plenary of the Commission:

That consideration be given to recognizing the legal consequences of the responsibility of the affected State by stating that its consent “shall

97 Institute of International Law, “Humanitarian assistance”, p. 264, art. 1, para. 1.
99 ECHR, A. and Others v. the United Kingdom (Grand Chamber), application No. 3455/05, 2009, para. 180.
100 See footnote 63 above.
102 See paragraph 22 above.
103 Recent examples are provided by the response to the earthquakes that struck New Zealand and Japan in February and March 2011, respectively. See www.reliefweb.int.
105 Eighth preambular paragraph.
106 Sixth preambular paragraph.
not unreasonably be withheld”, without prejudice to its sovereign right to decide whether or not external assistance was appropriate.97

55. States interacting in response to disasters have the duty to cooperate in good faith with one another to meet the needs of persons affected by a disaster. The importance of the duty to cooperate has been recognized by the Commission when it provisionally adopted draft article 5.98 In his second report, the Special Rapporteur has described this duty in some detail.99 The duty to cooperate shapes the legal framework within which the consent of the affected State manifests itself and reinforces the argument that consent is part and parcel of the international legal order, but that limitations may nevertheless be placed on it. In the context of humanitarian assistance the argument has been made, for example, by the Representative of the Secretary-General on internally displaced persons, that:

It can be argued that this duty to cooperate is referenced as the leading basis for two General Assembly resolutions reaffirming the primary responsibility of States to provide assistance to victims of natural disasters and similar emergencies that occur within their territory. This duty implies a corollary obligation of States to receive international assistance when offered and needed.100

56. The Representative’s assertion presupposes that the sovereignty of the State should be exercised in the way that best contributes to the protection and assistance of those in need.101 It is recalled in this connection that the Commission has already acknowledged that the affected State has the obligation, by virtue of its sovereignty, to ensure the protection of persons and the provision of humanitarian assistance to them on its territory.102

57. The obligation of the affected State to ensure such protection and assistance in the event of a disaster aims at preserving the life and dignity of the victims of the disaster and guaranteeing the access of persons in need to humanitarian assistance. It thus reaffirms the State’s paramount duty to secure the enjoyment of the right to life of those under its jurisdiction, as grounded in international law. While the right to life has been explicitly recognized in all major human rights instruments and is extensively dealt with by universal and regional human rights institutions, it has at the same time acquired a more general status in international law.103

58. Restrictions on the right to refuse humanitarian assistance can be found in various legal regimes aimed at the protection of persons, such as international human rights law, the law concerning internally displaced persons and international humanitarian law. The work currently undertaken by the Commission on the protection of persons in the event of disasters can therefore benefit from the tenets informing those regimes, as was already explained by the Special Rapporteur in his preliminary report.104

59. International human rights law encapsulates, to a certain extent, a balance of interests between States inter se with respect to ensuring the protection of persons on its territory and under its jurisdiction. The obligations are owed not only to other State parties to a particular convention but may equally be said to be owed to those individuals. To ensure the fulfillment of those obligations, an external dimension may also be made explicit or implicit in the various human rights instruments. The Human Rights Committee has interpreted the right to life, as embodied in article 6 of the International Covenant on Civil and Political Rights, to contain the obligation for States to adopt positive measures to ensure the enjoyment of this right.105 An offer of assistance that is met with refusal might thus, under certain conditions, constitute a violation of the right to life. Moreover, for the rights which are established in the International Covenant on Economic, Social and Cultural Rights,106 mention must be made of the general obligation described in article 2, paragraph 1, of that instrument. This provision states that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

60. From this text it follows that States, in order to realize the human rights enshrined in the International Covenant on Economic, Social and Cultural Rights, must cooperate internationally. If the affected State is a party to the Covenant and is not capable of addressing the consequences of a disaster to a sufficient extent, it is obliged to cooperate. Therefore, the duty to cooperate not only provides a basis for the requirement of consent as presently described, but it further underlines that treaty law implies a duty not to withhold consent arbitrarily.

97 Yearbook ... 2010, vol. II (Part Two), para. 323.
98 Ibid., paras. 298, 299 and 331.
101 In the words of Lauterpacht: “to give effect, through appropriate limitation and international supervision of the internal sovereignty of States, to the principle that the protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international”, International Law: Being the Collected Papers of H. Lauterpacht, p. 47.
102 Yearbook ... 2010, vol. II (Part Two), footnote 1334, draft article 9.
103 Ramcharan, “The Concept and Dimension of the Right to Life”, p. 3.

105 Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, General Comment No. 6, para. 5: “The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.” Other human rights institutions, such as the Inter-American Court of Human Rights and the European Court of Human Rights, have interpreted the right to life in a similar fashion. Note that the General Assembly has expressed indirectly the connection between the lack of access to humanitarian assistance and human rights law in its resolutions 43/131 and 45/100.

106 Relevant rights in this regard include the rights to food, to be free from hunger, to housing and to clothing (art. 11), the rights to health and medical services (art. 12), the rights to water and sanitation (art. 12) and the right not to be discriminated against (art. 2(2)). In the context of the protection of internally displaced persons, the Representative of the Secretary-General has correctly stated the following: “Thus, it can be argued that States parties to the International Covenant on Economic, Social and Cultural Rights have a duty to at least refrain from unreasonably denying offers of international assistance in cases of imminent humanitarian problems seriously affecting the subsistence needs of internally displaced persons and, perhaps, an obligation to accept reasonable offers… A refusal to accept an offer of international cooperation and assistance where necessary to realizing subsistence rights recognized under the treaty could be considered to constitute, at the least, ‘a deliberately retrogressive measure’ and, at most, a breach of treaty obligations” (E/CN.4/1996/52/Add.2, para. 365).
61. The guiding principles on internal displacement, which have been welcomed by the United Nations Commission on Human Rights and the General Assembly in unanimously adopted resolutions, are referred to by the Secretary-General as “the basic international norm for protection” of internally displaced persons. Guiding principle 25, paragraph 2, in fine, reads:

Consent to offering of providing humanitarian assistance shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.

62. In this text it is established not only that consent is required before assistance can be provided, but also that such consent “shall not be arbitrarily withheld”. This qualification is especially valid in situations where the affected State is either “unable” or “unwilling” to provide the assistance which is required in a particular situation. Thus, in this context, the sovereign right to give consent has been recognized, but with the qualification that in certain circumstances consent “shall not be withheld arbitrarily”.

63. International humanitarian law includes various provisions stipulating the obligations of a party to an international armed conflict and a non-international armed conflict, and the obligations of an occupying power. Article 59 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War states as a positive obligation that

if the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree* to relief schemes on behalf of the said population, and shall facilitate* them by all the means at its disposal.

The need of the population operates here as the trigger for the obligation to agree to and to facilitate relief schemes on behalf of the population in an occupied territory.

64. In non-occupied territory under the control of a party to an international conflict, article 70, paragraph 1, 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) provides that

[i]f the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement* of the Parties concerned in such relief actions.

In this case not only the need of the population but also the nature of the relief action is taken into account with regard to the obligation to consent to humanitarian assistance. The rule provides that there must be agreement before humanitarian actions for the benefit of a civilian population shall be undertaken.

65. Consent is more explicitly required by article 18 of 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), which reads:

If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

This provision, relating to situations occurring within the borders of a State, is also often the case with disasters, confirms the rule that humanitarian assistance must be preceded by the consent of the State on whose territory the assistance will be delivered. In the event of disasters, that State would be the affected State.

66. However, the question has been raised to what extent States are free to give or to withhold their consent in an armed conflict. The draft versions of the Additional Protocols of 1972 and 1973 contained an obligation to accept relief, if the relief answered to certain requirements such as impartiality and humanity. In order to protect the sovereignty of the State accepting relief, the requirement of consent was added, while clearly stating that this condition:

did not imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones.

Accordingly, it has been held that consent cannot be withheld arbitrarily, as it would otherwise deprive the provision of its meaning.

67. The Institute of International Law dealt twice with the question of consent in the context of humanitarian assistance. Its 1989 resolution on the “Protection of human rights and the principle of non-intervention in the domestic concerns of States”, article 5, paragraph 2, states in the original French text:

Les États sur le territoire desquels de telles situations de détresse [où la population est gravement menacée dans sa vie ou sa santé] existent ne refuseront pas arbitrairement de pareilles offres de secours humanitaires.

68. In 2003, the Institute dealt with this issue again. The resolution it adopted on the matter of refusal of consent is pertinent in a number of ways. The relevant text under the heading of the “Duty of affected States not arbitrarily to reject a bona fide offer of humanitarian assistance” reads:

AFFECTED STATES ARE UNDER THE OBLIGATION NOT ARBITRARILY AND UNJUSTIFIABLY TO REJECT A BONA FIDE OFFER EXCLUSIVELY INTENDED TO PROVIDE HUMANITARIAN ASSISTANCE OR TO REFUSE ACCESS TO THE VICTIMS. IN PARTICULAR, THEY MAY NOT REJECT AN OFFER OR REFUSE ACCESS IF SUCH REFUSAL IS LIKELY TO ENDANGER THE FUNDAMENTAL HUMAN RIGHTS OF THE VICTIMS OR WOULD AMOUNT TO A VIOLATION OF THE BAN ON STARVATION OF CIVILIANS AS A METHOD OF WARFARE.

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109 The issue of being “unable or unwilling” is dealt with below (paras. 70 and 71).
110 Institute of International Law, “Protection of human rights and the principle of non-intervention in the domestic concerns of States”, art. 5, para. 2. Included in the French text is clear mandatory language (“ne refuseront pas arbitrairement”), while the English translation reads: “States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance.”
111 Institute of International Law, “Humanitarian assistance”, p. 274.
Interestingly, the members of the Institute thought it necessary to add “unjustifiably” to “arbitrarily”. This may signify that, in their view, the inclusion of the word “arbitrarily” alone left too implicit the need for the statement of reasons justifying the decision to reject a bona fide offer.

69. There is yet a last notable private undertaking by Schindler, who in 1995 had drawn up a set of rules derived from a number of legally binding and non-binding instruments, some of which have been dealt with above. His rule 6 states the following:

States have a duty to admit humanitarian assistance furnished by States, IGOs or NGOs in accordance with international law. They may not arbitrarily refuse their consent.

70. The foregoing analysis is of particular relevance to an affected State that does not have the required resources or does not wish to activate those resources to provide protection and assistance to persons in need on its territory. In other words, when a State is unable or unwilling to protect and assist persons on its territory affected by a disaster, a provision to reasonably limit the general rule on consent may be justified. Indeed, in order to effectively discharge the obligation of the State to ensure protection and assistance, the Special Rapporteur concludes that consent as a fundamental right of the State cannot be used if it results in the lack or reduction of protection and assistance when appropriate external assistance is needed and available.

71. The determination of when a State’s conduct amounts to that State being unable or unwilling is to be arrived at in the light of the specific circumstances of each case and cannot be exhaustively dealt with. The objective element of inability may be satisfied if the affected State clearly lacks the required goods or services. A State can be considered to be unwilling to provide assistance when it does possess the necessary resources and capacity for adequate relief, but has indicated that it does not wish to use those resources or capacity.

72. Whether a decision not to accept assistance is arbitrary depends on the circumstances of the case and should be determined on a case-by-case basis. Practice in this regard is inconclusive and therefore of little value in distilling a general rule. The above-mentioned examples may already provide an indication of what might be considered arbitrary for the purpose of accepting or rejecting humanitarian assistance.

73. As already mentioned, the lack of a clear need to provide assistance may be a reason for refusal which is not arbitrary. Another reason to reject humanitarian assistance that is not arbitrary may be found when certain criteria are not met. In draft article 6, as provisionally adopted by the Drafting Committee, it has been recognized that humanitarian assistance must conform to certain humanitarian principles. The principle of humanity must ensure that assistance is focused on the rights and needs of the persons affected. “Neutrality” and “impartiality” imply that assistance which is being offered does not have any political connotations. Moreover, these humanitarian principles also mean that the assistance offered does not call for anything in return. Therefore, conformity with the principles makes sure that assistance activities are “not undertaken for purposes other than responding to the disaster”. Draft article 6, as provisionally adopted, thus ensures that the humanitarian assistance which is offered to an affected State shall meet certain standards in order to provide sufficient grounds, in principle, for it to be accepted. Therefore, if an offer does indeed meet those criteria, the affected State must possess very strong and valid reasons for choosing not to give its consent. If it withholds its consent without such reasons being present, a State may be considered to have done so “arbitrarily”.

74. Furthermore, the decision to reject humanitarian assistance implies an obligation of the affected State to, at least, furnish the assisting State with legitimate grounds to substantiate such a decision. This conclusion is most apparent in the context of international humanitarian law, where, according to the commentary to article 70 of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), agreement may “only be refused for valid reasons, not for arbitrary or capricious ones”. Next to this statement, it is explained in the commentary:

If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place. The authorities … cannot refuse such relief without good grounds.

According to this passage, “not withholding consent arbitrarily” means that a State must have strong and valid reasons for not giving consent when the population is in need of assistance. Thus, for the affected State not to withhold its consent arbitrarily also requires its stating the reasons for its decision not to consent. A more transparent mechanism contributes to the effectiveness of the system of protection and assistance in the event of disasters.

75. Moreover, the time to decide on an offer of humanitarian assistance cannot be extended unjustifiably. The expediency with which relief is provided is crucial. It is in the interest of all parties involved to know as soon as possible what the affected State decides regarding the external assistance or the offer thereof. In this spirit, the General Assembly included the following paragraphs in its resolutions 43/131 of 8 December 1988 and 45/100 of 14 December 1990:

Concerned about the difficulties that victims of natural disasters and similar emergency situations may experience in receiving humanitarian assistance,

115 Schindler, “The right to humanitarian assistance: right and/or obligation?”, para. 6.
116 See E/CN.4/1996/52/Add.2. Schindler (Institute of International Law, “Humanitarian assistance”, p. 413) uses the term “un besoin urgent d’aide”. Hardcastle and Chua (“Humanitarian assistance: towards a right of access to victims of natural disasters”) view the need to sustain life and dignity in natural disasters as sufficient ground to justify an obligation to accept humanitarian assistance.
Convinced that, in providing humanitarian assistance, in particular the supply of food, medicines or health care, for which access to victims is essential, rapid relief will avoid a tragic increase in their number.

The Framework Convention on civil defence assistance includes in article 3, paragraph (e), among the principles that States Parties undertake to respect in terms of providing assistance in the event of a disaster, the following:

Offers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time.

Any delay should be justified accordingly. In the context of international armed conflicts, the ICRC commentary to article 70 of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) states that “in concrete terms, the delay can only really be justified if it is impossible for reasons of security to enter the territory where the receiving population is situated”. Similarly, reasons of national security might be valid to justify a delay in the decision to accept or not an offer of assistance in the event of a disaster. The decision to refuse or accept humanitarian assistance should therefore be made for good reasons and without delay on the part of the affected State.

76. In conclusion, the rule on consent to humanitarian assistance must be in line with the purpose of the work of the Commission on this topic, defined in draft article 2, as provisionally adopted by the Commission. To reinforce this purpose, both in terms of the adequateness and effectiveness of the response, humanitarian assistance should not be arbitrarily objected to if required and appropriate to meet the essential needs of the persons concerned, with full respect for their rights. The position of the persons in need in all protection regimes and in the language adopted by the General Assembly is thus central to justifying a limitation on consent. In addition, the operational aspects involved may benefit from more clarity and transparency to enhance the response system, requiring the affected State to explain its conduct, in particular in case of refusal of humanitarian assistance.

77. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

**Draft article 11. Duty of the affected State not to arbitrarily withhold its consent**

1. Consent to external assistance shall not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.

2. When an offer of assistance is extended pursuant to draft article 12 of the present draft articles, the affected State shall, without delay, notify all concerned of its decision regarding such an offer.

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123 ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, para. 2846.

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**CHAPTER III**

**Right to offer assistance in the international community**

78. Throughout the discussion of the Special Rapporteur’s three prior reports and from the resulting provisional adoption of nine draft articles within the Commission, valuable guidance has been provided as to the international legal basis for the protection of persons in the event of disasters. Solidarity underpins the principles of humanity, neutrality, impartiality and non-discrimination, which have emerged as the juridical framework that defines the present undertaking (draft article 6). Protection of the individual, in turn, remains its ultimate goal and inspiration, reflected in the Commission’s concern with the inherent dignity of the human being (draft article 7) and the protection of human rights (draft article 8).

79. In turn, the role of the affected State has been considered by the Commission. Its definition has also been inspired by dignity and human rights, as the affected State has the duty to ensure the protection of persons on its territory. Similarly, it is primarily responsible for the direction, control, coordination and supervision of efforts to provide relief and assistance therein (draft article 9).

80. Thus understood, the protection of persons in the event of disasters is a project of the international community as a whole, which is hinged upon the primary responsibility of the affected State and its sovereignty. Such is the cornerstone of the legal structure that is framed by the principles of humanity, neutrality, impartiality and non-discrimination, underpinned by solidarity.

81. Non-affected States, as members of the international community, have an interest in the protection of persons in the event of disasters not occurring within their territory. This interest needs to be understood in the context of the primary responsibility of the affected State in the protection of persons in its territory, as it also is an expression of the principle of humanity, underpinned by solidarity. Furthermore, recognition of such interest is instrumental to the preservation of human dignity in the event of disasters, and the protection of human rights.

82. Perhaps the most salient instance of the interest of non-affected States in the protection of persons outside their territory is the event of a health hazard. In that case, the 2005 International Health Regulations impose on all States members of WHO the duty to report evidence that a human victim outside their territory is not being appropriately treated. Under article 9, paragraph 2:

126 WHO resolution WHA58.3.
States Parties shall, as far as practicable, inform WHO within 24 hours of receipt of evidence of a public health risk identified outside their territory that may cause international disease spread, as manifested by exported or imported:

(a) Human cases;

(b) Vectors which carry infection or contamination; or

(c) Goods that are contaminated.

83. This dual nature of the disaster as primary responsibility of the affected State or States, on the one hand, and as a global event of interest for the international community as a whole, on the other, has been noted before by the 186 States that adopted the 2005 Hyogo Framework for Action, paragraph 13 (b) of which confirms the 1994 Yokohama Strategy, and provides:

Taking into account the importance of international cooperation and partnerships, each State has the primary responsibility for its own sustainable development and for taking effective measures to reduce disaster risk, including for the protection of people on its territory, infrastructure and other national assets from the impact of disasters. At the same time, in the context of increasing global interdependence, concerted international cooperation and an enabling international environment are required to stimulate and contribute to developing the knowledge, capacities and motivation needed for disaster risk reduction at all levels.

84. An appropriate point of complementarity between the primary responsibility of the affected State and the interest of non-affected States in the protection of persons in the event of disasters may be found in the form of the latter’s right to offer assistance in the event of disasters. Offering assistance in the international community is the practical manifestation of solidarity, informing the present undertaking since its early inception. As such, it is the logical corollary of the recognition that the protection of persons in the event of disasters is an inherently global matter, which strains the capacity of the affected sovereign State, yet confirms the importance of its role as the primary responsible for the protection of its population.

85. Such a holistic approach to conflicts has been long part of the evolution of international law, most notably in the context of international humanitarian law. As early as 1907, the Convention (I) for the pacific settlement of international disputes established the right of third parties to offer their assistance in the event of an international dispute, while recognizing the right of the States in dispute to reject the means of reconciliation that could be offered. Under article 3 of the Convention:

Independently of this recourse, the Contracting Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

86. Moreover, the same principle providing for the right to offer assistance of third parties can be found in sub-paragraph (2) of common article 3 of the Geneva Conventions for the Protection of War Victims:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

87. Similarly, article 18 of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) has recognized the right of third parties to offer assistance in the case of conflict:

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.

2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

A. Offers of assistance by non-affected States

88. The holistic mindset has inspired more recent international legal developments, outside the laws of armed conflict. Specifically concerned with the present undertaking, the State’s right to offer assistance in the context of disaster response has also been recognized in multiple international treaties. In the Convention on assistance in the case of nuclear accident or radiological emergency, article 2, paragraph 4, creates a system of an open offer of assistance in the event of nuclear disasters, in the following terms:

States Parties shall, within the limits of their capabilities, identify and notify the Agency of experts, equipment and materials which could be made available for the provision of assistance to other States Parties in the event of a nuclear accident or radiological emergency as well as the terms, especially financial, under which such assistance could be provided.

89. In turn, the Inter-American Convention to Facilitate Disaster Assistance features that right in article I, paragraph b, providing that “[a]cceptance by a State party of an offer of assistance from another State party shall be considered to be a request for such assistance”. Article II of the same Convention develops the rules applicable to the possibility of offering assistance on the basis of a prior offer by the non-affected State, followed by the voluntary acceptance of the affected State. The system is set out in the Convention in the following terms:

a. Requests for and offers of assistance from one State party to another shall be communicated via diplomatic channels or the National Coordinating Authority, as the circumstances may warrant.

b. Upon the occurrence of a disaster the assisting State shall consult with the assisted State to receive from the latter information on the kind of assistance considered most appropriate to provide to the population stricken by the disaster.

c. To facilitate assistance, a State party that accepts it shall promptly notify its competent national authorities and/or its National Coordinating Authority to extend the necessary facilities to the assisting State, in accordance with this Convention.

90. A similar solution was found in the Tampere Convention of Telecommunication Resources for Disaster Mitigation and Relief Operations, which also contains language recognizing the right to offer assistance. According to article 4, paragraphs 5 and 6:

5. No telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party. The requesting State Party shall retain the authority to reject all or part of any telecommunication assistance offered pursuant to this Convention in accordance with the requesting State Party’s existing national law and policy.

6. The States Parties recognize the right of requesting States Parties to request telecommunication assistance directly from non-State entities and intergovernmental organizations, pursuant to the laws to which they are subject, to provide telecommunication assistance to requesting States Parties pursuant to this Article.

91. Confirming the pattern, the Framework Convention on civil defence assistance establishes in article 3:

The States Parties undertake to respect the following principles in terms of providing assistance when a State is threatened or affected by a disaster:

(a) Only assistance requested by the Beneficiary State or proposed by the Supporting State and accepted by the Beneficiary State may take place.

(b) All offers of assistance shall respect the sovereignty, independence and territorial integrity of the Beneficiary State as well as the principle of non-intervention in the internal affairs of this State and should be carried out with due respect for its ways and customs. Such assistance should not be viewed as interference in the internal affairs of the Beneficiary State.

(c) Assistance shall be provided without discrimination, particularly with regard to race, colour, sex, language, religion, political or any other opinion, to national or social origin, to wealth, birth, or any other criterion.

(d) Assistance shall be undertaken in a spirit of humanity, solidarity and impartiality.

(e) Offers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time.

92. More recently, the ASEAN Agreement on Disaster Management and Emergency Response established the following guiding principle (art. 3, para. 1):

The sovereignty, territorial integrity and national unity of the Parties shall be respected, in accordance with the Charter of the United Nations and the Treaty of Amity and Cooperation in Southeast Asia, in the implementation of this Agreement. In this context, each affected Party shall have the primary responsibility to respond to disasters occurring within its territory and external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party.

93. The right to offer assistance is recognized as well by a wealth of other international instruments. The United Nations Committee on Economic, Social and Cultural Rights has put forward the individual responsibility of States to contribute in times of emergency, and their interest in doing so, in its General Comment No. 14 (2000), concerned with the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), paragraph 40 of which reads:

States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population. Moreover, given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.

94. Moreover, a number of expertise-based organizations, concerned with the development of international law, have also put forward the right to offer assistance in the event of disasters. Thus, the Institute of International Law, in article 5 of its 1989 resolution on the protection of human rights and the principle of non-intervention in internal affairs of States, stated:

An offer by a State, a group of States, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened cannot be considered an unlawful intervention in the internal affairs of that State. However, such offers of assistance shall not, particularly by virtue of the means used to implement them, take a form suggestive of a threat of armed intervention or any other measure of intimidation; assistance shall be granted and distributed without discrimination.

States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance.

95. Developing such a principle, the Institute of International Law has more recently given content to a specific right to offer assistance in its 2003 resolution on humanitarian assistance. Under article IV, there is a specific right:

Right to offer and provide humanitarian assistance

1. States and organizations have the right to offer humanitarian assistance to the affected State. Such an offer shall not be considered unlawful interference in the internal affairs of the affected State, to the extent that it has an exclusively humanitarian character.

2. States and organizations have the right to provide humanitarian assistance to victims in the affected States, subject to the consent of these States.

B. Offers of assistance by international organizations and other humanitarian actors

96. The interest of the international community in the protection of persons in the event of disasters can be better achieved through the expedient involvement of international organizations and other humanitarian actors, always in the framework of the principles of humanity, neutrality, impartiality and non-discrimination, underpinned by solidarity.

97. Several of the aforementioned instruments establishing a right to offer assistance on behalf of non-affected

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121 Institute of International Law, “Humanitarian assistance” p. 262 (rapporteur: Budislav Vukas).
States extend that benefit to international organizations and other humanitarian actors. Moreover, offers of assistance from these actors have also been addressed specifically and belong as well to the *acquis* of the international law of disaster response.

98. In the ambit of the United Nations, the Secretary-General has been deemed competent to call upon States to offer assistance to victims of natural disasters and other disastrous situations, e.g., in General Assembly resolutions 43/131 of 8 December 1988 (Humanitarian assistance to victims of natural disasters and similar emergency situations), 36/225 of 17 December 1981 (Strengthening the capacity of the United Nations system to respond to natural disasters and other disaster situations) and 46/108 of 16 December 1991 (Assistance to refugees, returnees and displaced persons in Africa).

99. WHO, in turn, has been given the express power to offer its assistance in the event of a global health hazard. According to article 10, paragraph 3, of the 2005 International Health Regulations,

> When WHO receives information of an event that may constitute a public health emergency of international concern, it shall offer to collaborate with the State Party concerned in assessing the potential for international disease spread, possible interference with international traffic and the adequacy of control measures. Such activities may include collaboration with other standard-setting organizations and the offer to mobilize international assistance in order to support the national authorities in conducting and coordinating on-site assessments. When requested by the State Party, WHO shall provide information supporting such an offer.

100. In similar terms, under article 5, paragraph (d), of the Convention on assistance in the case of nuclear accident or radiological emergency, IAEA was given the power to:

> Offer its good offices to the States Parties and Member States in the event of a nuclear accident or radiological emergency.

101. The International Institute of Humanitarian Law adopted a corresponding approach in its 1993 Guiding Principles on the Right to Humanitarian Assistance (San Remo Principles), of which Principle 5 provides that

> National authorities, national and international organizations, whose statutory mandates provide for the possibility of rendering humanitarian assistance, such as the ICRC, UNHCR (Office of the United Nations High Commissioner for Refugees), other organizations of the United Nations system, and professional humanitarian organizations, have the right to offer such assistance when the conditions laid down in the present Principles are fulfilled. This offer should not be regarded as an unfriendly act or an interference in a State’s internal affairs. The authorities of the States concerned, in the exercise of their sovereign rights, should extend their cooperation concerning the offer of humanitarian assistance to their populations.

102. Non-governmental humanitarian organizations have also played a pivotal role in disaster response. The General Assembly was keen in recognizing as much, when in resolution 43/131 of 8 December 1988 (Humanitarian assistance to victims of natural disasters and similar emergency situations) it stated:

> ... aware that alongside the action of Governments and intergovernmental organizations, the speed and efficiency of this assistance often depends on the help and aid of local and non-governmental organizations working with strictly humanitarian motives, ... 

3. **Stresses** the important contribution made in providing humanitarian assistance by intergovernmental and non-governmental organizations working with strictly humanitarian motives;

4. **Invites** all States in need of such assistance to facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines and health care, for which access to victims is essential;

5. **Appeals**, therefore, to all States to give their support to these organizations working to provide humanitarian assistance, where needed, to the victims of natural disasters and similar emergency situations.

103. The offer of assistance by non-governmental humanitarian organizations is, therefore, a crucial aspect of the present project, which can also be found in prior developments of international law. Most of the instruments recognizing the right of States and international organizations also extend that benefit to humanitarian organizations. In the context of international humanitarian law, common article 3 of the Geneva Conventions for the Protection of War Victims and article 18 of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (quoted respectively in paras. 86 and 87 above) recognize the right of humanitarian organizations to offer their assistance in the case of conflict.

104. The Guiding Principles on Internal Displacement, in turn, establish under Principle 25:

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.

2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State’s internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.

105. Recent international practice suggests the existence of extensive and consistent practice of States and international and non-governmental organizations making offers of assistance to a State affected by a disaster. According to press reports, in response to the Japanese earthquake and tsunami of 11 March 2011, offers of assistance were made as of 17 March by about 113 countries. Likewise, press and United States congressional sources report that in the aftermath of Hurricane Katrina in 2005, a large number of States offered $854 million in cash and in kind to the United States. Similarly, many international organizations have made offers of assistance to States affected by disaster. For example, according to press information, after

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131 See footnote 126 above.

the Haiti earthquake of 12 January 2010, the EU offered €337 million in aid to the ravaged country. In addition to about 113 States which offered assistance to Japan following the 2011 earthquake and tsunami, 24 international organizations offered humanitarian assistance.

106. The Special Rapporteur concludes that the right to offer assistance is not limited to non-affected States, but applies also to international organizations whose mandate may be interpreted as including such offer, and other humanitarian organizations. Through the recognition of this right, the present projects complete the landscape of relevant actors needed to achieve the interest of the international community in the protection of persons in the event of disasters.

C. Non-interference

107. International instruments providing for a right to offer assistance by relevant actors in case of disaster or similar situations are consistent in reiterating the basic assumption of the Special Rapporteur’s third report that any such offer shall not be regarded as interference in the internal affairs of the beneficiary State nor an infringement on its sovereignty. For example, article 3, paragraph (b), of the Framework Convention on civil defence assistance states that offers of assistance should not be viewed as interference in the internal affairs of the beneficiary State. Similarly, Principle 5 of the Guiding Principles on the Right to Humanitarian Assistance contains a provision that offers of assistance should not be regarded as an unfriendly act or an interference in a State’s internal affairs.

108. Legal instruments in related areas provide likewise. The Guiding Principles on Internal Displacement provides that offers of assistance should not be regarded as an unfriendly act or an interference in the affected State’s internal affairs. The commentary to article 18 of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) also states that offers made by ICRC should not be considered an interference in the internal affairs of the State or as infringing its sovereignty, whether or not the offer is accepted.

109. In the light of the foregoing, the Special Rapporteur proposes the following draft article 12 on the right to offer assistance:

“Draft article 12. Right to offer assistance

“In responding to disasters, States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations shall have the right to offer assistance to the affected State.”

137 See footnote 134 above.
138 See paragraph 91 above.
IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

[Agenda item 8]

DOCUMENT A/CN.4/646

Third report on immunity of State officials from foreign criminal jurisdiction,
by Mr. Roman Anatolevich Kolodkin, Special Rapporteur

[Original: Russian]
[24 May 2011]

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INSTITUTE OF INTERNATIONAL LAW


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Introduction

1. At its fifty-ninth session, in 2007, the International Law Commission decided to include the topic “Immunity of State officials from foreign criminal jurisdiction” in its programme of work and appointed a Special Rapporteur on the topic.1 At the same session, the Commission requested the Secretariat to prepare a background study on the topic.2

2. At its sixtieth session, in 2008, the Commission considered the preliminary report on the topic.3 The Commission also had before it a memorandum by the Secretariat on the topic.4 In the absence of a further report, the Commission was unable to consider the topic at its sixty-first session, in 2009.

3. The second report5 of the Special Rapporteur was submitted to the Secretariat during the sixty-second session of the Commission, in 2010, and the Commission was not in a position to consider it.6

4. The preliminary report contained a brief history of the consideration by the Commission and the Institute of International Law of the question of immunity of State officials from foreign jurisdiction and outlined the range of issues proposed for consideration by the Commission in the preliminary phase of work on the topic. The latter included the issue of the sources of immunity of State officials from foreign criminal jurisdiction; the issue of the content of the concepts of “immunity” and “jurisdiction”, “criminal jurisdiction” and “immunity from criminal jurisdiction” and the relationship between immunity and jurisdiction; the issue of the typology of immunity of State officials (immunity ratione personae and immunity ratione materiae); and the issue of the rationale for immunity of State officials and the relationship between immunity of officials and immunity of members of special missions.7

5. The preliminary report also identified issues that needed to be considered, in the view of the Special Rapporteur, in order to determine the scope of this topic. These included whether all State officials or only some of them (for example, only Heads of State, Heads of Government and Ministers for Foreign Affairs) should be covered by the future draft guiding principles or draft articles that may be prepared by the Commission resulting from its consideration of the topic; the definition of the concept of “State official”; the question of recognition in the context of this topic; and the issue of the immunity of family members of State officials.8

6. Other issues which, in the view of the Special Rapporteur, needed to be considered in order to determine the scope of this topic were the extent of immunity enjoyed by current and former State officials to be covered by future draft guiding principles or articles; and the waiver of immunity (and possibly other procedural aspects of immunity).9

7. The conclusions reached by the Special Rapporteur as a result of the analysis carried out in the preliminary report are contained in paragraphs 102 and 130 thereof.10

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1 At its 2940th meeting on 20 July 2007 (Yearbook ... 2007, vol. II (Part Two), p. 98, para. 376). In para. 7 of its resolution 62/66 of 6 December 2007, the General Assembly took note of the Commission’s decision to include this topic in its programme of work. The topic had been included in the Commission’s long-term programme of work at its fifty-eighth session (2006), on the basis of the proposal contained in annex I to the Commission’s report (Yearbook ... 2006, vol. II (Part Two), p. 185, para. 257).
4 A/CN.4/596 and Corr.1 (available from the Commission’s website, documents of the sixtieth session; the final text will be published as an addendum to Yearbook ... 2008, vol. II (Part One).
6 Ibid., vol. II (Part Two), para. 343.
9 Ibid., p. 161, para. 4.
10 Ibid., p. 184 and pp. 191–192, respectively.

(Continued on next page.)
8. The second report considered the issue of the scope of immunity of officials from foreign criminal jurisdiction as a general rule, including immunity *ratione materiae* enjoyed as a general rule by all current and former State officials, and the issue of immunity *ratione personae* enjoyed by only certain serving high-ranking officials; the issue of the acts of a State exercising jurisdiction which are precluded by immunity; the issue of the territorial scope of the immunity of a State official; and the issue of whether there are exceptions to the rule on immunity, particularly in a case where an official has committed grave crimes under international law.

9. The general conclusions reached by the Special Rapporteur as a result of the analysis carried out in the second report are contained in paragraph 94 thereof.

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Footnote 10 continued

"(e) This topic covers only immunity of officials of one State from national (and not international) criminal (and not civil) jurisdiction of another State (and not of the State served by the official);

"(f) It is suggested that the topic should cover all officials;

"(g) An attempt may be made to define the concept ‘State official’ for this topic or to define which officials are covered by this concept for the purposes of this topic;

"(h) The high-ranking officials who enjoy personal immunity by virtue of their post include primarily Heads of State, Heads of Government and Ministers for Foreign Affairs;

"(i) An attempt may be made to determine which other high-ranking officials, in addition to the threesome mentioned, enjoy immunity *ratione personae*. It will be possible to single out such officials from among all high-ranking officials, if the criterion or criteria justifying special status for this category of high-ranking officials can be defined;

"(j) It is doubtful whether it will be advisable to give further consideration within the framework of this topic to the question of recognition and the question of immunity of members of the family of high-ranking officials.


14 Ibid., pp. 410–411, paras. 52–53.

15 Ibid., pp. 411–425, paras. 54–93.

16 Ibid., pp. 425–426.

94, ...

"(a) On the whole, the immunity of a State official, like that of the State itself, from foreign jurisdiction is the general rule, and its absence in a particular case is the exception to this rule;

"(b) State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State which they serve itself;

"(c) There are no objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility on the one hand and for the purposes of immunity on the other. There can scarcely be grounds for asserting that one and the same act of an official is, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction, is not attributed as such and is considered to be only the act of an official. The issue of determining the nature of the conduct of an official—official or personal—and, correspondingly, of attributing or not attributing the conduct to the State, must logically be considered before the issue of the immunity of the official in connection with this conduct is considered;

"(d) Classification of the conduct of an official as official conduct does not depend on the motives of the person or the substance of the conduct. The determining factor is that the official is acting in a capacity as such. The concept of an ‘act of an official as such’, i.e. of an ‘official act’, must be differentiated from the concept of an ‘act falling within official functions’. The first is broader and includes the second;

10. The preliminary and second reports therefore considered substantive or material aspects of the immunity of State officials from foreign criminal jurisdiction. The
present third report will consider procedural aspects of this topic. Furthermore, as consideration of this topic has shown, attention here also deserves to be paid to another issue: the relationship between a State’s argument that its official has immunity and the responsibility of that State for a wrongful act committed by that official which gives rise to the issue of immunity. This issue is also considered in the present report.

CHAPTER I

Procedural aspects of immunity

A. Timing of consideration of immunity

11. In practice, the issue of the immunity of a foreign official from criminal jurisdiction often arises for the authorities of a State only when they intend to take relevant action. At that stage, the State which this person is (or was) serving is usually not aware of the developments. In many cases, the preliminary actions of the criminal process are unrelated to measures precluded by immunity. In that situation, consideration of the issue of immunity by a State exercising criminal jurisdiction is not necessary and cannot be deemed its obligation. However, the issue of the immunity of a State official from foreign criminal jurisdiction should, in principle, be considered at an early stage of the judicial proceedings, or earlier still, at the pretrial stage, when a State exercising jurisdiction takes a decision on adopting criminal procedure measures precluded by immunity against an official. As ICJ stated in its advisory opinion in the case *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*: “Questions of immunity are … preliminary issues which must be expeditiously decided in *limine litis*. This is a generally-recognized principle of procedural law.” A British district judge considering an application to issue an arrest warrant against General Shaul Mofaz, the Minister of Defence of Israel, noted, “It has been argued by the Applicant that if the General enjoys any kind of immunity … then the proper time to raise it would be at the first hearing after the warrant has been issued. I am afraid that I disagree with that proposition and take the view that state immunity is one of the issues that I must consider.” In principle, the early consideration of immunity is necessary in order to achieve its fundamental objectives: ensuring normal relations among States and the maintenance of their sovereignty.

Immunity also needs to be considered at an early stage of the proceedings, *in *limine litis*, because the outcome determines the forum State’s continued ability to exercise criminal jurisdiction over an official. If the court fails to consider the issue of immunity at the start of the proceedings, this may result in a violation of the forum State’s obligations arising from the rule on immunity. Moreover, the failure to consider the issue of immunity *in *limine litis* itself may be deemed such a violation. In the aforementioned advisory opinion, ICJ noted that the Malaysian courts were obliged to consider the question of the immunity of the Special Rapporteur as a preliminary issue.

12. The latter also pertains to the consideration of immunity at the pretrial stage in the exercise of criminal jurisdiction, when the issue of adopting measures precluded by immunity is addressed (for example, arrest on suspicion of having committed a crime). Here, a failure by the relevant authorities to consider the issue of the immunity of the official may also result in a violation of the obligations arising from immunity by the State exercising jurisdiction, and this failure may itself be deemed such a violation.

13. However, the above should be considered in the light of the issue of invoking immunity and the burden of invoking immunity, which will be considered further. In particular, if the State of the official enjoying immunity *ratione materiae* does not invoke immunity in the initial stages of the process, then the process may continue and the issue of a violation of the obligations stemming from immunity does not arise.

B. Invocation of immunity

14. In order for a court or other relevant authorities of a State exercising jurisdiction to consider the issue of

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21 See Gattini’s remarks that State immunity is necessary “to maintain a minimum procedural order for the sake of peaceful intercourse between sovereign States as well as to avoid possible inequitable and/or discriminatory solutions”, and “in order to be effective, could only be *in *limine litis*” (“The dispute on jurisdictional immunities of the State before the ICJ: Is the time ripe for a change of the law?”, p. 192).

22 See the related comments by Verhoeven in paragraph 220 of the memorandum by the Secretariat (footnote 4 above). Indeed, as one of the key components determining the ability or inability to exercise foreign jurisdiction, immunity becomes devoid of substance as a legal phenomenon if due attention is not paid to it at the earliest stage of the juridical process. However, recognition of an official’s personal and functional immunity, as noted in the second report, does not preclude all measures which may be taken in the exercise of criminal jurisdiction, only those which impose an obligation on the official or are coercive (*Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631, paras. 38–51 and 94, subparagraph 1).

23 See memorandum by the Secretariat (footnote 4 above), paras. 215–229.
immunity of a foreign official, someone must raise the issue. The question is, who should do that—the official or the State which the official is (or was) serving? Or should the State exercising jurisdiction ask itself that question? 25

15. The preliminary report stated that immunity belongs not to the official himself, but to the State which the official serves (or served), i.e. the State of the official. 26

Strictly speaking, the official merely “enjoys” immunity, which belongs legally to the State. Accordingly, the rights inherent in immunity are rights of the State. In upholding the rights inherent in an official’s immunity from foreign criminal jurisdiction, the State is upholding its own rights and not those of its official. 27

In this connection, it could be said that only when it is the State of the official which invokes or declares immunity is the invocation or declaration of immunity legally meaningful, i.e. only under those circumstances does it have legal consequences. A declaration by an official himself that he has immunity does not, it would seem, have such legal significance, insofar as the official is merely the beneficiary of immunity. This does not mean that such a declaration by an official has no significance at all in the context of legal proceedings carried out in relation to that person. It is unlikely that it could be simply ignored by the State which is criminally prosecuting the official. This State can, on the basis of the declaration, consider the question of immunity. However, uncorroborated by the relevant opinion of the official’s State, it would seem that this declaration lacks sufficient legal weight and significance. 28

25 Asking an analogous question, Buzzini wrote, “There may be no clear-cut answer to this question.” (footnote 20 above, p. 473).

26 “The State stands behind both the immunity ratione personae of its officials from foreign jurisdiction and their immunity ratione materiae. It is the State that is entitled to waive the immunity enjoyed by an official, whether it is ratione personae or ratione materiae (in the case of a serving high-ranking official) or only ratione materiae (in the case of any official who has left government service). In the final analysis, the immunity of State officials from foreign jurisdiction belongs to the State itself, so that it alone is entitled to waive such immunity.” (Yearbook ... 2008, vol. II (Part One), document A/CN.4/601, p. 181, para. 94).

27 This applies to the immunity of former officials. In the case Arrest Warrant of 11 April 2000, Belgium stated specifically that after Yerodia ceased to be “Minister for Foreign Affairs, the Democratic Republic of the Congo was not upholding its rights, but rather the rights of that individual, i.e. it was exercising diplomatic protection and should therefore have previously exhausted local remedies (see Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, pp. 17–18, paras. 37–38). The Democratic Republic of the Congo was of the understanding that this was not an action for diplomatic protection, and that it was defending the rights of the Congolese State on account of the violation of the immunity of its Minister for Foreign Affairs (see ibid., p. 17, para. 39). The Court essentially agreed with the position of the Democratic Republic of the Congo (ibid., para. 40). As the Government of the United States noted in the Samantar case, “a former official’s residual immunity is not a personal right. It is for the benefit of the official’s State”, United States District Court for the Eastern District of Virginia, Alexandria Division, Bashe Abdi Yousuf, et. al., v. Mohamed Ali Samantar, Statement of Interest of the United States of America, February 14, 2011, para. 13. Since 2004, this case has served as a precedent in United States courts for addressing the issue of a civil case brought by Somali expatriates against the former Minister of Defence and Vice-President of Somalia M. Samantar in connection with the use of torture, extrajudicial executions and other human rights violations. For comments on this case, see, for example, Shatalova, “The United States Supreme Court decision in the case of Samantar v. Yousuf, and the immunities of foreign officials” and Stephens, “The modern common law of foreign immunity”. 29

28 This same logic is applicable when immunity is waived. See paragraph 33 below. See also Yearbook ... 2008, vol. II (Part One), paragraph 20 above, pp. 472–473.

16. For the State of an official to be able to declare that the official has immunity, it must know that criminal procedure measures are being taken or planned with regard to that person. Consequently, the State which is implementing or planning such measures must inform the State of the official about this. Naturally, this can be done only when it becomes known or there are grounds to suppose that a foreign official is involved. Therefore, a declaration by the person with regard to whom jurisdiction is being exercised, that he is (or was) an official of a foreign State provides the grounds for the State exercising jurisdiction to inform the official’s State accordingly. In its judgment in the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), ICJ stated, inter alia:

At no stage have the French courts (before which the challenge to jurisdiction would normally be expected to be made), nor indeed this Court, been informed by the Government of Djibouti that the acts complained of by France were its own acts, and that the procureur de la République and the head of National Security were its organs, agencies or instrumentalities in carrying them out. The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. 30

17. Thus, ICJ indicated that the burden of invoking immunity falls to the State which wants to shield its official from foreign criminal jurisdiction. If it fails to do so, then the State exercising jurisdiction is not obligated to consider the issue of immunity proprio motu, and, consequently, it may proceed with the criminal prosecution. 30

At the same time, it would seem that the official’s State can also declare the individual’s immunity at a later stage of the criminal process. However, in this case, measures taken with regard to the official by the State exercising jurisdiction prior to the invocation of immunity can hardly be considered as violating immunity (on the understanding, naturally, that the official’s State knew of the foreign criminal jurisdiction being exercised with regard to him or her but did not invoke immunity).

18. The Special Rapporteur notes that, judging from its context, the passage from the ICJ judgment cited above in paragraph 16 refers to the situation of officials who have functional rather than personal immunity. Such an approach to a situation involving persons with immunity ratione materiae would seem logical. 31 This immunity is enjoyed by officials who are not high-ranking and by former officials, and only with regard to actions carried out by them in an official capacity. It does not include serving Heads of State and Government and Ministers for Foreign Affairs. Unlike the situation with the “troika” (“threesome”) referred to below, the State
which exercises jurisdiction with regard to such persons is under no obligation from the outset to know or presume either that these are foreign officials or former officials or that in, violating the law, they were acting in an official capacity.\textsuperscript{52} Accordingly, if the State of a given official wants to shield him or her from foreign criminal proceedings, exercising immunity in such cases should mean that the State exercising jurisdiction that this is its official, and that he or she enjoys immunity, since he or she committed the incriminating acts in an official capacity.\textsuperscript{53}

19. If this same logic is applied to a situation where foreign criminal jurisdiction is exercised with regard to the troika of the highest officials in power—a Head of State, Head of Government and Minister for Foreign Affairs, who enjoy personal immunity—it seems that the answer to the question posed earlier would be different. First, at least in the absolute majority of cases, serving Heads of State or Government and Ministers for Foreign Affairs are widely known. Therefore, as a rule, the State exercising criminal jurisdiction with regard to such a person knows that a senior foreign official is involved.\textsuperscript{54} Second, it is also widely acknowledged that these serving senior officials enjoy personal immunity from foreign criminal jurisdiction, that is, immunity with regard to actions carried out in both their official and personal capacities. Accordingly, the State exercising criminal jurisdiction does not need to know or establish the capacity in which a given foreign official was acting in order to render a judgment on that person’s immunity. Thus, in a situation involving a foreign Head of State, Head of Government or Minister for Foreign Affairs, the State exercising criminal jurisdiction should itself raise the question of that person’s immunity and make a determination regarding its further actions within the framework of international law. In this case, it is appropriate perhaps to ask the official’s State merely to waive immunity. Accordingly, the latter State does not bear the burden of raising the issue of immunity with the authorities of the State exercising criminal jurisdiction.\textsuperscript{55}

20. During the oral proceedings of the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France),\textsuperscript{56} Alain Pellet, the Counsel for France, spoke of the “absolute and possibly irrefutable” presumption of immunity of a serving Head of State or Minister for Foreign Affairs from foreign criminal jurisdiction, unlike other officials, with regard to whom such a presumption is not in effect and for whom the question of immunity of Government in international law” in 2001, the question of the advisability of including in it provisions on submission to a foreign judge of evidence of the status of a Head of State or Government was considered. The members of the Institute concluded that this was not necessary. The principal argument was that in various national legal systems this question is addressed in a range of different ways (see Institute of International Law, “Immunities from jurisdiction and execution of Heads of State and of Government in international law”, pp. 452–485). As a result, article 6 of the resolution reads: “The authorities of the State shall afford to a foreign Head of State, the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, as soon as that status is known to them.” In other words, the fact that the position of a Head of State is known to the authorities of the State exercising jurisdiction is sufficient for the latter to be considered bound by obligations inherent in the immunity of the foreign Head of State. We note, however, that in his comments on a draft resolution, Institute member Jacques-Ivan Mestdagh noted that “It seems to us that the practice demonstrates that immunity must be pleaded” (ibid., p. 584).

\textsuperscript{52} Although in most cases, the case files are likely to indicate this.

\textsuperscript{53} Thus, for example, Israel invoked the immunity of A. Dichter, former head of the Israeli Security Service, in the case of Matar v. Dichter: “In February 2006, Dichter moved to dismiss, arguing (1) that he was immune under the Foreign Sovereign Immunities Act (FSIA); (2) that the suit presented a non-justiciable political question; and (3) that the suit implicated the act of State doctrine. At about the same time, Israel’s Ambassador to the United States, Daniel Ayalon, wrote the United States State Department declaring that ‘anything Mr. Dichter did … in connection with the events at issue, … was in the course of [his] official duties, and in furtherance of official policies of the State of Israel.’ The district court invited the State Department to ‘state its views, if any’ on the issues raised in the motion to dismiss, or other issues it deemed relevant to the case. The State Department’s statement of interest, filed in November 2006, opined that the FSIA afforded immunity for countries, not for individuals, but urged the court to dismiss the suit nevertheless on the ground that Dichter was entitled to immunity under common law as an official of a foreign State” (United States Court of Appeals for the Second Circuit, Appeal decision, 563 F.3d 9 (2d Cir. 2009); ILDC 1392 (US 2009) 16 April 2009, para. 6). The Ambassador of Israel to the United States made precisely the same statement with regard to former General of the Israel Defense Forces (serving as head of military intelligence) M. Ya’alon in the case Belhus v. Ya’alon (footnote 20 above). The previously mentioned statement of the United States Department of State in the case of Samantar on invocation of immunity said the following (para. 9): “the Department of State has determined that Defendant enjoys no claim of official immunity from civil suit … Particularly significant among the circumstances of this case and critical to the present Statement of Interest are (1) that Samantar is a former official of a State with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity, and (2) the Executive’s assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents” (footnote 27 above).

\textsuperscript{54} Indeed, the very fact that, due to established practice in international relations, the people who are members of the troika for the States of the world are known to the authorities of all (or nearly all) other States makes the requirement to inform the State exercising jurisdiction of the legal situation and inherent immunities of the person in question somewhat redundant. A State which knew such a requirement was not a condition for acknowledging immunity and to whom the status of a foreign Head of State (Head of Government, Minister for Foreign Affairs) is objectively known can hardly be considered to be carrying out its international obligations conscientiously.

\textsuperscript{55} It can be considered a different way. During preparation by the Institute of International Law of the resolution “Immunities from jurisdiction and execution of Heads of State and
immunity should be addressed on a case-by-case basis.\footnote{Luigi Condorelli, the legal adviser for Djibouti, did not agree with the presumption thesis as applicable to personal immunity, noting, in particular, that “it should first be emphasized that there can be no question of a ‘pre-supposition’ in the true sense of the word applying to incumbent Heads of Foreign States, since they are quite simple [sic] covered by complete immunity for all of their acts, including those of a private nature”\footnote{Oral Proceedings, CR 2008/6, 25 January 2008, p. 51, para. 77}.}

Luigi Condorelli, the legal adviser for Djibouti, did not agree with the presumption thesis as applicable to personal immunity, noting, in particular, that “it should first be emphasized that there can be no question of a ‘pre-supposition’ in the true sense of the word applying to incumbent Heads of Foreign States, since they are quite simple [sic] covered by complete immunity for all of their acts, including those of a private nature”\footnote{See paragraph 16 above.}.

21. It would seem that ICIJ based its judgments in this case and in the Arrest Warrant of 11 April 2000 case on the idea that the personal immunity of a Head of State (in the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters) and of the entire troika (in the Arrest Warrant of 11 April 2000 case) simply exists without any presumption whatsoever and the resultant oblations of the State exercising jurisdiction should be met. In the situation involving the two officials of Djibouti who did not enjoy personal immunity, the Court stated that Djibouti should have informed the French authorities about these persons in the appropriate manner.\footnote{See paragraph 16 above.} However, in the part of the decision pertaining to the Head of the Republic of Djibouti, there is no mention of the fact that Djibouti should have somehow raised the issue of immunity (although, upon receiving information on the request being prepared by the French authorities, Djibouti reminded France that the Head of State had immunity\footnote{Ibid., pp. 236–237, para. 170.}). The Court simply proceeded in this instance from the position that, as it had already noted in its judgment in the Arrest Warrant of 11 April 2000 case, “in international law it is firmly established that… certain holders of high-ranking office in a State, such as the Head of State… enjoy immunities from jurisdiction in other States, both civil and criminal” and that “[a] Head of State enjoys in particular full immunity from criminal jurisdiction.”\footnote{In this regard, see the opinion of Buzzini (footnote 20 above).}

At the same time, the judgment on the Arrest Warrant of 11 April 2000 case also fails to mention the fact that the Congolese authorities should have informed the Belgian authorities that their Minister for Foreign Affairs had immunity, so that the issue of immunity could be considered.\footnote{Ibid., pp. 189–190, para. 121.}

22. Indeed, it is not quite clear why only the presumption of immunity should be discussed, and not that of immunity more generally. In any case, whether we are dealing with an “absolute and possibly irrefutable” presumption of personal immunity of persons who are included in the troika, or simply with their personal immunity, it can presumably be asserted that a State which exercises criminal jurisdiction with regard to a foreign Head of State or Government

or Minister for Foreign Affairs should itself draw a conclusion about the immunity of the person in question and about the measures that it can take with regard to that person, given the constraints inherent in immunity.\footnote{Ibid.} For that to happen, the State of such an official who enjoys personal immunity does not have to inform the State exercising jurisdiction that the official has immunity.

23. The preliminary report stated that, in addition to the troika, certain other “persons of high rank”\footnote{41 This is precisely what usually happens in practice. Judges either independently consider the issue of the immunity of a foreign Head of State, or else they forward a query on the matter to the executive authorities of their own State, who can issue a conclusion or recommendation with a description of the privileges and immunities granted to the specific person (France, Court of Cassation, Affaire Ghaddafy, Decision No. 1414, 13 mars 2001, Cass Crim.I.). See, for example, the decision on the matter of issuing an arrest warrant in the Netherlands for President Yudhoyono of Indonesia (the court established independently that the President of Indonesia enjoyed immunity as a Head of State and declined to issue an arrest warrant, District Court of The Hague, civil sector, 377038/KG ZA 10-1220, 6 October 2010). See also the decision of the Court of Cassation of Belgium on the case of A. Sharon, A. Yaron et al., section having to do with A. Sharon, Court of Cassation of Belgium: H.S.A. et al. v. S.A. et al. (Decision related to the indictment of Ariel Sharon, Amos Yaron and others), 12 February 2003, ILM, vol. 42, No. 3 (May 2003), p. 596.} enjoy immunity ratione personae. No list of such officials exists in international law. In the preliminary report, the Special Rapporteur recommended consideration of the issue of criteria for determining whether a particular high-ranking official not included in the troika enjoyed personal immunity.\footnote{Yearbook... 2008, vol. II (Part One), document A/CN.4/601, pp. 188–190, paras. 117–121.} Specifically, it was noted that along with ensuring the participation of the State in international relations, the importance of the functions performed by a given high-ranking official in ensuring the sovereignty of the State\footnote{Ibid., pp. 189–190, para. 121.} could be a criterion for including an official among those who enjoy immunity ratione personae. A State which is starting to exercise criminal jurisdiction with regard to a high-ranking foreign official who is not included in the troika is not required to know or presume that the person meets the criteria mentioned and enjoys personal immunity. It need merely inform the official’s State of the measures taken by it. It appears logical to presume that, if the State of such an official believes that the person meets the criteria mentioned and enjoys personal immunity, then the burden of invoking immunity falls to that State. In this procedural sense, the personal immunity of high-ranking officials who are not in the troika is analogous to immunity ratione materiae.

24. In the case of the immunity ratione personae of a Head of State, Head of Government or Minister for Foreign Affairs which should be addressed by the State exercising jurisdiction, it is logical to presume that the State of the official is under no obligation to provide evidence of immunity or to substantiate its claim. It suffices, where this is not clear,\footnote{Ibid.} to confirm the official status of

\footnote{42 This is precisely what usually happens in practice. Judges either independently consider the issue of the immunity of a foreign Head of State, or else they forward a query on the matter to the executive authorities of their own State, who can issue a conclusion or recommendation with a description of the privileges and immunities granted to the specific person (France, Court of Cassation, Affaire Ghaddafy, Decision No. 1414, 13 mars 2001, Cass Crim.I.). See, for example, the decision on the matter of issuing an arrest warrant in the Netherlands for President Yudhoyono of Indonesia (the court established independently that the President of Indonesia enjoyed immunity as a Head of State and declined to issue an arrest warrant, District Court of The Hague, civil sector, 377038/KG ZA 10-1220, 6 October 2010). See also the decision of the Court of Cassation of Belgium on the case of A. Sharon, A. Yaron et al., section having to do with A. Sharon, Court of Cassation of Belgium: H.S.A. et al. v. S.A. et al. (Decision related to the indictment of Ariel Sharon, Amos Yaron and others), 12 February 2003, ILM, vol. 42, No. 3 (May 2003), p. 596.}
the person. This can be done via diplomatic channels, even if the matter is being considered in court. Should a State invoking the functional immunity of officials or the personal immunity of high-ranking officials outside the troika participate in the proceedings in a foreign court against an official so that the issue of immunity is considered and provide evidence of immunity?

25. In the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters, France maintained that the issue of immunity ratione materiae of officials should be dealt with on a case-by-case basis in a foreign court. “The contrary”, according to France, “would be devastating and would signify that all an official, regardless of his rank or functions, needs to do is assert that he was acting in the context of his functions to escape any criminal prosecution in a foreign State. As functional immunities are not absolute, it is, in France’s view, for the justice system of each country to assess, when criminal proceedings are instituted against an individual, whether, in view of the acts of public authority performed in the context of his duties, that individual should enjoy, as an agent of the State, the immunity from criminal jurisdiction that is granted to foreign States”. ICJ noted in this connection that the French courts had not been informed by the Government of Djibouti that the acts of the Djibouti officials were its own acts, and, more generally, that “the State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned”. Thus, the judgment of the Court refers merely to “informing” or “providing notification” about immunity and does not mention “substantiating” it or why it may be claimed that the acts of officials were carried out by them in an official capacity as organs of the State. In its advisory opinion on the case Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, ICJ also omits to mention the need for the United Nations to substantiate the functional immunity of its officials. In its judgment in the Case Concerning Certain Questions following constitutional reforms which significantly reassigned responsibilities among key Government posts.

It may be argued, especially in the context of an alleged immunity from testimony, that a State wishing to invoke such immunity cannot be deemed to have a duty to substantiate its claim by providing detailed information or evidence which might possibly defeat the whole purpose of that immunity.

26. In that connection, the Special Rapporteur points out the following. First, in the passage cited, ICJ refers only to the fact that the official nature of the acts of the Djibouti officials were not “concretely verified” in that particular court. The French court is not mentioned in that context. Second, strictly speaking, even recalling the lack of concrete verification, the Court, it is reiterated, mentions nothing about the obligation of Djibouti to substantiate immunity or the official nature of the acts of its officials on which the immunity is based. Commenting on this passage from the judgment, Buzzini writes:

It appears that this logic applies to the invocation of functional immunity in general and not only to immunity from giving evidence as a witness. In order to substantiate the official nature of the acts of its officials in a foreign court or before other organs of a foreign State, an official’s State may be requested to provide information that is of an extremely sensitive nature for it and to disclose data related to its internal sovereign affairs. However, immunity from foreign criminal jurisdiction is designed to provide protection in this very area.

27. The Special Rapporteur also points out that ICJ, in the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters, refers to notifying the “authorities” of the State exercising jurisdiction and does not restrict such notification to the courts. ICJ’s reference to the fact that notification may be provided to the “authorities” of the State exercising jurisdiction, and not only to the courts, appears to show that the Court did not consider it obligatory for an official’s State to notify a foreign court about the official’s immunity so that the foreign court might consider the issue of his or her immunity. The official’s State may invoke immunity for him or her through the diplomatic channels, thereby notifying the State exercising jurisdiction. This should suffice in order for a court requirement and can only be set aside for the most compelling reasons. See I.C.J. Reports 1999, p. 87, paras. 60–61. I.C.J. Reports 2008, p. 243, para. 191. Buzzini (footnote 20 above), p. 467.

On the basis of these considerations, in the Belhas et al. v. Ya’alon case (footnote 20 above), in the course of an appeals suit lodged as a result of the refusal of the United States district court to accept a civil suit to consider whether the defendant had functional immunity, the United States Court of Appeals for the District of Columbia Circuit noted that the “discovery” of documents confirming that the defendant was duly authorized by the State of Israel to commit the acts imputed to him would defeat the very purpose of immunity. (As this Court found in El-Faadil, “in light of the evidence that [the defendant] proffered to the district court and the absence of any showing by [the plaintiff] that [the defendant] was not acting in his official capacity, discovery would frustrate the significance and benefit of entitlement to immunity from suit”.)
of that State to consider the issue of immunity.\(^5^5\) The absence of a State’s obligation to contact a foreign court directly is derived from the principle of sovereignty and the sovereign equality of States.\(^{6^4}\)

28. In practice, States may behave differently.\(^{5^7}\) If they so wish, they have an opportunity to assert the immunity of their officials in foreign courts. Others may restrict themselves to invoking immunity through diplomatic channels, based on the premise that the relevant authorities of the State exercising jurisdiction will themselves inform the court that an official’s State has referred to the immunity of the official with regard to whom jurisdiction is being exercised.\(^{5^8}\) A State may also not take any of these positions and may act depending on the circumstances: in some cases declaring the immunity of its official directly to the court, in other cases acting only through diplomatic channels and, in yet others, making use of all the possibilities. Furthermore, it should be borne in mind that, when exercising criminal jurisdiction, the issue of immunity may arise at the pretrial stage. In that case, the issue of invoking immunity in a court in general may not arise.

29. In order to invoke functional immunity, the official’s State should indicate that the acts with which the official is charged were committed by that person in an official capacity (i.e., are acts of the State itself). It is the prerogative precisely of the official’s State to do so, since this is a matter of its internal organization and its relations with its own officials. As the Appeals Chamber of the International Tribunal for the former Yugoslavia noted in its judgment on the Prosecutor v. Blaškić case:

Customary international law protects the internal organization of each sovereign State: it leaves to each sovereign State to determine its internal structure and is not to designate the officials as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its officials in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions. The general rule under discussion is well established in international law and is based on the sovereign equality of States (par. in parem non habet imperium) … The general rule at issue has been implemented on many occasions, although primarily with regard to its corollary, namely the right of a State to demand for its organs functional immunity from foreign jurisdiction … This rule undoubtedly applies to relations between States inter se.\(^{5^9}\)

This prerogative for a State official is derived from State sovereignty.\(^{6^0}\)

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\(^{5^5}\) A similar conclusion is also derived from the advisory opinion in the Case Concerning Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (I.C.J. Reports 1999, paras. 60–61). Furthermore, it might be possible to talk about the obligations that the authorities of a State receiving the notification have to bring this to the attention of the national courts concerned with considering the immunity of the official in question. At all events, in the aforementioned advisory opinion I.C.J. noted: “The governmental authorities of a party [to the Convention on the Privileges and Immunities of the United Nations] are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information.” (ibid., para. 61). In this case, the relevant obligation of the authorities of the State exercising jurisdiction arises from obligations inherent in a rule on immunity for United Nations officials in an international treaty. Immunity of State officials from foreign criminal jurisdiction is based on general international law. Accordingly, general international law also forms the basis of the aforementioned obligation of the Government of the State exercising jurisdiction.

\(^{5^6}\) The commentary to article 6 of the draft articles on jurisdictional immunities of States and their property notes that: “Appearance before foreign courts to invoke immunity would involve significant financial implications for the contesting State and should therefore not necessarily be made the condition on which the question of State immunity is determined. On the other hand, the present provision is not intended to discourage the court appearance of the contesting State, which would provide the best assurance for obtaining a satisfactory result” (Yearbook ... 1991, vol. II (Part Two), p. 24, para. (5) of the commentary).

\(^{5^7}\) Differences in the practice of asserting immunity are well illustrated in a passage from the judgment of the Supreme Court of the Philippines regarding consideration of a petition from the Holy See to set aside earlier refusals to recognize the sovereign immunity of the Vatican, against which a civil claim had been lodged. While considering whether the International Relations Department of the Philippines could intervene in the case as a third party, the Court describes the practice of invoking State immunity in a foreign court: “When a State or international agency wishes to plead sovereign or diplomatic immunity in a foreign court, it requests the Foreign Office of the State which is sued to convey to the court that said defendant is entitled to immunity.” Having referred to certain aspects of this practice in the United States and the United Kingdom, the Court then notes: “In the Philippines, the practice is for the foreign government or the international organization to first secure an executive endorsement of its claim of sovereign or diplomatic immunity. But how the Philippine Foreign Office conveys its endorsement to the courts varies. In International Catholic Migration Commission v. Calleja … the Secretary of Foreign Affairs just sent a letter directly to the Secretary of Labor and Employment, informing the latter that the respondent-employer could not be sued because it enjoyed diplomatic immunity. In World Health Organization v. Aquino … the Secretary of Foreign Affairs sent the trial court a telegram to that effect. In Baer v. Tizon … the United States Embassy asked the Secretary of Foreign Affairs to request the Solicitor General to make, on behalf of the Commander of the United States Naval Base at Olongapo City, Zambales, a ‘suggestion’ to the respondent. The Solicitor General embodied the ‘suggestion’ in a Manifestation and Memorandum as amicus curiae … In some cases, the defense of sovereign immunity was submitted directly to the local courts by the respondents through their private counsels … In cases where the foreign States bypass the Foreign Office, the courts can inquire into the facts and make their own determination as to the nature of the acts and transactions involved.” (The Solicitor General represented Philippine Republic v. Amcorp Enterprises Inc., Supreme Court G.R. No. 101949, 1 December 1994, ILR, vol. 102 (1996), pp. 167–168.)

\(^{5^8}\) In the aforementioned Belhas v. Ya’alon case (footnote 20 above), the immunity from United States civil jurisdiction of Moshe Ya’alon, a former General of the Israeli Defense Forces (serving as the head of military intelligence), was stated in a letter from Israel’s Ambassador to the United States, Daniel Yaalon, to United States Deputy Secretary of State Nicholas Burns. This letter was submitted to the court of first instance by Moshe Ya’alon, in a motion filed to dismiss the suit, and was later submitted to the Court of Appeals. In the same way, the actions of Avi Dichter, former head of the Israeli Security Service, were found to be of an official nature. Mr. Dichter also filed a motion to dismiss. (Matar v. Dichter (footnote 33 above)).


‘As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, and the individual members acting as such, have the duty and responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts in mission, by asserting their immunity.’ (I.C.J. Reports 1999, p. 87, para. 60)

\(^{6^0}\) Prosecutor v. Blaškić (preceding footnote), para. 41. As noted by Seyersted, “[T]he organic jurisdiction of a State implies that all its relations with—and all relations between and within—its organs and
that the Special Rapporteur of the Commission on Human Rights had been acting in an official capacity in carrying out the actions that were the subject of a lawsuit in Malaysia and therefore had immunity for those actions. The case thus dealt with the immunity of a United Nations official ratione materiae, based on the fact that the official had performed the alleged acts in an official capacity, of which the United Nations informed Malaysia. In that connection, the Court stated:

When national courts are seized of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts. Clearly, what is referred to here is not only a presumption of functional immunity but also a presumption that an official’s acts are official in nature, which arises when the Organization notifies the State exercising jurisdiction that an official in its service was acting in an official capacity.

31. The considerations set out above regarding the absence of an obligation on the part of the State of an official to participate in court proceedings involving an official who has functional immunity, including by directly notifying a foreign court of the individual’s immunity in order to have the court consider the question of immunity, would also appear to apply to cases involving the personal immunity of high-ranking officials who are not among the troika. In such cases, the official’s State is also not obligated to participate in court proceedings and may inform solely the Government (and not necessarily the court) of the State exercising jurisdiction that its official has immunity in order to have the question of immunity considered by the appropriate organs of the foreign State, including the court. However, considering the circumstances discussed in paragraph 23 above, the State must set out the grounds for a claim that, although its official is not a Head of State or Government or a Minister for Foreign Affairs, his or her status and functions nevertheless meet the criteria for asserting personal immunity. The question of an official’s status, functions and importance

30. However, it would seem worthwhile to heed van Aalbeek, who writes, “The rule of functional immunity does not … oblige courts to blindly accept any claim of a foreign State that an official has acted under its authority. A court may independently inquire into the reasonableness of such claim.”61 Indeed, a foreign court (or any other authority of the State exercising jurisdiction) is not obliged to “blindly accept” such a claim by the State which the official serves. Yet the court cannot disregard such claims, unless the circumstances of the case clearly indicate otherwise, since, as was noted above, it is the prerogative of the official’s State, not of the State exercising jurisdiction, to characterize the acts of its officials as its own official acts. It might be appropriate here to wonder whether there may be a presumption that, if a State has appointed someone as an official, then his acts or conduct derive from the authority of the State that he represents. A similar presumption was indicated at least by ICJ in the case Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights. One of the principal elements of the situation under consideration in that case was that the Legal Counsel of the United Nations, acting on behalf of the Secretary-General, informed the Government of Malaysia officials as such are governed by the public law and by the executive and judicial organs of that State and not by the public or private law or the organs of any other State” (“Jurisdiction over organs and officials of States, the Holy See and intergovernmental organisations”, p. 33). In turn, Shaw, referring to the status of the Head of State (and a waiver of immunity, in particular), also mentioned the constitutional order of the State in which the official serves (“First, the question of the determination of the status of the head of State before domestic courts is primarily a matter for the domestic order of the individual concerned. In Republic of the Philippines v. Marcos (No. 1), for example, the U.S. Court of Appeals for the Second Circuit held that the Marcoses, the deposed leader of the Philippines and his wife, were not entitled to claim sovereign immunity. In a further decision, the Court of Appeals for the Fourth Circuit held in In re Grand Jury Proceedings Doe No. 770 that head of State immunity was primarily an attribute of State sovereignty, not an individual right, and that accordingly full effect should be given to the revocation by the Philippines government of the immunity of the Marcoses under National Law, p. 736). This is referred to by ICJ (“The individual as beneficiary of State immunity: Problems of the attribution of ultra vires conduct”, p. 276): “It has incontestably been stated that, ‘It is the national legal order, the law of the State, which determines under what conditions an individual acts as an organ of the State’.” Here the author is referring to Hans Kelsen, Principles of International Law (1952), p. 117. Morin, responding to questions raised by the Rapporteur in drafting the 2009 resolution of the Institute of International Law (“The fundamental rights of the person and the immunity from jurisdiction in international law”, p. 19), recalled the well-established principle that “each State is itself free to attribute the exercise of its competences to the persons whom its designates as its agents”.

61 The Immunity of States and Their Officials in the Light of International Criminal Law and International Human Rights Law, p. 115. Van Aalbeek goes on to state, “Certain acts are so inherently personal that it cannot be reasonably claimed that they were performed under authority of a State. It is hard to dispute, for instance, that a head of State that murders the proverbial gardener in a fit of rage was committing anything but a purely private crime. Likewise, the veil of State authority could not convincingly cover the trade in narcotic substances for purely private benefit. That such a purely private act is committed during the exercise of an official’s functions does not make a difference. In sum, the claim that acts should be attributed to the State rather than to the State official personally cannot be frivolously relied on by foreign States to protect their State officials (ibid.). The criteria for attributing the acts or conduct of a State official to the State itself were discussed in the second report (Yearbook ... 2010, vol. II (Part One), document A/CN.4/631, paras. 26 et seq.). The Commission itself reviewed the issue in detail when considering the draft articles on responsibility of States for internationally wrongful acts (Yearbook 2001, vol. II (Part Two), p. 26, para. 77, especially arts. 4 and 7). Subsequent commentaries thereto, pp. 40–42 and 45–47 (footnote 20 above).
for the exercise of State sovereignty, and the question of whether the person is acting in an official capacity, fall within the domestic competence of the official’s State. For that reason, the State exercising jurisdiction cannot ignore the invocation of an official’s personal immunity, even if that official is not one of the troika. However, as in the case where the actions of an official are characterized as official acts, the State exercising jurisdiction is not obliged to “blindly accept any” such claim by the State that he or she represents.

C. Waiver of immunity

32. As the Commission noted in its commentary to the draft articles on the jurisdictional immunities of States and their property, State immunity does not apply when a State has consented to the exercise of jurisdiction over it by another State. The absence of such consent is an important element of immunity. A State’s consent to the exercise of jurisdiction over it by another State is the essence of a waiver of immunity. This would appear to apply fully to immunity of State officials from foreign criminal jurisdiction as well. As the memorandum of the Secretariat states, “The rationale underlying waiver of immunity—like the rationale for immunity itself—is based on the sovereign equality of States and the principle of par in parem non habet imperium”.

33. Paragraph 15 above recalls the observation made in the preliminary report that immunity does not belong to the individual official but to the official’s State. Consequently, only the State can legally invoke the immunity of its officials. The same logic applies to the waiver of immunity. It is generally accepted that the authority to waive a State official’s immunity, whether it be ratione personae or ratione materiae, lies with the State and not with the official. The Commission had already reached this conclusion concerning the staff of diplomatic missions in preparing the draft articles on diplomatic relations, which it then drew upon in preparing the draft articles on consular relations, special missions and State representatives in their relations with international organizations of a universal character. States have indicated their agreement with this conclusion by their corresponding provisions in the conventions adopted on the basis of these draft articles. There is no reason to suppose that this conclusion does not apply to all State officials.

66 As Mr. Hmoud, a member of the Commission, observed at its sixth session: “The status of an official was a matter to be decided by the State entitled to immunity pursuant to its domestic law and it was not a matter of discretion for the authorities of the State exercising jurisdiction”, Yearbook ... 2008, vol. I, 2985th meeting, para. 37.

67 Memorandum by the Secretariat (footnote 4 above), paras. 246–249.

68 State immunity … does not apply if the State in question has consented to the exercise of jurisdiction by the court of another State. There will be no obligation … on the part of a State to refrain from exercising jurisdiction, in compliance with its rules of competence, over or against another State which has consented to such exercise. The obligation to refrain from subjecting another State to its jurisdiction is not an absolute obligation. It is distinctly conditional upon the absence or lack of consent on the part of the State against which the exercise of jurisdiction is being sought” (Commentary to draft article 7, draft articles on jurisdictional immunities of States and their property (with commentaries), Yearbook ... 1991, vol. II (Part Two), p. 26, para. (3) of the commentary).

69 On the immunity of Heads of State, Watts writes: “Where an immunity exists, it may be waived and consent given to the exercise of jurisdiction” (“The legal position in international law of Heads of States, Heads of Governments and Foreign Ministers”, p. 67).

70 Memorandum by the Secretariat (footnote 4 above), para. 249.

71 See ibid., para. 265. As ICI stated in its decision in the Arrest Warrant of 11 April 2000 case, State officials “will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity” (I.C.J Reports 2002, p. 25, para. 61). As the Statement of Interest of the United States in the Namata case (footnote 27 above), paragraph 10 indicates, “Because the immunity is ultimately the State’s, a foreign State may waive the immunity of a current or former official, even for acts taken in an official capacity.” The United States Government refers to the In re Doe case (which dealt with a claim on the basis of the issuance of orders by Ferdinand Marcos, former president of the Philippines, and his wife, United States Court of Appeals for the Second Circuit, 860 F.2d 40). The decision in that case noted that “Because it is the State that gives the power to lead and the ensuing trappings of power—including immunity—the State must exercise the right to take back the power by the authority of its law.” See also article 7, paragraph 1, of the 2001 resolution of the Institute of International Law. (“The Head of State may no longer benefit from the inviolability, immunity from jurisdiction or immunity from measures of execution conferred by international law, where the benefit thereof is claimed by his or her State. Such a law waiver may be effected by the State concerned even if it is obtained by the person claiming the immunity” (footnote 20 above), p. 474; Dominé, “Quelques observations sur l’immunité de juridiction pénale de l’ancien chef d’État” (Immunities, their contours and limits are set by international law. Where available, the State may waive its immunity or that of one of its organs”, p. 306.) In An Introduction to International Criminal Law and Procedure, Cryer and others state, “It is the State which is the real beneficiary of the immunity, and it is the State which may waive it, irrespective of the wishes of the person claiming the immunity” (p. 534). Shaw, in examining the waiver of immunity by diplomatic representatives, points out that in Fayed v. Attorney General (1987), the Court of Appeal referred to an apparent waiver of immunity by an ambassador made in pleadings by way of defence. Kerr correctly noted that both under international and English law, immunity was the right of the sending State and that therefore “only the sovereign can waive the immunity of its diplomatic representatives.” For that reason, the State cannot do so themselves (footnote 60 above).

72 See the discussion of waiver of immunity during the deliberations on the draft articles on diplomatic intercourse and immunities at the ninth session of the Commission, 27 May 1957 (Yearbook ... 1957, vol. I, 405th meeting, pp. 111–113). The Commission unanimously adopted article 21, paragraph 1, which provides that waiver of immunity is an act of State. In the draft articles adopted by the Commission, this provision was contained in article 30, paragraph 1: “The immunity of its diplomatic agents from jurisdiction may be waived by the sending State” (Yearbook ... 1958, vol. II, p. 99).

73 The Commission’s commentary to article 45 of the draft articles on consular relations is typical: “The capacity to waive immunity is vested exclusively in the sending State, for that State holds the rights granted under these articles. The consular officer himself has not this capacity” (Yearbook ... 1961, vol. II, p. 118, para. (1) of the commentary).
34. The question of which State authority is competent to waive the immunity of officials is determined by the State itself within the framework of its internal organization and does not appear to be subject to international regulation. However, special attention should be paid in this context to waivers of immunity for State officials who belong to the troika (meaning, of course, those in office).  

35. The Head of State and in many cases the Head of Government are the highest State officials. Together with Ministers for Foreign Affairs, they are deemed to represent the State in international relations without any requirement to present additional credentials. In that connection, the question arises of whether they can themselves waive the immunity from foreign jurisdiction that they enjoy.  

36. This question is to some extent hypothetical. As Tunks notes, “In practice, it is extremely uncommon for a sitting Head of State’s immunity to be waived because he is often the person who has the power to control whether or not to issue a waiver”.  

37. Watts infers, evidently on the basis of the hierarchy of officials and State bodies, that Ministers for Foreign Affairs cannot waive their own immunity, as this position is not the highest in the State structure and there is always a higher official or body that can waive the immunity of the Minister for Foreign Affairs. Under this approach, the situation with respect to the head of Government is not clear: the head of Government is the highest official in some countries but not in others.  

38. It may be useful to consider this question bearing in mind that all three officials are regarded, by virtue of their positions, as representatives of the State in international relations. If this circumstance, and not only considerations of hierarchy, is taken into account, it may be supposed that the State exercising criminal jurisdiction in respect of such an official and having received from him or her a waiver of immunity is entitled to presume that this reflects the wishes of the State represented by that official, at least until such time as that State otherwise indicates.  

39. Alongside the question of who has the power to waive an official’s immunity, it is necessary to consider what form such a waiver can take. Must a waiver of an official’s immunity always be express, or is an implied waiver sufficient? Or is a waiver, whether express or implied, considered sufficient provided it is clear?  

40. The Commission considered this issue during the preparation of draft articles concerning diplomatic intercourse, consular relations, special missions, representation of States in their relations with international organizations and jurisdictional immunities of States and their property. The Commission's work on this question in connection with the draft articles on diplomatic intercourse was definitive with regard to the first four sets of draft articles. The Commission’s draft article on the

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Immunity of State officials from foreign criminal jurisdiction

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76 The second paragraph of article 7, paragraph 1, of the Institute’s 2001 resolution (footnote 71 above) explicitly states that “The domestic law of the State concerned determines which organ is competent to effect such a waiver.”

77 “If there is a problem, it mainly concerns the person who is at the top of the hierarchy and has no immediate superior to whom we can refer, which is primarily the head of the foreign State” (Verhoeven (ed.), Droit international des immunités: contestation ou consolidation?, p. 114).

78 Tunks, “Diplomats or defendants? Defining the future of Head-of-State immunity”, p. 673, footnote 123. The author goes on to provide a clear illustration of this thesis by referring to the Lafontant v. Aristide case: “This catch-22 is illustrated in the Aristide/Tas case. The de facto Haitian government supported the lawsuit and tried to waive Aristide’s immunity, but it was unable to do so because Aristide represented the only Haitian government recognised by the United States; consequently, only Aristide could waive his own immunity”. Considering the hypothetical ability to waive immunity in Howland v. Resteiner, the United States Federal District Court notes that “even if Head-of-State immunity does apply to former Heads of State, that immunity may be waived at any time either by Dr. Mitchell in his present capacity as the Head of State of Grenada or by any subsequent administration that should come into power after Dr. Mitchell’s tenure has ended” (the case dealt with the filing of a civil suit against three defendants, including Keith Mitchell, the Prime Minister of Grenada, and his wife, Marietta Mitchell; the court recognized the immunity of these two individuals on the basis of the claim of immunity made by the United States Department of State and the absence of a waiver of immunity, but without prejudice to the possibility of relitigating the suit) (Charles C. Howland v. Eric E. Resteiner, et al., United States District Court, Eastern District of New York, No. 07-CV-2332, 5 December 2007). There is no doubt that the immunity of a Head of State can be waived. That is set out, for example, in the Institute of International Law’s 2001 resolution (art. 7, para. 1). In addition, for example, Yoram Dinstein observed during the Institute’s deliberations on the draft of the 2009 resolution that “the capacity to waive immunity was vested in the State and not in the individual who benefited from it. This was true even when the immunity was labelled ‘personal immunity’, since immunity was never personal in the full sense of the word. If the State exercised its option of waiving that ‘personal immunity’, the person concerned (regardless of his or her wishes) was subject to the exercise of the very jurisdiction that he or she was trying to avoid” (“The fundamental rights of the person and the immunity from jurisdiction in international law”, p. 199).
waiver of immunity of diplomatic agents provides that “in criminal proceedings, waiver must always be express.” 85

In the commentary to this provision, the Commission noted that “A distinction is drawn between criminal and civil proceedings. In the former case, the waiver must be express. In civil, as in administrative proceedings, it may be express or implied.” 86 The States decided otherwise, however, and the requirement that a waiver of immunity must always be express, as provided in article 32, paragraph 2, of the Vienna Convention on Diplomatic Relations, pertains to immunity from both criminal and civil jurisdiction.87 Similarly worded provisions on waiver of immunity can be found in the Vienna Convention on Consular Relations (art. 45, para. 2), the Convention on Special Missions (art. 41, para. 2) and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (art. 31, para. 2, and art. 61, para. 2).88 It should be noted that, except in the Vienna Convention on Consular Relations, the requirement that a waiver of immunity be express pertains to individuals enjoying personal immunity from foreign criminal jurisdiction. In all cases, moreover, these are individuals whose identity and status are well known to the State of residence. Both consular officials and consular employees enjoying only functional immunity belong to this category.

41. A number of rulings by national courts have expressed the view that a waiver of the immunity of a Head of State must be express. Examples of such rulings cited in the memorandum by the Secretariat include decisions by the Swiss Federal Tribunal in Ferdinand and Imelda Marcos v. Federal Office of Police [Ferdinand et Imelda Marcos c. Office fédéral de la police], the United States District Court for the Eastern District of New York in Lafontant v. Aristide and the Court of Appeal of Great Britain in Ahmed v. Government of the Kingdom of Saudi Arabia.89

42. An express waiver of immunity (the express consent of the State having sent an official to the exercise by another State of criminal jurisdiction in respect of that official) may take the form of a unilateral statement or notification by the sending State or the conclusion by that State of an international agreement with the State exercising jurisdiction. This may be done in connection with a specific official or officials named in the criminal proceedings in question, or in a more general manner. Both of these types of express waiver of immunity are specified in article 7, paragraph 1, of the United Nations Convention on Jurisdictional Immunities of States and Their Property.90

43. The question of the form to be taken by a waiver of immunity of a former Head of State was touched upon in Pinochet. The memorandum by the Secretariat contains a fairly detailed analysis of this aspect of the case and the scholarly commentary thereon.91 In particular, it is pointed out that

[In Pinochet (No. 3), the issue of waive revolved around Chile’s ratification of the Convention against Torture, and waiver was addressed on some level by all seven of the Lords. While one Lord considered this to be a case of express waiver, six Lords did not even consider it to be a case of implied waiver, yet five of the seven Lords concluded that it ultimately operated so as to manifest Chile’s consent to have its former head of State subject to jurisdiction.92

As Lord Saville noted, “It is … said that any waiver by States of immunities must be express, or at least unequivocal. I would not dissent from this as a general proposition, but it seems to me that the express and unequivocal terms of the Torture Convention fulfil any such requirement.” 93 Lord Goff disagreed, taking the view that the Convention does not provide for either express or implied waivers of immunity. He noted, inter alia:

It appears to me to be clear that, in accordance both with international law, and with the law of this country which on this point reflects international law, a State’s waiver of its immunity by treaty must … always be express. Indeed, if this was not so, there could well be international chaos as the courts of different State parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied.94

It thus appears that both Lords were saying, in essence, that a waiver of immunity, at least in the form of an international agreement, must be express.95

86 Ibid., p. 99, para. (3) of the commentary to art. 30.
87 A number of delegations at the Conference took the view that only an express waiver can constitute sufficient evidence of the real intent of the sending State to waive immunity. As immunity primarily protects the State (whereas the diplomatic agent merely benefits from it), there is no need to differentiate between criminal and civil jurisdiction for the purposes of waiver of immunity. See United Nations Conference on Diplomatic Intercourse and Immunities (Vienna, 2 March–14 April 1961), Official Records, vol. 1 (A/CONF.20/14), vol. 1, 29th meeting, pp. 526 et seq.
88 It is clear, however, that all these conventions permit implied waivers of immunity from civil jurisdiction. In particular, all the above-mentioned articles contain identical provisions to the effect that the initiation of proceedings by an official enjoying immunity shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim. See footnote 109 below.
89 Memorandum by the Secretariat (footnote 4 above), para. 251.
90 Memorandum by the Secretariat (footnote 4 above), paras. 258–264.
92 Ibid., p. 604.
93 In considering the question of an implied waiver of a State’s immunity under the Foreign Sovereign Immunities Act (FSIA), the
44. One viewpoint expressed in the literature is that a number of international agreements that do not include any provisions on waiver of immunity are nonetheless incompatible with immunity. Such agreements include human rights treaties that criminalize certain conduct and provide for universal criminal jurisdiction in respect of such conduct. Accordinly, a State that has consented to be bound by such an agreement has ipso facto implicitly waived its officials’ immunity if they violate the human rights protected by that agreement or commit acts criminalized therein. The Differences between jurisdiction, on the one hand, and immunity, on the other, and also between substantive and, in some cases, peremptory human rights norms and rules prohibiting and criminalizing various acts, on the one hand, and the procedural nature of immunity, on the other, were dealt with in the preliminary and second reports. The second report concludes that neither universal jurisdiction nor rules of this kind preclude immunity. These observations also apply to the present case. For similar reasons, a State’s consent to be bound by an international agreement of this kind does not imply consent to the exercise of foreign criminal jurisdiction in respect of its officials, i.e. waiver of their immunity. Moreover, an international agreement cannot be construed as implicitly waiving the immunity of a State party’s officials unless there is evidence that the State so intended or desired. Meanwhile, as noted by Verhoeven in relation to agreements concerning

United States District Court observed, in Doe and others v. Israel and others, Motion disposition, 400 F. Supp. 2d 86, 95–96 (D.D.C. 2005); ILDC 318 (U.S. 2005), that “[a]n implicit waiver under this provision requires that the foreign sovereign ‘have’ at some point indicated its actual consent” (ibid., p. 517). He also considers, however, that the existence of an implied waiver cannot be inferred from an agreement or recognize of an international crime and imposing the obligation to punish it, this is logically incompatible with the upholding of immunity where the accused is a foreign State official. As such, the necessary implication is that these States have opted to waive in advance any State immunity presumptively attaching to the impugned conduct, insofar as it is inconsistent with the agreement. In short, the act of establishing universal and mandatory criminal jurisdiction in respect of potentially official conduct constitutes consent in advance to the exercise of that jurisdiction by foreign municipal courts, regardless of the doctrine of State immunity (“The European Convention on State immunity and international crimes”, p. 513). The author substantiates that theory on the basis of his understanding of art. 2 (a) of the European Convention on State Immunity, noting, inter alia, that it “has at least the potential to sustain an argument based on implied waiver by inconsistent international agreement” (ibid., p. 517). He also considers, however, that the existence of an implied waiver cannot be inferred from an agreement unless the parties’ consent to consent to the exercise by foreign courts of criminal jurisdiction in respect of the conduct criminalized therein is unequivocally apparent. In his view, the existence of an obligation to exercise jurisdiction (including under the principle aut dedere aut judicare) constitutes evidence of such intent. Koivu, for his part, notes that in order to establish the existence of an implied waiver the international agreement must “expressly conflict with the applicable provisions of immunity” (“Head-of-State immunity v. individual criminal responsibility under international law”, p. 318).

45. In its judgment in the Arrest Warrant of 11 April 2000 case, ICJ stated its opinion most definitely on the issue of whether, a State conclusion by States of an international treaty criminalizing certain actions and requiring States to extend criminal jurisdiction to them meant that these States were waiving immunity for their officials. The Court said, in part:

Jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions. It would seem that this statement also fully applies to the relationship between human rights treaties and waivers of immunity.

46. Overall, the memorandum by the Secretariat notes “general reluctance to accept an implied waiver based on the acceptance of an agreement”.

47. In the resolution of the Institute of International Law, instead of a choice between an explicit or implied waiver of immunity, the emphasis is on the clarity and lack of ambiguity of the waiver of immunity. With regard to waiving immunity for Heads of State, its article 7 says: “Such waiver may be explicit or implied, so long as it is certain.” As Verhoeven noted in this connection in his report, “The important thing anyway is this: that the will of the State be certain.” As an example of such an unambiguous expression of a State’s will, which, if not expressly clear, can be considered an implied waiver of immunity, the author cites a situation in which a Government brings a former Head of State to trial.

100”Drout international…” (footnote 77 above), p. 123. The author also notes that “These conventions (genocide, torture, etc.) have no provision explicitly dismissing its and ... there is no evidence, either in their preparatory work or elsewhere, that such was the implied will of States that negotiated them or became parties to them” (ibid., p. 125).

101 I.C.J. Reports 2002, pp. 24–25, para. 59. With regard to the Convention against torture and other cruel, inhuman or degrading treatment or punishment, Yang notes, “The Torture Convention is silent on the question of State immunity. The reason for this silence may be a matter of conjecture but one thing is clear, that is, in the absence of a specific provision dealing with State immunity, the interpretation and application of the Torture Convention should be subject to existing rules of international law pertaining to this matter. The existence of universal jurisdiction does not necessarily entail a loss of immunity, as has been affirmed in unequivocal terms by the ICP (“Jas cogens and State immunity”, pp. 144–145). The Court of Cassation of Belgium, considering the issue of the immunity of Ariel Sharon in connection with charges of war crimes, states, “The Geneva Conventions of August 12, 1949 as well as the Additional Protocols I and II to these Conventions contain no provision that would prevent the defendant from invoking jurisdictional immunity before Belgian courts” (ILM (footnote 43 above), p. 600).

102 Memorandum by the Secretariat (footnote 4 above), para. 259.

103 “Immunities from jurisdiction and execution of Heads of State and of Government in international law” (footnote 34 above), p. 689.

104 Ibid., p. 534.

105 Ibid.
48. However, is this so obvious? For example, a former Head of State (or other official) can be brought to trial by his State, and that State can even demand that he be extradited from another country. Such a request would obviously mean a waiver of that person’s immunity with regard to the procedural actions by the foreign State to extradite him. At the same time, however, the State can continue to insist on the immunity of its former Head with regard to actions by a foreign State that can be undertaken by the latter for the purpose of its own criminal prosecution of the person in question or in order to extradite him to a third country. On the whole, it would seem that the desire of a State to prosecute its own former official in no way means that this State has ceased to consider the actions in question as having been committed in an official capacity, and is not equivalent to consent to the exercise of foreign criminal jurisdiction against this official, i.e. a waiver of immunity. It is more likely the contrary: the State does not want its former official to be prosecuted abroad, but wants to bring him to justice itself.

49. Probably, one could imagine a situation in which a State requests a foreign State to carry out some sort of criminal procedure measures against one of its sitting high-ranking officials—a Head of State or Government or a Minister for Foreign Affairs. This of course presumes a waiver of immunity for that person with regard to the measures in question. But such a situation is, it would seem, hypothetical in nature.

50. In conventions on diplomatic relations, consular relations, special missions, representation of States in their relations with international organizations of a universal character and on the jurisdictional immunities of States and their property, there are similar provisions, whereby the initiation of proceedings by a subject enjoying immunity precludes him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim. It is clear that civil jurisdiction is at issue here. However, various forms of initiative participation by victims in criminal litigation exist in the criminal procedure legislation of many countries. Can it be considered a waiver of immunity from criminal procedure measures carried out with regard to an official, if he is the aggrieved party in a criminal case, including from measures carried out in connection with countermeasures by the person against whom the case is brought?

51. It would seem that, in general, an analogy with a situation involving immunity from civil jurisdiction in an instance where the aggrieved party initiates or joins a criminal case is not exactly fitting. In cases where a criminal trial is conducted through a judicial investigation or a State prosecution, procedural measures are carried out, regardless of participation by the aggrieved party or the authorities of the relevant State. In this context, it is important that the official is only a beneficiary of the immunity which belongs to the State of that official. And that State, whose interests the immunity protects, cannot be considered to have waived immunity as a result of its official’s actions.

52. At the same time, there are cases when an official acts as the sole prosecutor in a criminal case at the trial stage, without any involvement by a State prosecutor, while enjoying all the procedural rights of the prosecution. In this connection, the question arises of whether this leads to a waiver of immunity with regard to counter-accusations related to the presumed crime. Such a situation can arise in cases of so-called private prosecution, which is provided for in the legislation of a number of States for a limited number of crimes (generally, crimes without serious consequences, such as infliction of minor injuries, etc.) In private prosecutions, there is no State prosecutor, and the aggrieved party exercises all rights usually enjoyed by the State prosecutor, so that the aggrieved party actually engages in a dispute with

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106 Thus, for several years, Peru worked to obtain the extradition of former dictator Alberto Fujimori, first from Japan (which was unsuccessful due to the fact that he held Japanese citizenship), and then from Chile. Fujimori was arrested in Chile at the request of the Peruvian leadership immediately upon his arrival, and some time later, in 2007, was extradited to Peru for criminal prosecution. As far as can be determined from accounts of the case, in the decision regarding his arrest and during consideration of the extradition request, the issue of whether Fujimori had immunity did not come up. See, for example, Haas, “Fujimori extraditable!: Chilean Supreme Court sets international precedent for human rights violations”.

107 In the case Lafontant v. Aristide, a United States circuit court dismissed the argument that a warrant for the arrest of Jean-Bertrand Aristide issued in Haiti could be considered a waiver of immunity for the Head of State. Moreover, the absence of a waiver of immunity was noted in a letter from the Ambassador of Haiti to the United States. However, a statement that Aristide had immunity, which was submitted by the United States Department of State, was decisive for the court in this case. It follows that the United States did not recognize the Government of Haiti, since Aristide, then in exile, was still recognized by the United States as the sole legitimate Head of State (District Court of the United States, Eastern District of New York, 27 January 1994, ILR, vol. 103, p. 581).

108 A criminal case brought by a State against a former Head of that State may be accompanied by that State’s consent to exercise of jurisdiction with regard to that person by a foreign State. (See, for example, the case of the former President of Bolivia Gonzalo Sanchez de Lozada.) The criminal charges brought against him in Bolivia were accompanied by a waiver of any remaining immunity by the Government of Bolivia with regard to the civil case brought against him in the United States, which was then considered. (Mamani, et al. v. José Carlos Sánchez Berzain and Gonzalo Daniel Sanchez de Lozada Sánchez Bustamante, United States District Court, Southern District of Florida, Miami Division (20 November 2009). This only confirms that to equate attempts at criminal prosecution with an implied waiver of immunity is not likely to be legal.

109 See article 32, paragraph 3, of the Vienna Convention on Diplomatic Relations; article 45, paragraph 3, of the Vienna Convention on Consular Relations; article 41, paragraph 3, of the Convention on Special Missions; article 31, paragraph 3, of the Convention on the Representation of States in their Relations with International Organizations of a Universal Character; and article 8 of the Convention on Jurisdictional Immunities of States and Their Property.

110 Although, again, a somewhat unclear situation results in this hypothetical case, when a criminal case is initiated by a Head of State or Government or a Minister for Foreign Affairs.

111 See, for example, articles 43 and 318 of the Criminal Procedure Code of the Russian Federation; articles 374 to 394 of the German Code of Criminal Procedure; article 27 of the Criminal Procedure Code of Ukraine; and article 71 of the Criminal Procedure Code of Austria. There are rules under which criminal cases involving certain forms of crime can be brought only as private prosecutions—the Government prosecutor does not have that right, i.e. the Government does not have jurisdiction, or, essentially, a legal interest in a criminal prosecution. See article 20, paragraph 2, of the Criminal Procedure Code of the Russian Federation (these include inflicting minor injuries, beating which does not result in serious consequences, slander or libel and insults).

112 See, for example, article 71, paragraph 5, of the Criminal Procedure Code of Austria and article 43, paragraph 2, of the Criminal Procedure Code of the Russian Federation.
the defendant, with the court acting as arbitrator in that dispute. In other words, it can be very close, in its procedural aspects, to a civil legal case. Of course, how close it comes, based on nuances of the criminal procedure legislation of the State of jurisdiction, should in fact be decisive in situations involving a waiver of immunity in “private prosecution” cases.

53. In the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters, ICJ, in considering the issue of France’s actions with regard to the Prosecutor of the Republic and the head of the national security service of Djibouti, concluded that France had not violated the functional immunity that those officials may have enjoyed, since Djibouti did not invoke it. At the same time, the Court did not state that in not invoking immunity, Djibouti had waived it. Nonetheless, it seems reasonable to ask whether a State’s non-invocation of the immunity of an official can be considered an implied waiver of immunity.115

54. There was mention above of the fact that when the troika is involved, the burden of invoking immunity falls to the State exercising criminal jurisdiction, and that it falls to the State of the official when the matter involves an official who enjoys functional immunity or an official who is not one of the troika but enjoys personal immunity.116 If that is the understanding, then if the State of the official does not invoke immunity in a situation where foreign criminal jurisdiction is being exercised against the Head of that State or its Government or its Minister for Foreign Affairs, that does not mean that the State consents to the exercise of foreign criminal jurisdiction with regard to that person, and, accordingly, to a waiver of immunity. Proceeding from that same logic, in a case where foreign criminal jurisdiction is being exercised against an official who enjoys functional immunity or personal immunity but who is not one of the troika, it can be presumed that non-invocation of immunity by the State of the official can be considered consent by that State to the exercise of jurisdiction and, accordingly, a waiver of immunity.117

55. Therefore, a general conclusion on the issue of the form of the waiver of immunity of State officials from foreign criminal jurisdiction could be phrased approximately as follows: when applied to a serving Head of State, Head of Government or Minister for Foreign Affairs, a waiver of immunity should be explicitly stated. A possible exception would be a hypothetical situation in which the State of such an official requests the foreign State to carry out certain criminal procedure measures with regard to the official. Such a request would unambiguously presume a waiver of immunity with regard to those measures, and in such a case, it would be implied. Applied to serving officials who are not included in the troika but who enjoy personal immunity, to other serving officials who enjoy functional immunity and to all former officials who also enjoy functional immunity, a waiver of immunity can be either express or implied. An implied waiver in this case can be expressed specifically in the non-invocation of immunity by the State of the official.

D. Can the official’s State invoke immunity after waiving it?118

56. It would seem that in a case when immunity is expressly waived, i.e. after a State has consented to the exercise of criminal jurisdiction over its official by another State, it is legally impossible to invoke immunity. In particular, this would not be in keeping with the principle of good faith.119 At the same time, an express waiver of immunity may, in some cases, affect immunity only with regard to certain measures. For example, a State may waive the immunity of its Minister for Foreign Affairs with regard to his testifying at a deposition. It would seem that such a waiver of immunity cannot be considered a waiver of that person’s immunity if the State who subpoenaed that

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115 See article 388 of the German Criminal Procedure Code.

116 Private prosecutions can take a variety of forms in certain States and consist sometimes of a blend. For example, in Germany there are “private collaborative prosecutions” (arts. 395–402 of the German Criminal Procedure Code), in which the essential role in the trial is played by the State prosecution, while the private prosecution plays an auxiliary role.

117 See also Buzzini (footnote 20 above), p. 474.

118 See paragraphs 18–24 above.

119 However, the Special Rapporteur is not familiar with any court judgments, practices, State opinions or doctrines which either clearly confirm or are at variance with such an approach to the issue. The provisions of the previously mentioned statement of the U.S. Department of State in the case of Sanantar (see footnote 27 above) indicate a link between failure to invoke immunity and exercise of criminal jurisdiction by a foreign State with regard to a person who could in principle enjoy immunity. There are quite a few examples of court judgments in which immunity was either rejected or not considered at all, in which the State of the (former) official did not invoke immunity. These include the judgment in the case of Xancas v. Gramajo, United States District Court of Massachusetts, 1995 (886 F. Supp. 162), and in a similar case in Spain, the Guatemala Genocide Case, Spanish Supreme Court, 25 February 2003 (ILM, vol. 42, p. 868); as well as the judgment of the Supreme Court of Belgium in the case of H.S.A. v. S.A. et al. (footnote 43 above). The United States Government did not invoke immunity before the Italian court relative to the criminal case in which

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119 At the same time, an express waiver of immunity may, in some cases, affect immunity only with regard to certain measures. For example, a State may waive the immunity of its Minister for Foreign Affairs with regard to his testifying at a deposition. It would seem that such a waiver of immunity cannot be considered a waiver of that person’s immunity if the State who subpoenaed that...
person as a witness then intends to criminally prosecute him.\footnote{120}

57. As noted earlier, an implied waiver of immunity can occur when there is non-invocation of immunity of someone who is not one of the troika (with the understanding, of course, that the official’s State was aware of the exercise of foreign criminal jurisdiction with regard to this person but did not invoke immunity).\footnote{121} The Special Rapporteur is not certain that, when there is such an implied waiver of immunity, it cannot be invoked at a later stage of a criminal trial.\footnote{122} On the one hand, as noted earlier,\footnote{123} the issue of immunity should be considered at an early stage of the process. On the other hand, in a situation, for example, in which the official’s State did not invoke that person’s immunity at the pretrial stage, and can thereby be considered as having already waived immunity with regard to the measures taken at that stage, would it be unlawful for it to then decide to invoke immunity when the case comes to trial? It would seem that in such a situation it is still possible to invoke immunity. However, procedural actions already carried out with regard to the official in question by the State exercising jurisdiction, up to the point when immunity is invoked, cannot be considered illegal, since, as noted earlier, in this case the State exercising criminal jurisdiction is not required to consider the issue of immunity \textit{proprio motu}, and the burden of invoking the official’s immunity falls to his State.\footnote{124} At the same time, there are doubts as to the applicability of such an approach to a situation in which immunity was not invoked in the court of first instance, but the official’s State decides to invoke it at the appeal stage.\footnote{125}

\footnote{120} The memorandum by the Secretariat (footnote 4 above), \textit{para. 269, notes, in part: “Concerning the legal effects of the waiver of immunity—including any residual immunity not covered by the waiver—in the case of express waiver this question should be clarified by the express terms of the waiver itself.”}

\footnote{122} What is at issue here, of course, is a situation in which the State of the official knows that a foreign State is exercising (intends to exercise) criminal jurisdiction with regard to its official and does not invoke immunity for some period of time. As Buzzini has noted, “It is not entirely clear until which point in time in the proceedings an immunity [issue] can still be raised” (footnote 20 above, p. 474).

\footnote{123} See paragraphs 11–13 above.

\footnote{124} See paragraph 17 above.

\footnote{125} See the opinion of the Commission set forth in the commentaries on the draft articles on diplomatic intercourse and immunities, cited in footnote 119 above.

\textbf{CHAPTER II}

\textbf{An official’s immunity and the responsibility of the official’s State}

58. If the official’s State waives his immunity, that opens the way for the full exercise of foreign criminal jurisdiction in regard to this official. This also relates to jurisdiction with regard to actions performed by the official in an official capacity (even a waiver of immunity \textit{ratione materiae} does not have to be accompanied by a statement that the presumed illegal actions were performed in a personal capacity). As noted in the preliminary report, attributing to the State actions performed by an official in an official capacity does not mean that they cease to be attributed to that official.\footnote{126} The only hindrance to the criminal prosecution of this person by a foreign State is the fact that he enjoys immunity. Waiving immunity removes this hindrance. At the same time, waiving immunity of an official with regard to actions performed by this person in an official capacity does not mean that this conduct loses its official character. Accordingly, it is still attributed not only to the official but also to the State which he is or was serving. This is dual attribution. Accordingly, waiving immunity not only creates the conditions for establishing the official’s criminal responsibility, but also is not an obstacle to holding the official’s State responsible under international law, if...

\footnote{126} \textit{Yearbook of International Law, 2008, vol. II (Part One), document A/CN.4/601, para. 89. However, directly opposite views are expressed in the doctrine. See, for example, how Akande and Shah (“Immunities of State officials, international crimes, and foreign domestic courts”, pp. 826–827) describe such a position: “This type of immunity constitutes (or, perhaps, more appropriately, gives effect to) a substantive defence, in that it indicates that the individual official is not to be held legally responsible for acts which are, in effect, those of the State. Such acts are imputable only to the State and immunity \textit{ratione materiae} is a mechanism for diverting responsibility to the State. This rationale was cogently expressed by the Appeals Chamber of the International Tribunal for the former Yugoslavia in \textit{Prosecutor v. Blaškić}: [State] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called ‘functional immunity.’ This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.” \textit{[Prosecutor v. Blaškić (objection to the question of suprema duces tueum) IT-95-14-AR108 (1997), ILR, vol. 110 (1997) 607, p. 707, para. 38.]}
the actions are in violation of the State’s obligations under international law. Thus, despite the waiver of immunity with regard to its official, the official’s State is not released from responsibility under international law for the actions performed by that person in an official capacity.128

127 Judge Kenneth Keith of ICJ describes the relationship between State responsibility and the responsibility of an official in the following terms: “Even if States cannot commit international crimes, they might ... be held to be subject to the same obligations as individuals, without the obligations being characterized as criminal; that is to say, the obligations may be dual, binding both States and individuals” (“The International Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),” 2007 I.C.J. Reports, p. 173). Nollekampers observes: “State responsibility neither depends on nor involves the legal responsibility of individuals” (“Concurrence between individual responsibility and State responsibility in international law”, J. Int. L. & Econ. 6, p. 616). Further on, he writes: “State practice provides no support for the proposition that, in cases where responsibility has been allocated to an individual, there can be no room for attribution to the State ... The prosecution of the individual responsible for the Lockerbie bombing, considered to be an agent of Libya, did not preclude subsequent claims against Libya for compensation by the United Kingdom and the United States ... The effectuation of responsibility of individual agents of Yugoslavia for acts during the armed conflict between 1991 and 1995 in the International Tribunal for the former Yugoslavia and national courts did not preclude claims by Bosnia-Herzegovina and Croatia in the I.C.J. It does not appear that in any of these cases the States against which claims were made invoked the argument that these acts could not be attributed to the State since they already had been attributed to individual agents.” Individual responsibility does not necessarily mean that the State is atomized and that the State could negate its own responsibility by having responsibility shifted towards individual State organs — State responsibility can exist next to individual responsibility” (ibid., pp. 619-621). It is worth keeping in mind, however, that an official’s lack of immunity does not preclude the State itself from having responsibility for such a person, or that of the State (with regard to the latter, the fact that the official is protected by immunity has no significance either; see para. 60, below) (“We ought to bear in mind that the denial of jurisdictional immunity does not necessarily amount to the existence of responsibility as a matter of substantive law” (Tomonori, footnote 60 above, p. 2661)).

The draft articles on responsibility of States for internationally wrongful acts (Yearbook ... 2001, vol. II (Part Two), p. 26, para. 76) contain no indication that the responsibility of States depends in some way on the exercise by the International Tribunal for the former Yugoslavia in the case of Krstic in the case Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). See I.C.J. Reports 2007, p. 166, para. 296). On the other hand, Nollekampers writes: “Eventually, the findings of individual responsibility in connection to the Lockerbie bombing supported subsequent claims of State responsibility. On the other hand, the Scottish Court sitting in the Netherlands would have found that the individuals who were indicted were not remotely related to the bombing, the factual basis for the claim of the responsibility of the State of Libya would have fallen away. It is difficult to envisage that a court charged with determining State responsibility would in a subsequent proceeding find evidence of individual involvement that a court charged with determining individual responsibility would have missed” (preceding footnote, p. 628). At the same time, he goes on to say: “If a court or tribunal were to find that no factual basis exists for individual responsibility, this need not preclude a finding of State responsibility” (ibid., p. 630).

59. While waiving an official’s immunity with regard to actions carried out in an official capacity does not release the official’s State from responsibility under international law, invocation of an official’s immunity with reference to the fact that the internationally wrongful act with which the official is charged was performed in an official capacity establishes grounds for such responsibility. In considering the issue of the functional immunity (or lack thereof) of officials of Djibouti in the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters, ICJ stated that “the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.” In the context of this case, that meant that if Djibouti had informed the French court (or other appropriate French authority) that the acts of its officials were its own (official) acts and that these were acting in an official capacity (as organs, or something similar, of Djibouti) and on that basis had invoked those officials’ immunity, it would have assumed responsibility for those internationally wrongful acts.

60. It would perhaps be more accurate to say that the State which invokes its official’s immunity on the grounds that the act with which that person is charged was of an official nature is acknowledging that this act is an act of the State itself, but is still not acknowledging its responsibility for that act. Atributing behaviour to a State is definitely an important element, the basis of responsibility under international law, but it still falls short of acknowledging it. Another element necessary to State responsibility, as is well known, is that the act attributed to the State should be in violation of its obligations under international law. It should be kept in mind here that a State usually invokes its official’s immunity at a point in criminal proceedings when the wrongfulness of the official’s act has yet to be proven in court, and in and of itself, the invocation of immunity does not mean that the State agrees that the act in regard to which immunity is invoked is an internationally wrongful act. At the same time, acknowledgement that the conduct with which the official is charged is the conduct of the State itself, i.e. attribution by the State to itself of that conduct, is, of course, an important step towards the possible assumption by it of responsibility. In any case, it provides grounds for the institution of international legal proceedings against this State by actors who are entitled to do so. It is worth


130 During the sixtieth session of the Commission, Ms. Jacobsson raised a question in her statement about the possible responsibility of a State which invokes its official’s immunity from foreign criminal jurisdiction in a case when it subsequently fails to criminally prosecute that official (Yearbook ... 2008, vol. I, 2985th meeting, para. 6). It would suggest that the responsibility can arise only when the State has something resembling the following obligation under international law: either to waive its official’s immunity from foreign criminal jurisdiction, or else, if immunity has been invoked, to carry out its own criminal prosecution of its official. The Special Rapporteur is aware of no case where there exists in general international law: if it so chooses, the Commission can of course consider developing international law in this direction.
noting that, in many cases, if the official’s State wishes to invoke that official’s immunity, the necessity of acknowledging an official’s conduct as official, as being its own, presents the State with a difficult choice. In stating that its official’s actions were official in nature and that he enjoys immunity, the State is acting in the official’s defence but is establishing significant premises for its own potential responsibility for what this person did. Yet, if it does not invoke the official’s immunity, the State opens the way for this person to be criminally prosecuted in a foreign State and thereby creates the possibility of occasionally serious intrusion by a foreign State into its internal affairs.

CHAPTER III

Summary

61. The contents of this report can be summarized in the following statements:

(a) The question of the immunity of a State’s official from foreign criminal jurisdiction must in principle be considered either at the early stage of court proceedings or even earlier at the pretrial stage, when the State that is exercising jurisdiction decides the question of taking, in respect of the official, criminal procedure measures which are precluded by immunity.

(b) Failure to consider the issue of immunity *ratione materiae* may be viewed as a violation of the obligations of the forum State under the norms governing immunity. This also relates to the consideration of the question of immunity at the pretrial stage of the exercise of criminal jurisdiction at the time when the question of the adoption of measures precluded by immunity is decided. This, however, does not pertain to a situation in which the State of the official who enjoys immunity *ratiorne materiae* does not invoke his immunity or invokes it at a later stage in the proceedings.

(c) Only the invoking of immunity or a declaration of immunity by the official’s State, and not by the official himself, constitutes a legally relevant invocation of immunity or declaration of immunity, i.e. they have legal consequences.

(d) In order to be able to invoke the immunity of that official, the official’s State must know that corresponding criminal procedure measures are being taken or planned in respect of that person. Accordingly, the State that is implementing or planning such measures must inform the official’s State in this regard.

(e) When a foreign Head of State, Head of Government or Minister for Foreign Affairs is concerned, the State exercising criminal jurisdiction itself must consider the question of the immunity of the person concerned and determine its position regarding its further action within the framework of international law. In this case, it is appropriate perhaps to ask the official’s State only about a waiver of immunity. Accordingly, the official’s State in this case does not bear the burden of raising the issue of immunity with the authorities of the State exercising criminal jurisdiction.

(f) When an official who enjoys functional immunity is concerned, the burden of invoking immunity lies with the official’s State. If the State of such an official wishes to protect him from foreign criminal prosecution by invoking immunity, it must inform the State exercising jurisdiction that the person in question is its official and enjoys immunity since he performed the acts with which he is charged in an official capacity. If it does not do so, the State exercising jurisdiction is not obliged to consider the question of immunity *proprio motu* and, therefore, may continue criminal prosecution.

(g) When an official who enjoys personal immunity but is not one of the troika is concerned, the burden of invoking immunity lies with the official’s State. If the State of such an official wishes to protect him from foreign criminal prosecution by invoking immunity, it must inform the State exercising jurisdiction that the person in question is its official and enjoys personal immunity since he occupies a high-level post which, in addition to participation in international relations, requires the performance of functions that are important for ensuring that State’s sovereignty.

(h) The State of the official, regardless of his level, is not obliged to inform a foreign court of his immunity in order for that court to consider the question of immunity. The official’s State may invoke the immunity of the official through the diplomatic channels and thereby inform the State exercising jurisdiction. This suffices in order for a court of that State to be obliged to consider the issue of immunity. The absence of an obligation on the part of a State to deal directly with a foreign court is based on the principle of sovereignty, the sovereign equality of States.

(i) The State invoking the immunity of its official is not obliged to provide grounds for immunity apart from those referred to in paragraphs (f) and (g) above. The State (including its court) that is exercising jurisdiction, it would seem, is not obliged to “blindly accept any” claim by the official’s State concerning immunity. However, a foreign State may not disregard such a claim if the circumstances of the case clearly do not indicate otherwise. It is the prerogative of the official’s State, not the State exercising jurisdiction, to characterize the conduct of an official as being official in nature or to determine the importance of functions carried out by a high-ranking official for the purpose of ensuring State sovereignty.

(j) The right to waive the immunity of an official is vested in the State, not in the official himself.

(k) When a Head of State or Government or a Minister for Foreign Affairs waives immunity with respect to himself, the State exercising criminal jurisdiction against such an official has the right to assume that that is the wish of the official’s State, at least until it is otherwise notified by that State.
(l) The waiver of immunity of a serving Head of State, Head of Government or Minister for Foreign Affairs must be express. The hypothetical situation in which the State of such an official requests a foreign State to carry out some type of criminal procedure measures in respect of the official possibly constitutes an exception. Such a request unequivocally involves a waiver of immunity with respect to these measures and in such a case the waiver is implied.

(m) A waiver of immunity of officials other than the troika but who have personal immunity, of officials who have functional immunity as well as of former officials who also have functional immunity may be either express or implied. Implied immunity in this case may be expressed, *inter alia*, in the non-invocation of immunity by the official’s State.

(n) It would seem that, following an express waiver of immunity, it is legally impossible to invoke immunity. At the same time, an express waiver of immunity may in some cases pertain only to immunity with regard to specific measures.

(o) In the case of an initial implied waiver of immunity expressed in the non-invocation of the functional immunity of an official or the personal immunity of an official other than the troika, immunity may, it would seem, be invoked at a later stage in the criminal process (*inter alia*, when the case is referred to a court). At the same time, there is doubt as to whether a State which has not invoked such immunity in the court of first instance may invoke it at the stage of appeal proceedings. In any case, the procedural steps which have already been taken in such a situation by the State exercising jurisdiction in respect of the official at the time of the invocation of immunity may not be considered unlawful.

(p) A waived by the State of the official of the latter’s immunity makes it possible to exercise to the full extent foreign criminal jurisdiction in respect of that official. This pertains, *inter alia*, to jurisdiction in respect of acts performed by the official in an official capacity.

(q) Irrespective of the waiver of immunity with regard to its official, the official’s State is not exempt from international legal responsibility for acts performed by that person in an official capacity.

(r) A State which invokes the immunity of its official on the basis that the act with which the official has been charged was of an official nature recognizes that the act constitutes an act by that State itself. This establishes the prerequisites for the international legal responsibility of that State and for the institution of international legal proceedings against it by actors that are entitled to do so.132

132 The Special Rapporteur would like to express his gratitude to Ms. S. S. Sarenkova and Mr. M. V. Musikhin for their assistance in the preparation of this report.
1. Following the death of Ms. Paula Escarameia (Portugal) and the resignation of Mr. Bayo Ojo (Nigeria) as a member of the Commission on 25 March 2011, two seats on the International Law Commission have become vacant.

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

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

Article 2 reads:

1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.

2. No two members of the Commission shall be nationals of the same State.

3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

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

3. The term of the two members to be elected by the Commission will expire at the end of 2011.
PEACEFUL SETTLEMENT OF DISPUTES

[Agenda item 15]

DOCUMENT A/CN.4/641

Working paper prepared by Sir Michael Wood

[Original: English]
[30 March 2011]

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WATTS, Arthur


Introduction

1. In accordance with a decision taken at its sixty-first session, in 2009,¹ the Commission, on 29 July 2010, held a debate in a plenary session on the peaceful settlement of disputes, under “Other matters”.² The debate³ took as its starting point a note by the Secretariat, entitled “Settlement of dispute clauses”.⁴ Widespread support was expressed for continuing consideration of the matter at the sixty-third session of the Commission, in 2011, and suggestions were made regarding possible areas of future work (see chap. I below). The Commission decided to resume discussion of the matter at its sixty-third session with a view to identifying specific matters that it might consider in the future.

³ Fifteen members of the Commission took part in the debate, which was held on 29 July 2010 (Ibid., vol. I, 3070th meeting).

2. The present working paper responds to a suggestion made during the above-mentioned debate and is intended to assist the Commission’s consideration of the matter at its sixty-third session, in 2011.

3. Chapter I of the present document summarizes the discussions of the Commission at its sixty-second session, in 2010, and lists the specific suggestions made. Chapter II recalls the work done by the United Nations and other bodies, including regional organizations. Chapter III contains tentative suggestions for the way forward. In the light of the plenary debate at the sixty-third session, in 2011, one or more proposals could, if considered appropriate, be referred to in the Working Group on the Long-term Programme of Work.

⁵ See footnote 3 above.

CHAPTER I

Note by the Secretariat and debate held by the Commission at its sixty-second session

4. Consideration by the Commission of dispute settlement issues may be viewed as part of its contribution to the consideration by the General Assembly of the rule of law at the national and international levels.⁶ For the debate at its sixty-second session, in 2010, the Commission took as a starting point the note by the Secretariat⁷ prepared in response to its request for a document on the history and past practice of the Commission in relation to dispute settlement clauses. The note, which was widely welcomed, contained three substantive chapters. Chapter I provided an overview of the study by the Commission of topics related to the settlement of disputes. It first described the work undertaken by the Commission in the 1950s, which led to the adoption of the Model Rules on Arbitral Procedure.⁸ It then recalled that the Commission had considered taking up aspects of dispute settlement on the occasion of its three reviews of international law: in 1949,⁹ from 1971 to 1973¹⁰ and in 1996.¹¹ On each occasion, the Commission had decided not to take up the topic of dispute settlement. As mentioned in the note by the Secretariat,¹² the Commission’s approach at that time was described in 1971 as follows:

The Commission has not in general been concerned, when elaborating texts setting out substantive rules and principles, with determining the method of implementation of those rules and principles, or with the procedure to be followed for resolving differences arising from the interpretation and application of the substantive provisions—with one exception. That exception arises when the procedure is seen as inextricably entwined with, or as logically arising from, the substantive rules and principles, or, in the Commission’s words “as an integral part” of the codified law. Otherwise the question of the settlement of disputes and, indeed, of implementation as a whole, have been regarded as

⁷ Note by the Secretariat (footnote 4 above).
⁹ Note by the Secretariat (footnote 4 above), para. 9.
¹⁰ Ibid., paras. 10–12.
¹¹ Ibid., para. 13.
¹² Ibid., para. 11.
5. Chapter II of the note by the Secretariat described the Commission’s practice in relation to the inclusion of dispute settlement clauses in its drafts. It examined relevant clauses in draft articles adopted by the Commission—such as those on the law of the sea, diplomatic law, the law of treaties, internationally protected persons and non-navigational uses of international watercourses—and considered other draft articles in which the inclusion of such clauses, while substantially discussed, did not eventuate. This chapter provided, for each set of draft articles mentioned, a brief description of the factors considered by the Commission in deciding whether to include settlement of dispute clauses. The note concluded with a short chapter which provided information on the recent practice of the General Assembly in relation to settlement of dispute clauses inserted in conventions which were not concluded on the basis of draft articles adopted by the Commission.

6. During the debate held by the Commission, the growing importance of the peaceful settlement of disputes was noted. Together with the prohibition on the use of force set out in Article 2, paragraph 4, of the Charter of the United Nations, the principle of the peaceful settlement of disputes, as set forth in Article 2, paragraph 3, and Article 33, paragraph 1, lay at the heart of the system established under the Charter for the maintenance of international peace and security. It was a principle set forth in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, and was further elaborated in the Manila Declaration on the Peaceful Settlement of International Disputes, approved in 1982.

7. The view was expressed that the Commission did and should have a role in promoting the practical implementation of one of the basic principles of the Charter of the United Nations in the field of international law, the peaceful settlement of disputes. It was noted that the reasons which had led the Commission to hesitate to take up dispute settlement issues might no longer apply. In recent years, the political organs of the United Nations have stressed the importance of dispute settlement, including through courts and tribunals. The General Assembly, including in recent practice, the Secretary-General and now the Security Council, have been quite clear in this regard. In particular, it was recalled that a statement by the President of the Security Council dated 29 June 2010 contained the following passages:

The Security Council is committed to and actively supports the peaceful settlement of disputes and reiterates its call upon Member States to settle their disputes by peaceful means as set forth in Chapter VI of the Charter of the United Nations. The Council emphasizes the key role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work and calls upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute.

The Security Council calls upon States to resort also to other dispute settlement mechanisms, including international and regional courts and tribunals which offer States the possibility of settling their disputes peacefully, contributing thus to the prevention or settlement of conflict.

8. Regarding the inclusion of dispute settlement clauses in international instruments, it was suggested that encouraging States to accept dispute settlement procedures would be broadly welcomed as a contribution to rule of law at the international level. Since the specific terms of the dispute settlement provision may need to be tailored to the substantive content of the instrument, it might often make sense for those who draft the substantive provisions to also indicate what they consider to be the appropriate modalities for dispute settlement. While recourse to ICJ may often be appropriate, specialized fields might sometimes require other methods.

9. It was apparent that the Commission had a rich practice in considering and sometimes including dispute settlement clauses in its drafts. It seemed, however, on the surface at least, to have approached dispute settlement in a somewhat haphazard manner. Also, it had not previously discussed the issue in general terms.

10. It emerged clearly from the note by the Secretariat that States, when adopting an instrument on the basis of the drafts prepared by the Commission, frequently departed from its recommendations on dispute settlement. That did not mean, however, that the Commission’s decision on the matter (i.e. to include or not to include a particular provision) was without purpose. The Commission’s recommendation may well have been influential in prompting States to consider the matter and pointing towards the eventual solution.

11. Consideration of the topic could also be relevant in relation to existing instruments. Many States continued not to accept dispute settlement clauses, such as those contained in the respective optional protocols to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. They maintained reservations to other clauses, which were often expressly permitted. There is, however, a trend in recent years not to make such reservations or to withdraw them, a move that could be encouraged.

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13 Yearbook ... 1971, vol. II (Part Two), p. 33, para. 144. (This exception concerns the provision for the settlement of disputes relating to invalidity, termination or suspension of the application of treaties, included in the draft articles on the law of treaties.)

14 Note by the Secretariat (footnote 4 above), paras. 15–44.

15 Ibid., paras. 45–66.

16 Ibid., paras. 67–69.

17 General Assembly resolution 2625 (XXV) (24 October 1970), annex.

18 General Assembly resolution 37/10 (15 November 1982), annex.

19 Note by the Secretariat (footnote 4 above), paras. 67–79.

20 The Secretary-General, in a letter dated 12 April 2010 informing States of the 2010 United Nations Treaty Event, encouraged States which had not yet done so to withdraw reservations made to jurisdictional clauses contained in the multilateral treaties to which they were already party, providing for the submission to ICJ of disputes in relation to the interpretation or application of those treaties. States becoming party to such instruments were also encouraged to accede to the jurisdictional clauses contained therein. The Secretary-General was of the view that the event would also encourage States which had not yet done so to deposit with him during the 2010 event declarations recognizing as compulsory the jurisdiction of the Court under art. 36, para. 2, of its Statute (United Nations, 2010 Treaty Event: Towards Universal Participation and Implementation).

12. It was suggested that, with the current emphasis on the rule of law in international affairs, there might even be a presumption in favour of including effective dispute settlement clauses in international instruments. Such a trend could be seen with the inclusion by the General Assembly of article 27 in the United Nations Convention on Jurisdictional Immunities of States and Their Property, and of elaborate dispute settlement provisions in the International Convention for the Protection of All Persons from Enforced Disappearance.

13. In specific cases, inclusion of a dispute settlement clause may be an essential part of a package deal on some delicate issue. A classic example was the inclusion of such provisions in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations in relation to jus cogens. One could also cite part XV of the United Nations Convention on the Law of the Sea.

14. Various suggestions were made for specific outcomes from the Commission's study of the issues.

15. One member suggested that such outcomes might include the following:

(a) There was already useful output: the note by the Secretariat. The note itself might serve as a point of reference for consideration by the Commission, and indeed by States, of the inclusion of dispute settlement clauses in future drafts and instruments;

(b) The very fact of having the debate was recognition of the importance of the inclusion or not of dispute settlement clauses in drafts prepared by the Commission, and in instruments, multilateral and bilateral, adopted by States;

(c) The Commission could recall that, in paragraph 9 of the Manila Declaration on the Peaceful Settlement of International Disputes, the General Assembly had encouraged States to include in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation and application thereof;

(d) In recognition of the practical importance of dispute settlement, the Commission could decide, at least in principle, to discuss dispute settlement at an appropriate stage of the consideration of each item or sub-item of its agenda;

(e) The Commission should acknowledge the important work done by other United Nations bodies in regard to the peaceful settlement of disputes. For example, the United Nations Handbook on the Peaceful Settlement of Disputes between States remained a valuable introduction to the subject. The Secretariat could perhaps be encouraged to find a way of bringing the Handbook up to date;

(f) The Commission might invite the regional bodies with which it had a relationship to provide information on any work they had done in the field of dispute settlement. They could do so on the occasion of their visit to the Commission and/or in writing. The Commission had been informed by the Council of Europe of the two recommendations adopted in 2007 by the Committee of Ministers on the basis of work done by the Committee of Legal Advisers on Public International Law. Dispute settlement could be a good subject for cooperation between the Commission and regional bodies.

16. Other suggestions made in the debate included:

(a) Fact-finding and inquiry, in particular the procedures and principles for fact-finding missions;\(^{22}\)

(b) The need for States and international organizations to reinforce procedures for the settlement of disputes, the position of international organizations being particularly problematic. In the case of international organizations to which ICJ was not open, arbitration needed to be made more effective;\(^{23}\)

(c) The elaboration of one or more standard model dispute settlement articles for inclusion, as appropriate, in conventions adopted under the auspices of the United Nations or elsewhere, together with commentaries on the draft articles. Such clauses would be relevant where the Commission’s work culminated in a convention but possibly also where the output comprised guidelines, principles or a study. Whether a model clause would be suitable for all circumstances was something the Commission should examine; it was suggested that there could be a single model clause which could be adapted to individual circumstances but others expressed doubt in that regard;

(d) The need to consider methods of dispute settlement other than judicial and arbitral methods, including negotiation, conciliation and mediation;

(e) The elaboration of model rules for conciliation, good offices, mediation, fact-finding and inquiry;

(f) Consideration to be given to preparing model clauses for declarations under the Optional Clause (art. 36, para. 2, of the Statute of the International Court of Justice), as had been done by the Council of Europe;

(g) Stressing the importance of prevention of disputes and of provisions on cooperation, as in the aquifers draft;

(h) Recommending that all new conventions include dispute settlement clauses and consider whether existing conventions could be amended to include such provisions;

(i) Examination of the question of the fragmentation of dispute settlement procedures;

(j) Consideration of why States accept dispute settlement in certain fields (e.g. trade) but not in others;

(k) Enforcement of decisions of dispute settlement bodies.

\(^{22}\) A. Jachec-Neale, “Fact-finding”.

\(^{23}\) See, for example, Boisson de Chazournes, Romano and Mackenzie, International Organizations and International Dispute Settlement: Trends and Prospects. On the involvement of the EU in international dispute settlement, see Hoffmeister, “Litigating against the European Union and its member States—Who responds under the ILC’s draft articles on international responsibility of international organizations?”
CHAPTER II

Work done by the United Nations and other bodies, including regional organizations

17. The Commission will need to take account of the work already done by the United Nations in regard to the peaceful settlement of disputes, in particular by the General Assembly. The present chapter may provide a basis for determining, among other things, where the Commission may add value.

18. Examples of such work include:

(a) Model Rules on Arbitral Procedure; 24

(b) Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations;

(c) The Manila Declaration on the Peaceful Settlement of International Disputes;

(d) United Nations Model Rules for the Conciliation of Disputes between States. 25

19. It is suggested that, during the debate at the sixtieth session of the Commission, in 2011, members discuss which, if any, specific issues within the broad field of dispute settlement might be appropriate for further consideration. These could either be topics mentioned above or additional topics suggested during the debate. Every effort should be made to specify as precisely as possible the scope and aim of any such issue.

20. Examples of possible topics are:

(a) Model dispute settlement clauses for possible inclusion in drafts prepared by the Commission;

(b) Improving procedures for dispute settlement involving international organizations;

(c) More broadly, the conduct by the Commission of a study of access to and standing before different dispute settling mechanisms of various actors (States, international organizations, individuals, corporations, etc.);

(d) Competing jurisdictions between international courts and tribunals. This could address issues such as forum shopping and the procedural fragmentation of international law;

(e) Declarations under the optional clause, including the elaboration of model clauses for inclusion therein.

21. In the light of the discussion, one or more members may wish to propose a syllabus (or syllabuses) for consideration, perhaps during the sixtieth session, by the Working Group on the Long-term Programme of Work. The question of appointing a special rapporteur, as suggested during the debate, 26 could await a later stage.


26 See footnote 3 above.

CHAPTER III

Tentative suggestions

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26 See footnote 3 above.
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