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**RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS
[STATE RESPONSIBILITY]**

Statement of the Chairman of the Drafting Committee, Mr. Peter Tomka

I have the honor and the pleasure to introduce the second report of the Drafting Committee which is devoted to the topic of State Responsibility. The texts and titles of the draft articles of this topic are contained in document A/CN.4/L.602.

Mr. Chairman,

The Drafting Committee held 19 meetings from 3 to 23 May on this topic. I am pleased to report that the Committee was able to complete the second reading of the draft articles. There is only one small issue still pending on which the Committee will report to the Plenary in July.

Mr. Chairman,

The topic of State Responsibility is unquestionably one of the most important topics that the Commission has undertaken. It deals with issues of great importance to international law. The topic has had successive well qualified and experienced Special Rapporteurs who have put much of their energy and their intellectual talent into developing the regime of State responsibility. The importance of the contribution of late Professor Roberto Ago who set out the overall approach and structure of the topic cannot be over emphasized. While Professor Ago formed a solid foundation for this topic, its completion is, owed, to a great extent, to its current Special Rapporteur, Professor Crawford. I wish to express my deep appreciation to the Special Rapporteur for his full cooperation and the efficient manner in which he responded to the need to revise the articles. His mastery of the subject and perseverance in finding a solution to difficult and divisive issues greatly facilitated the task of the Drafting Committee. I also wish to express my appreciation to the members of the Drafting Committee for their cooperation and their constructive manner, as well as the good spirit in which they discussed the articles.

Mr. Chairman,

The Drafting Committee completed a second reading of the articles on this topic over the last three years under the able Chairmanship of Prof. Simma, Ambassador Candiotti and Prof. Gaja. The Drafting Committee did not have sufficient time to undertake a complete review of all the articles and that was one of the reasons why the Commission postponed their adoption. In addition, given the substantial time lapse between the completion of different parts of the topic, the breadth and the importance of the topic as well as the development of international law in this area, the Commission considered it prudent to allow Governments to reflect on the articles once more before finalizing them.

This year the Drafting Committee reviewed all the draft articles. It took carefully into account the comments made by Governments either in the 6th Committee or in writing, and the views expressed in the Plenary. The Committee also worked on the basis of the understandings that were reached in the Commission on the settlement of disputes, serious breaches and countermeasures.

In discussing the articles, the Drafting Committee avoided where possible, reopening substantive issues which had been decided on in the last few years. This was both for practical reasons – at this late stage reopening any major issues would risk delaying the completion of the project - and for reasons of principle, that is, since the Committee provisionally adopted an entire set of draft articles last year, this year's review could only be limited to a consideration of comments made with regard to particular articles. However in cases where comments of Governments or of members of the Commission itself justified this, particular issues were carefully reconsidered, and a number of important changes were made. I consider that the resulting text is a balanced one, which responds fairly and fully to the comments made and which reflects reasonably the balance of opinion in the Drafting Committee and, I hope, in the Plenary as well.

I might add that the Committee considered matters of translation into all the languages of the United Nations, in order to align the various linguistic texts with the English original. I will not dwell on such matters today, and will only refer to issues of translation in those few cases where a particular formulation of a word or concept was adopted for ease of translation. Through you, Mr. Chairman, I will request the members of the Commission who still notice some discrepancies in other language versions of the articles to inform either me or the Secretariat.

Mr. Chairman,

I am pleased to say that unlike the previous three reports of the Drafting Committee on this topic, this year the Committee is submitting its report with the recommendation that the Commission adopts the articles.

Title of the topic

With your permission, sir, I will begin with the title of the topic, which has not been previously discussed at any point during the second reading. The Committee was concerned with the possibility that the title “State responsibility” was not sufficiently clear to distinguish the topic from the responsibility of the State under internal law.

The Committee considered different variants for the title, such as “State responsibility under international law”, “International responsibility of States” and “International responsibility of States for internationally wrongful acts”. One of the advantages of the last formulation was that it made it easier for the text to be translated into the other languages, by clearly distinguishing it from the concept of international “liability” for acts not prohibited by international law.

The Committee subsequently settled on the title “**Responsibility of States for internationally wrongful acts**”, without the qualifier “international” before “responsibility” so as to avoid repeating the word “international” twice in the title. However, it will be explained in the commentary that we understand the word “responsibility” to refer exclusively to “international responsibility”. Since the draft

articles cover only internationally wrongful acts and not any other wrongful acts, it was considered preferable to retain the reference to “international” before “wrongful acts”.

In terms of **structure**, the Committee did maintain, with a few exceptions, the same order of the articles adopted last year. The draft now before you consists of 4 Parts. I will begin with Part One.

Part One

Mr. Chairman,

The Committee considered the possibility of modifying the title of **Part One**, in light of the change to the title of the entire draft articles. The concern was that the title of Part One was too close to the new title of the topic. It considered, in particular, the proposal by France to adopt the title “Fait Generateur de la Responsabilité des États”, which was found to be difficult to translate into English. One possibility was to revert to the first reading title of the Part, namely “Origin of international responsibility”, but the Committee decided that the implication of “historical origin” militated against such approach. Another possibility was to adopt a more generic title such as “International responsibility of States”.

The Committee decided to retain the existing title of “The Internationally Wrongful Act of a State”, which, on balance, was considered to be the best rendition. As to the French version, while the Committee considered the possibility of exceptionally using the proposal suggested by France, it decided that, in light of the change to the title of the draft articles as a whole, the concern underlying that proposal no longer existed. It was therefore decided to retain the French title as “Le fait internationalement illicite de l’État”.

Chapter I

Mr. Chairman,

As regards **Chapter I** of Part One, the Committee decided to retain the title “General Principles”, which was uncontroversial.

In considering **articles 1, 2 [3] and 3 [4]**, the Committee noted that they were structural in nature; that they had been widely endorsed and that no criticism had been raised by either Governments or in the plenary debate.

With regard to **article 2 [3], paragraph (b)**, the Committee considered the possibility of rendering the term “obligation” as “legal obligation”. This was particularly relevant in some of the linguistic versions, such as Russian, where a distinction is necessarily made between “legal” and other commitments (such as political commitments). The Committee decided that the English original would remain as is, since it was clear from the context that it was dealing with an obligation under international law, and also because it is explained as such in the commentary. Furthermore, as a practical matter, the addition of the term “legal” would result in numerous amendments throughout the draft articles. The Committee was also concerned that stressing the legal nature of the obligation would have the affect of implying that there exist other types of obligations of a non-legal nature which may give rise to responsibility. Such a possibility is not envisaged under the present Articles.

Regarding **article 3 [4]**, the Committee considered the comment made by a Government that some duplication exists between it and article 32 [42] since both dealt with the issue of irrelevance of internal law. The Committee noted that some duplication was inevitable and that there seemed to be no inconsistency between the two articles. Article 3 [4] dealt with the characterization of an act, while article 32 [42] concerned the question of reparation as a legal consequence of a wrongful act, an issue relevant to Chapters I and II of Part Two.

The Committee also considered a proposal made in the context of the debate in the Sixth Committee to change the title of article 3 [4] to “Law applicable for characterization of an act of a State as internationally wrongful” or “The applicable law”. In rejecting such alternative wording as insufficient, the Committee noted that article 3 [4] does not consider internal law to be irrelevant to the question of whether conduct is

internationally wrongful; rather it provides that international law governs the question of characterization, taking into account internal law to the extent that it may be relevant. In other words, there may be situations where internal law is relevant to the question of international responsibility, and the wording of article 3 reflects this.

The Committee thus decided to adopt all three draft articles in Chapter I in their existing form.

Chapter II

Turning now to **Chapter II** of Part One, the Drafting Committee made small structural changes as well as some drafting changes to the draft articles. In particular, the Committee decided to reorder two of the draft articles with a view to introducing a more logical grouping of the draft articles in Chapter II. As I will explain shortly, this reordering arose out of a need to clarify that former article 9 [10], now renumbered article 7, concerning conduct carried out in the absence or default of the official authorities, was linked to, what was referred to last year as articles 4 [5], 5 [7] and 8 [9] and not to articles 6 [8] and 7 [8]. Accordingly, the Committee decided to reorder the draft articles as follows:

- **Articles 4 [5] and 5 [7]** retain the same numbering;
- **New article 6** is last year's article 8 [9] dealing with conduct or organs at the disposal of a State;
- **New article 7**, as already mentioned, contains the substance of last year's article 9 [10] dealing with excess of authority or contravention of instructions;
- **New article 8** is last year's article 6 [8] concerning conduct directed or controlled by a State;
- **New article 9** is last year's article 7 [8] on conduct carried out in the absence or default of the official authorities; and
- **Articles 10 [14, 15] and 11** retain the same numbering as last year.

An additional benefit of this reordering has been the grouping together of the first four articles dealing with conduct of organs, persons or entities and the last four articles which deal with other types of conduct.

The Committee decided to standardize the various references to persons, entities and organs in the Chapter. While, at first, it considered the formulation “person or body”, it settled for “person or entity” in article 4, paragraph 2, and in articles 5 and 7 – which conforms with the language of the draft articles on jurisdictional immunities of States and their property, adopted in 1991. Article 4, paragraph 1, and article 6 retain the reference to “organ”. Similarly, the words “person or group of persons” have been kept in articles 8 and 9.

The Committee considered the possibility of standardizing the formula used in all these articles, but decided against such an approach. The reference to “person or entity” was retained in the relevant articles to cover the situation of natural and legal persons. Conversely, the reference to “person or group of persons” appears in those articles dealing with aggregates of individuals or groups that do not or need not have legal personality, but are nonetheless acting as a collective.

Mr. Chairman,

Regarding the **title of Chapter II**, the Committee was concerned with the possible connotation that the phrase “act of the State” may have on the Act of State doctrine, a legal term within some legal systems dealing with a completely different issue. The Committee considered alternative formulations which more closely describe the scope of Chapter II, that is, attribution of conduct to the State. These included “Conduct attributable to the State”, “Attribution to the State”, “Attribution of an act to the State” and “Attribution of conduct to the State under international law”. The Committee decided to adopt a shorter version of the latter formulation, namely “Attribution of conduct to a State”, leaving out the reference to “under international law” which is clear from the context, and which flows from the application of article 3 [4].

As a consequence of the new title, the Committee adopted shorter versions of the titles for each of the draft articles, reflecting the particular conduct in question, it being understood that the entire chapter dealt with attribution to the State of such conduct.

Article 4 [5]

Concerning **article 4 [5]**, it should be reiterated that it contains a balance, worked out in 1998, between the role of the internal law of the State and international law in terms of the qualification of an entity as an “organ”. Generally speaking, this balance has been accepted, and the Committee decided not to reopen the substance of the article.

The Committee also considered a proposal to delete the opening phrase to paragraph 1, namely “[f]or the purposes of the present articles”. It was noted that because of the structure of the draft articles, including the absence of a provision on use of terms, a number of definitions appear as, or within, separate articles. It would be inelegant to start these articles every time with the phrase “for the purposes of the present articles”. In the view of the Drafting Committee, any definition in a legal instrument is intended for the purpose of application of that instrument. It is therefore unnecessary to reiterate each time such an understanding at the beginning of every article that defines a term. For that reason, the Drafting Committee deleted the phrase “for the purposes of the present articles” from paragraph 1 and the corresponding phrase in the beginning of paragraph 2. The commentary either to this Chapter or to this article will make a general reference to the understanding I have just mentioned.

The Commission also considered a proposal to amend “shall be considered an act” to read “is an act” or “constitutes an act”. At the same time, the view emerged in the Committee that “constitutes” might be too absolute, and that it loses the sense of the process or intellectual operation implicit in the phrase “shall be considered”. On balance, the Committee decided to retain the reference to “shall be considered”.

The Committee subsequently decided to delete the reference to “acting in that capacity”, as a consequence of its debate on what is now article 7 [10]. It should be noted

at this point that the deletion of the phrase should not be seen as a change to the scope of article 4 [5]. Instead, the phrase was deleted so as to reduce a certain amount of overlap between articles 4 [5] and 7 [10]. I will explain this point further when discussing article 7 [10].

The Committee shortened the title of the article to “Conduct of organs of a State”.

Article 5 [7]

Mr. Chairman,

Article 5 [7] has a specific function, dealing with para-statal entities which are given, under internal law, particular governmental functions, such as the exercise of immigration authority by an airline or certain licensing functions. The Committee considered the phrase “elements of the governmental authority”, and the suggestion made by a Government that it be further clarified. The Committee took the view that it is a commonly used phrase, that no additional language in the article itself was likely to clarify it further, and that any such addition might in fact cause more confusion. Further clarification should be left to the commentary.

The Committee agreed that the terminology used in article 4 [5], paragraph 2, and article 5 [7] had to be consistent. It also recognized that there exists a large variety of entities, which may exercise elements of governmental authority, not all of which have legal personality, for example, militias or associations. As I mentioned in my introduction to this Chapter, the use of the broader phrase “person or entity” was deemed preferable to capture all the possibilities that may arise in practice.

The Committee also considered the use of the word “case” in the last line of the article, and decided that the possible confusion with the use of the word in the sense of a judicial proceedings called for an alternative formulation. Various suggestions were proposed, such as “matter”, “issue” or “circumstances”. The Committee eventually decided on replacing the final clause “in the case in question” with “in the particular instance”.

You will also note that the article is now in the present tense, since the articles do not apply retrospectively. For the same reason, the past tense in other articles were changed to the present tense.

As to the title of the article, the Committee decided on a new formulation, namely “Conduct of persons or bodies exercising elements of governmental authority”, in line with the new formula for all titles in the Chapter.

Article 6 [9]

I now turn to **article 6 [9]**. The Committee considered a suggestion made by a Government to include a proviso to cover the situation of joint responsibility of the State, an organ of which was put at the disposal of another State, and that other State. However, the Committee decided that such a reference was not necessary since the articles in Chapter II operate cumulatively. In addition, it was not entirely clear whether in the situation where one State, in effect, lends one of its organs to another State, the question of joint State responsibility would necessarily arise. In certain circumstances there may be a joint organ of two States, for example, an organ of State A acting also as an organ of State B, as contemplated under article 6 (such as in the case of the Swiss authorities exercising immigration authority on behalf of Liechtenstein as well as on behalf of Switzerland). In such a situation the conduct would be attributable to both States by virtue of the general structure of Chapter II. Alternatively, in other circumstances an organ of State A actually becomes the organ of State B. To attempt to cover all situations would result in a lengthy article. It was better to discuss the meaning of the phrase “placed at the disposal of” in the commentary which could also discuss the issue of joint responsibility.

The Committee, in adopting the article, thus retained the text as adopted in 2000 with the minor editorial modification. The Committee also adopted a revised title “Conduct of organs placed at the disposal of a State by another State”.

Article 7 [10]

As to **article 7 [10]**, the Committee held a lengthy discussion on the scope of the article. The purpose of the article is to cover negligent acts, acts *ultra vires* or abuse of authority in situations where the individuals in question are acting within the scope of their authority, i.e. “in that capacity”. The Committee considered the term “exceeded” which was felt by some to be too emphatic. This raised a question as to the limits of article 7 [10]. It was considered unnecessary to cover expressly in the draft articles the situation where an organ of State A is corrupted and acts on the instructions of State B. That would be a special situation, and the corrupting State would be responsible under what is now article 8 [8]. The question of the responsibility of State A towards State B in such a case could not arise, but there could be issues of the responsibility of State A towards a third party, which would be properly resolved under article 7 [10]. A much more common case is the situation of conduct under the cover of official capacity, or “colour of authority”. That concept is intended to be conveyed by the words “acting in that capacity”. Indeed, the key aspect of the provision is not so much that such persons or entities were acting in excess of their authority, but rather the capacity that they were acting in when they committed such acts, that is, that they were acting with apparent authority.

Mr. Chairman,

If you recall, in my introduction to Chapter II, I mentioned that the Drafting Committee decided to rearrange the order of some of the articles. In last year’s version of the draft articles, article 7 [10] was numbered as article 9, and applied, without expressly saying so, to what were then articles 4, 5 and 8. But this was not clear from the text, and without proper indication in the text, the Committee felt that the reader would not necessarily arrive at the correct conclusion. Various possibilities were considered as to how to clarify this further, including making an explicit cross-reference in the article to those articles it applies to (which would depart from the Committee’s policy of limiting cross-references to the extent possible). In the end, the Committee decided to treat the matter more as a question of the structure of the Chapter itself. It decided to change the

order of the draft articles, so that what is now article 7 [10], previously article 9, would follow all the articles to which it applies.

A further proposal was made to replace the phrase “concerning its exercise” with a formulation such as “required by its exercise”. The Committee went further and considered that such reference was unnecessary and therefore deleted the last phrase entirely, thus rendering the last part of the article more simply as “exceeds its authority or contravenes instructions”.

The Committee adopted a revised title “Excess of authority or contravention of instructions”, which focuses more closely on the function of the article.

Article 8 [8]

Mr. Chairman,

The language of **article 8 [8]** was generally endorsed by Governments. In response to a proposal to merge articles 8[8] and 9[8], the Committee noted that while article 8 [8] deals with the ordinary case of *de facto* agency, article 9 [8] deals with more exceptional situations of conduct carried out in the absence or default of the official authorities. As such, the Committee considered it justified to treat the two situations in separate articles.

The Committee also considered several suggestions for drafting changes, including the possibility of deleting the reference to “or control”, but decided to retain the text substantially as adopted in 2000. The title is streamlined to read “Conduct directed or controlled by a State”.

Article 9 [8]

Turning to **article 9 [8]**, the Committee noted that the suggestion, made by a Government, that the exceptional character of the article be stressed would best be reflected in the commentary. The commentary will also clarify that article 9 might also apply in a situation analogous to that of the occupying Allied forces at the end of the

Second World War, during the transition of power back to the legitimate authorities, for example in France and Poland.

As to the terms “absence or default”, the first covers the situation where the official authorities do exist, but are not physically there at the time, and the second covers cases where they are incapable of taking any action. Indeed, the reference to “default” was specifically added during the second reading to cover such a situation. The combination of “absence or default” was thus considered appropriate to capture all possible scenarios.

The Committee also considered the final phrase “in circumstances such as to call for the exercise of those elements of authority”. This covers the case, for example, where a group of individuals, not constituted as organs of the State, take over the running of an airport and undertake the responsibility of dealing with immigration during or in the immediate aftermath of a revolution. The emphasis is on the words “such as to call for”. Under the example just given, the situation was such as to call for the exercise of the immigration authority, and this was done by a de facto authority. It should also be recalled that the Committee, on second reading, changed the first reading wording “in circumstances which justified the exercise of elements of authority” to “in circumstances such as to call for the exercise of those elements of authority”, because it was not appropriate to refer to something as “justified” which, at least hypothetically, is a breach of international law – “call for the exercise” is more descriptive and less judgemental of the character of the act.

The Committee accordingly decided to retain the wording of article 9 [8], with a minor editorial modification. It also adopted a new title for the article, “Conduct carried out in the absence or default of the official authorities”, which conforms to the new standard formula for the titles in Chapter II, and which also reflects more clearly the requirement of “absence or default”.

Article 10 [14, 15]

Mr. Chairman,

I turn now to **article 10 [14, 15]**, which retains the same article number as last year. The Committee disagreed with the comment made by a Government that the article creates an *a contrario* interpretation, implying that all acts of unsuccessful insurrectional movements are attributable to the State. On the contrary, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of Chapter II, for example article 9[8]. To allay any concern, the Committee was of the view that the commentary should make this point very clear.

In **paragraph 2**, the Committee considered the words “under its administration”, and whether the case of a union between States would be covered. A proposal was made to delete the second half of the paragraph, leaving the question of administration or union to the development of customary international law. However, the Committee decided that such deletion was not advisable at such a late stage, especially since paragraph 2 has not been called into serious question by any of the comments by Governments. In addition, the Commission has in related contexts used the phrase “in a territory under its administration”. As to the question of union, paragraph 2 does not cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new government or State, as the case may be.

The Committee also considered the term “or other”, and a suggestion to replace it with the phrase “national liberation movement”, which would deal more clearly with the situation of decolonization. However, it was considered that national liberation movements would be included in the term “insurrectional movement”, and that it was not necessary, at this stage, for the Commission to enter into a debate on national liberation movements in the context of these articles.

The Committee further considered the need to retain **paragraph 3**, in light of a suggestion that it could be dealt with in the commentary. However, on balance, the Committee decided to keep it, since its deletion could create the impression, for example, that the responsibility of the pre-existing State, which retains only part of its territory under paragraph 2, would somehow also be affected by the conduct of a movement which succeeds in establishing a new State in what used to be its territory.

Other than some minor technical amendments, the article and its title were adopted in the same form as in 2000.

Article 11

Mr. Chairman,

As to **article 11**, the Committee considered the proposal by a Government to delete the reference to an act of the State “under international law”. However, it decided to retain the phrase as it is used throughout the draft articles. The Committee also decided to replace the existing reference to specific articles with the more general, “the preceding articles”, which is a reference to the preceding articles in Chapter II. While, at first, there was some question as to the applicability of article 7, it was felt that there would be no harm in making such a reference. One of the functions of article 11 is to remove doubt where States decide to adopt the conduct as their own. As such, the article plays a useful supplementary role to the other articles in the Chapter.

The Committee also considered a proposal to replace the phrase “acknowledges and adopts” with “acknowledges or adopts”. Similarly, it was proposed to delete the reference to acknowledgement since this is implied in the word “adoption”. However, it should be recalled that the Committee had, in 1998, adopted “acknowledges and adopts” so as to make it clear that what is required is something more than a general acknowledgement of a factual situation. Such formulation would thus require the State to identify the conduct and make it its own. The conditions are cumulative, and the order indicates the normal sequence of events. Furthermore, the Committee also found the dual reference to “acknowledges and adopts” useful for translation of the concept into other

languages. The commentary will explain that both conditions have to be satisfied together.

The Committee also considered the question of the degree to which the conduct is attributable to the State, conveyed by the phrase “to the extent that”. It was felt that this allowed sufficient flexibility to encompass different scenarios where States elect to acknowledge and adopt only some of the conduct in question. The issue will be elaborated further in the commentary.

In adopting the draft article, the Committee retained the text of the 2000 draft articles, with the sole change being the reference to the “preceding” articles, as I have already explained, as well as some linguistic refinements. The title is a streamlined version of that adopted in 2000.

Chapter III

Mr. Chairman,

Chapter III is entitled ‘Breach of an international obligation’ and consists of four articles. Governments have generally welcomed the simplification of this Chapter carried out by the Commission in 1999. In particular there has been no demand for the re-introduction of any deleted provisions. The few comments and suggestions from Governments were mainly of a drafting nature or pertained to having a clearer explanation of some of the concepts introduced in the Chapter.

Article 12

Turning to the first article of the Chapter, **article 12 [16, 17, 18]**, the Drafting Committee made no changes since the article was found generally acceptable.

Article 13

Article 13 which deals with the principle of inter-temporal law was also found to be acceptable and there were no suggestions for changes. The Drafting Committee, however, replaced the words “shall not be considered” by “does not constitute” in order

to be consistent with the language of article 2(b). The Committee made no other changes.

Article 14 [24]

As to **article 14 [24]**, the Drafting Committee considered a drafting suggestion by a Government to replace the title of the article by the following title: “The moment and duration of the breach of an international obligation”. The Committee decided to retain the existing title because it would not be appropriate to use the word “moment”.

The Committee discussed various drafting changes to **paragraph 1**. One proposal was to replace the phrase “not having a continuing character” with “not extending in time” which were the words used in article 24 as adopted on first reading. Another proposal was to delete the phrase “having a continuing character” and to replace it with the words “whose effects continue”. The Committee decided to retain the paragraph as it is. It noted that the Commission had discussed this issue in 1999, and intentionally decided to use the words “having a continuing character”. The Committee noted that the question when a breach actually occurs is intentionally not covered in the article. This would depend on the facts and on the content of the primary obligation, and could hardly be clarified by a single verbal formula. Furthermore the distinction between the continuing character of the breach and the continuing character of the effects of that breach were complicated matters which needed to be explained and elaborated on in the commentary and not in the paragraph.

In relation to **paragraph 2**, the Committee considered a proposal to add “occurs at the moment when the act is performed” after “continuing character” in order to be consistent with paragraph 1. It decided not to make the addition as there might be situations which would then not be covered by the provision. The Commission had earlier decided not to seek to cover all issues systematically in these articles. As a number of Governments had pointed out, such an approach was rigid and over-prescriptive, and tended to trespass on the scope of the primary obligations. The various

paragraphs of the article dealt with key issues which arose in practice and dealt with each in its own terms.

As regards **paragraph 3**, a proposal was made to delete the entire provision. A further proposal was made to delete the words “what is required by” because they were superfluous. The Committee decided however to retain the paragraph in its current form. It noted that the paragraph usefully clarifies an important practical point, and that the words “what is required by” makes it clear that the reference is to the international obligation.

Finally, the Committee considered a proposal to include a fourth paragraph covering breach of obligations of result because paragraph 3 covered obligations of prevention. The Committee noted that there had been an extensive debate in 1999 on the distinction between the obligation of conduct and the obligation of result; the conclusion reached was that this was a classification of certain primary rules which had no specific context within the framework of the draft articles. It noted that the commentary would elaborate on the discussion of obligations of conduct and obligations of result.

Article 15

Turning to **article 15**, the Committee considered a drafting suggestion by a Government to replace the phrase “defined in aggregate as wrongful” by “capable of being regarded in aggregate as wrongful”. It decided to retain the existing text as the proposed language would involve various contingencies, whereas the article is concerned with a narrower case. The point would be explained in the commentary.

As regards **paragraph 2**, the Drafting Committee noted that the word “such” at the beginning of the paragraph carried a heavy burden. It considered replacing the words “In such a case” with “Such a breach”, but decided to retain the paragraph as it is and to explain the reference to “such” in the commentary. The Committee also considered a proposal to delete the words “of the series” in paragraph 2 as being unnecessary, but decided to leave it in for the sake of clarity.

Chapter IV

Mr. Chairman

As regards **Chapter IV of Part One**, one Government proposed the deletion of the Chapter because it reflects primary rules. But other Governments have indicated their support for it, and this was also the general view in the plenary. Accordingly the Drafting Committee made only certain drafting suggestions.

The Committee first considered the title of the Chapter. It decided to replace the words “in respect of” by “in connection with”, which reflects the content of the Chapter more accurately and also makes it clear that responsibility is for the act of the other State.

Article 16 [27]

Turning to **article 16 [27]**, as to the title, the Committee considered a proposal to delete the reference to “internationally wrongful” which is repeated various times in the body of the provision. The Committee decided that there was a need to repeat the words “internationally wrongful” in the title to the article because it had deliberately not been included in the title to the Chapter.

As regards the requirement in **subparagraph (a)** that the assisting State should have “knowledge of the circumstances”, the Committee considered a suggestion by certain Governments to delete it. It also considered a proposal by a Government to redraft the subparagraph to include the words “or should have known”. The Committee decided that the article should be retained in its entirety and as presently drafted. In particular, it noted that the knowledge requirement was essential, as a narrow formulation of the Chapter was the only approach acceptable to many States. The commentary will clarify the threshold at which aid and assistance becomes participation in the commission of the act.

The Committee also considered a suggestion to qualify the aid or assistance by a “materiality” requirement. It noted that this issue had been taken up in 1999, when it was

considered more appropriate to discuss such a qualification in the commentary. The Committee followed the same view.

Article 17 [28]

As regards **article 17 [28]**, the Drafting Committee considered a suggestion by a Government to broaden the scope of the article by saying “direct or control” instead of “and control”. The Committee concurred with the opinion of the Drafting Committee which had looked at this issue in 1999. At that time, the Committee had decided that to use the conjunction “or” would broaden the scope of the article too much. The two words are complementary and should be read together with the conjunction “and”, which would provide more certainty and clarity regarding the narrow and specific intention behind the article. The position with article 8[8] was considered to be different, since here two States were involved, whereas in the context of article 8[8], in practice only the directing State could be internationally responsible.

The Committee also considered the suggestion (also made in respect of articles 16 and 18) by Governments to delete the knowledge of the circumstances requirement in subparagraph (a) because it is implicit in the notion of directing and controlling. It decided to retain the text as presently formulated for the reasons that I have already explained in the context of article 16.

Article 18 [28]

Article 18 [28] was generally supported and therefore the Committee introduced no changes to the text. The Committee agreed that the commentary should point out that where the coercion is itself unlawful, the coercing State is responsible vis-à-vis the coerced State for its conduct, whereas article 18[28] was essentially concerned with the position vis-à-vis a third party.

Article 19

Article 19 is a saving clause. It was also supported by Governments, and the Committee made no changes to last year’s text.

Chapter V

Mr. Chairman,

Turning to **Chapter V**, concerning circumstances precluding wrongfulness, the Committee began its consideration with the title. It held a lengthy debate on the proposal made by a Government that the title should instead be rendered as “circumstances precluding responsibility”, repeating largely the debate the Committee had in 1999, when Chapter V was adopted. While it was recognized in the Committee, as it had been in 1999, that the proposal did have some merit in relation to some of the draft articles, it was the view of the Committee that changing the title would have significant substantive implications for the provisions of Chapter V. In particular, the Committee was concerned about the lack of consistency in the approach to justification and excuses in domestic legal systems. In the light of this experience, no one terminological solution would be satisfactory. The Committee eventually decided that, at this advanced stage in the work, it was prudent to retain the title and to deal with the matter in the commentary.

Article 20 [29]

Concerning **article 20 [29]**, the Committee noted that no Government has opposed its inclusion in Chapter V. You may recall that a proposal was made in Plenary to include an express provision restricting consent in the case of peremptory norms. The Committee considered that the reference to “valid” consent is a reference to the rules of international law that might affect the validity of the consent of the State. Such rules include, by definition, peremptory norms. In fact this was the understanding of the Committee in 1999 in adopting the text of this article and that understanding was clearly stated by the then Chairman of the Drafting Committee when introducing the article. In this respect the adoption of article 26 bis (to which I will refer shortly) made the matter clearer but made no substantive difference to the position.

The title remained unchanged.

Article 21

Mr. Chairman,

As to former **article 21**, the Committee adopted a new formulation for the provision and decided to move it to later in the Chapter as article 26 *bis*. This decision arose out of a proposal made in the Plenary to have a general exclusion clause in Chapter V to the effect that no State may rely upon a circumstance precluding wrongfulness in respect of conduct which violates a peremptory norm. The alternative was to retain the existing case-by-case approach whereby the issue was expressly provided for in some, but not all, of the provisions in Chapter V as adopted last year, for example, in subparagraph 2(a) of article 26 prohibiting reliance on necessity in the context of the violation of an obligation under a peremptory norm. Likewise, article 23 [30] incorporates by reference the provisions on countermeasures in what is now Part Three, including the restriction on the affect of countermeasures on peremptory norms, and which is now included in article 51 [50], subparagraph 1 (d).

The Committee proceeded on the basis of a written proposal containing a draft text of the provision, initially in the form of a second paragraph in article 21. After a lengthy debate on the merits of including the new text, the Committee decided instead to replace last year's text of article 21 with the following, "[n]othing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law". While some support existed in the Committee for keeping the text of former article 21 as paragraph 1, and placing the new text as paragraph 2, it was decided that the the new, more general, formula was to be preferred. Adopting the new wording avoided the slight infelicity of suggesting, as the former text did, that the peremptory norm in question required an act, where in most cases it merely prohibits certain acts. Since the new text is construed in general terms so as to apply to all the various circumstances in the Chapter, the Committee decided to place it towards the end, after necessity. It also decided, as a consequence of the adoption of the new formula, to delete subparagraph 2 (a) of article 26 [33].

The title of the provision remains unchanged.

Article 22 [34]

Mr. Chairman,

As to **article 22 [34]**, the Drafting Committee, in considering the reference to “lawful measure of self-defence”, was of the view that it is intended to incorporate by reference the legal regime applicable to self-defence under international law. Likewise, the Committee considered the necessity of retaining the concluding phrase “taken in conformity with the Charter of the United Nations” which was viewed by some Governments as unnecessary in light of article 59 [39]. The Committee, in considering the article on its merits, preferred to retain the reference since it is essentially a *renvoi* to the general international law position on self-defence, as effected by the Charter of the United Nations.

The Committee further decided to retain the word “lawful”. In this context it was noted that in the Nuclear Weapons Advisory Opinion, the International Court of Justice was of the view that even States acting in self-defence have to comply with certain basic rules such as rules of international humanitarian law. Similarly, lawfulness implies compliance with the requirements of proportionality and of necessity.

In addition, Mr. Chairman, the Committee recognized that all the provisions in Chapter V are formulated as general provisions, which, in turn, incorporate by reference their respective legal regimes. The Committee has, as a general policy, refrained from entering into the details of each circumstance, which would, in most cases, constitute entire topics on their own accord. This is the case with article 22 [34], where the current drafting is meant to reflect the basic principle, while at the same time making a reference to the existing law on self-defence.

The Committee thus retained the text of article 22 [34] and its title without any change.

Article 23 [30]

Mr. Chairman,

Whereas the Drafting Committee did not seek to elaborate the legal regime of self-defence or consent, the position with countermeasures is different, since these are specific responses to internationally wrongful conduct and fall within the scope of the articles in that respect. Article 23 [30] deals with the specific issue of countermeasures as a circumstance precluding wrongfulness; I intend to introduce it when I introduce Chapter II of Part III dealing with the whole question of countermeasures.

Article 24 [31]

Turning to **article 24 [31]** on *force majeure*, the Committee noted that there has been no objection to the inclusion of the provision.

The Committee made no changes to **paragraph 1**.

Regarding **paragraph 2, subparagraph (a)**, the Committee considered a drafting proposal submitted by a Government which would emphasize the causal link between the wrongful conduct of the State invoking *force majeure* and the occurrence of *force majeure*. The issue was whether to add “internationally wrongful” before “conduct” to clarify the point that the contributory conduct must itself have been wrongful. The Committee decided against such addition because, in principle, the provisions of circumstances precluding wrongfulness should be construed narrowly. Furthermore, the inclusion of a reference to “internationally wrongful” would give rise to a new set of difficulties. Instead, the Committee decided to consider the possibility of amending the text of subparagraph (a), as an attempt to accommodate the concern. In 1999, the Drafting Committee had adopted the phrase “results, either alone or in combination with other factors,” to establish a direct nexus with the conduct of the State. However, the Committee considered different possibilities for further emphasizing such link. These included deleting “either alone or in combination with other factors”; explaining in the commentary that “results” does not mean that it is the only causal factor, but rather the

dominant causal factor; and replacing “results” with “is caused...by the conduct”; “is a consequence of” or “is due...to”.

The Committee decided to adopt the last of these suggestions, replacing “results...from” with “is due...to”, and to replace the term “occurrence” with “situation”, since it is the situation of *force majeure*, having arisen, that is emphasised.

Concerning **subparagraph (b)**, the Committee considered a suggestion to add a reference to “validly”, “definitely” or “expressly” assuming the risk. However, the Committee felt that the matter was not one of validity but of interpretation. The commentary will consider the question of the assumption of risk further. The Committee did, however, replace the reference to “occurrence” with “situation occurring” so as to align the language with what was adopted in subparagraph (a).

The title of the provision remains unchanged.

Article 25 [32]

Mr. Chairman,

As to **article 25 [32]**, the Committee aligned the text of **paragraph 2 (a)** with what was adopted in article 24 [31], that is, it changed the words “results...from” to “is due...to”.

Other than some minor technical changes, relating primarily to tenses, no other changes were made.

Article 26 [33]

Mr. Chairman,

The Committee began **article 26 [33]** by considering the appropriateness of the title “State of Necessity”. The Committee had before it a suggestion by a Government that the title be shortened to “[n]ecessity”, since the reference to “[s]tate” was confusing. In addition, paragraph 1 only makes reference to “[n]ecessity”. Although it was

recognized that the term “State of Necessity” has been widely used, particularly in civil law systems, the Committee decided to adopt the shorter version in English, that is “[n]ecessity”, so as to conform with the short form of titles that have been adopted for the other articles in Chapter V. The Committee, however, decided to retain “État de nécessité” in the French text, as well as in the text of the article in both paragraphs 1 and 2.

As to **paragraph 1**, the Committee considered the difference between “essential interest”, “fundamental interests” in article 41, as adopted last year, and “collective interests” in article 49, subparagraph 1 (a), as well as whether a distinction between “essential interests” and “fundamental interests” should be retained, or whether the same expression should be used in articles 26 [33] and 41. In the context of necessity, the emphasis has normally been on essential as distinct from non-essential interests. Yet, “fundamental interests” are by definition, not capable of being divided into “essential” and “non-essential”. As such, the Committee decided to retain the reference to “essential interests” as in last year’s draft. In addition, the Committee subsequently decided to delete the reference to “fundamental interests” in article 41, which I will discuss further when we reach that article.

Concerning **subparagraph (b)**, the Committee considered first the question of the phrase “international community as a whole”. Several Governments proposed instead to use the formula “international community of States as a whole”. The Committee noted that the term “international community” is commonly used in numerous international instruments, and that the phrase “international community as a whole” was recently used in the preamble of the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly in 1999. In addition, it has to be noted that the Commission has never used the phrase “[i]nternational community of States as a whole”. Likewise, the International Court used the phrase “[i]nternational community as a whole” in the *Barcelona Traction* case. There is only one international community, which States belong to *ipso facto*. Moreover the States retain paramountcy over the making of international law, i.e. the establishment of international obligations, and

especially those of a peremptory character. It is this paramountcy which article 53 of the Vienna Convention intended to stress, and not to assert the existence of an international community consisting solely and exclusively of States. Everyone accepts that there are other entities besides States towards whom obligations may exist. This issue will be explained in the commentary. The Committee eventually decided to retain the phrase “international community as a whole”.

Continuing with subparagraph (b), it should be noted that it is formulated disjunctively, in that necessity is disqualified as a defence if any of the conditions are met. This disjunctive nature of the provision is conveyed by the use of the word “or”.

On **paragraph 2**, the Committee considered deleting the opening phrase “[i]n any case”, in the chapeau. That phrase had adopted on first reading, by way of emphasis, that is, irrespective of the balance in paragraph 1, necessity may not be raised as a defence in certain circumstances. The Committee, however, decided to retain the phrase, primarily because article 26 is drafted in a negative form to stress the exceptional and limited nature of necessity.

As a consequence of the decision to include a general provision on peremptory norms as article 26 *bis*, the Committee decided to delete subparagraph (a) of last year’s draft and to renumber the remaining subparagraphs accordingly.

On new **subparagraph (a)**, the Committee also considered proposals to delete the subparagraph in article 26, and to make it applicable to Chapter V as a whole or to deal with it in the commentary. However, the Committee, decided to retain the subparagraph both because of its expository value and also because certain obligations do exist that expressly exclude the possibility of relying on necessity, for example in the field of international humanitarian law. Those are the examples the Committee had in mind in previously adopting what is now subparagraph (a). As to the argument that subparagraph (a) is equally applicable to the other circumstances in Chapter V, the Committee took the view that the substance of subparagraph (a) may already be included in the individual

regimes of each circumstance in Chapter V, and would probably be covered by the *lex specialis* provision. On balance, as a matter of policy, the Committee felt that, since necessity is the most marginal of the circumstances in Chapter V, it was justified to have an express reference to the primary norm itself. The Committee therefore decided not to make subparagraph (a) applicable to the entire Chapter, but to retain it in article 26, paragraph 2. This issue will be clarified further in the commentary.

Still on subparagraph (a), I wish to reiterate the view of the Committee when it adopted article 26 in 1999, namely that the basic assumption of the draft articles are that they apply both to conventional and customary international law. While most examples of the type of international obligation contemplated in subparagraph (a) are found in treaties, it is possible to envisage such obligation arising as a matter of customary international law or an unilateral undertaking which expressly or implicitly excludes the possibility of the invocation of necessity.

The Committee decided to retain **subparagraph (b)** without any change. The Committee considered a proposal to adopt the same basic formulation in articles 24 (2)(a) and 25 (2)(a) for subparagraph (b) for the sake of consistency, but decided against doing so. The provision is phrased in broader and more categorical terms than the equivalent provisions in articles 24 (2)(a) and 25 (2)(a), again because of the general policy that necessity should be narrowly construed and changing the formulation as proposed would have the effect of broadening the scope of necessity. The commentary will explain the question of contribution in the context of article 26 [33] further.

Article 26 bis

Mr. Chairman,

I introduced this article earlier. As I explained in the context of article 21, the Committee adopted a new formulation for the article, and decided to place it after article 26, as article 26 *bis*.

Article 27 [35]

I turn now to the last article in Chapter V, **article 27** [35] which deals with two issues, namely that circumstances precluding wrongfulness do not as such affect the underlying obligation so that if the circumstance no longer exists the obligation resumes its operation; and the question of compensation. The text is framed as a without prejudice clause because it may be that the effect of the facts which give rise to a circumstance precluding wrongfulness may independently give rise to the termination of the obligation, especially if it is a treaty obligation.

With regard to the opening clause of the article, the Committee considered the phrase “invocation of” and proposals either to delete it or to replace it with “existence of”. A further alternative was to return to the original formulation of article 35 on first reading, namely “[p]reclusion of the wrongfulness...”. Yet, the inference is that if a State finds itself in a situation where it wishes to rely on one of the circumstances precluding wrongfulness it should invoke it, and not wait until later on. The Committee thus felt that there was some value in referring to “invocation”. Furthermore, the existing text retains an element of flexibility whereby the State may decide not to invoke, for example, necessity even though it might be entitled to do so. To clarify the matter further, the Committee decided to retain “invocation” and replace the term “under” with the phrase “in accordance with”, to reiterate that what is being referred to here is invocation of a circumstance contemplated in Chapter V.

As to **paragraph (a)**, in response to a proposal made by a Government to delete the provision as being unnecessary, the Committee felt retaining it would be worthwhile so as to clarify the situation, and also because the principle has been confirmed by the International Court of Justice in the *Gabčíkovo-Nagymaros* case.

The Committee next considered the possibility of reformulating paragraph (a) so as to provide more detail, for example, by stating “if the obligation may still be performed” or “if execution is possible”. However, doing so would run the risk of either developing a very complex text, or of not being sufficiently thorough. The Committee in

1999 decided against providing a substantive statement on paragraph (a), for example on questions of termination of the underlying obligation, and against entering into a discussion as to the effects of circumstances precluding wrongfulness on the obligation in question, which relates to other areas of law such as that covered by the Vienna Convention in the treaty context. Instead, it preferred then to leave such discussion to the commentary. The Committee decided to follow this approach again this year, and adopted paragraph (a) without change.

Concerning **paragraph (b)**, the Committee noted the proposal that, since no regime on compensation is fully established, the provision should be deleted. It also considered an alternative proposal going the opposite way, namely to provide more detail on the regime relating to compensation. That there may be situations where compensation is required is clear. However, the Committee was of the view that the elaboration of such a regime would require more particularization, which would be difficult and there is no justification for doing so in this paragraph. In fact, the Committee in 1999 adopted a middle road between these proposals, by making the first reading version (which was limited to only some circumstances) generally applicable. This year, the Committee again decided to retain this basic balance, so as to ensure that the State invoking the circumstance would bear the costs, as a matter of equity, but without going into more detail. The Committee replaced the reference to “material harm or loss” with “material loss” so as to avoid any reference to the term “harm” which has been used in the articles on the Prevention of Transboundary Harm from Hazardous Activities. The reference to “material loss” is purposively construed narrower than the concept of damage elsewhere in the draft articles because what we are concerned with here is the adjustment of losses that occur when a party relies on, for example, *force majeure*. These matters are to be explained further in the commentary as well.

The Committee, therefore, decided to retain article 27 and its title substantially as adopted in 2000, as being useful in clarifying the law, even if its provisions are largely expository in nature.

Part Two

Mr. Chairman,

I will now move on to **Part Two**. As regards the title of Part Two, the Drafting Committee considered it in the light of the amendment which has been made to the title of the draft articles as a whole. It found the existing title to reflect accurately the content of the Part. It made a small grammatical change by adding the word “the” before “international”.

Chapter I

Turning to **Chapter I of Part Two**, the Committee noted that the title presented no problems.

Article 28 [36]

As regards **article 28 [36]**, the Committee noted that this article was a link between Parts One and Two, and was essentially expository in nature, and that it had been extensively debated last year and was generally accepted by Governments. The Committee decided to make only some drafting amendments to the text by replacing “arising from” by “is entailed by” which brings the language closer to article 1. It also replaced the words “entails legal consequences” by “involves legal consequences” to avoid repetition of the word “entail”.

Article 29 [36]

Concerning **article 29 [36]**, in the light of the fact that no objections or comments were made by Governments on this article, the Drafting Committee retained the text with no changes.

Article 30 [41, 46]

With regard to **article 30 [41, 46]**, there was general agreement to retain **the chapeau** and **subparagraph (a)** as these aspects of the article presented no problems.

As for **subparagraph (b)**, the Drafting Committee noted comments by some Governments questioning the legal basis for this provision and comments by some other Governments indicating that they had no objections to the text. The Committee, however, taking into account that the provision was *sub judice*, decided to place it in square brackets and reconsider it during the second part of the session.

Article 31 [42]

As regards **article 31 [42]**, while in principle, there were no objections to the article, Governments comments focused on two aspects of the article. The first set of comments related to the use of the notion of “injury” which appears for the first time in this article and in which it is defined. The second set of comments related to the notion of proportionality and its application to this article.

As regards the notion of injury, the Committee did not agree with a suggestion to merge paragraphs 1 and 2 in order to avoid the definition of “injury”, nor did it agree with the suggestion to replace the notion of “injury” with “damage”. Taking into account the relationship between this article and articles 38 and 43 on satisfaction and definition of the injured State, the Committee thought it was useful to use both notions of “injury” and “damage”; the notion of injury being broader than that of “damage”. In addition, considering the different and sometimes conflicting uses of the notions of “injury” and “damage” in different legal traditions, the Committee was convinced that there should be a definition of the term “injury” for the purposes of these articles, and that the definition should be broadly construed so as to take into account various forms of reparation provided for under the articles of this Part. The Committee, however, agreed that the definition of injury as contained in paragraph 2 of the article could cause confusion. In paragraph 2, injury was defined as consisting of any damage, whether material or moral. The word “consists” limited the notion of injury. The Committee therefore replaced the word “consists” by the word “includes” which broadens the definition. Accordingly, injury is more than damage, whether material or moral. It includes the so-called “legal injury” or moral damage to a State which may be entitled only to satisfaction. The

Committee also replaced the words “arising in consequence of” in paragraph 2 by the words “caused by” which seemed more descriptive.

As regards the inclusion of the notion of proportionality into the general provision on reparation, the Committee was of the view that “proportionality” applied differently to different forms of reparation. The notion of proportionality was addressed in individual articles describing various forms of reparation and could not therefore be put, in addition, as a general condition to reparation. The issue can, however, be addressed in the commentary to the article.

Article 32

Turning to **article 32**, the Drafting Committee considered the proposal by some Governments to place this article in Part Four. The Committee noted that the article was especially relevant to the issue of reparation and should be retained in its current place. It noted that if it were moved to Part Four, among other difficulties, there might be some confusion as to how the article would relate to countermeasures. Moreover, Part Four contains mainly saving clauses or articles explaining the scope of the text, which do not actually apply in the field of responsibility unlike article 32. The Committee, therefore, did not make any changes to the article and retained it in its original place.

Article 33 [38] Article 56bis [38]

Mr. Chairman,

Article 33 [38] was moved to Part Four and with your permission sir, I will introduce the text when we get to that Part and I now draw your attention to article 34.

Article 34

As regards **article 34**, the Drafting Committee first considered whether to move it to the beginning of the Chapter because an article on “scope” might be more appropriate at the beginning. It decided, however, that the article could stay at the end of the Chapter because the whole Chapter contains general principles applicable to Part Two as a whole. It also noted that with respect to the title of the article, the French word “Portée” reflected

the aim of the article better than the word “scope” but no alternative word was found for the English text. The Committee decided however to change in the title the word “covered by” to “set out in” to make it more consistent with the terminology used in the article itself.

As for the text of the article, the Committee noted that Governments made only a few drafting suggestions. One suggestion related to the formulation of the expression “international community as a whole”, which has already been discussed by the Committee in the context of article 26 [33] and I already explained the reasons for not changing the phrase. Another proposal by a Government was the deletion of the last phrase in **paragraph 1**: “and irrespective of whether a State is the ultimate beneficiary of the obligation”. The Committee noted that the phrase was not strictly speaking necessary and did not add much to the text. The words “content of the international obligation” in fact covered what was intended by the last phrase. It, therefore, decided to delete the phrase in order to shorten the text, and to explain its intention in the commentary.

The Committee also considered a proposal to delete the phrase “depending on the character and content of the international obligation and on the circumstances of the breach” as being superfluous. The Committee however considered that there was value in retaining the phrase and decided to add the words “in particular” after the word “depending” to make it clear that the series of factors were not exhaustive and may operate cumulatively or alternatively, as well as to retain flexibility within the provision.

As regards **paragraph 2**, the Drafting Committee considered a proposal by a Government to delete the paragraph. The Committee noted that this provision is concerned with the invocation of the rules on State responsibility by a non-State entity, and is an important provision which deals with the discrepancy between the scope of Parts One and Two. It was therefore necessary to retain the provision. In response to a proposal to delete the word “directly”, the Committee decided to soften the wording of the paragraph to read: “which may accrue directly to any person....”

Chapter II

Mr. Chairman,

I will now consider **Chapter II** of Part Two, which, in the 2000 draft articles, had the title “The forms of reparation”. The Committee noted the inelegance of having the same wording for the title of the Chapter and for that of article 35 [42]. The Committee considered various proposed alternatives for the title of the Chapter and finally settled on “Reparation for injury” and decided to retain the title of article 35 as adopted in 2000.

Article 35

Mr. Chairman,

In considering the substance of **article 35** [42], and indeed of all of the articles in Chapter II, the Committee kept in mind its recent textual changes to article 31 [42], which I have already covered in my statement, so as to make, if necessary, any consequential changes. For example, the Committee had before it a proposal made by a Government to replace “injury” by “damage”. But as the Committee had already decided to retain “injury” in paragraph 1 of article 31 [42], the reference had to be retained in article 35 [42] as well.

The Committee also considered a proposal by a Government to add a second paragraph, which would require that the determination of reparation take account of the nature and gravity of the internationally wrongful act. In the view of the Drafting Committee this article is introductory in nature and serves the function of pointing out all of the forms of reparation, which combined amount to full reparation as required by article 31 [42]. In addition, as I explained in the context of article 31, the issue of proportionality, which is what this proposal is about, is already addressed in the context of each form of reparation taking into account their specific character. For example, in relation to satisfaction, the issue is one of appropriateness of the modality, which is explicitly provided for in the text of the article dealing with satisfaction. The Committee therefore considered that the substance of the proposal was either already covered in the draft articles or that in some cases it would amount to an overstatement of the principle

since it would not always be a determining factor. It would, therefore, be better explained in the commentary.

The Committee subsequently adopted article 35 [42] in the form finalized in 2000.

Article 36[43]

Mr. Chairman,

Turning to **article 36 [43]**, the Committee considered a proposal by a Government to reformulate the opening clause as follows: “to re-establish the situation which would have existed if the internationally wrongful act would have not been committed.” However, the Committee debated this exact language last year, and for the reasons given by my predecessor in his statement last year, it decided to adopt the shorter formulation which is now in article 36 [43]. You will recall that Professor Gaja, then the Chairman of the Drafting Committee explained that that formulation stated the general policy that applied to full reparation rather than to restitution as one form of reparation. The Committee saw no reason to reverse that decision.

The Committee also considered a suggestion, again made by a Government, to discuss the application of article 36 in the context of the expropriation of foreign property. However, it decided that this was a matter for the commentary, as appropriate, especially in light of the fact that expropriation is a controversial area that is strictly not within the scope of the draft articles.

The Committee also decided not to follow a proposal to reinsert language, based on subparagraph (d) of the first reading draft articles, concerning serious impairment of the economic stability of the responsible State. The issue was settled last year as being largely covered by subparagraph (b), and in the opinion of the Committee, there was no reason to reopen the debate on the point. In addition these issues will be elaborated in the commentary.

Finally, the Committee considered a proposal by a Government to include a new paragraph (c) to limit the provision of reparation where it would entail the violation by the State of some other international obligation. This issue was considered by the Drafting Committee last year. This year, following a lengthy debate on the problem of conflicting secondary obligations, the Committee decided not to change the language for the same reasons as last year; namely that “material impossibility” is intended to address legal impossibility as well. The issue of priority between conflicting obligations depends on the context and on a number of other factors that cannot be simply put in a paragraph, not to mention also that it is outside the scope of these articles. The Committee decided that the issue should be dealt with in the commentary, which will make it clear, *inter alia*, that the envisaged situation is covered by the reference to material impossibility.

The Committee subsequently decided to adopt article 36 [43], and its title, in the form finalized in 2000, without any changes.

Article 37 [44]

Mr. Chairman,

Article 37 [44] deals with compensation. In **paragraph 1**, it limits compensation for damage in so far as such damage is not made good by restitution. The notion of “damage” refers back to article 31, paragraph 2; that is any damage whether material or moral. The Committee considered the meaning of moral damage. It was agreed, as I explained in the context of article 31, that moral damage in this article, for the purposes of compensation, means pain and suffering. It does not include moral damage to the State which some refer to as “legal injury”. This is covered under the broad notion of injury and is primarily catered for by way of satisfaction. The Committee did consider a proposal to clarify the matter further by inserting in paragraph 2 an express reference to compensation for “moral damage for pain and suffering”, but decided against doing so since it raised additional difficulties relating to the definition of moral damage suffered by individuals. Instead the Committee decided that these issues should be elaborated on in the commentary. The Committee further considered a proposal made by a Government to extend the proposition in article 36 [43], paragraph (b), to article 37 [44]. However,

this proposal was not adopted since it could contradict the principle of full reparation in article 31.

As to **paragraph 2**, the Committee agreed that the qualification “financially assessable” was also intended to exclude any possibility of granting compensation for moral damage to a State. In addition, the Committee agreed with the observation made by a Government, that the reference to “financially assessable” is to be determined by international law, which will be stressed in the commentary, and which, in any case, would flow from article 3 [4] on the predominance of international law. It also discussed a proposal to replace “insofar as” with “if and to the extent that”, but elected to retain the existing formulation since “insofar as” carries with it the connotation that loss of profits may not be recoverable, depending on the context.

The Committee decided, therefore, to retain the 2000 text of article 37 [44], and its title, without any changes.

Article 38 [45]

Regarding **article 38** [45] on satisfaction, the Committee first considered a proposal to replace, in **paragraph 1**, the reference to “injury” with “damage”. In view of the modified definition of injury in article 31(2) the Committee decided to retain the word injury in this article. Injury here means moral damage to the State itself; these are circumstances in which there might be nothing to restore or compensate for but there still has been a breach, which is exceptional and amounts to an affront to the State. It is in those circumstances that satisfaction may be offered even if it is nominal. The commentary will clarify these matters, in particular, that satisfaction is not intended to be punitive in character, nor does it include punitive damages.

The Committee next considered the concluding phrase “insofar as it cannot be made good by restitution or compensation”. Article 38 [45] is subject to the phrase “either singly or in combination” in article 35 [42], and, therefore, satisfaction is not required to be made “in addition” to restitution or compensation. However, the phrase

“insofar as it cannot be made good by restitution or compensation” reaffirms the point that restitution and compensation are more common forms of reparation and enjoy a certain priority. It is only in those cases where those two forms have not provided full reparation that satisfaction may be required. This matter will be explained in the commentary.

As to **paragraph 2**, the Committee had before it a proposal, made by several Governments, to extend the list of modes of satisfaction to include nominal damages or to add the phrase “of a similar character”, as well as another proposal made in the plenary to include “formal regrets”. As to the inclusion of nominal damages, the Committee decided last year not to include such a reference, particularly because it was a concept that was difficult to translate into other languages. At any rate, paragraph 2 is only intended to indicate some of the sorts of satisfaction that are available, and its non-exhaustive nature is confirmed by the phrase “or another appropriate modality”. On including the phrase “of a similar character”, to the extent these words are intended to limit satisfaction, the word “appropriate” covers the matter. Furthermore, including this qualification would have the effect of limiting the concluding phrase “or another appropriate modality”, which the Committee adopted last year as a compromise, having regard to the views of those members that wanted the inclusion of other modes of satisfaction, such as taking disciplinary or penal action against individuals whose conduct had caused the internationally wrongful act.

The Committee also considered the order of the modalities of satisfaction in paragraph 2, and discussed the possibility of placing formal apology before the expression of regret. The question was whether the modes should be viewed as being in ascending or descending order. However, the Committee felt that in reality there is no hierarchy between the modalities and the commentary will state that these are simply examples which are not listed in order of appropriateness or seriousness. It is the context which should determine the most appropriate form of satisfaction. Lastly, the Committee considered the use of the word “may”, which, besides indicating that the list is not

exhaustive, serves to indicate that it is not up to the responsible State to choose which form of satisfaction is appropriate. Instead it is left to the circumstances of each case.

On **paragraph 3**, the Committee noted that there was strong support for the provision in the Sixth Committee, even though there were some that had spoken against it. As to the comment, made by a Government, that the term “humiliating” is imprecise, the Committee considered that while this is true analytically, there are certainly historical examples that can be cited. Indeed, some of the speakers in the Sixth Committee who favoured the retention of the word “humiliating” had specific examples in mind. In that context, the Committee considered a further proposal to replace the concluding phrase with “impairing the dignity of the responsible State”. However, the Committee felt that the new language was neither clearer nor more readily understood than the existing text.

The Committee therefore adopted the draft article, and its title, in the form finalized in 2000, with some minor linguistic amendments.

Article 39

Mr. Chairman,

Turning to **article 39** regarding interest, the Committee considered the proposal, made by some Governments, to reinsert article 39 back into article 37 [44]. The Committee noted that the matter was considered extensively last year, at which time it was decided to maintain a separate article because the issue of interest is important and should not be hidden within another article. This year it felt that there was no reason to reverse that decision. Indeed, it is the Committee’s view that the provision, as it stands, strikes a suitable middle ground between those that wish more details on the issue of interest, and others that wish to reduce it to a mere reference in the context of compensation, as was done in the draft articles adopted on first reading.

The Committee decided to retain article 39, and its title, in the same form as adopted in 2000.

Article 40 [42]

Mr. Chairman,

With regard to the final article of Chapter II, namely **article 40** [42], which concerns, in a generalized form, what in some systems is termed “contributory negligence”, the Committee noted that this is one of the balancing factors in the context of reparation. The Committee first considered the following proposals for the opening phrase “[i]n the determination of the amount of reparation...” and “[f]or the purpose of contribution to damage and in relation to the question of determination of reparation account shall be taken of...”. The Committee decided not to adopt either proposal. With regard to the first, it was felt that the reference to “amount” was unnecessarily restrictive, since the provision applies both to amount and to form, that is the individual or the injured State may have, for example, waived the right to restitution and opt for compensation only.

In addition, the Committee considered the words “in relation to whom” at the end of the paragraph, in light of possible alternatives such as “on behalf of whom”, “on whose account”, “for whom” or “for the benefit of whom”. However, the existing formula is phrased generally in order, *inter alia*, not to prejudice the approach to be taken in Diplomatic Protection, which the Commission has not yet decided on. It also leaves the paragraph open to a variety of different situations, not all of them covered by Diplomatic Protection. The Committee decided to retain the phrase “in relation to whom”, but to adopt “au titre de laquelle” in the French text.

The Committee further brought the text of the provision into line with the language used in the preceding article, by changing the word “damage” so that it now reads “injury”. This was necessary since “damage” could be read as limiting the applicability of article 40 [42] in the case of satisfaction, which is not the intention. It is clear that the behaviour of the injured person or entity is relevant to satisfaction as well as to other forms of reparation.

The Committee also considered a proposal made by some Governments to place the article in Chapter I, possibly as a third paragraph to article 31 [42], as an aspect of the principle of full reparation. The principle in article 40 [42] was initially located in the predecessor to article 31, namely article 42 as adopted on first reading. However, the Committee decided last year to place it in its own article, so as to simplify what is now article 31 [42], containing the general principle of reparation. In addition, in practice, the primary function of article 40 [42] is the determination as between the different forms of reparation or the amount of reparation, that is, functionally it belongs in Chapter II. It was thus decided to keep article 40 [42] in its current place.

The Committee thus adopted article 40 with the single textual amendment I have referred to, together with the title “[c]ontribution to the injury”.

Chapter III

Mr. Chairman,

Chapter III of Part Two of last year’s text dealt with serious breaches. That Chapter was the subject of lengthy and difficult discussions both in the Commission and also by Governments. You will recall that, at the end, the Commission agreed to proceed with a compromise. That compromise included the retention of this Chapter with the deletion of article 42, paragraph 1 of last year’s text which dealt with damages reflecting the gravity of the breach. As part of the compromise, the previous references to serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests, which mostly dealt with the question of invocation as expressed by the International Court of Justice in the *Barcelona Traction* case, would be replaced with a category of peremptory norms that goes to the underlying obligations. The rationale for this approach is that the notion of peremptory norms is well established by now in the Vienna Convention on the Law of Treaties and has been referred to by the International Court of Justice. In certain circumstances there might be some trivial or minor breaches of peremptory norms which would not be the concern of this Chapter. However, serious breaches of peremptory norms would be covered by this Chapter. The Drafting Committee was also asked to give further consideration to aspects

of consequences of serious breaches as contained in article 42 in order to simplify it and avoid excessively vague formulas and to narrow the scope of its application to cases falling within the category of this Chapter. On the basis of these understandings the Drafting Committee considered Chapter III.

The title of the Chapter reflects the understanding reached in the Plenary and speaks of serious breaches of obligations under peremptory norms of general international law.

The Committee further considered the question of the reference to “peremptory norms of general international law” in light of its decision to maintain the phrase “international community as a whole” in various articles - a decision which I explained in the context of article 26. It had before it a concern that, in light of such a decision, the reference to peremptory norms in the draft articles would be broader than that found in article 53 of the Vienna Convention on the Law of Treaties, which refers to the narrower “international community of States as a whole”. The Committee was of the view that article 53 relates primarily to defining peremptory norms for the purposes of that treaty, which is done by the international community of States as a whole, as a subset - albeit the most important one - of the international community as a whole. It should be stressed that the draft articles on the responsibility of States are not concerned with the definition of peremptory norms, and as such, do not conflict with the relevant provisions of the Vienna Convention.

Article 41

Mr. Chairman,

The Committee reformulated **article 41** in the light of the compromise I just stated. As in the previous text, article 41 defines the scope of the application of the Chapter; that is the international responsibility of a State for serious breaches of an obligation under a peremptory norm of general international law. You will note that the language of **paragraph 1** is drafted narrowly. It speaks of a “serious breach by a State”.

This is to avoid the implication that States may be responsible for serious breaches of peremptory norms by others in situations not otherwise specified in the text.

Paragraph 2 of the article defines the word “serious” for the purposes of paragraph 1. It is the same as paragraph 2 of last year’s text with the deletion of the last phrase “risking substantial harm to the fundamental interests protected thereby”. By definition, if peremptory norms are at play, and a serious breach is involved, there will be a risk of substantial harm to such fundamental interests, and the phrase is accordingly superfluous. The Committee found the new text of paragraph 2 preferable to last year’s text, because it is briefer and avoids yet another category of reference to interest.

The word “serious” signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to denominate some types of violations as more serious than others. Nor is it intended to imply any punitive character to the violation or to the reparation which may ensue. The commentary will elaborate on this issue.

The title remains unchanged from last year’s text.

Article 42

Mr. Chairman,

Article 42, consistent with the understanding reached in the Plenary, begins with an obligation to bring to an end through lawful means any serious breach within the meaning of article 41. That applies, in effect, in the context of cessation. This is the subject of **paragraph 1**. This paragraph corresponds to paragraph 1 and subparagraph 2(c) of last year’s text. It, however, no longer uses the words “as far as possible” which existed in the previous paragraph 2(c). Instead, it refers to “lawful means”. In addition, the modalities of “cooperation” are not specified. They could include coordinated actions by a group of States or all States. But it is not intended to exclude unilateral actions by States. The commentary will elaborate on these issues.

Paragraph 2, corresponds to subparagraphs 2(a) and (b) of last year's text. It addresses unlawful situations arising by virtue of a serious breach and expresses the obligation of non-recognition or rendering of aid or assistance in relation to that unlawful situation. This paragraph, of course, does not apply when the breach under article 41 is not continuing and where there is no unlawful situation created thereby, which is conceivable, though in the context of the types of wrongful acts within the context of the article it is unlikely. It intends to apply in the *Namibia* type situations. The paragraph is an expression of what the International Court of Justice said in relation to the *Namibia* case in respect of the obligation of non-member States of the UN.

The redrafting of the paragraph no longer speaks of "other States" which was intended to refer to States other than the responsible State in last year's text. Under the new formulation, "[n]o State" shall recognize the situation created by the serious breach as lawful. Accordingly, even the responsible State itself is under an obligation not to sustain the unlawful situation, an obligation consistent with article 30 on cessation.

In the context of this paragraph, the Committee considered the question of whether an injured State could waive its right to invoke the responsibility of another State for breaches referred to in article 41. It was noted that while clearly an injured State cannot waive the right of another State, which is entitled to invoke responsibility, there is nothing to prevent an injured State from waiving its own right to invoke responsibility. In any event, this issue was not of concern to the scope of this provision and therefore need not be addressed.

Paragraph 3, which corresponds to paragraph 3 of last year's text, is a without prejudice clause. It provides that the article is without prejudice to other consequences referred to in Part Two, which includes reparation and to such further consequences that a breach to which this Chapter applies may entail under international law. Of course, this language does not exclude the applicability of the provisions of Part Four. The commentary will elaborate on the meaning of this paragraph further.

The title of the article was changed to read “Particular consequences of a serious breach of an obligation under this Chapter”

Part Three

Mr. Chairman

I will now turn to **Part Three** of the draft, which corresponds to Part Two *bis* of last year’s draft. You will recall that Part three adopted on first reading contained provisions on dispute settlement and therefore the Special Rapporteur, last year, referred to the present Part as Two *bis* so as to avoid confusion. But in view of the decision on the possible form of the draft articles and on not including any machinery for dispute settlement in the present articles so far at least as concerns the initial phase of their consideration by the General Assembly, the Drafting Committee has renumbered this Part as Part Three.

Turning first to the title of this Part, the Committee aligned it more closely with the new title of the draft articles as a whole and to the title of Part Two. It now reads: “The Implementation of the International Responsibility of a State.”

Chapter I

Turning to **Chapter I**, the Drafting Committee also made some changes to the title. It shortened it to read “Invocation of the responsibility of a State”.

On the concept of “invocation”, the Committee considered a general comment by a Government regarding the need to be clear on what would amount to “invocation”. The Drafting Committee noted that invocation should be understood as taking measures of a relatively formal character which, though they may not involve the commencement of legal proceedings, certainly include it. A State does not invoke responsibility of another State by reminding it of a breach or even protesting. For the purpose of the articles, protest as such is not an invocation of responsibility; it has a variety of forms and

motivations, including for example the reservation of rights, and is not limited to cases involving State responsibility. On the other hand certain diplomatic exchanges, such as the lodging of a formal claim, would amount to invocation. The Drafting Committee decided to retain that concept and to leave the explanation of its meaning and parameters for the commentary.

Article 43 [40]

As regards **article 43 [40]**, the Committee noted that Governments raised two concerns about its substance. The first relates to the need to have a more direct link with article 31 on reparation, and the second relates to the concept of integral obligations found in subparagraph (b) (ii) of last year's draft.

The Committee noted that the chapeau of the article was clear and makes a sufficient link to article 31. It noted also that no Government had made any drafting suggestions concerning **the chapeau and subparagraph (a)** and therefore decided to retain these provisions without any changes, except a linguistic change to the French text.

As regards **subparagraph (b)**, the Drafting Committee considered a comment by a Government that the expression "group of States" implied some form of entity with legal personality. The Committee looked at other alternatives such as "several States" but noted that the expression "group of States" conveyed most accurately the sense of the provision (i.e. a community of States). The commentary will clarify that there is no intention to attribute legal personality to a group of States in the context of this provision.

With regard to the category of States in **subparagraph (b)(i)**, there were no objections and the Committee therefore retained it.

As regards **subparagraph (b) (ii)**, however, the Committee noted that this provision has created some confusion and misunderstanding among Governments. The Committee noted that the origin of integral obligations comes from article 60(2) (c) of the Vienna Convention on the Law of Treaties. While this category is more familiar in the

context of multilateral treaties and is more likely to occur in that context, it is not well known in the context of other forms of obligations nor is it likely to occur with any frequency outside multilateral treaties. In addition, the subparagraph, in the context of State responsibility dealt with collective interest, a matter that was already covered by article 49, paragraph 1(a). For these reasons, and in view of the criticism by Governments that the provision is too vague, the Committee considered deleting it. However, on balance the Committee felt there was merit in retaining a provision on “integral obligations”. It noted that such a category of obligations, although narrow, does exist and that there needed to be some parallelism with article 60 (2) (c) of the Vienna Convention. The Committee noted that the confusion amongst Governments could be attributed to the poor drafting of the provision, and in particular to its excessive breadth, risking confusion with article 49 (1) (a). Accordingly, it decided to retain the provision and narrow the definition of “integral obligations” by aligning it rather closely with the language used in article 60 (2) (c) of the Vienna Convention. The text of subparagraph (b) (ii) now reads: “Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.”

The Drafting Committee changed the title to reflect more clearly the content of the provision. It noted that the article does not directly define the injured State, but a definition is inferred from its content. The title now reads: “Invocation of responsibility by an injured State” which was the title of article 44 but the Commission found it more fitting for article 43.

Article 44

Concerning **article 44**, in light of the changes made to the title of article 43, the Drafting Committee amended the title to this article to read: “Notice of claim by an injured State”. The Committee noted that this wording also reflects more clearly the content of the article and would be more in line with article 45.

As regards **paragraph 1**, the Committee noted that other than the comment by one Government regarding the meaning of the term “invocation”, which has already been dealt with, there was no objections to, or drafting suggestions on, this paragraph. The Committee therefore made no changes.

As regards **paragraph 2**, the Committee considered a suggestion by a Government to list all the remedies that an injured State has. The Committee added the words “in accordance with the provisions of Part Two” at the end of **subparagraph (b)** to clarify that an injured State has all those remedies found in Part Two. The Committee also considered a proposal to expand paragraph 2, including by adding another subparagraph on the nature and characteristics of the claim. It noted, however, that previous discussions on this article had given support to as much flexibility as possible. The Committee therefore decided that it would be unnecessary to elaborate on the specifications of the claim in the text, but that something more could be said in the commentary.

Article 45 [22]

As regards **article 45 [22]**, which deals with the admissibility of claims, the Drafting Committee considered a proposal by a Government to insert in the chapeau the words “by an injured State” after “may not be invoked”. It decided not to insert these words as they would be inconsistent with the scope of the article, which applied equally to an injured State as well as to States other than the injured State which are entitled to invoke responsibility.

As regards **subparagraph (a)**, the Drafting Committee first considered a proposal by a Government to return to the rule on nationality of claims found in the first reading text. The Committee noted that the issue of nationality of claims essentially relates to the admissibility of claims. It noted also that new subparagraph (a) introduces the necessary flexibility and decided that it would not be appropriate to revert to the previous text. The Committee also considered a comment by a Government that the nationality of claims rule was not a concept familiar to French legal terminology, and that the expression

should be redrafted to refer to nationality in the field of diplomatic protection. The Committee decided to retain the text as it is, including in the French language. It noted that the expression “nationality of claims” was used in 1949 by the International Court of Justice in its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*¹, which opinion was delivered in French. The Committee also noted that the nationality of claims rule has a wider field of application than only in the diplomatic protection.

As regards **subparagraph (b)**, the Committee noted that Governments generally endorsed this provision. It made no changes.

Article 46

Turning to **article 46**, the title presented some problems to members of the Drafting Committee who preferred to use the word “Renunciation of the right...” rather than the word “Loss of the right...”. The Committee made this change to the French text, but as regards the English text, the word “loss” was still considered to be better than “renunciation”.

As regards **subparagraph (a)**, the Committee considered suggestions by some Governments to exclude the ability to waive a claim, which arose from a breach of a peremptory norm or an *erga omnes* obligation. The Committee felt that to the extent that we are in the context of Chapter V of Part One, in the circumstances precluding wrongfulness, the word “validly” is intended to address the issue of procedural validity as well as the substantive validity of the waiver of the claim. As to the underlying question in which circumstances a breach of an obligation under a peremptory norm may be waived, it is a matter that the Committee cannot address in the article for reasons that I already explained when introducing article 42, paragraph 2.

The Committee considered a suggestion by a Government to delete the word “validly” as being redundant. The Committee noted that it is essential to retain the

¹ See 1949 ICJ Report, p. 182.

principle that the claim has been validly waived. This qualification would address situations in which an injured State may under duress or coercion waive its claim, which should not be regarded as a sufficient waiver.

The Committee also considered a proposal by a Government to delete the qualification “in an unequivocal manner”, as its application might be problematic. The Committee noted that the expression is not strictly necessary as the aim of this wording is taken care of by the word “validly waived”. It therefore deleted the expression and agreed to explain this aspect in the commentary.

As regards **subparagraph (b)**, in light of the fact that no Government made any comments, the Committee retained the provision with no changes.

Article 47

Concerning **article 47**, the Drafting Committee changed its title to read: “Plurality of injured States” (inspired by the French Government’s proposal) which it considered reflects better the content of the article.

The article was generally accepted by Governments. The Committee considered whether the article should make it clear that States could invoke responsibility together as well as separately. It noted however that the word “separately” was expressly included in the text to make it clear that States can invoke responsibility individually, and that it goes without saying that injured States could act together. However, in such circumstances each State would be acting on its own right, and not on that of any collectivity. The provision does not deal with the question of joint actions for which there is a separate body of law. This matter could be explained in the commentary.

Article 48

Regarding **article 48**, the title was changed to read: “Plurality of responsible States”.

As regards **paragraph 1**, the Drafting Committee first considered an issue raised by a Government as to whether the article recognizes the category of joint and several responsibility. The Committee noted that the general rule in international law is that of separate responsibility of a State for its own wrongful acts and that article 48 reflects this general rule. The commentary will make it clear that the provision is not be read as recognizing a rule of joint and several responsibility. If States wished to establish such a regime, however, they could do so, and there were several examples of this.

The Committee also considered a proposal by a Government to add the concept of attribution by changing the last part of paragraph 1 to read: "...each State may only be invoked to the extent that injuries are properly attributable to that State's conduct". It noted that to introduce the notion of attribution would create confusion with Part One, and that the existing words "in relation to that act" achieves the same objective. This will be explained in the commentary.

As regards **paragraph 2**, the Committee noted that no Government had made any drafting suggestions and other than some editorial changes, it retained the text of the paragraph.

Article 49

Turning to the last article in this Chapter, **article 49**, the Committee noted that other than one Government, which suggested its deletion, there was general support for its retention.

As regards the **opening clause of paragraph 1**, the Committee considered a proposal to delete "subject to paragraph 2", as this implies some form of reservation. It considered that it would be better to use the expression "in accordance with paragraph 2" and this was inserted in the latter part of the opening clause.

On **subparagraph (a) of paragraph 1**, the Committee considered a comment by a Government on the need to clarify the concept of collective interest. It decided to

narrow the provision by adding the words “of the group” after “collective interest”. Thus the provision speaks of the collective interest of the group. This language, however, does not exclude the possibility of a group of States undertaking an obligation which is in the common interest of a larger community. For example, a group of States with rain forests may undertake an obligation for the protection and the preservation of the rain forests for the benefit of not only themselves, but also for the benefit of the international community at large. In the view of the Drafting Committee, such a situation is also covered by the subparagraph. The commentary will elaborate on this issue.

As regards **subparagraph (b) of paragraph 1**, the Committee made no changes because the text was generally acceptable to Governments.

Turning to **paragraph 2**, the Committee first changed “A State” to read “Any State”, so as to be consistent with paragraph 1. It also made a slight editorial change by replacing “may seek” with “may claim”. The Committee then considered a suggestion by a Government to include a saving clause indicating that non-State entities may also be entitled to invoke State responsibility. This issue was already covered under article 34 (2) and it was unnecessary to repeat it here.

The Committee then noted that the reference to assurances and guarantees of non-repetition in **subparagraph (a)** is consequential on the outcome of article 30, subparagraph (b), and therefore decided to place these words in square brackets pending a decision on that article. The reference to the cessation of the internationally wrongful act presents no problems.

As regards **subparagraph 2 (b)**, the Committee noted that a number of Governments queried the substance of this provision. In particular, they question whether the States under this article are entitled to ask for more than cessation of the wrongful act and whether the right to demand reparations by these States is recognized by international law. The Committee also took note of comments by some Governments on how the invocation of responsibility by several States, under this provision, could be

reconciled with each other in case of conflicting or divergent demands. The Committee noted that this provision is a clear example of progressive development and its utility should be evaluated from a policy perspective. The Committee noted that the right of article 49 States' to take countermeasures with regard to breaches of obligations for the collective interest, contained in article 54 of last year's draft, was highly controversial. The general view in the Commission was that it should be replaced by a saving clause, even if this might have the effect of diminishing the protection of the collective interest concept. Under these circumstances, therefore and on balance, the Committee viewed this provision, though representing progressive development, as proposing a good and useful policy, which should be retained. The Committee, however, replaced the words "under Chapter II of Part Two" by "in accordance with the preceding articles". This makes it clear that article 49 States could not demand reparation on behalf of an injured State that has chosen to waive its right to do so in accordance with article 46, on the loss of a right to invoke responsibility. The commentary would elaborate on the question of procedure to deal with conflicting or divergent demands by article 49 States. The Committee also replaced the words "Compliance with..." at the beginning of the provision with "Performance of", in order to align it with the French text.

Finally, as regards **paragraph 3**, the Committee considered a proposal by one Government to add the clarification "*mutatis mutandis*" before "under articles 44, 45 [22] and 46". It noted that the intent of the provision was clear and concluded that there was no need to add this language. In light of the fact that this paragraph was generally acceptable to Governments, the Committee made no changes to it.

Chapter II

Mr. Chairman,

I will now turn to **Chapter II** of Part Three. This Chapter deals with the question of countermeasures; a subject which attracted many comments both by Governments and in the Commission, many of which were critical for variety of reasons and sometimes for contradictory reasons. The Drafting Committee proceeded on the basis of the compromise reached in the Commission, which the Special Rapporteur reported to the

Plenary on 18 May. In accordance with that understanding it was found undesirable to cram the whole or a substantial part of the articles on countermeasures into article 23 which is devoted only to one aspect of the question. Such an attempt would overburden article 23 and could make it incomprehensible. As part of the compromise, article 23 would remain in Chapter V of Part One. The Chapter on countermeasures will remain in Part Three, but article 54 of last year's text would be deleted. You will recall that that article dealt with the taking of countermeasures by States other than the injured State, which proved to be extremely controversial. Instead, there would be a saving clause leaving all the positions on this issue unaffected. As part of that compromise, article 53 of last year's draft, dealing with conditions relating to countermeasures, would also be reconsidered and the distinction between countermeasures and provisional countermeasures would be deleted. That article was also to be simplified and be brought substantially into line with the decisions of the arbitral tribunal in the *Air Services* case and the decision of the International Court of Justice in the *Gabčíkovo-Nagymaros* case. Articles 51 and 52 on the obligations not subject to countermeasures and proportionality were also to be reconsidered, as necessary, in light of the various comments made.

On the basis of the above understandings, the Drafting Committee considered this Chapter which I will now introduce. I will also introduce **article 23 [30]** on countermeasures as a circumstance precluding wrongfulness at the end of this Chapter because of the relationship it has with this Chapter.

Article 50 [47]

Mr. Chairman,

Governments did not object to **article 50 [47]**, but raised questions as to the balance in the article and that is the issue that the Committee tried to address.

Paragraph 1 describes the purpose of countermeasures as an attempt to induce the wrongdoing State to comply with its obligations. The obligations are, of course, the obligations under Part Two, namely the obligations of cessation of the breach and reparation. Countermeasures are taken by way of inducement and not punishment. One

Government proposed a more limited conception of countermeasures, that is to induce compliance with the primary obligation which in this context means cessation of the wrongful act only. In the view of the Committee, in situations where due to the wrongful act, damage had already been done and was continuing to be felt, it was insufficient just to resume performance of the obligation and make no reparation. That, in the opinion of the Committee was a too restricted conception of countermeasures and was not supported by State practice.

The Committee also considered the word “only” in the first line and was of the view that it applied both to the target of countermeasures, that is the responsible State, as well as to the purpose of the countermeasures, which is to induce the responsible State to comply with its obligations.

The Committee also considered a suggestion for the exclusion of countermeasures with respect to satisfaction, since such serious measures should not be taken just for satisfaction which plays a minor role in the entire spectrum of reparation. In the Committee’s view, in normal situations, satisfaction will be symbolic, nominal or supplementary and it is inconceivable that a State that had ceased the wrongful act and had provided compensation could properly be made the target of countermeasures. However, the notion of proportionality adequately addressed this concern and it was unnecessary to make arbitrary distinctions in this paragraph.

As regards **paragraph 2**, the Committee considered the use of the words “suspension of performance of one or more international obligations”, which some considered to be too close to the language used in the context of treaty obligations and hence implying that the paragraph was limited to treaty obligations. It was suggested that the words “one or more international obligations” were unclear, since it could imply that several obligations could be suspended. The Committee noted, however, that a countermeasure could well affect several obligations: for example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to the State under different arrangements. Different and coexisting obligations might relate to

exactly the same act. For that reason, the paragraph cannot speak merely of suspension of a single obligation. Therefore, the Committee retained last year's text with some drafting changes which do not affect the substance of the paragraph. It changed the words "the suspension of performance of one or more international obligations" to "the non-performance for the time being of international obligations". Under the new formulation, the paragraph speaks of "non-performance" of obligations, instead of "suspension of performance" of obligations. The temporary character of the countermeasure is reflected by the words "for the time being".

The Committee also considered a suggestion by a Government that the text does not sufficiently protect the rights of third States. In the Committee's view, there may be situations in which the consequences of countermeasures may be felt by a third State. Unless those third States would have a right against the State that is taking the countermeasures, there was nothing that can be provided in these articles to preclude the injured State from taking countermeasures. To do otherwise, would not be supported by State practice.

On **paragraph 3**, the Committee considered a suggestion by some Governments with regard to avoiding irreversible consequences of countermeasures. In the Committee's view, it would be impossible to ensure the irreversibility of the effect of countermeasures in every case. For example, there are certain obligations that have to be performed at a specific time otherwise they would lose their value. All one can reasonably require is to ask the States "as far as possible" to take countermeasures the effects of which are reversible. The Committee made some drafting changes to the paragraph for further clarity. It replaced the words "not to prevent" by "to permit". It also deleted the words "obligation or" in the second line so as to make it consistent with paragraph 2, which now uses the word "obligations" in the plural.

The title of the article remains unchanged.

Article 51

With regard to **article 51**, a number of suggestions were made by Governments. One Government proposed the deletion of this article on account that the issues addressed are either covered by the UN Charter or by the article on proportionality. Comments by other Governments dealt not with the deletion, but with additions to the list and with some drafting issues in paragraph 1.

The article before you corresponds largely to last year's text with some modifications. The Committee was of the view that the article had a useful function. It clarified certain issues which will be helpful to Governments.

In **paragraph 1**, the Drafting Committee made two changes: one drafting and one structural. The language of the opening clause was changed slightly, because some Governments found that the word "derogation" creates confusion between this provision and human rights derogability clauses. They suggested that it be changed. The Committee agreed with this criticism and changed the language from "[c]ountermeasures shall not involve any derogation from" to "[c]ountermeasures shall not affect".

Subparagraph 1(a), (b) and (d) are identical to last year's draft. Subparagraph (c) was simplified by deleting the reference to a form of reprisal which was "against persons protected". Since this subparagraph relies on *lex specialis*, it is unnecessary to be anymore specific about the forms of reprisals, which are spelled out in their respective regimes.

As in 2000, it was the understanding of the Committee that subparagraph (d) did not qualify the preceding subparagraphs, some which may or may not be peremptory. In particular subparagraphs (b) and (c) stand on their own.

You may recall that the last year's text included an additional subparagraph on diplomatic and consular inviolability. Governments did not criticize that paragraph. The Committee noted that one Government suggested that this obligation should be

considered peremptory. In the view of the Committee, this category of obligations is not of a peremptory character, because a State may waive the inviolability of its own personnel, premises, etc. Precisely for this reason the Committee found that the subparagraph could create confusion. The utility of this paragraph is directly connected with paragraph 2 on the requirement of the fulfillment of the obligation of dispute settlement. In order to settle the dispute peacefully, clearly it is essential to keep diplomatic channels open between the States concerned. For that reason, the Committee moved paragraph 1(e) of last year's text to paragraph 2.

In the course of its consideration of this paragraph, the Committee considered whether it would be useful to keep paragraph 1 general, with no listing of specific obligations. The advantages of a general rule were that the scope of the paragraph would remain within the realm of secondary rules, and would avoid the possibility of excluding any of the obligations against which countermeasures may not be taken. On the other hand, the advantages of a list of some of the so-to-speak "prohibited countermeasures" were to remove uncertainty, at least, about those for which there should be no ambiguity. On balance, the Committee was persuaded that the second approach was more useful, even though the provision would have to draw on primary rules.

Paragraph 2 is a merger of paragraph 2 and subparagraph 1(e) (on diplomatic and consular inviolability) of the last year's draft. Otherwise there are no changes to the paragraph.

In the context of its consideration of this paragraph, the Committee considered a question on the meaning of "applicable dispute settlement procedure" between the injured State and the responsible State. The Committee confirmed its understanding that these words intended to be construed narrowly and to refer only to dispute settlement procedures that were related to the dispute in question and not to other issues between the States concerned. For that reason it was unnecessary to change "applicable" to "relevant" which would have the same meaning. It was agreed, however, that the commentary would make this issue clear.

The title of the article is modified to read “Obligations not affected by countermeasures”.

Article 52 [49]

Mr. Chairman,

Article 52 deals with proportionality. Governments did not question the usefulness of this article. However, a number of suggestions were made affecting both the drafting and the substance of the article. With regard to drafting, some Governments proposed to replace the word “commensurate”, which seems to suggest a more restrictive meaning, with the word “proportional” or “not disproportionate”. The Committee, consistent with its general approach to avoid double negatives, did not find the words “not disproportionate” acceptable. As regards “proportional”, in the view of the Committee, that term was interchangeable with “commensurate”. The Committee selected the term “commensurate” because the International Court of Justice used it in the *Gabčíkovo-Nagymaros* case.

The Committee also considered a proposal by some Governments that countermeasures should be justified to the extent that they are necessary to induce compliance with the obligation breached. Therefore, the proportionality article should be linked to the purpose of countermeasures. Along the same line, some other Governments had suggested to replace the words “the rights in question” with the words “the effects of the internationally wrongful act on the injured State”. In the view of the Committee, the purpose of countermeasures was already described in article 50 and it was unnecessary to repeat it here. As to the words “the rights in question”, the Committee had opted last year for this language which comes from the International Court’s decision in the *Gabčíkovo-Nagymaros* case and has a broad meaning including the effect of a wrongful act on the injured State. On this issue I refer to the statement of my predecessor, Professor Gaja.

Article 52 is intended to identify injury suffered, the gravity of the internationally wrongful act and the rights in question as factors that have to be taken into account in taking countermeasures with regard to the mode of countermeasures and their intensity. The article captures the necessary and relevant elements identified by the Arbitral Tribunal in the *Air Services* case . These issues will be explained in the commentary.

The title of the article remains unchanged.

Article 53 [48]

Mr. Chairman,

Article 53 is central to the Commission's compromise that I referred to at the beginning of my introduction of this Chapter. The most difficult aspect of this provision was the relationship between countermeasures and dispute settlement. To address that issue, the Committee deleted paragraph 4 of last year's text, essentially prohibiting countermeasures while negotiations are being pursued in good faith, but retained paragraph 5 dealing with the suspension of countermeasures where the States concerned are before a competent court or tribunal with the power to make binding decisions.

Paragraph 1 before you is a merger of paragraphs 1 and 2 of last year's text. It provides that before taking countermeasures, the injured State shall give notice of its claim to the responsible State and request it to comply with its obligations under Part Two; those are the cessation of the wrongful act and reparation of injuries caused. This is the subject matter of subparagraph (a). Subparagraph (b) which corresponds to paragraph 2 of last year's text provides that before taking countermeasures, the injured State should notify the responsible State of any decision to take countermeasures and offer to negotiate with that State. Under the new formulation, the notification of intention to take countermeasures should be given before the taking of countermeasures.

Paragraph 2 is the same as paragraph 3 of last year's text, with some changes. Under this paragraph urgent countermeasures could be taken without prior notification to the responsible State. The Committee deleted the reference to "provisional"

countermeasures which were in last year's draft, since the notion of reversibility of countermeasures is already covered by paragraph 3 of article 50. Therefore, by definition, all countermeasures are provisional, and beyond that, the term lacked specific meaning. The Drafting Committee also changed the words "countermeasures as may be necessary to preserve its rights" to "countermeasures as are necessary to preserve its rights" in order to establish a link with the purpose of countermeasures as set out in article 50.

Paragraph 3 is identical to paragraph 5 of last year's text with only one drafting change in the opening clause. The words "within a reasonable time" are changed to "without undue delay" which only signifies the importance of suspending countermeasures when it is no longer necessary. You will recall that, my predecessor, Professor Gaja, when introducing this paragraph last year, stated the understandings of the Drafting Committee. In accordance with those understandings, the reference to tribunal or court referred to any third party dispute settlement mechanism. Furthermore, such a court or tribunal should be established and operating, and should have the competence to make decisions binding on the parties including decisions regarding provisional measures. The rationale behind this paragraph is that the injured State could request such a court or tribunal to order provisional measures to protect its rights which would have the functions of countermeasures and therefore would make countermeasures unnecessary.

Paragraph 4 is identical to paragraph 6 of last year's text. It provides further conditions for the suspension of countermeasures under paragraph 3. According to this paragraph if the responsible State fails to implement the dispute settlement procedure in good faith, paragraph 3, that is the requirement of the suspension of countermeasures, would not apply.

The title of the article remains unchanged.

Article 54 [now article 55bis]

Mr. Chairman,

Article 54 of last year's text was also criticized by a number of Governments many of whom requested its deletion. It gave rise to similar controversy in plenary. As part of the compromise in the Commission, article 54 adopted last year was deleted. You will recall that was the article which provided for countermeasures to be taken by States other than the injured State. In place of this article, it was agreed that there should be a saving clause reserving the position of all sides; namely those who believed that the right to take countermeasures should be granted to States other than the injured State with regard to the breaches of obligations for collective interests and, on the other hand, those who believed that only injured States should have the right to take countermeasures. Accordingly, the Committee proposes an article as a saving clause which is now placed at the end of the Chapter as article 55**bis**. Under this article, the Chapter on countermeasures does not prejudice the right of any State, entitled under article 49, paragraph 1 to invoke the responsibility of another State to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interests of the beneficiaries. You will note that the article speaks of "lawful measures" and not "countermeasures". This is used deliberately so as not to prejudice any positions. By this saving clause, the Commission is not taking a position on the issue and has left the matter to the development of international law.

The article is entitled "Measures taken by States other than an injured State".

Article 55 [48]

The last article I will be introducing in this Chapter is **article 55**, which is identical to the text of the same article proposed by the Committee last year. It simply provides for when the countermeasures should be terminated. Governments generally supported this article and the Committee made no changes to its text or title.

The title of the Chapter remains unchanged, since it is short and states the subject matter of the Chapter.

I will now introduce article 23 [30] of Chapter V of Part One.

Article 23 [30]

Article 23 [30] which deals with countermeasures as a circumstance precluding wrongfulness corresponds to last year's text of the same article with a minor drafting change. At the end of the article, the reference to "conditions set out" in the articles of the Chapter on countermeasures is replaced by a general reference stating "in accordance with Chapter II of Part Three". The redrafting was necessary in view of article 55**bis** which does not deal in so many words with "countermeasure", and does not set out any conditions for taking measures; in short, it is a saving clause. While article 23 does not intend to include the measures referred to in article 55**bis** to the extent that these are not countermeasures, it would not *per se* exclude the possibility of those measures precluding wrongfulness either. In effect, there is also, in article 23, an implied without prejudice clause with regard to article 55**bis** measures. The commentary will elaborate on these issues further.

Part Four

Mr. Chairman,

I will now move on to **Part Four**. As regard the title of the Part, the Committee decided to retain the title "General Provisions", since there was no objection to it.

The Committee considered several proposals for the inclusion of additional issues into Part Four. The first issue involved a suggestion that the reflexive nature of the draft articles be made clear. This will be done in the commentary. Next, the Committee considered a proposal to move article 34, paragraph 2, dealing with the position of non-State entities into Part Four. However, the Committee decided that such move was not strictly necessary. Likewise, the Committee considered a proposal to move the internal law provisions, in articles 3 and 32, into Part Four. However, as I mentioned in my

discussion of article 32, the Committee did indeed consider the possibility of moving the article into Part Four, but decided against doing so for the reasons I have explained.

Article 56 [37]

Mr. Chairman,

Concerning **article 56 [37]**, on *Lex specialis*, the Committee noted that strong support exists both for its content and for its placement in Part Four. There was, however, a proposal made by a Government to move this article back to Part Two. For the reasons given by my predecessor last year, such a move would be undesirable, particularly because many of the issues in Part One and Part Three can also be subject to the *lex specialis* principle.

In addition, the Committee noted the concern that the article only applies to Parts One and Two and not to Part Three (formerly Part Two *bis*), because of the inclusion of the phrase “existence of an internationally wrongful act or its legal consequences” in the text adopted in 2000. There is no intention that this article not apply to Part Three. Indeed, the issues dealt with in Part Three are often covered by special regimes, although not necessarily exclusively. The Committee decided to make the point clearer in the text by incorporating abbreviated versions of the titles of the Parts of the draft articles. It should be noted that it is not the mere co-existence of specific rules that is sufficient to trigger the provision, but rather the co-existence of specific rules to the exclusion of general rules. The more detailed version enjoys the benefit of making this aspect of the provision clearer. In addition, the provision is designed to cover both “strong” forms of *lex specialis*, such as self-contained regimes, as well as “weaker” forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution.

As a consequence of the new formulation, the Committee considered that there was some difficulty in saying that the implementation of responsibility could be “determined” by special rules. One possibility was to say that the “conditions for implementation...are determined”, but that would have resulted in a double reference to

“conditions”. Instead, the Committee opted for replacing the word “determined” by “governed”.

Article 56bis [38]

Mr. Chairman,

Article 56bis was adopted last year as article 33 [38]. The Drafting Committee noted that Governments made two types of suggestions. The first related to whether there was a need for the article at all, and if so what form it should take, and the second related to its placement. The Drafting Committee considered that the provision was necessary, in particular because the draft articles do not, and cannot, state all the consequences of an internationally wrongful act, and because there is no intention of precluding the further development of the law on State responsibility. The article is intended to include customary international law as well as the application of treaties. The concerns of some Governments as to what else was left in customary international law that is not addressed in the draft articles are more appropriately addressed in the commentary to the article.

As regards the placement of the provision, the Drafting Committee noted that there is a direct link between article 33 and article 56 on *lex specialis*, which had in previous drafts been included in Part Two and preceded article 33. The Committee also agreed with the views expressed by some Governments that there was no reason to limit the application of this article to the legal consequences of wrongful acts and that the article should apply to the whole regime of State responsibility set out in these articles. The Committee therefore decided to move the article to Part Four. It considered that the most logical place for it is after article 56 on *lex specialis*.

As regards its formulation, the Committee considered that if placed in Part Four, it needed to be drafted more broadly so as to be applicable to all the articles. The Committee agreed on the present language of the text which is inspired by a preambular paragraph of the Vienna Convention on the Law of Treaties. While the article is placed here and it is certainly applicable to all the draft articles, its application is most relevant to Part Two and the commentary will explain this point.

The title of the article is changed to reflect the new text of the article.

Article 57

Mr. Chairman,

Article 57 is a without prejudice clause dealing with two issues: It excludes any question of the responsibility of an international organization under international law, and of the responsibility of a State for the conduct of an international organization, that is, where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization. While a proposal was made to have a more general rendering of the provision so as not to prejudice the position of the law on the matter, the Committee was reluctant to introduce any language which could potentially expand the second part of the article. Any expansion of the article would allow for a significant escape clause in the text, whereby a State could exempt itself from the scope of the draft articles by arguing that it would not have done the act but for the international organization or by ostensibly acting at the behest of an international organization. If a State did the act, it is responsible for it. In certain circumstances, the State may also be responsible for acts of international organizations, but that is excluded since it falls within the realm of the law of international organizations.

The Committee considered the phrase “that may arise in regard to” in light of other suggested versions, including “relating to”, “concerning”, and settled on the even shorter phrase, “any question of the responsibility...” which conforms with the formula used in article 58.

As to the title of the article, the Committee considered the formulations “[c]onduct of an international organization”, or “[q]uestions relating to the responsibility of an international organization”, but settled for “[r]esponsibility of an international organization”.

Article 58

Mr. Chairman,

With regard to **article 58**, the Committee considered a proposal to render the phrase “individual responsibility” as “responsibility of individuals” under international law, since the term “individual responsibility” could imply the individual responsibility of States. Other suggested formulations included “personal responsibility” and “the responsibility of a person”. However, the Committee decided to retain the phrase “individual responsibility” as it has acquired an accepted meaning in light of the Rome Statute of the International Criminal Court, and various Security Council resolutions and thus has become a term of art.

As to the formulation “agent of a State”, which appeared in the version adopted last year, the Committee was concerned with the potential inconsistency with some of the formulations now adopted in Chapter III of Part One, as well as with possible difficulties that may arise in referring to the issue of “agency” at this point in the draft articles, which have until now not analyzed the issue of attribution in terms of “agency”. Suggested reformulations included “acting as an organ or otherwise on behalf of the State”, “the acts of which are attributable to a State” or simply to end the sentence after “of any person”. The Committee eventually settled on the formulation, “acting on behalf of a State.” To the extent that an individual is responsible under international law, for example under international criminal law, the fact that the act was undertaken on behalf of a State does not serve to exonerate such individual responsibility.

The title remains unchanged.

Article 59

Mr. Chairman,

I will now draw your attention to the last article of the draft, **article 59** [39]. The Committee considered a proposal to delete this article since it was not necessary for two reasons: first in case the articles were to be taken note of by the General Assembly, second, and perhaps more fundamentally, that the article was redundant in light of Article

103 of the Charter - and its inclusion in the draft articles might, in fact, give rise to an *a contrario* interpretation with regard to other agreements where such a clause does not exist. The Committee, while agreeing that the provision was not strictly necessary, decided to retain it so as to confirm that the provisions of the draft articles are to be interpreted in conformity with the Charter of the United Nations. Its inclusion was expository and just a useful reminder.

As to the drafting of the provision, the Committee considered that the opening phrase of the text “[t]he legal consequences of an internationally wrongful act of a State under”, as adopted last year, had to be consistent with the new, longer, formula now adopted in article 56 [37], or alternatively that it could be deleted, leaving the text to read only “[t]hese articles are without prejudice to the Charter of the United Nations”. In adopting the shorter alternative, the Committee was of the view that article 59 [39] plays a slightly different role to that of article 56 [37] in relation to the text, and that, therefore, the shorter form was acceptable.

The Committee also considered the observation made by several Governments that the phrase “without prejudice to the Charter of the United Nations” could be made more precise – although it is not clear how that could be done. In addition, the Committee did not accept a suggestion to include a reference to preemptory norms in the provision.

Concerning the title, the Committee decided to adopt the shorter version, “Charter of the United Nations”.

The Committee thus adopted article 59 in the form I have just described.

Mr. Chairman,

This concludes my introduction of the report of the Drafting Committee. As I stated at the beginning of my statement, the Drafting Committee is recommending that the Commission adopt the articles on this topic that are before you.

I apologise for the length of my statement. But due to the importance of the subject and many comments by Governments and by members of the Commission, I felt that it was necessary to have a written record of the way in which the Drafting Committee addressed these comments, including the reasons for accepting or rejecting them.

I thank you for your attention.
