Chapter IV

STATE RESPONSIBILITY

A. Introduction

28. At its first session, in 1949, the Commission selected State responsibility among the topics which it considered suitable for codification. In response to General Assembly resolution 799 (VIII) of 7 December 1953 requesting the Commission to undertake, as soon as it considered it advisable, the codification of the principles of international law governing State responsibility, the Commission, at its seventh session in 1955, decided to begin the study of State responsibility and appointed Mr. F. V. García Amador as Special Rapporteur for the topic. At the next six sessions of the Commission, from 1956 to 1961, the Special Rapporteur presented six successive reports dealing on the whole with the question of responsibility for injuries to the persons or property of aliens.[4]

29. At its fourteenth session in 1962, the Commission set up a subcommittee whose task was to prepare a preliminary report containing suggestions concerning the scope and approach of the future study.[5]

30. At its fifteenth session, in 1963, the Commission, having unanimously approved the report of the Subcommittee, appointed Mr. Roberto Ago as Special Rapporteur for the topic.

31. The Commission, from its twenty-first (1969) to its thirty-first (1979) sessions, received eight reports from the Special Rapporteur.[6]

32. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic of "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation of international responsibility.[7]

33. At its thirty-first session, the Commission, in view of the election of Mr. Roberto Ago as a judge of ICJ, appointed Mr. Willem Riphagen Special Rapporteur for the topic.

34. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility".[8] From its thirty-second to its thirty-eighth (1986) sessions, the Commission received seven reports from the Special Rapporteur,[9] with reference to Parts Two and Three of the draft.[10]

35. At its thirty-ninth session, in 1987, the Commission appointed Mr. Gaetano Arangio-Ruiz as Special Rapporteur to succeed Mr. Willem Riphagen, whose term of

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[4] For a detailed discussion of the historical background of the topic until 1969, see *Yearbook . . . 1969*, vol. II, pp. 229 et seq., document A/7610/Rev.1.

[5] Ibid.

[6] The eight reports of the Special Rapporteur are reproduced as follows:

First report: *Yearbook . . . 1969*, vol. II, p. 125, document A/CN.4/217 and Add.1 and *Yearbook . . . 1971*, vol. II (Part One), p. 193, document A/CN.4/217/Add.2;

Second report: *Yearbook . . . 1970,* vol. II, p. 177, document A/CN.4/233;

Third report: *Yearbook . . . 1971*, vol. II (Part One), p. 199, document A/CN.4/246 and Add.1–3;

Fourth report: *Yearbook . . . 1972*, vol. II, p. 71, document A/CN.4/264 and Add.1;

Fifth report: *Yearbook . . . 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2;

Sixth report: *Yearbook . . . 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1–3;

Seventh report: *Yearbook . . . 1978*, vol. II (Part One), p. 31, document A/CN.4/307 and Add.1 and 2;

Eighth report: *Yearbook . . . 1979*, vol. II (Part One), p. 3, document A/CN.4/318 and Add.1–4 and *Yearbook . . . 1980*, vol. II (Part One), p. 13, document A/CN.4/318/Add.5–7.

[7] *Yearbook . . . 1975*, vol. II, pp. 55–59, document A/10010/Rev.1, paras. 38–51.

[8] *Yearbook . . . 1980*, vol. II (Part Two), pp. 26–63.

[9] The seven reports of the Special Rapporteur are reproduced as follows: Preliminary report: *Yearbook . . . 1980*, vol. II (Part One), p. 107, document A/CN.4/330;

Second report: *Yearbook . . . 1981*, vol. II (Part One), p. 79, document A/CN.4/344;

Third report: *Yearbook . . . 1982*, vol. II (Part One), p. 22, document A/CN.4/354 and Add.1 and 2;

Fourth report: *Yearbook . . . 1983*, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1;

Fifth report: *Yearbook . . . 1984*, vol. II (Part One), p. 1, document A/CN.4/380;

Sixth report: *Yearbook . . . 1985*, vol. II (Part One), p. 3, document A/CN.4/389;

Seventh report: *Yearbook . . . 1986*, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1.

[10] At its thirty-fourth session (1982), the Commission referred draft articles 1 to 6 of Part Two to the Drafting Committee. At its thirty-seventh session (1985), the Commission decided to refer articles 7 to 16 of Part Two to the Drafting Committee. At its thirty-eighth session (1986), the Commission decided to refer to the Drafting Committee draft articles 1 to 5 of Part Three and the annex thereto.

office as a member of the Commission had expired on 31 December 1986. The Commission, from its fortieth (1988) to its forty-eighth (1996) sessions, received eight reports from the Special Rapporteur.[11]

36. By the conclusion of its forty-seventh session, in 1995, the Commission had provisionally adopted, for inclusion in Part Two, draft articles 1 to 5[12] and articles 6 (Cessation of wrongful conduct), 6 bis (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction), 10 bis (Assurances and guarantees of non-repetition),[13] 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures).[14] It had furthermore received from the Drafting Committee a text for article 12 (Conditions relating to resort to countermeasures), on which it deferred action.[15] At its forty-seventh session, the Commission had also provisionally adopted, for inclusion in Part Three, articles 1 (Negotiation), 2 (Good offices and mediation), 3 (Conciliation), 4 (Task of the Conciliation Commission), 5 (Arbitration), 6 (Terms of reference of the Arbitral Tribunal), 7 (Validity of an arbitral award) and annex, articles 1 (The Conciliation Commission) and 2 (The Arbitral Tribunal).

37. At the forty-eighth session of the Commission, Mr. Arangio-Ruiz announced his resignation as Special Rapporteur. The Commission completed the first reading of the draft articles of Parts Two and Three on State responsibility and decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles provisionally adopted by the Commission on first reading,[16] through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1998.

38. At its forty-ninth session, in 1997, the Commission established a Working Group on State responsibility to address matters dealing with the second reading of the draft articles.[17] The Commission also appointed Mr. James Crawford as Special Rapporteur for the topic.

39. The General Assembly, by paragraph 3 of its resolution 52/156 of 15 December 1997, recommended that, taking into account the comments and observations of Governments, whether in writing or expressed orally in debates in the Assembly, the Commission should continue its work on the topics in its current programme, including State responsibility, and, by paragraph 6 of that resolution, recalled the importance for the Commission of having the views of Governments on the draft articles on State responsibility adopted on first reading by the Commission at its forty-eighth session.

40. At its fiftieth session, in 1998, the Commission had before it the first report of the Special Rapporteur, Mr. Crawford.[18] The report dealt with general issues relating to the draft, the distinction between "crimes" and "delictual responsibility", and articles 1 to 15 of Part One of the draft. The Commission also had before it the comments and observations received from Governments on State responsibility,[19] on the draft articles provisionally adopted by the Commission on first reading. After having considered articles 1 to 15 bis, the Commission referred articles 1 to 5 and 7 to 15 bis to the Drafting Committee.

41. At the same session, the Commission took note of the report of the Drafting Committee on articles 1, 3, 4, 5, 7, 8, 8 bis, 9, 10, 15, 15 bis and A. The Commission also took note of the deletion of articles 2, 6 and 11 to 14.

42. At its fifty-first session, in 1999, the Commission had before it the second report of the Special Rapporteur.[20] That report continued the task, begun at the fiftieth session, of considering the draft articles in the light of comments by Governments and developments in State

[11] The eight reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook . . . 1988,* vol. II (Part One), p. 6, document A/CN.4/416 and Add.1;

Second report: *Yearbook . . . 1989,* vol. II (Part One), p. 1, document A/CN.4/425 and Add.1;

Third report: *Yearbook . . . 1991*, vol. II (Part One), p. 1, document A/CN.4/440 and Add.1;

Fourth report: *Yearbook . . . 1992*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1–3;

Fifth report: *Yearbook . . . 1993*, vol. II (Part One), p. 1, document A/CN.4/453 and Add.1–3;

Sixth report: *Yearbook . . . 1994*, vol. II (Part One), p. 3, document A/CN.4/461 and Add.1–3;

Seventh report: *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/469 and Add.1 and 2;

Eighth report: *Yearbook . . . 1996*, vol. II (Part One), document A/CN.4/476 and Add.1.

At its forty-first session (1989), the Commission referred to the Drafting Committee draft articles 6 and 7 of chapter Two (Legal consequences deriving from an international delict) of Part Two of the draft articles. At its forty-second session (1990), the Commission referred draft articles 8 to 10 of Part Two to the Drafting Committee. At its forty-fourth session (1992), the Commission referred to the Drafting Committee draft articles 11 to 14 and 5 bis for inclusion in Part Two of the draft. At its forty-fifth session (1993), the Commission referred to the Drafting Committee draft articles 1 to 6 of Part Three and the annex thereto. At its forty-seventh session (1995), the Commission referred to the Drafting Committee articles 15 to 20 of Part Two dealing with the legal consequences of internationally wrongful acts characterized as crimes under article 19 of Part One of the draft and new draft article 7 to be included in Part Three of the draft.

[12] For the text of articles 1 to 5 (para. 1), see *Yearbook ... 1985*, vol. II (Part Two), pp. 24–25.

[13] For the text of article 1, paragraph 2, and articles 6, 6 bis, 7, 8, 10 and 10 bis with commentaries thereto, see *Yearbook . . . 1993*, vol. II (Part Two), pp. 53 et seq., document A/48/10.

[14] For the text of articles 11, 13 and 14, see *Yearbook . . . 1994*, vol. II (Part Two), pp. 151–152, footnote 454. Article 11 was adopted by the Commission on the understanding that it might have to be reviewed in the light of the text that would eventually be adopted for article 12 (ibid., para. 352). For the commentaries to articles 13 and 14, see *Yearbook . . . 1995*, vol. II (Part Two), pp. 64–74, document A/50/10.

[15] See *Yearbook . . . 1994*, vol. II (Part Two), pp. 151–152, para. 352.

[16] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), pp. 58–65, document A/51/10, chap. III, sect. D. For the text of draft articles 42 (para. 3), 47, 48 and 51 to 53, with commentaries thereto, ibid., pp. 65 et seq.

[17] For the guidelines on the consideration of the draft articles on second reading decided upon by the Commission on the basis of the recommendation of the Working Group, see *Yearbook . . . 1997*, vol. II (Part Two), p. 58, para. 161.

[18] *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7.

[19] Ibid., document A/CN.4/488 and Add.1–3.

[20] *Yearbook . . . 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4.

practice, judicial decisions and literature. The Commission also had before it the comments and observations received from Governments on State responsibility,[21] on the draft articles provisionally adopted by the Commission on first reading. After having considered articles 16 to 19, paragraph 1, 20 to 26 bis, 27 to 28 bis, 29, 29 bis, 29 ter, paragraph 1, 30 to 33, 34 bis, paragraph 1, and 35, the Commission referred them to the Drafting Committee.

43. At the same session, the Commission took note of the report of the Drafting Committee on articles 16, 18, 24, 25, 27, 27 bis, 28, 28 bis, 29, 29 bis, 29 ter, 31 to 33 and 35. The Commission also took note of the deletion of articles 17, 19, paragraph 1, 20 to 23,[22] 26 and 34.[23]

B. Consideration of the topic at the present session

44. At its present session, the Commission had before it the comments and observations received from Governments on State responsibility,[24] and the third report of the Special Rapporteur. That report continued the task, begun at the fiftieth session, in 1998, of considering the draft articles, particularly those contained in Part Two, in the light of the comments by Governments and developments in State practice, judicial decisions and literature. The Commission considered the report at its 2613th to 2616th, 2621st to 2623rd, 2634th to 2640th and 2643rd to 2653rd meetings held from 2 to 5 May, 16 to 18 May, 8 and 9 June, 10 to 14 July and 20 July to 8 August 2000.

45. The Commission decided to refer the following draft articles to the Drafting Committee: 36, 36 bis, 37 bis and 38 at its 2616th meeting, on 5 May; 40 bis at its 2623rd meeting, on 18 May; 43 and 44 at its 2637th meeting, on 11 July; 45, 45 bis and 46 bis at its 2640th meeting, on 14 July; 46 ter, 46 quater, 46 quinquies, and 46 sexies at its 2645th meeting, on 25 July; 30, 47, 47 bis, 48, 49, 50 and 50 bis at its 2649th meeting, on 1 August; and 50 A, 50 B, 51 and the texts contained in the footnotes to paragraphs 407 and 413 of the report at its 2653rd meeting, on 8 August.

46. At its 2662nd meeting, on 17 August 2000, the Commission took note of the report of the Drafting Committee on the complete text of the draft articles provisionally adopted by the Drafting Committee on second reading (A/CN.4/L.600) which are reproduced in the annex to this chapter.

1. Introduction by the Special Rapporteur of general issues relating to the draft articles

(a) *Programme for completion of the second reading*

47. As indicated in paragraphs 3 and 4 of the third report, the Special Rapporteur reaffirmed his commitment to completing the second reading of the draft articles at the fifty-third session of the Commission, in 2001. He recommended the following programme for achieving this ambitious yet feasible goal: the Drafting Committee should produce a complete text of the draft articles, leaving aside the question of dispute settlement, by the end of the present session; this would enable the Commission to consider and adopt the entire text and commentary, in the light of any further comments by Governments, at the next session.

(b) *Outstanding issues relating to Part One*

48. As identified in paragraphs 2 and 3 of the third report, there were four outstanding issues concerning Part One that could not be resolved until related aspects of Part Two had been decided: State responsibility for breach of obligations owed to the international community as a whole (art. 19), the formulation of articles on exhaustion of local remedies (art. 22) and countermeasures (art. 30), and the possible addition of an article on the exception of non-performance as a circumstance precluding wrongfulness. In addition, Part One contained material that was in several instances repeated in Part Two, e.g. in article 42, paragraph 4, which was unnecessary and raised doubts about the assumed applicability of the principles contained in the former part to the latter.

(c) *General considerations relating to Part Two as adopted on first reading*

(i) *The scope of Part Two as compared to Part One*

49. As a general point, the Special Rapporteur drew attention to a disjunction between Parts One and Two since the former was concerned with breaches of obligations by States and the latter, and especially article 40, was concerned with the responses of States to breaches of international law. The obligations covered in Part One might, for example, be obligations to an international organization or to an individual—breaches whose invocation by persons other than States were not dealt with in Part Two. Accordingly, he was proposing a saving clause stating that Part Two was without prejudice to any rights arising from the commission of an internationally wrongful act by a State that accrued to any person or entity other than a State.

(ii) *Title*

50. The present title of Part Two, "Content, forms and degrees of international responsibility", was not readily comprehensible or self-explanatory and could be replaced by the more straightforward phrase "Legal consequences of an internationally wrongful act of a State", which conformed to the traditional view of State responsibility as a secondary legal consequence arising from a breach.

(iii) *Formulation of the draft articles*

51. As discussed in paragraphs 7 (*b*) and 7 (*c*) of the report, future drafting work should review the awkward formulation of the draft articles contained in Part Two in terms of categorical rights and the qualifying phrase

[21] *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/488 and Add.1–3 and *Yearbook . . . 1999*, vol. II (Part One), document A/CN.4/492.

[22] Article 22, as adopted on first reading, dealt with exhaustion of local remedies. The Special Rapporteur proposed a new text for the provision as article 26 bis. The Drafting Committee decided to reserve discussion on the content of the article.

[23] The Drafting Committee adopted article 34 (Self-defence) as article 29 ter.

[24] See footnote 21 above.

"where appropriate", which had attracted the criticism of Governments from various legal traditions on the grounds that the articles were either too rigid or so vague as to lack content. However, in some cases qualifications such as "appropriate" may still be necessary in the absence of detailed specification of the content of a particular provision.

(d) *Proposed revised structure of the remaining draft articles*

52. As discussed in paragraphs 8 and 9 of the report, the Special Rapporteur proposed the revised structure set forth in paragraph 10 for the remaining substantive sections of the draft articles to disentangle issues relating to article 40 and to facilitate discussion.

53. Chapter I of Part Two should retain its existing title (General principles) and should consist of at least three articles concerning general principles: article 36, a general introductory provision indicating that an internationally wrongful act entailed legal consequences; article 36 bis, dealing with cessation as a general principle; and article 37 bis on reparation as a general principle. Furthermore, the draft articles should contain a definition of "injured State", set out in article 40 bis, but it could be placed somewhere else in the text. It was uncertain whether article 38 was needed, but it had been included for the purposes of discussion.

54. Chapter II would deal with the three forms of reparation, namely restitution, compensation and satisfaction (without necessarily specifying the modalities of the choice between them, which could be done later), interest, and the consequences of the contributory fault of the injured State, and any other provisions that might be considered appropriate in the light of the debate.

55. The Special Rapporteur proposed inserting a new Part Two bis entitled "The implementation of State responsibility" to introduce a distinction between the legal consequences for the responsible State of an internationally wrongful act and the invocation of those consequences by the primary victim of the breach or, in certain circumstances, by other States; and to eliminate some of the confusion created by article 40. Part Two bis could contain articles dealing with the general question of who was entitled to invoke responsibility, currently dealt with in a highly unsatisfactory manner in article 40; the loss of the right to invoke responsibility, analogous to the loss of the right to invoke grounds for the termination or suspension of a treaty under the Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention"); countermeasures as a form of invocation of responsibility, rather than of reparation, since they were taken against a State that refused to acknowledge its responsibility and cease its wrongful conduct; and the issues addressed in article 19 in terms of the invocation of a responsibility to the international community as a whole.

56. Noting the provisional decision not to link the taking of countermeasures to dispute settlement, the Special Rapporteur recommended that Part Three be considered in general terms after the adoption of the entire draft, taking into account their form. It would be pointless to include dispute settlement provisions unless the draft was submitted to the General Assembly as a convention. Furthermore, the acceptance of such provisions was questionable since the text covered literally the whole of the obligations of States.

57. The Special Rapporteur also recommended including a Part Four on general provisions, to include, inter alia, the provision on *lex specialis*.

2. Summary of the debate on general issues

58. The Special Rapporteur was commended for his third report which enriched not only the work of the Commission, but also international law in general, by establishing the parameters and identifying the problems with respect to an extremely difficult subject.

(a) *Programme for completion of the second reading*

59. Support was expressed for the Special Rapporteur's proposed programme for the completion of the second reading of the draft articles. However, it was noted that the Commission had set aside for further reflection a number of questions relating to Part One, such as State responsibility for breaches of obligations *erga omnes* and the relationship between the provision in question and article 19 as adopted on first reading. It was also said that the draft articles of Part Two adopted on first reading at the forty-eighth session[25] had not been considered with the same care as those of Part One. It was suggested that, in particular, the question of the violation of multilateral obligations should be the subject of an in-depth discussion. It was noted that the fifty-fifth session of the General Assembly would give the Commission a last opportunity to obtain feedback from the Sixth Committee on certain questions such as countermeasures and dispute settlement.

(b) *The distinction between primary and secondary rules*

60. Regarding paragraph 50 of the report, the view was expressed that the distinction between primary and secondary rules was not problematic since the function of a norm in a given context determined whether it was of a primary or secondary nature. In contrast, the view was expressed that the distinction between primary and secondary rules was intellectually tempting, but rather artificial, hard to maintain, difficult to apply in practice and sometimes invalid. It was, however, unnecessary to dwell unduly on the problem even if in certain cases the distinction was artificial; as a general matter it was workable and it had long been the plinth on which the entire drafting exercise rested. The Special Rapporteur agreed that the distinction between primary and secondary rules should not be abandoned, although the application of many secondary rules would be affected by primary rules, and this needed to be made clear as appropriate, especially in the commentary.

[25] See footnote 16 above.

(c) *The reflexive nature of the rules of State responsibility*

61. Support was expressed for the characterization of the rules of State responsibility as reflected in paragraph 7 of the report. However, it was also suggested that if the circumstances precluding wrongfulness, set out in Part One, were intended to apply to obligations in Part Two, it would be necessary to state this explicitly in the draft. Others thought it would be preferable not to regulate this question and to leave it to customary international law. While recognizing the relationship between Parts One and Two, it was considered important to avoid premature conclusions based on the notion of reflexivity. Noting the uncertainty expressed about reflexivity, the Special Rapporteur suggested that it was a matter requiring further consideration in the Drafting Committee, which would have to decide on the retention or deletion of certain provisions.

(d) *The scope of the draft articles*

62. It was suggested that the draft articles be expanded to cover all cases of State responsibility, not only those between States, since in describing consequences of internationally wrongful acts, account would inevitably have to be taken of the position of all those who, under international law, had been injured, whether States, international organizations, other entities or individuals. The view was expressed that although the present wording of article 36, paragraph 1, covered all international obligations, the matter could be left to the primary obligation when it came to those other entities and to implementation procedures other than State responsibility such as reporting requirements and domestic legal forums: hence there was support for the proposed saving clause. It was further pointed out that the articles were not supposed to codify the entire law of international responsibility, which was not sufficiently developed to warrant such treatment. The objective was to formulate general provisions that would provide the foundation for new branches in the law of international responsibility, with the details and nuances being worked out in future as practice in the field evolved.

(e) *General considerations relating to Part Two*

(i) *The appropriate level of detail and specificity*

63. According to one view, since the technical aspects of reparation had been neglected in Part Two, it was considered important to include, particularly in chapter II, more specific and detailed articles on the forms and modalities of reparation, particularly compensation for *lucrum cessans*, and the means of calculating the amount and possible interest payments. These issues were not addressed in the draft and States needed to know when they had to make interest payments and required general guidelines for calculating them. In contrast, the view was expressed that, in terms of doctrine and in practice, the principles relating to remedies—compensation, restitution, remoteness of damage—were necessarily determined by primary rules and the Commission must be careful not to formulate what appeared to be general rules when in fact it was only listing optional remedies. In other words it should avoid over-elaborating on the topic. It was suggested that the Commission must find a middle way between the two approaches to detailed rules on reparation bearing in mind that the more detailed the rules were, the less likely it was that reparations would fully comply with them and that some flexibility was required in the rules on reparation, particularly since State responsibility cases would usually be dealt with through negotiations, rather than by an international court or tribunal. The Special Rapporteur explained that the subject of detailed provisions had been dealt with in Part Two in the context of compensation because that was where it most obviously arose. In view of the disagreement on the matter, he would seek guidance from the Commission on the advisability of going into detail on the quantification of compensation or the calculation of interest; these issues were technical in character and varied from one context to another. He would propose a separate article on interest, since interest was different from compensation, but in his provisional view, both articles should be relatively general. It would be a matter for the Commission in due course to decide how much further detail it wanted.

(ii) *Title*

64. While agreeing with the Special Rapporteur on the need to reformulate the title of Part Two, some thought that the proposed new title was not fully satisfactory in terms of reflecting the content of the articles contained in Part Two and distinguishing it from Part Two bis. Suggestions for the title of Part Two included: "Reparation and obligation of performance", "Legal consequences of international responsibility", or to refer to "legal implications" rather than "consequences". However, the alternative title "Legal consequences of international responsibility" was described as inappropriate because responsibility was an immediate legal consequence of an internationally wrongful act, and it failed to resolve the problem of the relationship between Part Two and Part Two bis. The Special Rapporteur agreed that the title of Part Two covered some aspects which ought to be incorporated in Part Two bis. He was pleased about the apparent agreement on the need to draw a distinction between the consequences flowing from a wrongful act and their invocation. At a later stage, it would be necessary to consider whether the provisions in question should form two separate parts or two chapters of the same part.

(iii) *Formulation of the draft articles*

65. Strong support was expressed for the Special Rapporteur's proposal to reformulate the draft articles from the perspective of the State incurring responsibility rather than that of the injured State since this approach was consistent with Part One and facilitated solving difficult issues in Parts Two and Two bis.

(f) *The structure of the draft articles*

66. There was broad support for the new structure proposed by the Special Rapporteur in paragraph 10 of his third report.

67. It was suggested that the rules on a plurality of States could be divided: the obligations of a plurality of

author States could be dealt with in Part Two (Legal consequences of an internationally wrongful act of a State) and the rights of a plurality of injured States could be addressed in Part Two bis (The implementation of State responsibility). Alternatively, all the rules on plurality could be included in a separate chapter.

68. Support was expressed for the Special Rapporteur's proposal to include a Part Two bis and to move the provisions on countermeasures from Part Two to Part Two bis since countermeasures related to the implementation of responsibility, not the content or forms of international responsibility. It was suggested that, in accordance with Special Rapporteur Ago's original conception of Part Two bis, it should have contained articles on diplomatic protection, but they could not now be included since diplomatic protection was being treated as a separate topic. Nevertheless, the Special Rapporteur was urged to include a "without prejudice" clause on diplomatic protection in chapter I of Part Two bis. In contrast, the view was expressed that the desirability of having a Part Two and a Part Two bis should be re-examined once the substantive articles had been considered.

69. There was support for the Special Rapporteur's proposal to set aside Part Three for the time being. The linkage between the form of the draft articles and the peaceful settlement of disputes was said to be clearly demonstrated in paragraph 6 of the report. The view was expressed that nothing would be more harmful than to make substantive rules on State responsibility depend on the highly hypothetical acceptance of compulsory dispute settlement procedures by States, as was the case with countermeasures in the text adopted on first reading. In contrast, the view was expressed that the only form the text could take was that of an international convention, which would clearly call for a general, comprehensive system for the settlement of any disputes that might arise from the interpretation or application of the draft as a whole. If, however, the introduction of such a system were to prove difficult, it would be necessary to revert to the idea of setting up a dispute settlement procedure at least for disputes entailing countermeasures.

70. There was also support for the Special Rapporteur's proposal to include a Part Four dealing with general provisions. The Special Rapporteur was right to propose including a general part containing common "without prejudice" clauses, any definitions other than that of responsibility, and all provisions concerning more than one part of the draft. However, the view was also expressed that the content of a new Part Four required more detailed analysis.

3. Special Rapporteur's concluding remarks on the debate on general issues

71. As for the difficulty of establishing a distinction between primary and secondary rules, a problem several members had raised, he considered that the Commission had no choice but to adhere to its original decision and maintain that distinction.

72. He noted that there was general agreement on the strategy of formulating Part Two, or at least the consequences set forth therein, in terms of the obligations of the responsible State and on the need to deal with those obligations and their invocation by other States, if not in different parts, at least in different chapters, of one and the same part. It had also become apparent that the existing provisions would in substance be retained, together with some additional elements, such as an article on interest, which had been proposed by the previous Special Rapporteur, Mr. Arangio-Ruiz, in his second report.[26]

73. With regard to the possibility of entities other than States invoking the responsibility of a State, he stressed that the open conception of responsibility formulated in Part One allowed for that possibility. It was clear that the responsibility of the State to entities other than States was part of the field of State responsibility. It did not follow that the Commission must deal with those questions: there were a number of reasons, not related to the field of State responsibility, why it should not do so, though it needed to spell out the fact that it was not doing so in order to make clear the discrepancy between the content of Part One and that of the remaining parts. That was the purpose of the saving clause in paragraph 3 of proposed article 40 bis. It was not desirable to go beyond the current proposed scope.

4. Introduction by the Special Rapporteur of Part Two: Legal consequences of an internationally wrongful act of a State

Chapter I. General principles

(a) *Introductory provision on the content of international responsibility (article 36)*

74. The Special Rapporteur noted that no Government had questioned the necessity of the introductory provision on the international responsibility of States contained in article 36, paragraph 1.[27]

(b) *The general principle of cessation (article 36 bis)*

75. The Special Rapporteur drew attention to two issues relating to the general principle of cessation, which was addressed in article 36, paragraph 2, and article 41. First, the obligation of cessation was the consequence of the breach of the primary obligation and did not exist if the primary obligation ceased to exist. For example, the issue of cessation would not arise where the material breach of a bilateral treaty was invoked as a ground for its termination. That important point needed to be made in the form of a saving clause. Secondly, notwithstanding the lack of

[26] *Yearbook . . . 1989,* vol. II (Part One), pp. 23–30 and 56, document A/CN.4/425 and Add.1.

[27] The text of article 36 proposed by the Special Rapporteur reads as follows:

"*Article 36. Content of international responsibility*

"The international responsibility of a State which arises from an internationally wrongful act in accordance with the provisions of Part One entails legal consequences as set out in this Part."

For the analysis of this article by the Special Rapporteur, see paragraphs 17 and 18 of his third report.

criticism by States of cessation (art. 41), some authors argued that cessation was the consequence of the primary obligation, not a secondary consequence of a breach, and therefore did not belong in the draft. As explained in paragraph 50 of his report, the Special Rapporteur believed that the draft should address the notion of cessation because it arose only after and as a consequence of a breach; it was related to other secondary consequences of the breach, for example countermeasures; and it was the primary concern in most State responsibility cases as indicated by the importance, for example, of declarations aimed at the cessation of the wrongful act and restoration of the legal relationship impaired by the breach.

76. The Special Rapporteur proposed addressing the general principle of cessation in a single revised article 36 bis[28] which took into account the fact that the question of cessation could arise only if the primary obligation continued in force and formulated the obligation by reference to the concept of the continuing wrongful act retained in Part One of the draft. In terms of its placement, the general principle of cessation should logically come before reparation since there would be cases in which a breach was drawn to the attention of the responsible State, which would immediately cease the conduct and the matter would go no further.

(c) *Assurances and guarantees of non-repetition (article 36 bis* (continued))

77. The Special Rapporteur drew attention to the twofold consequences of an internationally wrongful act: the future-oriented consequences of cessation and assurances and guarantees against non-repetition, assuming that the obligation continued, and the past-oriented consequence of reparation, i.e. undoing the damage that the breach had caused. This coherent approach to the question suggested that assurances and guarantees should be addressed with cessation in a single article as two conditions for ensuring that the legal relationship impaired by the breach had been restored: first, the breach stopped, and second, if appropriate, there were guarantees that it would not be repeated. Noting that sufficient assurances and guarantees could range from extraordinarily rigorous arrangements to mere promises or undertakings in different cases, the Special Rapporteur saw no alternative but to use the somewhat imprecise term "appropriate" and to incorporate the phrase "to offer appropriate assurances and guarantees of non-repetition" to provide the necessary degree of flexibility.

(d) *The general principle of reparation (article 37 bis and article 42, paragraphs 3 and 4)*

78. The Special Rapporteur drew attention to two problems with the existing draft. First, the general principle of reparation was formulated throughout the draft articles as a right of the injured State and yet the concept of the injured State was introduced in the middle of the logical construct without any consequent reasoning, rather than at the beginning, as suggested by France,[29] or at the end, as proposed by Special Rapporteur Ago.[30] In other words the draft articles switched in mid-stream between formulations in terms of the responsible State to formulations in terms of the injured State. Secondly, the identification of the rights of an injured State implied that that injured State was the only State involved, which in effect "bilateralized" multilateral legal relations by attributing the rights singularly to individual States. This produced an intolerable situation with respect to responsibility vis-à-vis several States or the international community as a whole. The Special Rapporteur proposed addressing these problems by formulating the general principle of reparation as an obligation of the State committing the internationally wrongful act to make reparation, in an appropriate form, for the consequences of that act, and addressing the question of who could invoke the responsibility of that State and in what form either in a later section of Part Two or in Part Two bis.

79. In addition, the Special Rapporteur drew attention to three problems that arose with regard to giving effect to the general principle of reparation already contained in the formulation of a right of an injured State in article 42, paragraph 1. First, the Special Rapporteur believed that a State was responsible for the direct or proximate consequences of its conduct notwithstanding the presence of concurrent causes and disagreed with the commentary to article 42 in this respect. He proposed simple language in the draft article to achieve that end, bearing in mind that the problem of remote or indirect damage could only be resolved by the application of the particular rules to the particular facts and that different legal systems had different ways of addressing this problem. Secondly, the Special Rapporteur noted that article 42, paragraph 3, had been strongly criticized by certain Governments. The basic principle, as stated in the *Chorzów Factory* case,[31] was that the responsible State should make reparation for the consequences of its wrongful act, and provided that there was some concept of "direct and not too remote" causation implied in that wording, there was no reason to fear that the requirement to do so would deprive that State of its own means of subsistence. The form that reparation might take, its timing and questions of modalities might well be affected by the position of the responsible State. Moreover, in extreme instances, as in the *Russian Indemnity* case,[32] a State might have to defer compensation until

[28] The text of article 36 bis proposed by the Special Rapporteur reads as follows:

"*Article 36 bis. Cessation*

"1. The legal consequences of an internationally wrongful act under these articles do not affect the continued duty of the State concerned to perform the international obligation.

"2. The State which has committed an internationally wrongful act is under an obligation:

"(*a*) Where it is engaged in a continuing wrongful act, to cease that act forthwith;

"(*b*) To offer appropriate assurance and guarantees of non-repetition."

For the analysis of this article by the Special Rapporteur, see paragraphs 44 to 52 of his third report.

[29] See footnote 19 above.

[30] Second report (*Yearbook . . . 1970*, vol. II, p. 192, document A/CN.4/233).

[31] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*.

[32] Decision of 11 November 1912 (Russia *v.* Turkey) (UNRIAA, vol. XI (Sales No. 61.V.4), pp. 421 et seq.).

it was in a position to make such payments. But except for the fiasco of reparations payments at the end of the First World War, there was no history that called for a limit of the kind in question. For those reasons, he proposed deleting article 42, paragraph 3, and dealing with the problems raised in the context of the specific forms of reparation in chapter II. Thirdly, the Special Rapporteur proposed the deletion of article 42, paragraph 4, since this principle was already stated in article 4. He therefore proposed that the general principle of reparation set forth in article 37 bis be incorporated in Part Two, chapter I.[33]

(e) *Other legal consequences under customary international law (article 38)*

80. The Special Rapporteur doubted the need for article 38[34] for two reasons. First, the *lex specialis* principle provided that specific rules of treaty law or of customary international law governed the consequences in a specific case of a breach. Secondly, the Commission had not identified other general consequences of a breach under international law that were not set out in Part Two. The commentary identified two consequences of a wrongful act, but neither had any bearing on the subject of responsibility. If the Commission could pinpoint other consequences within the field of State responsibility, then it should try to indicate what they were. The only case for retaining article 38 was the general principle of law embodied in the maxim *ex injuria ius non oritur*, which held that, when a State had committed a wrongful act, it could not rely on that act to extricate itself from a particular situation. The Court had cited that principle in the *Gabčíkovo-Nagymaros Project* case[35] in drawing particular consequences within the framework of the termination of treaties rather than responsibility, but legal obligations might conceivably arise in specific contexts because of the generating effect of the principle *ex injuria ius non oritur.*

81. In terms of its placement, the Special Rapporteur believed that, if it was retained, article 38 should remain in Part Two because it was concerned with other consequences of a breach in contrast to the saving clauses in articles 37 and 39 which could be placed in a general Part Four.

5. Summary of the debate on Part Two

Chapter I. General principles

(a) *Introductory provision on the content of international responsibility (article 36)*

82. There was broad support for the proposed reformulation of article 36 which was described as correctly referring to international responsibility entailing legal consequences. However, the view was also expressed that the text of article 36 raised the same problem as the title of Part Two since Part Two bis also addressed the consequences of an internationally wrongful act. There was also some dissatisfaction with the title of article 36 which was said not to reflect the content of the provision itself. It was also proposed that in the French text, the words *est engagée par un fait* should be replaced by the words *est engagée à raison d'un fait*, as the responsibility of a State could not arise from the act itself.

(b) *The general principle of cessation (article 36 bis)*

83. There was support for article 36 bis proposed by the Special Rapporteur, particularly for the reason stated in paragraph 50 of his report. There was also support for a single provision linking the related concepts of cessation and assurances and guarantees of non-repetition. However, the view was also expressed that those three concepts, although similar in some respects, were distinct and should be dealt with in separate articles.

84. It was suggested that the title of the proposed new article 36 bis should read "Cessation and non-repetition" because cessation and assurances or guarantees of non-repetition were two different concepts. The title of article 36 bis was also considered unsatisfactory because it failed to refer to the continuing validity of the obligation breached.

85. As regards paragraph 1, it was considered important to reaffirm that the primary international obligation, although breached, continued to be in force and must be performed by the State in question.

86. Regarding paragraph 2 (*a*), it was suggested that it should emphasize the linkage to primary obligations rather than the continuation of the consequences of wrongfulness, along the lines of article 36 proposed by France.[36] It was also suggested that the text should avoid any reference to "cessation of a continuing wrongful act" because, not only was the concept of a continuing wrongful act in itself difficult to pinpoint and use, but the obligation of cessation also applied when there was a series of instantaneous acts. The Special Rapporteur agreed that the notion was not exclusively linked to that of a continuing wrongful act, since there could be a pattern of individual breaches which were not continuing breaches, but

[33] The text of article 37 bis proposed by the Special Rapporteur reads as follows:

"*Article 37 bis. Reparation*

"1. A State which has committed an internationally wrongful act is under an obligation to make full reparation for the consequences flowing from that act.

"2. Full reparation shall eliminate the consequences of the internationally wrongful act by way of restitution in kind, compensation and satisfaction, either singly or in combination, in accordance with the provisions of the following articles."

For the analysis of this article by the Special Rapporteur, see paragraphs 23 to 43 of his third report.

[34] The text of article 38 proposed by the Special Rapporteur reads as follows:

"*Article 38. Other consequences of an internationally wrongful act*

"The applicable rules of international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part."

For the analysis of this article by the Special Rapporteur, see paragraphs 60 to 65 of his third report.

[35] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

[36] See footnote 19 above.

were a continuation of the pattern. This nonetheless called for cessation and, possibly, for assurances and guarantees of non-repetition.

(c) *Assurances and guarantees of non-repetition (article 36 bis* (continued)*)*

87. There was support for including a provision on the duty to provide assurances and guarantees of non-repetition in the draft because there were cases in which there was a real danger of a pattern of repetition and countries could not simply apologize each time. While recognizing that they would not be possible in every case, the view was expressed that it was necessary to provide for appropriate assurances and guarantees of non-repetition. For example, a guarantee of non-repetition would be particularly necessary in the case of a breach committed by recourse to force to reassure the victim of the breach. From a legal standpoint, the fact that such a guarantee had been given would be a new undertaking over and above the initial undertaking that had been breached. It was pointed out that such a guarantee could take a number of forms such as a declaration before the court, which might or might not be included in the court's ruling, or a diplomatic declaration, which would not necessarily be made during the proceedings. The report was considered to demonstrate a reasonable basis in State practice for including assurances and guarantees of non-repetition in article 36 bis. Attention was also drawn to certain measures contained in peace treaties signed after the Second World War and to the more recent WTO Panel decision on section 301 of the United States Trade Act of 1974.[37]

88. Others questioned the necessity of retaining a provision on appropriate assurances and guarantees of non-repetition. While recognizing that in daily diplomatic practice Governments often provided such assurances, it was considered questionable whether that kind of statement given as a political or moral commitment could be regarded as a legal consequence of responsibility. It was therefore suggested that the provision had no legal significance and might be deleted. Some members were also of the opinion that little support existed in State practice for embodying the idea in a concrete legal formulation. It was pointed out that there were no examples of cases in which the courts had given assurances and guarantees of non-repetition. The actual place of assurances and guarantees of non-repetition in the current practice of States was questioned since they seemed directly inherited from nineteenth-century diplomacy.

89. The Special Rapporteur said that in the nineteenth century there had been instances in which demands for ironclad guarantees and assurances had been made in coercive terms and enforced coercively. Nevertheless, there were modern examples of guarantees and assurances supplied in the form of a declaration before a court and of demands therefor submitted without coercion. Moreover, as even critics of the notion admitted, assurances and guarantees were frequently given in State practice, for example, by the sending State to the receiving State concerning the security of diplomatic premises.

90. The view was expressed that in a situation where a domestic law obliged State organs to act in a way contrary to international law, it was the application of that law, not the law itself, that was a breach of international law. Assurances and guarantees of non-repetition could constitute a means of obliging a State to bring its conduct into conformity with international law, e.g. by repealing or amending the law in question. However, it was also noted that the adoption of a law could engage State responsibility: for instance, a law organizing genocide, or a law empowering the police to commit torture. The view was also expressed that assurances and guarantees of non-repetition were needed in cases in which the legislation of a State and its application led to grave violations which, although not continuing, were recurrent. The Special Rapporteur noted that this was a very delicate subject because it concerned the relationship between international and internal law. In general, the mere existence in internal law of provisions which might be capable in certain circumstances of producing a breach was not per se a breach of international law, since, inter alia, such a text could be implemented in a way consistent with international law.

91. Regarding the formulation of paragraph 2 (*b*), it was suggested that the appropriateness and applicability of assurances and guarantees of non-repetition varied greatly with the particular context and, therefore, the provision had to be worded in very flexible and general terms. Support was also expressed for recognizing the limited application of the provision by replacing "where appropriate" with "if circumstances so require", as proposed by the Czech Republic in the Sixth Committee. It was also suggested that assurances and guarantees of non-repetition should be a function of two parameters: the seriousness of the breach and the probability of repetition. The Special Rapporteur endorsed the position that it would be useful to clarify the notion of assurances and guarantees of non-repetition and to refer in the commentary to the question of the gravity of the breach and the risk of repetition.

(d) *The general principle of reparation (article 37 bis and article 42, paragraphs 3 and 4)*

92. Support was expressed for article 37 bis proposed by the Special Rapporteur.

93. It was suggested that the question of reparation was related to the intention underlying the wrongful act since a State committing the violation could not incur the same degree of responsibility for a wrongful act that was intentional as for one that resulted from pure negligence. Support was expressed for taking account of the element of intention in article 37 bis.

94. Referring to paragraph 1, the view was expressed that it was not logical to speak in Part Two of the consequences of an internationally wrongful act; this consequence was the responsibility itself. Part Two dealt with consequences arising from responsibility. It was suggested that this paragraph be reformulated along the lines

[37] See WTO, report of the Panel on *United States—Sections 301–310 of the Trade Act of 1974* (document WT/DS152/R of 22 December 1999); reproduced in ILM, vol. 39 (March 2000), p. 452.

of "A State responsible for an internationally wrongful act is under an obligation to make full reparation for the consequences flowing from that act." It was similarly suggested that this paragraph should read "An internationally responsible State is under an obligation to make full reparation for the consequences of the internationally wrongful act that it has committed."

95. The view was expressed that the reference to "full reparation" in paragraph 1 was questionable for the following reasons: the goal was not full reparation, but as much reparation as possible to remedy the consequences of the wrongful act; full reparation was possible only in the case of straightforward commercial contracts where damages were quantifiable; the requirement to make reparation could be continuously modified by the circumstances of the case and by the failure of the affected party to take appropriate measures to mitigate damages, as was illustrated by the *Zafiro* case;[38] and the responsible State's ability to pay must be taken into account and a State must not be beggared. Responding to the notion that mitigation, if not performed, logically led to a decrease in the reparation, the view was expressed that, in fact, mitigation led to a decrease in the damage for which the reparation was paid. It was further stated that the fact that it was hard to quantify reparation in a given case did not mean that the rules were invalid. It was also considered unwise to abandon the concept of full reparation since it had not been criticized by Governments and the Commission should focus less on the situation of the wrongdoing State than on the injury suffered by a State as a result of the wrongful act of another State.

96. The words "flowing from that act" in article 37 bis, paragraph 1, were interpreted as an attempt to introduce the causal link between an act and damage or harm without actually mentioning damage or harm. However, the word "flowing" was considered somewhat unclear, and a preference was expressed for the wording "reparation for all the consequences of that wrongful act".

97. The view was expressed that the obligation of reparation did not extend to indirect or remote results flowing from a breach, as distinct from those flowing directly or immediately. It was further stated that the customary requirement of a sufficient causal link between conduct and harm should apply to compensation as well as to the principle of reparation. Similarly, the view was expressed that only direct or proximate consequences and not all consequences of an infringement should give rise to full reparation. With regard to the direct nature of the damage, the chain of causality, or "transitivity", must be direct and uninterrupted, whereas the cause might not be immediate. It was suggested that sooner or later the Commission would have to make a general study of causation. The Special Rapporteur noted that the application of the concept of "remote damage" depended on the particular legal context and on the facts themselves. He also noted agreement on the need to reflect on the topic of directness or proximity in the context of article 37 bis.

98. As regards paragraph 2, there were different views as to whether a priority should be established with respect to the forms of reparation set forth therein. Some members expressed concern that the draft placed restitution in kind on the same level as other forms of reparation, namely, compensation and satisfaction. Attention was drawn to the *Chorzów Factory* case giving priority to restitution as the best means of reparation in that it restored as far as possible the situation that had existed before the breach.[39] In contrast, the view was expressed that restitution was not a general consequence of a wrongful act but rather an optional remedy whose applicability depended on the primary rules, i.e. the precise legal context, which would determine whether compensation or restitution was the appropriate remedy. The Special Rapporteur noted that article 37 bis was neutral on the choice between restitution and compensation, whereas article 43, as it stood, established restitution as the primary remedy. He would return to that question when dealing with article 43.

99. As to paragraph 2, a concern was raised that although full reparation might eliminate the legal consequences of the internationally wrongful act, its material or factual consequences might persist, as reparation did not in every case seek to eliminate the consequences of the act, but was sometimes intended to compensate for them. It was therefore suggested that the words "eliminate the consequences" should be amended. However, the proposal to replace "eliminate" by a different expression was considered unsatisfactory since it was a question of eliminating the consequences of the wrongful act and not the act itself, which clearly could not be undone, and the new formula would no longer convey the original meaning.

100. There were different views as to whether article 42, paragraph 3, which stipulated that reparation must not result in depriving the population of a State of its own means of subsistence, should be retained with respect to reparation in article 37 bis. Some members favoured retaining this provision as of critical importance for developing countries. It was noted that article 37 bis did not include the provision of article 42, paragraph 3, which Governments had objected to since it could be abused by States to avoid their legal obligations and erode the principle of full reparation. At the same time, it was felt that the provision had its validity in international law, with attention being drawn to the influence of the case of the war reparations demanded from Germany after the First World War on the Treaty of Peace with Japan. Attention was also drawn to national legislation concerning measures of constraint which exempted from attachment items that were required for livelihood. It was suggested that the matter could be solved by resorting to circumstances precluding wrongfulness, as suggested in paragraph 41 of the report. It was also noted that the State Treaty for the Re-establishment of an Independent and Democratic Austria contained a similar provision on protection of the means of survival. The question was raised as to whether the case cited concerning Japan could be covered by article 33 on state of necessity. However, article 33 was described as insufficient because it dealt with the problem of precluding the wrongfulness of the act,

[38] *D. Earnshaw and Others (Great Britain)* v. *United States* (UNRIAA, vol. VI (Sales No. 1955.V.3), p. 160).

[39] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, at p. 47.

whereas article 42, paragraph 3, was addressing not wrongfulness, but the humanitarian aspect associated with forgiveness of debt and the re-establishment of peace after conflict. It was suggested that the provision could not be applied to reparation in full, but might apply to compensation. It was also suggested that the issue should be reconsidered in connection with countermeasures.

101. The Special Rapporteur did not think that the provision was covered by either necessity or distress which were grounds for postponing the payment of compensation rather than grounds for annulling obligations. What had happened in the Treaty of Peace with Japan was that the Allied Powers, for a variety of reasons, including the realization that terrible mistakes had been made at the end of the First World War, had decided not to insist on reparations at all. In a sense, it had been an act of generosity, which had since been repaid a thousandfold. But it was also an indication that there was no point in insisting on reparation if it simply beggared the State which had to pay it. Such extreme situations posed a problem that was not addressed by circumstances precluding wrongfulness. The problem facing the Commission was that the wording in article 42, paragraph 3, which had been taken from human rights treaties, was there to express that concern in extreme cases. On the other hand, it had been criticized by a number of Governments from various parts of the world as being open to abuse. The Commission accepted, especially in the context of countermeasures but even in that of the quantum of reparation, that problems could arise and could not all be covered merely by a requirement of directness. The Drafting Committee would need to consider whether there was some way of reflecting that concern. The Special Rapporteur also agreed that the Commission should review the limitation referred to in article 42, paragraph 3, when it studied countermeasures.

102. Regarding article 42, paragraph 4, this provision was described as redundant because of article 4, paragraph 1. In contrast, the view was expressed that article 4 did not cover the cases referred to in article 42, paragraph 4, and it would therefore be wise to keep the latter provision or broaden the scope of article 4.

(e) *Other legal consequences under customary international law (article 38)*

103. Some members believed that article 38 should be retained. It was suggested that the scope should not be limited to the rules of customary international law since rules from other sources might also be relevant. However, other members agreed with the Special Rapporteur that article 38 added nothing of substance and could therefore be deleted.

104. There were a number of suggestions concerning this provision. It was suggested that the title might be improved by replacing *conséquences diverses* with *autres conséquences* because even the consequences referred to previously were included in *conséquences diverses*. It was also suggested that the provision might be recast in positive terms, indicating by way of example some of the legal consequences that had not been dealt with, rather than attempting to cover all the consequences provided for by customary law and including a saving clause to cover anything that might have been overlooked. In addition, there were suggestions that such a saving clause could be modelled on article 73 of the 1969 Vienna Convention or that this article could be referred to in the commentary. It was further suggested that a reference could be made in Part Four or in some part dealing with the rules of law relating specifically to the consequences of the wrongful act (*lex specialis*) to those consequences that were not part of the law of State responsibility, such as the right to terminate a treaty that had been materially breached or the case of a State occupying a territory by force not being entitled to prerogatives implied by possession of a territory. In addition, it was also suggested that the contents of articles 37 (*lex specialis*) and 38 should be combined in one provision.

105. Some members questioned the placement of article 38 in Part Two which limited its application. There were a number of suggestions on this point as well, including: referring in article 38 to Parts One and Two; including it in the part on general provisions to indicate its applicability to the draft as a whole; or including it in the preamble as in other conventions. There were different views regarding the suggestion to include the provision in a preamble with concerns being raised that the draft articles might not take the form of a convention and that such a provision could raise questions concerning the articles.

106. The Special Rapporteur said that there seemed to be general support for the retention of article 38 in some form. It would be a matter for the Drafting Committee to decide whether it was placed in Part Two or in Part Four.

6. Special Rapporteur's concluding remarks on chapter I

107. In summing up the debate on articles 36, 36 bis, 37 bis and 38, the Special Rapporteur noted that the Commission had made good progress on many issues, although there were still a number of outstanding questions on which a final decision would be taken during the consideration of other aspects of his third report.

108. Turning to the various articles he had proposed, he noted that there had been a helpful debate on the language of the title of Part Two and also on the titles of the various articles. It was now for the Drafting Committee to consider all the proposals that had been made as to the form. There seemed to be general agreement that the four articles should be referred to the Drafting Committee and that they should be retained somewhere in the draft. In that connection, he had been persuaded of the need to retain article 38, either in Part Four or in the preamble, in the light of the proposals to be made by the Drafting Committee.

109. Similarly, there was general agreement that articles 36 bis and 37 bis should contain general statements of principle on cessation and reparation, respectively, so as to establish a balance in chapter I. Useful comments had been made as to the form, including emphasis with regard to article 36 bis, that the question of cessation and particularly that of assurances and guarantees of non-

repetition arose not only in the context of continued wrongful acts, but also in the context of a series of acts apprehended as likely to continue, even though each of them could be viewed individually. It would be for the Drafting Committee to decide whether the reference to continuing wrongful acts in article 36 bis, paragraph 2 (*a*), was necessary.

110. As paragraph 2 (*b*) concerned assurances and guarantees of non-repetition, the title of the article as adopted on first reading, "Cessation", should perhaps be amended. Different views had been expressed on the retention of that subparagraph; however, it was clear from the debate that most members of the Commission favoured its retention. It should be borne in mind that no Government had proposed the deletion of article 46, as adopted on first reading, although there had been proposals that it should be relocated. Replying to comments that there appeared to be no examples of guarantees of non-repetition ordered by the courts, he said it was true that there were very few such examples; on the other hand they were common in diplomatic practice. He noted, however, that the award made by the Secretary-General in the "*Rainbow Warrior*" case[40] included certain elements that might be conceived of as falling within the category of assurances and guarantees of non-repetition. As noted previously, the draft articles operated primarily in the area of relations between States, although it was the courts that might eventually have to apply them if the problem could not be resolved diplomatically. It was certainly true that assurances and guarantees of non-repetition were frequently given by Governments in response to breaches of an obligation, and not only continuing breaches. The Drafting Committee might wish to reformulate the subparagraph, incorporating the proposal by the Czech Republic[41] referred to in paragraph 56 of the third report, perhaps mentioning the gravity of the wrongful conduct and the likelihood of its repetition and drawing on the corresponding article adopted on first reading.

111. Article 37 bis had raised several difficulties, particularly with regard to the expression "full reparation". The retention of the phrase had been questioned. As it had appeared in the original text of the article and had not been criticized to any significant extent by Governments, it would be preferable to retain it. It must, however, be borne in mind that there was a problem of balance. In questioning the retention of the provision, the remarks had focused almost entirely on the concerns of the responsible State, but, as had been pointed out, the Commission must also consider the concerns of the State that was the victim of the internationally wrongful act. It was true that there were extreme cases in which the responsible State could be beggared by the requirement of full reparation. Safeguard measures might thus be needed to cope with that situation, without prejudice to the principle of full reparation. As to the words "eliminate the consequences", which appeared in article 37 bis, paragraph 2, it had rightly been pointed out that it was impossible to eliminate completely the consequences of an internationally wrongful act. Furthermore, in its judgment in the *Chorzów Factory* case, PCIJ had indicated that reparation should eliminate the consequences of the wrongful act "as far as possible".[42] It might be a question for the Drafting Committee to consider whether that phrase should be included so as to qualify the term "full reparation" or whether the question should be dealt with in the commentary.

112. There had been general agreement that a notion of causation was implied in the concept of reparation and ought consequently to be expressed. There again, it would be for the Drafting Committee to decide whether the notion was correctly formulated in paragraph 1 of article 37 bis.

113. There was a fairly strong consensus in favour of the retention of article 38, but some difference of opinion as to its precise location in the text. The Drafting Committee might consider whether it should be incorporated in the proposed Part Four.

7. Introduction by the Special Rapporteur of the right of a State to invoke the responsibility of another State (article 40 bis)

114. The Special Rapporteur noted that article 40 was problematic in a number of respects. In the case of several injured States, it failed to recognize the right of every such State to demand cessation, and to distinguish between rights concerning cessation and reparation with respect to such States, which might be very differently affected by the breach, materially or otherwise. Its drafting identified examples rather than concepts, leading to confusion and overlap. In particular in the field of multilateral obligations, it dealt with a whole series of concepts without distinguishing them, notably paragraph 2, subparagraphs (*e*) and (*f*), and paragraph 3, or indicating their interrelationship. He noted that the provisions of paragraph 3 were redundant in the context of article 40, because in the event of an international crime, as defined, other paragraphs of article 40 would have already been satisfied. Aspects of the problem currently addressed by articles 19 and 51 to 53 would need to be resolved in later provisions.

115. The Special Rapporteur identified two possible approaches to article 40: either to provide a simple definition which in effect referred to the primary rules or the general operation of international law to resolve issues relating to the identification of persons (this would be a rather extreme but defensible version of the distinction between primary and secondary rules); or to specify more precisely how responsibility worked in the context of injuries to a plurality of States or to the international community as a whole. He proposed the first approach for bilateral obligations, by simply stating in a single provision that, for the purposes of the draft articles, a State was injured by an internationally wrongful act of another State if the obligation breached was owed to it individually. The

[40] Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair, decision of 30 April 1990 (UNRIAA, vol. XX (Sales No.E/F.93.V.3), p. 215).

[41] See footnote 19 above.

[42] See footnote 39 above.

elaborate provisions in article 40, paragraph 2, subparagraphs (*a*), (*b*), (*c*) and (*d*), would be unnecessary since international law would say when bilateral obligations existed. In contrast, he proposed a more refined and articulated solution for multilateral obligations, where the real problem was not so much obligations towards several States, but a single obligation vis-à-vis a group of States, all States or the international community as a whole.

116. The Special Rapporteur noted the relatively recent development of categories of obligations that were in some sense owed to a group of States and the breach of which resulted in not merely bilateral consequences, referring, inter alia, to the *Barcelona Traction* case.[43] He suggested that there was authority for adopting three distinct categories of multilateral obligations: first a single obligation owed to the international community as a whole, *erga omnes*; second, obligations owed to all the parties to a particular regime, *erga omnes partes*; and third, obligations owed to some or many States, where particular States were nonetheless recognized as having a legal interest. The Special Rapporteur emphasized the need to distinguish between different States affected in different ways by a breach in the field of State responsibility, as discussed in paragraphs 108 et seq. of his third report. He also drew attention to the question of which responses by "injured States" might be permissible: this was addressed in table 2 in paragraph 116 of his report.

117. As to the reformulation of article 40, the Commission should draw on article 60 of the 1969 Vienna Convention which distinguished between cases where a particular State party was specially affected by a breach and those where the material breach of "integral obligations" by one party radically changed the position of every party with respect to performance. A second aspect of the formulation of article 40 concerned the situation where all of the States parties to an obligation were recognized as having a legal interest. The Special Rapporteur saw no reason for requiring an express stipulation to that effect, nor for limiting it to multilateral treaties, as in article 40 adopted on first reading.

118. The Special Rapporteur proposed article 40 bis[44] and suggested that it would be logical to include this provision in a new part concerning the invocation of responsibility.

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

[44] The text of article 40 bis proposed by the Special Rapporteur reads as follows:

"*Article 40 bis. Right of a State to invoke the responsibility of another State*

"1. For the purposes of these draft articles, a State is injured by the internationally wrongful act of another State if:

"(*a*) The obligation breached is owed to it individually, or

"(*b*) The obligation in question is owed to the international community as a whole (*erga omnes*), or to a group of States of which it is one, and the breach of the obligation:

"(i) Specifically affects that State; or

"(ii) Necessarily affects the enjoyment of its rights or the performance of its obligations.

"2. In addition, for the purposes of these draft articles, a State has a legal interest in the performance of an international obligation to which it is a party if:

"(*a*) The obligation is owed to the international community as a whole (*erga omnes*);

"(*b*) The obligation is established for the protection of the collective interests of a group of States, including that State.

"3. This article is without prejudice to any rights, arising from the commission of an internationally wrongful act by a State, which accrue directly to any person or entity other than a State."

For the analysis of this article by the Special Rapporteur, see paragraphs 66 to 118 of his third report.

8. Summary of the debate on the right of a State to invoke the responsibility of another State (article 40 bis)

(a) *General remarks*

119. There was broad agreement that article 40, as adopted on first reading, was defective in a number of respects, as noted by the Special Rapporteur in paragraph 96 of his report and as shown in the summary of debate on that article in the Sixth Committee.[45]

120. Several members welcomed the Special Rapporteur's proposal for article 40 bis as a major improvement in several respects, including the following: the distinction between the different types of obligations for the purpose of identifying the injured State and the recognition of a greater diversity of international obligations, notably obligations *erga omnes*; the distinction between injured States and States with a legal interest in the performance of an obligation; and the emphasis on the right of a State to invoke the responsibility of another State, focusing on the problems of States' entitlement to invoke responsibility in respect of multilateral obligations and on the extent to which differently affected States might invoke the legal consequences of a State's responsibility. At the same time, a number of members were of the view that various aspects of the proposal needed to be further clarified or developed, as indicated below.

(i) *Definition of an injured State*

121. The view was expressed that the draft articles should include a definition of the injured State. It was pointed out that many Governments had mentioned the importance of such a provision which would help to strike an appropriate balance between the concepts of "injured State", "wrongdoing State" and State with a "legal interest". However, the view was also expressed that drafting a comprehensive definition of the "injured State" raised major difficulties because the subject matter was extremely technical and complex and could not simply be based on customary law. An inclusive definition should thus be preferred, although one which followed the general line proposed by the Special Rapporteur rather than that adopted on first reading.

(ii) *Obligations* erga omnes

122. The view was expressed that the category of obligations *erga omnes* should be reserved for fundamental human rights deriving from general international law and not just from a particular treaty regime, in accordance

[45] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-fourth session of the General Assembly" (A/CN.4/504), sect. A.

with the judgment of ICJ in the *Barcelona Traction* case.[46] However, the view was also expressed that obligations *erga omnes* could not necessarily be equated with fundamental obligations, peremptory norms or *jus cogens*. In addition, some members expressed concern about any attempt to draw a distinction between fundamental human rights and other human rights: any distinction would be difficult to apply in practice and would go against the current trend towards a unified approach to human rights. It was suggested that in order to define the concept of injured State in respect of human rights, a quantitative criterion might be added, as opposed to the qualitative criterion used to distinguish between fundamental and other rights, so as not to call the unity of human rights into question. It was also suggested that a distinction must be made between obligations owed individually to all States making up the international community and those owed to that community as a whole.

123. The Special Rapporteur agreed on the need to be careful not to assert that all human rights were necessarily obligations *erga omnes*, and cited the example of human rights under regional agreements and even some provisions in the "universal" human rights treaties.

(iii) *The reference to the international community*

124. The reference to the international community in paragraphs 1 and 2 of article 40 bis gave rise to various comments and questions. A question was raised concerning the meaning of the term "international community as a whole" and whether it included individuals and non-governmental organizations. It was hoped that the Commission would refrain from including private entities such as non-governmental organizations among the subjects of law legally entitled to invoke State responsibility. The view was expressed that "international community as a whole" meant the international community of States as referred to in article 53 of the 1969 Vienna Convention. Other members considered that the "international community as a whole" was a wider concept.

125. It was suggested that the difficulties the Commission was encountering were partly explained by the fact that it was discussing the international community and the obligations owed to it, while ignoring the existing institutions of the international community as such in the draft. Consequently, the Commission should consider including a provision entitled "Responsibility of the State in respect of the international community", the text of which would read: "In the case of a breach of an obligation *erga omnes* the State bears responsibility towards the international community of States represented by the universal international organs and organizations."

126. It was also considered difficult to see how the rules of State responsibility could be applied in practice, given such a loose and theoretical characterization of the affected group. It was also seriously doubted that the international community had become a subject of international law with the right to invoke the responsibility of a State which had breached its international obligations.

127. The Special Rapporteur noted that the concept of "obligations owed to the international community as a whole" had been introduced by ICJ. It was true that the concept was still developing, but it was widely accepted in the literature and could hardly be dispensed with. Moreover, in Parts Two and Two bis, the Commission was not concerned with the invocation of responsibility by entities other than States, and the draft articles should make that clear. But in fact it was the case that victims of human rights abuses had certain procedures available to them for what could only be described as the invocation of responsibility, and in some circumstances others could act on their behalf. A saving clause acknowledging that possibility should be inserted, and the matter left to developments under the relevant instruments.

(iv) *The question of article 19*

128. Several members expressed the view that the Commission would eventually need to consider the issues addressed in article 40 bis in relation to State "crimes". It was suggested that international crimes should constitute a separate category under this article. It was also suggested that paragraph 1 (*b*) should specify that an internationally wrongful act by a State could injure "all States if the obligation breached is essential for the protection of fundamental interests of the international community"; this could be based on the definition contained in article 19 as adopted on first reading, perhaps with some refinement. It was further suggested that all States should be entitled to invoke responsibility in respect of all its consequences, except perhaps that of compensation in cases of such serious breaches. Of particular importance was the principle of restitution in the form of a return to the *status quo ante.* The obligations provided for in article 53 as adopted on first reading would become far more comprehensible if the concept of "injured State" was applied to all States of the international community in cases of crime. Others, however, pointed out that to allow individual States to respond separately and in different ways to a "crime" was a recipe for anarchy, and that in such cases only collective responses were appropriate. Some members were of the view that in addressing this question it was not necessary or desirable to use the term "crime" or any other qualitative distinction among wrongful acts.

(v) *The structure of article 40 bis*

129. In terms of the structure of article 40 bis, there were various suggestions for dividing the provision into several separate articles in the interest of clarity. In particular, it was suggested that dividing it into two articles, one focusing on the State injured by an internationally wrongful act of another State and the other on the State which had a legal interest in the performance of an international obligation without having been directly injured, would make it possible to formulate more clearly the conditions for, and the extent of, the right of a State to invoke the responsibility of another State.

130. It was also suggested that article 40 bis should be divided according to the type of obligation: with the first

[46] See footnote 43 above.

part dealing with bilateral or multilateral obligations which, in a specific context, gave rise to bilateral relations; and the second part dealing with obligations *erga omnes* and saying that, in the event of the infringement of those obligations, all States were entitled to request cessation and seek assurances and guarantees of non-repetition. It was further suggested that the Commission should consider whether those States might request reparation, with the proviso that compensation was to be given to the ultimate beneficiary, which might be another State, an individual or even the international community as a whole. It was noted that the Commission did not have to determine the beneficiary since that was a matter for the primary rules.

(vi) *The placement of article 40 bis*

131. There were different views concerning the placement of article 40 bis including the following: it should appear in chapter I of Part Two to identify the categories of States to which obligations arising from a wrongful act were owed; it should be placed in chapter I of Part Two if the Commission intended to specify the secondary obligations without referring to the concept of "injured State"; it should be placed in the chapter on general principles if it differentiated between two groups of injured States; or it should appear at the beginning of Part Two bis, concerning the implementation of State responsibility, if its role was to determine which States had the right to invoke the responsibility of a State that had allegedly committed an internationally wrongful act.

(b) *Title of article 40 bis*

132. Some members expressed the view that the title of article 40 bis did not fully correspond to its content. Moreover there was no logical link between the first two paragraphs, which dealt successively with the definition of the injured State and conditions in which a State has a legal interest in the performance of an international obligation. The proposed title of article 40 bis should be retained but its content should be revised accordingly.

(c) *Paragraph 1 of article 40 bis*

133. There were various proposals concerning this paragraph. It was suggested that paragraph 1 should be amended to clarify the distinction between injured States and States having a legal interest without being directly injured to enable the article to play its role in determining who could trigger the consequences of responsibility. It was also suggested that the concepts of the injured State and the State having a legal interest should be defined before the question of the implementation of international responsibility was discussed and that the proposed list of cases in which a State suffered an injury should be open-ended, since it could be difficult to envisage all cases in which a State could be injured by an internationally wrongful act attributable to another State.

134. There were different views concerning the inclusion of the notion of damage or injury in article 40 bis, paragraph 1, or elsewhere in the draft. The view was expressed that it was unnecessary to include damage; its exclusion as an element of the wrongful act did not lead to the result that all States could invoke the responsibility of the responsible State. On the contrary: only the State whose subjective right had been injured or in respect of which an obligation had been breached could demand reparation. The view was also expressed that injury or damage should not be included as a constituent element of an internationally wrongful act or in article 40 bis, which triggered the invocation of State responsibility, because the concept would have to be broadened to a degree that rendered it meaningless, and it was virtually impossible to "calibrate" it according to the proximity of a State to a breach.

135. In contrast, some members considered it necessary to have a provision equivalent to article 3 of Part One, which might read along the lines of "An internationally wrongful act incurs an obligation to make reparation when (*a*) that internationally wrongful act has caused injury, (*b*) to another subject of international law." The concept of damage was also considered indispensable by some members if the essential distinction was to be drawn between a State suffering direct injury on the basis of which it could invoke article 37 bis, and one that, in the framework of *erga omnes* obligations or as a member of the international community, merely had a legal interest in cessation of the internationally wrongful act. There were suggestions that it would be preferable to refer to injury or damage only in connection with reparation (since reparation presupposed damage), as compared with the issue of entitlement to act, e.g. by demanding cessation. It was also suggested that it would be useful to define the concept of damage, preferably in the draft articles.

136. The Special Rapporteur said that the proposal that a provision on damage should be drafted as a counterpart to article 3 of Part One deserved careful study. That concept had to be dealt with in Part Two of the draft articles in a variety of contexts, for example, compensation, to which it was unquestionably related. In terms of a definition of damage, it was first what was suffered by a State party to a bilateral obligation which was breached; secondly, what was suffered by the State specially affected; and, thirdly, what was suffered by the State affected just by virtue of the fact that it was a party to an integral obligation, breach of which was calculated to affect all States.

(i) *Paragraph 1* (a)

137. The view was expressed that the treatment of bilateral obligations was a relatively simple matter, and seemed to be adequately reflected in paragraph 1 (*a*) of article 40 bis.

(ii) *Paragraph 1* (b)

138. The view was expressed that the provision should be further clarified with respect to the three categories of multilateral obligations referred to in table 1 of the report, namely: obligations to the international community as a whole (*erga omnes*); obligations owed to all the parties to a particular regime (*erga omnes partes*); and the obligations to which some or many States were parties, but in

respect of which particular States or groups of States were recognized as having a legal interest.

139. It was suggested that paragraph 1 (*b*) could be deleted altogether, since all the cases it envisaged had to do with obligations owed to States individually as well as to the international community as a whole, and were therefore covered by paragraph 1 (*a*). Under paragraph 1 (*b*) (i), an obligation *erga omnes* the breach of which specially affected one State was an obligation also owed to that State individually. An obligation *erga omnes* could be broken down into obligations owed by one State to other States individually. The same was true for paragraph 1 (*b*) (ii): an obligation *erga omnes* whose non-performance necessarily affected a State's enjoyment of its rights or performance of its obligations was, at the same time, owed to the State individually. On the other hand it was pointed out that even with respect to a breach of an obligation *erga omnes*, an individual State could be injured (e.g. the victim of an unlawful armed attack).

(d) *Paragraph 2 of article 40 bis*

140. The view was expressed that paragraph 2 met the need for a reference to States which had a legal interest. Such States, although not directly affected, could at least call for cessation of a breach by another State. In agreeing with the Special Rapporteur's approach, attention was drawn to table 2 of the third report, concerning the rights of States that were not directly injured by a breach of an obligation *erga omnes*. This was interpreted as meaning that any State could act on behalf of the victim and had a whole range of remedies, including countermeasures, in cases of well-attested gross breaches.

141. It was suggested that it was important to distinguish between the existence of an obligation and the beneficiary of the obligation. The right to invoke, in the sense of the right to claim that a certain obligation must be fulfilled, should be given to all the States that had a legal interest, albeit not for their own benefit; this was particularly important in the context of human rights obligations infringed by a State with regard to its nationals, which otherwise could not be invoked by any other State.

142. In terms of drafting, the inclusion of the words "to which it is a party" was questioned. It was also suggested that paragraph 2 might begin with the following words: "In addition, for the purposes of these draft articles, a State may invoke certain consequences of internationally wrongful acts in accordance with the following articles", after which paragraph 2, subparagraphs (*a*) and (*b*), as proposed by the Special Rapporteur would follow.

(e) *Paragraph 3 of article 40 bis*

143. There were different views concerning paragraph 3. Some members felt that it was necessary to include such a provision since the draft articles were to apply to inter-State relations. But, in practice, there were quite a few cases of the international responsibility of States vis-à-vis international organizations or other subjects of international law. The provision was considered to be particularly important with regard to individuals in the human rights context. However, this paragraph was also considered unnecessary by some, since the Commission was dealing with the responsibility of States and not rights that accrued to any other subject of international law. The reference to rights that accrued directly to any person or "entity other than a State" was described as a very broad and even dangerous notion. However, it was also noted that the term "entity" was already used in various international conventions, such as the Convention on Biological Diversity.

144. It was suggested that since Part One of the draft was acknowledged to cover all international obligations of the State and not only those owed to other States, it might therefore serve as a legal basis when other subjects of international law, such as international organizations, initiated action against States and raised issues of international responsibility. In contrast, it was considered preferable to restrict the subject matter of Part Two to responsibility as between States because the emergence of different kinds of responsibilities with specific features, such as the responsibility of and to international organizations, individual responsibility and responsibility for violations of human rights, could not be dealt with comprehensively in the foreseeable future. The Special Rapporteur agreed with the distinction between the scope of Part One and of Part Two, and noted that his paragraph 3 was merely a saving clause consequential upon the point that Parts Two and Two bis dealt only with the invocation of responsibility by States.

145. There were also suggestions that paragraph 3 should be a separate provision and should be amended by replacing "without prejudice to any rights, arising …" by "without prejudice to the consequences flowing from the commission of an internationally wrongful act", for the consequences of responsibility were not only rights, but also obligations.

146. The Special Rapporteur stressed the need for paragraph 3 with respect to human rights obligations. This paragraph was necessary to avoid a disparity between Part One, which dealt with all obligations of States, and Part Two bis, which dealt with the invocation of the responsibility of a State by another State. Since it was possible for a State's responsibility to be invoked by entities other than States, it was necessary to include that possibility in the draft. It was important to retain the principle in article 40 bis or a separate article.

9. Special Rapporteur's concluding remarks on the debate on the right of a State to invoke the responsibility of another State (article 40 bis)

147. The Special Rapporteur noted that the deficiencies of article 40 as adopted on first reading had been generally recognized. His proposed treatment of bilateral obligations in a single, simple phrase had been endorsed. However, two approaches had been suggested for multilateral obligations. The first, reflected in his proposal, sought to provide additional clarification and further specification in the field of multilateral obligations. The second approach entailed a series of definitions on the specification of States that were entitled to invoke

responsibility without actually saying what they were. The second approach should be used as a fall-back if greater clarity could not be achieved with regard to multilateral obligations. If a general *renvoi* was adopted, the Commission would disbar itself from making any further distinctions between categories of injured States.

148. The Commission's precise concern was to identify those States which ought to be able to invoke the responsibility of another State, and the extent to which they could do so. In that respect he stressed the value of article 60, paragraph 2, of the 1969 Vienna Convention. The Commission, in the context of the law of treaties, had distinguished between bilateral and multilateral treaties, and had emphasized that the State specially affected by a breach of a multilateral treaty should be able to invoke that breach. An analogy could be drawn for obligations in the field of State responsibility. The reference to "specially affected State", reflected in article 40 bis, helped to deal with the problem of harm raised by some members, because the State that was injured must surely be regarded as being in a special position. There might be a spectrum of specially affected States, but if so it was a relatively narrow one.

149. Regarding the "article 19 issue", the Special Rapporteur fully respected the wish of some members that the draft should address the most important obligations, those of concern to the international community as a whole, and the most serious breaches of such obligations. He also agreed that there could be breaches of non-derogable obligations which did not raise fundamental questions of concern to the international community as a whole in terms of collective response. But, in terms of the right to invoke responsibility, it was not necessary to refer to grave breaches of obligations owed to the international community as a whole. Once it was established, as ICJ had done in the *Barcelona Traction* case,[47] that all States had an interest in compliance with those obligations, no more need be said for the purposes of article 40 bis.

150. There had been some disagreement about the reservation concerning the invocation of responsibility by entities other than States as set out in article 40 bis, paragraph 3, but the prevailing view seemed to be that it was of value. The Special Rapporteur thought it essential, because it resolved the difference in scope between Part One of the draft and the remaining parts.

10. Introduction by the Special Rapporteur of Part Two: Legal consequences of an internationally wrongful act of a State (*continued*)

Chapter II. The forms of reparation

(a) *General comments on chapter II*

151. The Special Rapporteur noted that, in accordance with the approach already agreed by the Commission, chapter II of Part Two dealt with the different forms of reparation from the point of view of the obligation of the State which had committed the internationally wrongful act. In the text adopted on first reading, in addition to assurances and guarantees against repetition, three forms of reparation had been envisaged, namely, restitution in kind, compensation, and satisfaction. The provisions of article 42, paragraph 2, on contributory fault and mitigation of responsibility, as adopted on first reading, also belonged in chapter II rather than in chapter I, as restrictions on the forms of reparation. He further proposed adding a new article on interest and deleting the reference to it in article 44. The Special Rapporteur noted that States had accepted the idea that restitution, compensation and satisfaction were three distinct forms of reparation and had generally agreed with the position taken as to the relationship between them.

(b) *Restitution (article 43)*

152. Turning first to article 43, the Special Rapporteur preferred to use the term "restitution" rather than "restitution in kind" in the English version in order to avoid any misunderstanding, while using *restitution en nature* in the French version. As to substance, article 43 asserted the priority of restitution. Restitution was the primary form of reparation, with compensation available where restitution did not fully make good the injury. Otherwise, States would be able to avoid performing their international obligations by offering payment. But there were four exceptions to the availability of restitution, and these raised a number of questions. He proposed retaining two of these exceptions.[48] The first exception, dealing with material impossibility, was universally accepted and should be retained. The second exception, dealing with peremptory norms, had been criticized on various grounds and should be deleted: this situation, if it ever arose, would be adequately covered by chapter V of Part One which, in his view, applied to Part Two. The third exception, dealing with disproportionality of burden and benefit, also should be retained. The fourth exception, dealing with catastrophic situations, had been criticized by many Governments: the situation, if it ever arose, would be adequately covered by subparagraph (*c*), so that subparagraph (*d*) could be deleted.

(c) *Compensation (article 44)*

153. The Special Rapporteur said that there was no doubt that compensation should cover any economically

[47] Ibid.

[48] The text of article 43 proposed by the Special Rapporteur reads as follows:

"*Article 43. Restitution*

"A State which has committed an internationally wrongful act is obliged to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

"(*a*) Is not materially impossible;

…

"(*c*) Would not involve a burden out of all proportion to the benefit which those injured by the act would gain from obtaining restitution instead of compensation."

For the analysis of this article by the Special Rapporteur, see paragraphs 124 to 146 of his third report.

assessable damage sustained by the injured State. Although some States had suggested a more detailed definition of compensation and its quantification, caution was needed in elaborating more detailed principles of compensation, which was a dynamic concept strongly influenced by the particular primary rules in play in a given context. He preferred a general formulation accompanied by further guidance in the commentary, to avoid limiting the development of the law on the subject. For these reasons he proposed a simplified version of article 44, with the commentary explaining that lost profits could be compensable, depending on the content of the primary rule in question and the circumstances of the particular case, and with interest being addressed in a separate article.[49]

(d) *Satisfaction (article 45)*

154. Despite an underlying core of agreement, article 45, as adopted on first reading, gave rise to a number of difficulties. As regards paragraph 1, the association of satisfaction with moral damage was problematic for two reasons. First, the term "moral damage" had a reasonably well-established meaning in the context of individuals, but claims for such damage on their behalf would come under the heading of compensation rather than satisfaction. Secondly, it was awkward to speak of moral damage in relation to States, since this appeared to attribute emotions, affronts and dignity to them. The Special Rapporteur proposed replacing the term "moral injury" by the term "non-material injury" (*préjudice immatériel*), thereby avoiding confusion with moral damage to individuals and the use of emotive language for States.[50] He noted that the words "to the extent necessary to provide full reparation" in paragraph 1 indicated that there might be circumstances in which no question of satisfaction arose.

155. As to paragraph 2, there was doubt whether it was intended to be exhaustive, but in the view of the Special Rapporteur it should not be. A significant gap was the absence of any reference to the declaration which was one of the main forms of satisfaction and well-established in judicial practice. Since the draft articles were intended to apply directly to State-to-State relations, he proposed including the notion of an acknowledgement by the responsible State as the equivalent, in terms of State-to-State conduct, of a declaration granted by a tribunal. He further proposed listing it as the first and most obvious form of satisfaction. The commentary would explain that, where a State declined to acknowledge that it had committed a breach, the corresponding remedy obtained in any subsequent third-party proceedings would be a declaration.

156. Paragraph 2 (*a*) referred to apology, which was frequently given by States in the context of wrongful conduct. The Special Rapporteur proposed that an acknowledgement or apology should be treated separately from the other forms of satisfaction in a new paragraph 2, since these were the minimum forms of satisfaction and the basis on which any other form of satisfaction would be granted. The other more exceptional forms of satisfaction, which might be appropriate in certain cases, would be contained in new paragraph 3.

157. Referring to the other forms of satisfaction, the Special Rapporteur proposed deleting nominal damages in paragraph 2 (*b*) adopted on first reading since the reasons for such damages in national legal systems were inapplicable in international litigation and the declaratory remedy was almost always sufficient. He noted that nominal damages would not be precluded in appropriate cases if the paragraph contained a non-exhaustive list of the forms of satisfaction.

158. As regards paragraph 2 (*c*) adopted on first reading, the Special Rapporteur recommended that this simply provide for the award of damages by way of satisfaction, where appropriate. The words "in cases of gross infringement" unduly limited the normal function of satisfaction in respect of injuries which could not be qualified as "gross" or "egregious"; such a limitation was contrary to the relevant jurisprudence. In his view, the award of substantial (and not merely nominal) damages in appropriate cases was an aspect of satisfaction. On the other hand, paragraph 2 (*c*) did not include punitive damages, a subject that would be taken up later in the context of a possible category of "egregious breach". If awards of punitive damages were to be allowed at all, special conditions needed to be attached to them.

159. The fourth form of satisfaction in paragraph 2 (*d*) adopted on first reading dealt with disciplinary action or punishment of the persons responsible, who might be officials or private individuals. The Special Rapporteur proposed deleting the reference to "punishment" which implied individual guilt, a matter which could only be determined in the proceedings and which could not be

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[49] The text of article 44 proposed by the Special Rapporteur reads as follows:

"*Article 44. Compensation*

"A State which has committed an internationally wrongful act is obliged to compensate for any economically assessable damage caused thereby, to the extent that such damage is not made good by restitution."

For the analysis of this article by the Special Rapporteur, see paragraphs 147 to 166 of his third report.

[50] The text of article 45 proposed by the Special Rapporteur reads as follows:

"*Article 45. Satisfaction*

"1. The State which has committed an internationally wrongful act is obliged to offer satisfaction for any non-material injury occasioned by that act.

"2. In the first place, satisfaction should take the form of an acknowledgement of the breach, accompanied, as appropriate, by an expression of regret or a formal apology.

"3. In addition, where circumstances so require, satisfaction may take such additional forms as are appropriate to ensure full reparation, including, inter alia:

"[(*a*) nominal damages;]

"(*b*) damages reflecting the gravity of the injury;

"(*c*) where the breach arose from the serious misconduct of officials or from the criminal conduct of any person, disciplinary or penal action against those responsible.

"4. Satisfaction must be proportionate to the injury in question and should not take a form humiliating to the responsible State."

For the analysis of this article by the Special Rapporteur, see paragraphs 167 to 194 of his third report.

presumed. Again it was not necessary to cover all possible types of procedures (e.g. inquiry) if the paragraph was understood to be non-exhaustive.

160. The issue of limitations on satisfaction was dealt with in paragraph 3 adopted on first reading. The Special Rapporteur noted that some States had proposed deleting the term "dignity" as meaningless and as allowing for satisfaction to be evaded. He felt however, in light of the earlier history of abuses, that some guarantee was required: he proposed a provision excluding any form of satisfaction that was disproportionate to the injury or that took a form humiliating to the responsible State.

(e) *Interest (article 45 bis)*

161. The Special Rapporteur proposed including an article dealing with the general question of entitlement to interest, based on the proposition that where a principal sum owed had not been paid, interest was due on that sum until such time as it was paid.[51] In terms of the starting date for payment of interest, the question was whether the compensation should have been paid immediately upon the cause of action arising, within a reasonable time after a demand had been made or at some other time. The terminal date for payment of interest would be that on which the obligation to pay had been satisfied, whether by waiver or otherwise. He had used the wording "Unless otherwise agreed or decided", in paragraph 2, because States could agree that there should be no award of interest and also because tribunals had in some cases exercised some flexibility about interest that was inconsistent with the idea that there was a simple right to interest covering any fixed period. He believed that the provision should neither mandate nor rule out the possibility of compound interest; in the light of the limited international jurisprudence on the point, it was too much to say that compound interest was available as of course, but neither could it be excluded in appropriate cases where this was necessary to provide full reparation.

(f) *Mitigation of responsibility (article 46 bis)*

162. The Special Rapporteur recalled that, except for the situation of contributory fault, the question of the mitigation of responsibility had not been covered in the draft articles adopted on first reading.

163. Subparagraph (*a*) of his proposal[52] dealt with the case in which an injured State, or a person on behalf of whom a State was claiming, contributed to the loss by negligence or wilful act or omission, for which various terms such as "contributory negligence" and "comparative fault" were used by different legal systems. There was well-established jurisprudence that the fault of the victim, where the victim was an individual, could be taken into account in the context of reparation. In his view, considerations of equity required that the principle be extended to injured States, to avoid a responsible State being required to pay for damage or loss suffered by reason of the conduct of the injured State.

164. The Special Rapporteur also observed that a further concern was ensuring that injured States not be overcompensated for loss. He therefore proposed a new provision, as subparagraph (*b*), dealing with mitigation of damage, based on the formulation of that principle by ICJ in the *Gabčíkovo-Nagymaros Project* case.[53] Mitigation of damage related to the attenuation of the primary amount, and prevented a State that unreasonably refused to mitigate damage from recovering all of its losses.

11. Summary of the debate on Part Two (*continued*)

Chapter II. The forms of reparation

(a) *General comments on chapter II*

165. Agreement was expressed with the general approach of the Special Rapporteur to chapter II. The Special Rapporteur had been right to avoid excessive detail which could create new areas of conflict among States, even if the wrongdoing State had already acknowledged responsibility. On the other hand, certain doubts were expressed, not only about the changes proposed by the Special Rapporteur, but also about the approach adopted, which was considered superficial and insufficient, having regard to the practical importance of compensation and the guidance currently offered by decisions of courts and tribunals.

166. As to the proposed new emphasis on the obligation imposed on the responsible State, the view was expressed that in Part Two the Commission would have to go beyond a statement of principles, and therefore it would have been better to recognize the injured State as the

[51] The text of article 45 bis proposed by the Special Rapporteur reads as follows:

"*Article 45 bis. Interest*

"1. Interest on any principal sum payable under these draft articles shall also be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be those most suitable to achieve that result.

"2. Unless otherwise agreed or decided, interest runs from the date when the principal sum should have been paid until the date the obligation to pay compensation is satisfied."

For the analysis of this article by the Special Rapporteur, see paragraphs 195 to 214 of his third report.

[52] The text of article 46 bis proposed by the Special Rapporteur reads as follows:

"*Article 46 bis. Mitigation of responsibility*

"In determining the form and extent of reparation, account shall be taken of:

"(*a*) The negligence or the wilful act or omission of any State, person or entity on whose behalf the claim is brought and which contributed to the damage;

"(*b*) Whether the injured party has taken measures reasonably available to it to mitigate the damage."

For the analysis of this article by the Special Rapporteur, see paragraphs 215 to 222 of his third report.

[53] *Gabčíkovo-Nagymaros Project* (see footnote 35 above), at p. 55, para. 80.

driving force behind reparation. Others noted that the rights of the injured State would be separately covered, so that nothing was lost by the change in terminology, while the text gained in its capacity to deal with claims brought by "differently injured" States.

167. In support of the latter view, the Special Rapporteur explained that the articles were formulated in terms of the obligation of the responsible State so as to leave open the question of who was entitled to invoke responsibility, which could be considered only at the time it was invoked. Referring to the "right" or "entitlement" of the injured State, as was done during the first reading, implied a bilateral form of responsibility. Yet, in some situations, several States could be affected or concerned, some more than others. Likewise, it had to be recognized that obligations could arise towards different entities or towards the international community as a whole. The proposed drafting allowed for these various possibilities.

168. Support was expressed for the Special Rapporteur's proposal that the title of chapter II as adopted on first reading, "Rights of the injured State and obligations of the State which has committed an internationally wrongful act", be replaced by the shorter title, "The forms of reparation". The new title was not only shorter and simpler, but would also avoid the implication that the rights of "injured States" were in all cases the strict correlative of the obligations of the responsible State. It was also suggested that the new title could be further refined to read "Forms and modalities of reparation". In response, the Special Rapporteur pointed out that a reference to "modalities" would be more a matter for Part Two bis, on the implementation of State responsibility. Instead, chapter II of Part Two concerned itself with the basic forms of reparation, i.e. the content, so far as the responsible State was concerned, of the basic obligation to provide full reparation set out in chapter I.

169. Some members noted that the discussion so far largely overlooked the question of State "crimes". The Commission was reminded of its late consideration of the matter during the first reading, which had resulted in the inclusion in the part, referring to delicts, of consequences that should have been reserved for crimes, thereby depriving articles 51 to 53, on the consequences of crimes, of much of what might otherwise have been their substance. The concept of crimes, according to this view, was implied in paragraph 126 of the report, in which the Special Rapporteur was compelled to draw a distinction between acts contrary to an ordinary rule of international law and a breach of a peremptory norm of general international law—a distinction which could constitute an acceptable definition of "crime".

(b) *Restitution (article 43)*

170. Different views were expressed as to the priority of restitution over compensation. That priority was criticized as being too rigid and inconsistent with the flexibility actually displayed by tribunals. Others suggested that the fact that compensation was the most frequently used form of reparation, was due to the limitations inherent in restitution, and not proof of its subsidiary role as a matter of principle.

171. In addition, if the practical importance of the primary rules was recognized, there would be no need to determine whether or not restitution was the generally applicable form of reparation. As such, it was considered preferable to give priority to the decisions of tribunals, although caution was advised since the applicable law was not always clearly stated in those decisions. Similarly, it was suggested that the commentary could explain that some cases may be resolved by means of a declaratory judgement or order without giving rise to restitution as such.

172. The Special Rapporteur observed that there was no requirement that all attempts to secure restitution be first exhausted, and that in those cases in which the injured State had the choice to prefer compensation, the election to seek compensation rather than restitution would be legally effective. The rare cases where the injured State had no choice about restitution, i.e. where restitution was the only possible outcome, were better covered under the notion of cessation. There were also cases where restitution was clearly excluded, for example, because the loss has definitively occurred, and could not be reversed. Furthermore, in some circumstances, other States would be able to invoke responsibility. Those States might substitute for the injured State, and would not be compensated themselves, but would be entitled to insist not just on cessation, but on restitution as well. Support was expressed in the Commission for this view.

173. In paragraph 142 of his third report, the Special Rapporteur had expressed the view that restitution might be excluded in cases where the respondent State could have lawfully achieved the same or a similar result without breaching the obligation. Some members disagreed: if there was a lawful way to achieve a given result, the fact that the respondent State had not taken advantage of that way did not in itself exonerate it from the obligation of restitution. In response, the Special Rapporteur noted that in theory, restitution had primacy, yet in practice, it was exceptional. The challenge was to reconcile theory and practice.

174. Differing views were expressed regarding the objective of restitution. On the one hand, it was argued that the objective was to remove the effect of the internationally wrongful act, by re-establishing the *status quo ante*. This was the approach of article 43 as adopted on first reading. Others favoured a duty to establish the situation that would have existed without the wrongful act, and not the mere re-establishment of the *status quo ante*. It was observed that in the judgment of PCIJ in the *Chorzów Factory* case, the formula was that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[54] As such, *restitutio in integrum* was the preferred reaction to an internationally wrongful act, subject to the choice of the injured State. In response, it was suggested that this approach confused restitution as a narrower remedy implying a return to the *status quo ante* and reparation which had additional elements, in particular compensation.

[54] See footnote 39 above.

175. Different views were expressed about the Special Rapporteur's proposal to delete the words "in kind" after "restitution". Some favoured such deletion, noting that it solved the problem of whether reference should be made to restitution in kind or *restitutio in integrum*. Others thought the longer formula was established.

176. As to the drafting, it was suggested that the opening phrase "A State which has committed an internationally wrongful act", be rendered as "A State responsible for an internationally wrongful act". It was also proposed that the word "obliged" be rendered as "bound", and that it be explicitly provided that restitution must be made to the injured State. Moreover, it was suggested that in some instances, "restoration" would be more precise than "restitution".

177. The view was expressed that, since restitution was itself an obligation, the provisions of the draft articles, including those dealing with circumstances precluding wrongfulness, were applicable to it. In response, the Special Rapporteur said that the effect of the circumstances precluding unlawfulness in Part One was to suspend compliance with the obligation under consideration for a period of time. The courts had always made a distinction between the continued existence of the underlying obligation and the exemption from performance of the obligation at a given time. In his view, circumstances precluding wrongfulness were generally speaking supplementary to the exceptions given in article 43, and that the impossibility of proceeding with restitution referred to a permanent impossibility rather than a temporary one. During the subsequent debate, doubt was expressed whether the circumstances precluding the wrongfulness of an act also applied to the part of the draft articles under consideration: if this was intended it should be clearly spelt out.

178. The view was also expressed that interim measures of protection and similar measures were not included in the classic concept of restitution, and that these should be distinguished from restitution in the context of the subsequent proceedings on the merits. The Special Rapporteur agreed, noting however that interim remedies could be directed at cessation, though in the context of provisional measures no decision would have been made that the act in question was definitively unlawful.

179. Support was expressed in the Commission for the proposed deletion of the exception contained in subparagraph (*b*), as adopted on first reading, relating to breaches of peremptory norms. It was noted that the question was resolved by the general rules of international law, and was already covered under article 29 bis. It was, however, noted that the draft articles needed to reflect the proposition that if a "crime" in the sense of article 19 had been committed, or a norm of *jus cogens* had been violated, restitution could not be waived by the injured State in favour of compensation, since the vital interests of the international community as a whole were at stake in such cases.

180. The proposed deletion of subparagraph (*d*), as adopted on first reading, concerning jeopardy to the political independence or economic stability of a State, also received support.. The exception was described as being too general in character, thus risking overly broad interpretations in practice. It was adequately covered by the exception in subparagraph (*c*).

181. It was suggested that a further exception be included, relating to cases where restitution is prevented by an insurmountable legal obstacle, not necessarily relating to the violation of a peremptory norm. The case of nationalization was cited as an example. It was maintained that in the light of several General Assembly resolutions, the legality of nationalizations had been affirmed, and that a State which had carried out a nationalization was not required to provide restitution. But in such cases, issues of restitution did not arise: by definition the taking itself was lawful and the question became one of payment for the property taken. Where the taking was unlawful per se, different considerations might apply.

182. Regarding subparagraph (*a*), it was queried whether "legal" impossibility was included in the phrase "material impossibility". This situation arose, for instance, under the primary rules of international law, States were required to adopt certain types of legislation, but did not do so. There were limits to the changes that could be made under some national legal regimes. For example a contrary Supreme Court decision in a given case could not be overturned, thus rendering restitution impossible.

183. Others noted that the State was responsible for the actions of its executive, legislative and judicial arms, and no governmental organ should be able to escape the duty to rectify any violation of international law that might occur. Moreover, although there might be no legal remedy within the domestic system for a final judgement not subject to appeal, reversal of the results of judgements had occurred on issues concerning international law in various countries. In principle, internal law could never be a pretext for refusing restitution and thus could not constitute a case of impossibility. It was considered essential to ensure that no margin be left for more powerful States to advance unilateral interpretations of "impossibility". True cases of legal impossibility were very rare, and a reference to material impossibility was sufficient.

184. The Special Rapporteur suggested, in the light of the debate, that the Commission needed to reconsider draft article 42, paragraph 3, affirming the basic principle that a State could not rely on its domestic law as an excuse for not fulfilling its international obligations. Introducing the phrase "legal impossibility" could amount to a revision of that basic principle. What was true was that a change in the relevant legal position could result in actual impossibility, for example, property seized from one person could not be restored if it had already been validly sold to another. The situation was more complicated where the rights of an individual were involved and international law acted as a critical standard, as it did in the human rights field.

185. Reference was further made to the decision of the Central American Court of Justice in the *El Salvador* v. *Nicaragua* case,[55] mentioned in paragraph 128 (*b*) of the

[55] See AJIL, vol. 11 (*Supplement*), No. 1 (January 1917), p. 3; see also decision of 9 March 1917 (ibid., vol. 11, No. 3 (July 1917), p. 674).

report, where the Court had avoided addressing the nullity of a treaty between Nicaragua and a third State (the United States of America) but had not considered that restitution was necessarily impossible. On the contrary, it held that Nicaragua was obliged to use all means available under international law to restore and maintain the situation which had existed before the conclusion of the treaty.

186. With regard to subparagraph (*c*), while support was expressed for the provision, it was queried whether the reference to "those injured" was to the State, as had been the case in the version adopted on first reading, or whether it also covered individuals. A preference was expressed for not making any reference to the injured entity at all. Alternatively, it was suggested that the term "injured" be replaced with "injured State or States".

187. The notion of proportionality in subparagraph (*c*) did not only concern cost and expense but also required that the gravity or otherwise of the breach be taken into account. But this could be covered either in the text or the commentary; in any event subparagraph (*c*) was necessary especially in the light of the proposed deletion of subparagraph (*d*).

(c) *Compensation (article 44)*

188. Strong support was expressed for the inclusion of a concise provision on compensation.

189. It was noted that the various judicial decisions on this issue, such as the *"Rainbow Warrior"* case, had prescribed a certain amount of compensation without indicating the precise criteria used for calculating the amount, and that a great deal depended on the circumstances of the breach and the content of the primary rule.[56] In many instances, States reached agreement on compensation for an internationally wrongful act, but on an *ex gratia* basis. In the context of world trade and environmental issues, States had created special regimes for compensation, which excluded the application of general principles. All the Commission could do was devise a flexible formula leaving the development of rules on the quantification of compensation to be developed by tribunals and practice.

190. Conversely, the view was expressed that article 44, as proposed by the Special Rapporteur, was essentially a *chapeau* article retaining only the priority accorded to restitution. A more detailed elaboration of the principle of compensation was required so as to give greater guidance to States and tribunals. Furthermore, the succinct treatment of the question of compensation created the impression that the general principle was restitution, and nothing less, and that, in technical terms, compensation only came into play if there had not been any restitution. It was suggested that additional determining factors be mentioned, including: that it should compensate both material damage and moral damage when the moral damage was suffered by an individual; that it must compensate *damnum emergens* and *lucrum cessans* at least when both were certain; that only "transitive" damage—that which resulted from a necessary and certain link of causality with the internationally wrongful act—should be liable for compensation; and that subject to article 45 bis, the damage should be assessed on the date of commission of the internationally wrongful act. Preference was also expressed for dealing with the question of loss of profits in the draft articles, and not merely in the commentary. The notion of "full reparation", endorsed by PCIJ in the *Chorzów Factory* case,[57] required that loss of profits be compensated as a general matter and not only on a case-by-case basis.

191. It was suggested that compensation should not go beyond the limit of injury or damage caused by the wrongful act or conduct so that possible abuses may be avoided. In that regard, agreement was expressed with the proposal to limit compensation by a provision such as that found in article 42, paragraph 3, as adopted on first reading. It was noted that the question of crippling compensation was worth examining, since it could lead to widespread violations of human rights. At the same time, consideration should be given to the economic capacity of the State to compensate the victims of mass and systematic violations of human rights.

192. The Special Rapporteur noted that the Commission was faced with a choice between two solutions: it could either draft article 44 succinctly, stating a very general principle in flexible terms, or it could go into some detail and try to be exhaustive. If the Commission opted for the long version, it would have to include a reference to loss of profits. He had deleted the reference to loss of profits principally because some Governments had been of the opinion that the version adopted on first reading had been formulated in such a weak way that it had the effect of "decodifying" international law. Others suggested an intermediate solution, with a concise version retaining a reference to loss of profits.

193. It was queried whether the word "economically" was appropriate to cover, for example, the wrongful extinction of an endangered wildlife species of no economic use to humans. It was proposed that the word "financially" be used instead. It was also noted that the answer was also to be found in the meaning of "moral damage" in article 45. As such, it was proposed that the phrase "material" damage be used in article 44, and "non-material" damage in article 45. As to whether moral damages belonged in article 44, the Special Rapporteur recalled that the former Special Rapporteur, Mr. Arangio-Ruiz, had solved the problem by saying that the article (former article 8) covered moral damage to individuals and article 45 (former article 10) covered moral damage to States.[58] That solution had been controversial because the term "moral damage" could apply to things so disparate as the suffering of an individual subjected to torture and an affront to a State as a result of a breach of a treaty. Others suggested that the reference to "economically assessable" did cover material damage, moral damage and loss of profits. Compensation for moral damage was confined to the damage caused to natural persons, leaving aside the moral damage suffered by the victim State. It was pointed out that this reflected judicial practice where

[56] See case concerning the difference between New Zealand and France (footnote 40 above), at p. 274, paras. 126–127.

[57] See footnote 39 above.

[58] Second report (see footnote 26 above), p. 7, para. 19.

pecuniary compensation had been granted in order to compensate moral damage suffered by individuals, especially in cases of cruel treatment.

194. It was noted that while article 43 made reference to "those injured", article 44 did not state who suffered damage, i.e. whether it was the State, or the real persons or entities injured, such as individuals. One reason for this imprecision was that account had to be taken of the wide variety of different cases: individual claims by companies or persons before national or international courts or commissions, claims by Governments on behalf of individuals or on their own account, claims by injured States and by "other" States, etc.

195. Reference was made to the decision of the ICSID tribunal in the *Klöckner* case,[59] where both parties were held to have violated the contract in question, with significant consequences in terms of reparation. The Special Rapporteur pointed out that part of the solution was to be found in what was known as "set-off", which would be a procedural issue before a court and was not part of the law of responsibility. In fact the decision in the *Klöckner* case had been annulled, and the case had been settled by agreement before any further decision on compensation.

196. Reference was also made to the question of the proper measure of compensation for expropriation, which article 44 did not address, and which had been a source of conflict between developing and developed countries. The classic western position of "prompt, adequate and effective compensation"[60] required, inter alia, that compensation be based on the value at the time of taking and that it be made in convertible currency, without restrictions on repatriation. However, it was noted that the foreign exchange implications of that formula could impose an embargo on any significant restructuring of the economy by a developing country that faced balance-of-payments difficulties. Current international practice revealed that considerable inroads had been made into the traditional formulation. Moreover, the General Assembly, in paragraph 4 of its resolution 1803 (XVII), of 14 December 1962, on permanent sovereignty over natural resources, had prescribed the payment of "appropriate compensation" in the event of nationalization, expropriation or requisitioning, which was a significant departure from the phrase "prompt, adequate and effective", although the Assembly had failed to define it. However, a number of speakers stressed that this long-standing debate had nothing to do with the content of article 44. Nationalization was a lawful act, whereas article 44 dealt with internationally wrongful acts. The Special Rapporteur agreed and reiterated that it was not the Commission's function to develop the substantive distinction between lawful and unlawful takings or to specify the content of any primary obligation.

197. Several members stressed that it was not enough to accept the principle that primary rules played an important role in determining whether compensation was justified. The different types of cases also had to be classified; guidance was to be obtained here less from legal writing and more from such arbitral decisions as in the *Aminoil* case.[61] Article 44 should include a qualifier along the lines of "unless the primary rules indicate a different solution". As against this it was noted that the rules stemming from judicial decisions and arbitral awards were applied only occasionally, and that questions of State responsibility were more often dealt with through direct contact among States or even through national courts. Such practice was not necessarily reflected in arbitral awards. In response, the Special Rapporteur pointed out that, however important the primary rules were, it was difficult to draw the appropriate conclusions in the drafting of the articles themselves. A discussion of the various points in the commentary was more appropriate.

(d) *Satisfaction (article 45)*

198. There was support for the provision as proposed by the Special Rapporteur, which maintained elements of flexibility especially through the notion of "offer". The objective was to set out a range of political options and entitlements open to States following the commission of an internationally wrongful act. Moreover, satisfaction could be either autonomous or complementary to restitution and/or compensation, and this was made clear by the proposed provision.

199. Others expressed the view that article 45 was a hybrid provision that contained a mixture of the law relating to the quantitative assessment of damage and measures of satisfaction *stricto sensu*. As the latter were a form of political punishment of States they were no longer applicable. In practice, satisfaction was an institution to which States rarely had recourse. It was thus queried whether legal rules on satisfaction really existed, and even whether the wrongdoing State was under an obligation to offer satisfaction to the injured State. Instead, the draft articles should either omit or minimize "satisfaction" as a discrete remedy and focus on the "missing" remedy of declaratory relief, whether by way of orders or declarations of rights, which was not generally accepted as a diplomatic form of reparation, but which had legal consequences.

200. Others disagreed with the attack on satisfaction as a discrete form of reparation. In their view, satisfaction was a normal form of reparation and the fact that courts made awards and declarations in terms of satisfaction bore that out. It was true that the decision of ICJ in the *Corfu Channel* case was unusual in that the respondent State had not actually asked for damages; the declaration awarded there by way of satisfaction had been all that the Court could do.[62] But that case had led to a consistent and valuable practice of declarations by way of satisfaction, which the draft articles should recognize.

[59] *Klöckner Industrie-Anlagen GmbH and others* v. *Republic of Cameroon,* Award on the Merits (*ICSID Reports* (Cambridge University Press, Grotius, 1994), vol. 2, p. 3).

[60] See G. H. Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1942), vol. III, p. 659.

[61] Arbitration between Kuwait and the American Independent Oil Company (Aminoil), ILM, vol. 21, No. 5 (September 1982), p. 976.

[62] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4, at p. 35.

201. The Special Rapporteur noted that an unnecessary distinction between the diplomatic and legal spheres was being made. Since the Commission was concerned to determine the rules that were applicable to inter-State relations, the rules of responsibility could not be formulated in terms of the powers of courts, thus creating the problem of "missing remedies". His proposal distinguished between the "normal" method of satisfaction, i.e. the acknowledgement that a breach existed, and the forms referred to in article 45, paragraph 3, which were exceptional. The failure of such acknowledgement was the basis for a declaration by a court or tribunal in any subsequent proceedings.

202. Regarding paragraph 1, there was agreement with the proposed emphasis on the obligation of the State which had committed an internationally wrongful act to offer satisfaction. Support was also expressed for the proposed substitution of the term "moral damage" by "non-material injury". The proposed change allowed for a symmetrical contrast between article 44, concerning material injury, and article 45, concerning non-material injury.

203. Conversely, the view was expressed that the proposed text was too narrow, since it limited the institution of satisfaction to non-material or moral injury. The suggestion was made that an injured State could also enjoy a right to satisfaction in the context of material injury. The term "non-material injury" omitted the crucial point that the purpose of satisfaction was to repair the moral damage suffered by the State itself.

204. It was noted that, whereas the wrongdoing State was "obliged to make restitution" and "obliged to compensate" in articles 43 and 44, respectively, under article 45, it was obliged simply to "offer" satisfaction, reflecting the perception that satisfaction could not be defined in the abstract. But others thought this introduced an unsatisfactory form of subjectivity: whether an offer of satisfaction was adequate in terms of the standard of full reparation could be judged, in essentially the same way as the adequacy of an offer of compensation.

205. As to acknowledgement of the breach, the view was expressed that expressions of regret or formal apology might imply such an acknowledgement and thus render it unnecessary.

206. There was support for mentioning acknowledgement of the breach first, as proposed by the Special Rapporteur, and which conformed with the approach in the *Corfu Channel* case. Conversely, it was queried whether acknowledgement should be first, at the State-to-State level, since some States offered apologies freely, without acknowledging the breach, in a manner comparable to *ex gratia* payments. In other instances, apologies were offered to avoid any further consequences of a breach. Faced with possible or pending litigation, States would be well advised to avoid any acknowledgement, even if it might possibly form part of an overall settlement, expressly or by implication.

207. The use of the phrase "as appropriate" was considered too imprecise, and only acceptable if the cases referred to were explained in the commentary and illustrated by examples. It was suggested that paragraphs 1 and 2 be combined in order to provide a more precise draft. A single paragraph could begin with the phrase, like in the article adopted on first reading: "Satisfaction may take one or more of the following forms", followed by a non-exhaustive list of all the forms of satisfaction, beginning with acknowledgement of the breach.

208. Concern was also expressed that the proposed paragraph 2 downgraded the status of apologies, whereas on first reading apologies had figured as a self-contained form of satisfaction. But it was noted that there was a political element to apologies, since they usually resulted from negotiated settlements. It was doubtful whether sufficient *opinio juris* existed for the recognition of apologies as a form of satisfaction.

209. In relation to paragraph 3, support was expressed for a non-exhaustive list of measures, as well as for the reference to "full reparation". However, the phrase "where circumstances so require" was considered too general since States, courts and arbitrators could benefit from knowing precisely in what cases and circumstances a particular step should be taken.

210. As regards paragraph 3, subparagraph (*a*), a preference was expressed for retaining a reference to nominal damages, which could be inserted in paragraph 2. The Special Rapporteur noted that if article 45, paragraph 3, was inclusive then nominal damages could be subsumed under subparagraph (*b*) relating to damages reflecting the gravity of the injury.

211. Concerning subparagraph (*b*), it was observed that satisfaction could also be accompanied or preceded by the payment of damages, even if there was no material damage; a possibility implied by the term "full reparation". Conversely, it was stated that the text incorrectly implied that such damages were a component of full reparation, and were necessary in order to eliminate all the consequences of the wrongful act. The concept of damages in article 45 overlapped with article 44. Hence paragraph 3 (*b*) could be moved to article 44, or to a specific provision on damages.

212. The view was expressed that damages on a more than nominal scale were conceivable only in cases of "gross infringement" of a rule of fundamental importance, not only for the injured State, but also for the international community as a whole, i.e. that of State "crimes". As such, the provision should be transferred to the chapter on the consequences of crimes. A preference was further expressed for restricting the scope of damages to cases of "gross infringement of the rights of the injured State", as stipulated in paragraph 2 (*c*) as adopted on first reading. Conversely, it was maintained that paragraph 3 (*b*) should not be restricted to crimes and should be retained, as proposed by the Special Rapporteur. Furthermore, it was noted that the expression "gravity of the injury" could be interpreted either to refer to the gravity of the wrongful act or the gravity of the harm suffered.

213. Disagreement was expressed with the idea that punitive damages and moral damage should be discussed under the heading of "Satisfaction". Paragraph 3 (*b*) could be deleted, although without prejudice to any future consideration of the issue of punitive damages by the Commission, for example in the context of grave

breaches, particularly international "crimes" contemplated by article 19, as adopted on first reading.

214. The Special Rapporteur stressed that paragraph 3 (*b*) did not concern punitive damages but what were referred to in some legal systems as "aggravated" or "expressive" damages. As demonstrated by the *"I'm Alone"* case,[63] in some situations it was necessary to recognize the gravity of a wrong, and those situations were not confined to "grave breaches".

215. The meaning of the expression "serious misconduct", in paragraph 3 (*c*), which could imply a reference to negligence, was queried. It was noted that since the introductory phrase to paragraph 3 restricted its scope to cases where "circumstances so require", the adjective "serious" could be deleted. It was also considered necessary to clarify that the criminal conduct of private persons related to State responsibility only in relation to the State's breach of the duty of prevention; indeed this implied that the scope of the provision should be restricted solely to criminal acts of State agents. Any penal action against private individuals was nothing but the belated performance of a primary obligation. Moreover, some primary rules already required action to be taken against State officials in cases of misconduct; in the light of these provisions it was doubtful whether the subparagraph was necessary.

216. It was proposed that specific mention could be made in article 45, or in the commentary, to the holding of an inquiry into the causes of an internationally wrongful act, as a form of satisfaction. However, caution was voiced as to conceiving inquiry as a form of satisfaction per se: it was more properly considered as part of the process leading to satisfaction.

217. According to some members, factors favouring the retention of article 45, paragraph 2 (*d*), as adopted on first reading included recent developments in the field of international criminal law. In this connection, it was proposed that a clause be added to the end of paragraph 3 (*c*) as proposed by the Special Rapporteur requiring that the disciplinary or penal action be taken by the respondent State itself, or that there be extradition to another State or transfer to an international criminal tribunal with jurisdiction over the alleged crime.

218. With regard to paragraph 4, it was suggested that it be moved to either article 37 bis or into a *chapeau* to chapter II.

219. The view was expressed that it was unnecessary to refer to "humiliation" in article 45, since there was no need to avoid humiliating a responsible State that had itself humiliated the injured State. The requirement of proportionality was sufficient. Even the act of acknowledging the breach might be considered as humiliating by certain States and therefore the rule in paragraph 4 must not be understood as applicable *in extenso*.

220. Conversely, a strong preference was expressed for retaining the reference to humiliation, since satisfaction should avoid humiliation: there was still a strong concern about imbalances of power that had historically enabled powerful States to impose humiliating forms of satisfaction on weaker States. In that regard, it was suggested that the word "should" be replaced by "must" or "shall". In this regard, a reference could be included to the sovereign equality of States.

(e) *Interest (article 45 bis)*

221. Support was expressed for the main thrust of article 45 bis, especially in the light of the cursory treatment given to the question of interest in the draft articles adopted on first reading. However, the provision had to be consistent with the function of Part Two, namely to ensure that the injured State was made whole by the wrongdoing State. There was thus a close connection with article 44, and the question of interest should either be addressed in the framework of article 44, possibly as a second paragraph to article 44, or placed as a separate article immediately after article 44, dealing only with interest due on compensation payable under article 44, as well as with the issue of loss of profits and compound interest. In the latter regard, the view was expressed that care had to be taken to avoid double recovery. Moreover, it could not be assumed that the injured party would have earned compound interest on the sums involved if the wrongful act had not been committed. The Special Rapporteur noted that although the principal sum on which interest was payable would normally involve compensation under article 44, circumstances could be envisaged where that was not the case, but interest was nonetheless payable.

222. It suggested that the second sentence of paragraph 1 was unnecessary and should be deleted. In paragraph 2, the phrase "[u]nless otherwise agreed or decided" was likewise unnecessary since it was a precaution applicable to all the provisions of chapter II and indeed to the whole of the draft article. As regards the date from which interest runs, it was noted that, in practice, interest was payable from the date of the wrongful act, or from the date on which the damage had occurred or, more precisely, from the date from which the compensation no longer fully covered the damage. Article 45 bis could be reformulated accordingly. In response, the Special Rapporteur noted that, in principle, the decisive date was that on which the damage had occurred, but that some flexibility was characteristically shown by tribunals and this should be reflected in the text.

(f) *Mitigation of responsibility (article 46 bis)*

223. Support was expressed for the inclusion of article 46 bis, which contained elements of progressive development. However, it was doubted whether the conditions for mitigation of responsibility also applied to restitution. If so, the object of the restitution could be restricted since the wrongdoing State might have some say in deciding on the extent of the restitution. It was observed that the title of the proposed draft article did not accurately reflect its contents.

224. Article 46 bis, while an improvement on article 42, paragraph 2, as adopted on first reading, nonetheless

[63] *S.S. "I'm Alone",* awards of 30 June 1933 and 5 January 1935 (UNRIAA, vol. III (Sales No. 1949.V.2), p. 1609).

raised various concerns relating to the possible—albeit unintended—mixing of the measure of damages with the primary rule establishing responsibility. It needed to be made clear that the point at issue was not the primary rules but a factor that might be taken into account in determining the magnitude of the damages owed.

225. Concerning subparagraph (*a*), the view was expressed that only "gross" negligence or serious misconduct could be regarded as limiting the extent of reparation.

226. In response to a question, the Special Rapporteur indicated that subparagraph (*b*) was not limited to the doctrine of "clean hands", which had been considered at the Commission's previous session.[64] He referred to the *Gabčíkovo-Nagymaros Project* case[65] in which ICJ had recognized a "duty" to mitigate damage, i.e. in determining the amount of reparation it was possible to take into account the question whether the injured State had taken reasonable action to mitigate the damage. But reference to such a "duty" must not be taken to imply that if that obligation was violated, secondary rules applied and reparation had to be made. Instead, failure to mitigate would lead to a limitation on recoverable damages. However, the view was also expressed that subparagraph (*b*) could create difficulties insofar as it would require States to take precautionary measures with regard to all possible kinds of breaches of international law in order to obtain full reparation.

12. Special Rapporteur's concluding remarks on chapter II

227. The Special Rapporteur agreed with the observation that the extent of the obligation of restitution (art. 43) depended on the primary rules at stake. There was thus a "legal" element to impossibility, but provided it was made clear that article 29 bis applied to Part Two, subparagraph (*b*) as adopted on first reading was unnecessary. Arguments by States that restitution was impossible for domestic legal reasons did not constitute justifications as a matter of international law, but it was clear that the primary rules of international law could come into play at that stage.

228. As to the question of the narrow as opposed to the broad conception of restitution, he favoured the narrow conception. The *Chorzów Factory* dictum[66] was about reparation in the general sense, and was therefore about *restitutio in integrum* in the general sense; it was not about restitution in the article 43 sense, which had already been excluded by the time PCIJ had issued its dictum because it had been disavowed by Germany. It was already stated in chapter I that reparation must be full. If restitution was not understood in this narrow sense, an impossible overlap would arise between article 43 and other forms of reparation. The Commission had been very clear on first reading in adopting this approach, and it had not been criticized for that by Governments.

229. As to the question to whom restitution should be made, the articles had to be drafted so that they could be invoked by the injured State in a bilateral context, by one of several States injured in a multilateral context, or indeed by States which were in the position of Ethiopia and Liberia in the *South-West Africa* cases.[67] Restitution could be sought by different States, and compensation could be sought on behalf of a variety of interests, and this had to be reflected in the text.

230. As to article 44, the Special Rapporteur was prepared to consider a more detailed provision, on the understanding that it was essential to take account of the different legal relations involved, including legal relations with non-State entities. A modern conception of responsibility required that it be conceived of in a multi-layered manner.

231. He observed further that a majority of the Commission had favoured the reintroduction of the reference to loss of profits. However, the difficulty with that in regard to article 44, as adopted on first reading, was that it decodified the existing law on loss of profits. The reintroduction of the reference would necessitate a further article or paragraph. The issue could also be relevant in connection with article 45 bis. His own preference was to retain the separate identity of article 45 bis and not to subsume it into article 44. Since a specific formulation on interest was possible, a specific treatment of loss of profits could also be possible.

232. As to the question of moral damage, it was clear that article 44 covered moral damage to individuals, whereas what was called moral damage to States was intended to be dealt with in article 45. The use of the term "moral damage" was confusing for reasons he had explained in relation to article 45. Instead, the content of the provision should be made clear, and questionable terms like "moral" should be left to the commentaries.

233. Concerning article 45, the debate on the article had revealed a wide divergence of views. Satisfaction was well founded in doctrine and jurisprudence, and its elimination would constitute a fundamental change. The concept of satisfaction had a hybrid function with some aspects being synonymous to reparation, as was the case with article 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The non-material aspects of international conflicts were frequently important and it was necessary to resolve the differences in a way that "satisfied" both parties. This need for an agreement in order for satisfaction to take place was implicit in the use of the verb "offer".

234. While recognizing that the institution of satisfaction had been the object of serious abuses in the past, the Special Rapporteur felt that this was not reason enough to dispense with it, but that it needed to be re-examined in order to fulfil its contemporary functions. The main problem posed by article 45, as adopted on first reading, was that it had not provided for the acknowledgement of a

[64] *Yearbook . . . 1999*, vol. II (Part Two), p. 85, document A/54/10, paras. 411–415.

[65] *Gabčíkovo-Nagymaros Project* (see footnote 35 above), at p. 55, para. 80.

[66] See footnote 39 above.

[67] *Second Phase, Judgment, I.C.J. Reports 1966,* p. 6.

breach by the State which had committed it nor, in a judicial context, for the declaration of the existence of a breach. In modern practice, the normal form of satisfaction was the declaration of the existence of a breach, such as in the *Corfu Channel* case.[68] Expressions of regret or apologies could, by implying that there had been a violation, fulfil the same function. His approach had been to partition satisfaction so as to differentiate between its standard form, namely the acknowledgement of a breach by the State that committed it or a declaration by a tribunal, from its exceptional forms. In that regard, he opposed the suggested merger of paragraphs 2 and 3, which would blur that distinction.

235. As regards paragraph 3, he noted that the forms of satisfaction referred to were essentially exemplary and therefore symbolic, even if in some instances, such as in the *"I'm Alone"* case,[69] a substantial sum had been awarded as satisfaction. The Commission, when adopting the articles on first reading, had opted for dealing with such situations in the context of article 45, instead of article 44. In doing so it had limited the concept in an unsatisfactory manner, i.e. by rejecting the analogy between non-material damage to private individuals involving affront, *injuria* in the general sense, and *injuria* to States. One possible way of limiting the concerns as to the possible abuse of satisfaction would be to acknowledge that a form of non-material injury could also be compensated for in the context of article 44, by allowing for damages to the State for *injuria*. Article 45 would then be restricted to non-monetary and expressive elements of the resolution of disputes.

236. The Special Rapporteur indicated that retention of a non-exhaustive list of the main forms of satisfaction was useful. He had no particular preference as regards the retention in the draft articles of nominal damages. He also noted that the holding of an inquiry could also prove important by providing insight into what had actually occurred and could, in addition, lead to assurances and guarantees of non-repetition.

237. As to paragraph 3, subparagraph (*c*), he noted that the argument could be made that the contents of the subparagraph were already covered by the primary rules, and would not constitute a major function of satisfaction.

238. Concerning paragraph 4, he recalled that the majority of the Commission had agreed with the notion of proportionality, and emphasized that the main objective of paragraph 4 was to prevent excessive demands in relation to satisfaction.

239. With regard to article 45 bis on interest, while some members had felt that interest was part of compensation, the majority had expressed a preference for a separate article, even if interest was only an accessory to compensation. His own view was that the provisions on interest should not be included in the article on compensation since there were circumstances where interest could be payable on principal sums other than compensation, for example, on a sum that was payable by virtue of a primary rule.

240. In relation to article 46 bis, the Special Rapporteur observed that although the main objective of the article was to limit the amount of compensation, under certain circumstances it could have a different effect, for example, where a delay in filing a claim for payment could lead a tribunal to determine that there was no need to pay interest.

241. In relation to subparagraph (*a*), he noted that the majority of members had supported his formulation, which had closely followed the wording of article 42, paragraph 2, as adopted on first reading, and which had been widely accepted by Governments. Yet some divergence of views had surfaced in the course of the discussion between those who favoured more elaborate provisions and those who preferred more concise ones. It would be a matter for the Drafting Committee to seek to conciliate the different views.

13. Introduction by the Special Rapporteur of Part Two bis: Implementation of State responsibility

Chapter I. Invocation of the responsibility of a State

(a) *General comments on Part Two bis*

242. The Special Rapporteur recalled that the Commission had provisionally agreed to formulate Part Two in terms of the obligations of the responsible State, together with the inclusion of a new Part Two bis which would deal with the rights of the injured State to invoke responsibility. The Commission had also accepted the Special Rapporteur's distinction between the injured State *qua* State victim, and those States that had a legitimate concern in invoking responsibility even though they were not themselves specifically affected by the breach.

243. Chapter III of his report dealt with the invocation of responsibility by the injured State, namely the State which was the party to the bilateral obligation, or which was specially affected or necessarily affected by the breach of a multilateral obligation. This was without prejudice to the special provisions on the right of the further category of States, i.e. those falling into the category of article 40 bis, paragraph 2, to invoke responsibility in a variety of ways, a matter that would be dealt with subsequently.

(b) *The right to invoke the responsibility of a State (article 40 bis)*

244. The Commission had earlier debated article 40 bis, although its location in the draft articles was still provisional. The Special Rapporteur subsequently proposed that the draft article be placed in chapter I of Part Two bis. He stated that in the ordinary case the injured State could elect whether to insist on restitution or to receive compensation. He did not agree that the injured State could elect the form of satisfaction, i.e. the injured State could not absolutely insist on a specific form of satisfaction, though

[68] See footnote 62 above.

[69] See footnote 63 above.

it was entitled to insist on some form of satisfaction. However, the injured State was entitled to decline restitution in favour of compensation. Yet, some exceptional limits on the right of the injured State to do so existed, as recognized in the notion of "valid" election. Those issues were generally dealt with in the context of the continuing performance of the primary obligation, rather than through any mechanism of election as between the forms of reparation.

(c) *Invocation of responsibility by an injured State (article 46 ter)*

245. The Special Rapporteur proposed article 46 ter[70] on formal requirements for the invocation of responsibility, based on the analogy of article 65 of the 1969 Vienna Convention. The first paragraph of the proposed article required notice of the claim, as a minimum requirement, since certain consequences arose from not giving notice of the claim over a long period of time, e.g. the State may be deemed to have waived the claim.

246. As to the question of admissibility of claims, in paragraph 2 the Special Rapporteur observed that, notwithstanding that the details of the rules on nationality of claims and the exhaustion of local remedies rule would be covered in the topic of Diplomatic protection, those were conditions to the admissibility of the claim itself, and not questions of judicial admissibility which were beyond the scope of the draft articles on State responsibility. As such they deserved a mention in the draft articles, and he proposed chapter I of Part Two bis, as the more appropriate place.

(d) *Loss of the right to invoke responsibility (article 46 quater)*

247. The Special Rapporteur noted that the 1969 Vienna Convention dealt with the loss of the right to invoke a ground for suspension and termination of a treaty. Since such issues were frequently raised in practice, it was appropriate to propose an analogous provision dealing with loss of the right to invoke responsibility, as article 46 quater.[71] The following possible grounds for loss of the right to invoke responsibility existed: waiver, delay, settlement and termination or suspension of the obligation breached. The latter was important, as it were *a contrario*, because the termination or suspension of the obligation breached did not give rise to a loss of a right to invoke responsibility, as pointed out by arbitral tribunals in the modern period.

248. The proposed text recognized two grounds for the loss of the right to invoke responsibility: waiver, including by the conclusion of a settlement, and unreasonable delay. As to waiver, there was no doubt that in normal circumstances an injured State was competent to waive a claim of responsibility. This was a manifestation of the general principle of consent. It was not, however, feasible to codify the law of the modalities of the giving of consent by States. One case which could be assimilated to waiver was the unconditional acceptance of an offer of reparation (even partial reparation); in other words, settlement of the dispute. A second basis for loss of the right to invoke responsibility was undue delay; there was no set period or time limit for claims in international law, but the circumstances could be such that the responsible State reasonably believed the claim had been dropped, and this idea had been included in a separate paragraph.

(e) *Plurality of injured States (article 46 quinquies)*

249. The Special Rapporteur recalled that his second report[72] had introduced the question of the plurality of States and the vexed question of the character of responsibility where there is more than one State involved, in the context of chapter IV of Part One, and the general view had been that this should be addressed by the Commission in more detail. He noted the tendency for reliance on domestic law analogies with regard to the use of terminology. Examples included phrases like "joint and several responsibility" or "solidary" responsibility. Indeed, there were situations where phrases like "joint and several responsibility" or "joint and several liability" were incorporated in treaties, as in the case of the Convention on the International Liability for Damage Caused by Space Objects. However, the problem was that such responsibility tended to be conceived of differently between different legal systems, and even within them in different fields such as contract and tort. Great caution was thus needed in resorting to the use of domestic law analogies in this area.

[70] The text of article 46 ter proposed by the Special Rapporteur reads as follows:

"*Article 46 ter. Invocation of responsibility by an injured State*

"1. An injured State which seeks to invoke the responsibility of another State under these articles shall give notice of its claim to that State and should specify:

"(*a*) What conduct on the part of the responsible State is in its view required to ensure cessation of any continuing wrongful act, in accordance with article 36 bis;

"(*b*) What form reparation should take.

"2. The responsibility of a State may not be invoked under paragraph 1 if:

"(*a*) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

"(*b*) The claim is one to which the rule of exhaustion of local remedies applies, and any effective local remedies available to the person or entity on whose behalf the claim is brought have not been exhausted."

[71] The text of article 46 quater proposed by the Special Rapporteur reads as follows:

"*Article 46 quater. Loss of the right to invoke responsibility*

"The responsibility of a State may not be invoked under these articles if:

"(*a*) The claim has been validly waived, whether by way of the unqualified acceptance of an offer of reparation, or in some other unequivocal manner;

"(*b*) The claim is not notified to the responsible State within a reasonable time after the injured State had notice of the injury, and the circumstances are such that the responsible State could reasonably have believed that the claim would no longer be pursued."

[72] See footnote 20 above.

250. He proposed article 46 quinquies as a basis for discussion.[73] It was without prejudice to the situation where States parties to a particular regime had established a set of rules governing that regime, in the context of the activity of more than one State, entity or person. In the absence of a special arrangement, the situation was relatively simple: where there was more than one injured State, as narrowly defined in article 40 bis, paragraph 1, each injured State on its own account could invoke the responsibility of the responsible State.

(f) *Plurality of States responsible for the same internationally wrongful act (article 46 sexies)*

251. The Special Rapporteur stated that article 46 sexies[74] dealt with the situation where more than one State was responsible for a particular harm, which was different from where a series of States had separately done damage to a particular State. A classic example was the *Corfu Channel* case,[75] where mine laying was carried out by State A, on the territory of State B in circumstances where State B was responsible for the presence of the mines. The responsibility of State B in those particular circumstances did not preclude the responsibility of State A. Similarly, under chapter IV of Part One, several States could be responsible at the same time for the same act causing the same damage.

252. The provision was qualified in two ways. First, paragraph 2 (*a*) provided for the rule against double recovery of damages as a limit on the recovery of reparation, which had been recognized by courts and tribunals. However, the situation in which it arose was largely the situation where the same claim, or at least the same damage, was the subject of complaint by the injured State against several States. While other situations could be envisaged, the draft articles could not deal with all of the procedural ramifications of situations of multiple responsibility. It was sufficient, therefore, that the rule against double recovery be mentioned in the context of the provision dealing with a plurality of responsible States.

253. Furthermore, two saving clauses on the question of admissibility of proceedings and the requirement of contribution between States were included in subparagraph (*b*). Concerning the former, the primary reference was to the *Monetary Gold* rule,[76] albeit that this was a purely judicial rule of procedure. As to the question of contribution, which was a matter to be resolved between States, the inference was that the injured State could recover in full for the injury caused to it by the act attributable to State A, even if the same act was attributable to State B as well, or if State B was responsible for it. Such principle followed from the decision in the *Corfu Channel* case, and was supported by general principles of law and considerations of fairness.

254. The Special Rapporteur recalled that he had also considered in paragraphs 244 to 247 of his report the *non ultra petita* principle, i.e. that a court may not give a State, in relation to an international claim, more than it asks for. While that principle had been widely recognized by the courts, it was really a manifestation of the underlying doctrine of election, and therefore required no specific recognition in the draft articles.

14. Summary of the debate on Part Two bis

Chapter I. Invocation of the responsibility of a State

(a) *The right to invoke the responsibility of a State (article 40 bis)*

255. In reference to the proposed placement of article 40 bis into Part Two bis, it was noted that Part Two would not retain any indication of which were the States to whom the obligations are owed. Likewise, Part Two bis also needed to be completed, because article 40 bis, as proposed by the Special Rapporteur, distinguished between injured States and those that had a legal interest, but it was necessary to specify what having a legal interest implied. While article 46 ter provided for the injured State invoking responsibility to choose the form of reparation, nothing was said about the latter category of States. Such States could, for example, request cessation and assurances and guarantees of non-repetition.

(b) *Invocation of responsibility by an injured State (article 46 ter)*

256. General support was expressed for the inclusion of an article on the forms for the invocation of responsibility, along the lines of that proposed by the Special Rapporteur.

257. As to the requirement of notice, contained in the *chapeau* to paragraph 1 of the Special Rapporteur's proposal, the view was expressed that the analogy to invoking the invalidity, suspension or termination of a treaty under article 65 of the 1969 Vienna Convention was

[73] The text of article 46 *quinquies* proposed by the Special Rapporteur reads as follows:

"*Article 46 quinquies. Plurality of injured States*

"Where two or more States are injured by the same internationally wrongful act, each injured State may on its own account invoke the responsibility of the State which has committed the internationally wrongful act."

[74] The text of article 46 sexies proposed by the Special Rapporteur reads as follows:

"*Article 46 sexies. Plurality of States responsible for the same internationally wrongful act*

"1. Where two or more States are responsible for the same internationally wrongful act, the responsibility of each State is to be determined in accordance with the present draft articles in relation to the act of that State.

"2. Paragraph 1:

"(*a*) Does not permit any State, person or entity to recover by way of compensation more than the damage suffered;

"(*b*) Is without prejudice to:

"(i) Any rule as to the admissibility of proceedings before a court or tribunal;

"(ii) Any requirement for contribution as between the responsible States."

[75] See footnote 62 above.

[76] Case of the *Monetary Gold Removed from Rome in 1943, Judgment*, *I.C.J. Reports 1954*, p. 19.

being stretched too far. There was no reason why a State should first make a protest or give notice of intentions to invoke responsibility.

258. Furthermore, support was expressed for the fact that the text did not require notice of the claim to be in writing. In that regard, the analogy to article 23 of the 1969 Vienna Convention was not appropriate. States do not always communicate in writing, and it was not always clear what different acts "in writing" would cover. Various forms of notification, from an unofficial or confidential reminder to a public statement or formal protest could be taken as suitable means of notification, depending on the circumstances. The example of the flexible approach taken in the *Phosphate Lands in Nauru* case[77] was cited. Hence, any proposal to require writing would not reflect existing practice or the standards adopted by ICJ. By contrast, some members suggested the substitution of "a written notification" for the word "notice". It was also proposed that the reference be rendered as "officially notify", or "notification". The Special Rapporteur pointed out, in response, that his proposal only referred to "notice" which was more flexible than "writing"; he agreed that much depended on the circumstances.

259. As to subparagraphs (*a*) and (*b*), it was suggested that the permissive "should" at the end of the *chapeau* to paragraph 1 be replaced by "shall", so as to make the requirements in those subparagraphs mandatory. Others however thought that the term "should" was a more accurate reflection of the legal situation. It was also proposed that subparagraphs (*a*) and (*b*) be deleted and reflected in the commentary.

260. According to some speakers, paragraph 1 (*a*) created the impression that the injured State could decide on the required conduct, which was not the case. A responsible State would be entitled to object to a conduct other than that required by the breached rule. It was also suggested that the provision should be indicative and not restrictive, so as not to be limited to cessation.

261. Regarding paragraph 1 (*b*), the view was expressed that the right of an injured State to choose the form of reparation was not sufficiently clearly stated, since reference was made to the form and procedure in broad terms, and not to the object and content of the claim. The draft articles should make the right of election explicit: the injured State could demand restitution in accordance with article 43 each time it was possible and not disproportionate; the injured State could not yield restitution in cases of a violation of a peremptory norm of general international law, since the respect for the obligation was of interest to the whole international community; but in other cases there was nothing to prevent a State from waiving restitution or compensation for satisfaction. Another view was that paragraph 1 (*b*), did clearly state the right of the injured State to choose what form reparation should take. Still others took the view that the "right" of the injured State to choose the form of reparation, was not absolute, particularly when restitution in kind is possible, otherwise the rule of the priority of restitution over compensation would have no meaning. In particular, it was doubted whether such right of election was to be construed as a subjective right of an injured State, to which a corresponding obligation on the part of the responsible State (to provide the form of reparation that had been "validly" elected by the injured State) existed. In practice, election was most frequently between restitution and compensation, on the basis of an agreement among the parties. Instead, the election of the form of reparation should be considered an "option" or "claim" open to the injured State, as distinct from an entitlement which the responsible State was bound to respect. In practice, the question of the election of the form of reparation would come at a later stage, after the initial contact with the respondent State, so that the issue should not be confused with the initial notification of the claim.

262. It was further noted that while the draft articles only regulated inter-State relations, such relations could be affected by the fact that individuals or entities other than States are the beneficiaries of reparation, i.e. that claims may be brought for their benefit. It was thus proposed that the possibility be recognized that individuals have some say in the choice of the form of reparation.

263. Concerning paragraph 2, the suggestion was made to place it in a separate article, entitled "Conditions for the exercise of diplomatic protection", since it was not clearly related to paragraph 1.

264. The concern was expressed that the reference in paragraph 2 (*a*) to the nationality of claims rule could prejudge future work on the topic of diplomatic protection. Furthermore, the phrase "nationality of claims" was considered imprecise, and better reflected as the nationality of a person on whose behalf a claim was put forward by a State.

265. Again, in regard to paragraph 2 (*b*), it was pointed out that the inclusion of an article on the exhaustion of local remedies rule in the draft articles would limit the Commission's freedom of action in relation to the topic of diplomatic protection. A preference was thus expressed for a more neutral formula, which could state that local remedies need to be exhausted in accordance with the applicable rules of international law. Such a neutral approach would also avoid prejudging the question of which approach to the exhaustion of local remedies rule, i.e. the substantive or procedural, should be favoured. Others thought that the Special Rapporteur's formulation seemed to favour the procedural theory, and that it was right to do so. Even so, it might be wiser to include in Part Four a general saving clause relating to the law of diplomatic protection.

266. In response, the Special Rapporteur recalled that the Commission had previously considered the question of the exhaustion of local remedies in the context of his second report,[78] and that it had concluded that the matter should be left open, because the appropriate approach (substantive or procedural) depended on the context. In cases where it was clear that there had already been a

[77] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment*, *I.C.J. Reports 1992*, p. 240.

[78] See paragraphs 220 to 243 of his second report (footnote 20 above).

breach (e.g. torture) exhaustion of local remedies was a procedural prerequisite which could be waived; in other cases the denial of justice was the substance of the claim. There could also be cases in between. The formulation of article 46 ter was not intended to prejudice the matter. Furthermore, a specific reference in the draft articles was preferable, since it was at the very least arguable that the exhaustion of local remedies rule applied outside the field of diplomatic protection, e.g. to individual human rights claims under general international law. It was significant that the articles in the human rights treaties referred to the local remedies rule as being that applicable under general international law.

267. As to the principle of *non ultra petita*, support was expressed for not including it in the draft articles, since courts have the right to define compensation above what is being demanded by the claimant in exceptional cases. Its inclusion could also limit the flexibility of international tribunals in deciding on the appropriate combination of remedies. Other members, however, felt that the principle was an integral part of positive law.

(c) *Loss of the right to invoke responsibility (article 46 quater)*

268. The view was expressed that the term "waiver" was being used in a too extensive sense. As such it was suggested that the broader term "acquiescence", be used instead. According to one view, the terms "unqualified" and "unequivocal" needed clarification. It was suggested that provision could also be made for partial renunciation of the right to invoke a particular form of reparation, i.e. that the election of remedies was a form of partial waiver. The view was also expressed that settlement could not be categorized as a kind of waiver but should be treated separately, because unilateral action by one State was not enough. Settlement had to be reached through the actions of both States. It was also doubted whether unqualified acceptance of an offer of reparation could be subsumed under the category of waiver.

269. The question was raised of what happened to the wrongful act and the duty of cessation and reparation if the right to invoke responsibility was lost. In that regard, it was suggested that the duty to make reparation remained in force, and that the wrongful act could only become legal if the waiver of the right to invoke responsibility amounted to consent *ex post*.

270. On delay and extinctive prescription, agreement was expressed with the Special Rapporteur's view that a lapse of time does not as such lead to the inadmissibility of a claim to reparation. It was doubted whether extinctive prescription was recognised in respect of all categories of claims under general international law. It was certainly not appropriate in the context of "crimes", which were recognized as imprescriptible. Similarly, the example was given of the difficulties of applying the concept of prescription in the context of States that had undergone a process of decolonization, where, in many cases, the evidence that would enable such States to invoke the responsibility of another State had not been made available to them on independence: such contextual factors had been taken into account by ICJ in the *Phosphate Lands in Nauru* case.[79] Likewise, the reference to a "reasonable time" was considered too vague. Others disagreed: that notion served a useful purpose, as it left it to the court to decide, on the merits of each claim, whether the delay in notification constituted grounds for loss of the right to invoke responsibility. It was also doubted that the reference to the *LaGrand* case[80] in the report was appropriate to demonstrate the loss of the right to invoke responsibility.

271. A preference was expressed for replacing the last phrase, "the responsible State could reasonably have believed that the claim would no longer be pursued", with a reference to how the claimant had behaved, since a reference to what the respondent party had believed could give rise to problems of proof. It was also suggested that the entire phrase was vague and subjective and could be deleted.

(d) *Plurality of injured States (article 46 quinquies)*

272. General support was expressed for the Special Rapporteur's proposal, and for the view that, contrary to the approach taken by the draft articles as adopted on first reading, contemporary international relations increasingly involves plurilateral relations, a fact which needed to be reflected in the draft articles.

273. However, the view was also expressed that the situation envisaged in article 46 quinquies was too simplistic. The example was cited of multiple claims on behalf of individuals (non-nationals) under the European Human Rights system against a State party to the European Convention on Human Rights. Besides a claim brought by the individual in question, any other State party to the Convention could also bring an inter-State complaint. In addition, the State of nationality had the right to invoke the responsibility of the State in question for injury to its nationals under the general regime of responsibility. Furthermore, any other State would have the right to invoke responsibility in a restrictive sense if the violation was a gross violation of an *erga omnes* obligation. Hence, four different types of consequences to one and the same wrongful act could be envisaged. Similarly, the provision did not sufficiently take into account the involvement of international organizations in the actions of pluralities of States, and in particular the implications for States members of an organization with regard to their own responsibility, where they act in the context of an organization where responsibility is joint and several. The view was expressed that the wrongfulness of the conduct of States was not affected by the fact that they were acting in accordance with the decision of an international organization. It was also pointed out, however, that the question of the responsibility of international organizations was beyond the scope of the current draft articles.

274. Differing views were expressed regarding the appropriateness of citing the Convention on the International Liability for Damage Caused by Space Objects, as

[79] See footnote 77 above.

[80] *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999,* p. 9.

an example. While it could serve as a practical example of the phenomenon of joint and several liability, in the view of some, the Convention was an isolated example, without any successor, and could not be taken as proof of a certain tendency in international law. Others thought that the reference to the Convention was entirely justified, and should have been expanded to cover article VI of the Convention, which contained elements of liability and responsibility. Doubts were expressed regarding the usefulness of the example of European Union mixed agreements, which again were subject to a very specific regime. The Special Rapporteur noted that a function of the report was to set out relevant practice, whether convergent with the conclusions reached or not. He had himself argued that neither the regime of joint and several liability in the Convention, nor that of the mixed agreements within the European Union, reflected the general position under international law.

(e) *Plurality of States responsible for the same internationally wrongful act (article 46 sexies)*

275. While support was expressed for the proposed article, the view was expressed that paragraph 1 raised difficulties, since it was not always clear when there was the "same internationally wrongful act", and there was a plurality of States that committed that act. There may be a plurality of wrongful acts by different States contributing to the same damage. For example, in the *Corfu Channel* case,[81] it was arguable that there actually were two wrongful acts, not one. Others thought the *Corfu Channel* case provided evidence that international law was moving towards the notion of joint and several responsibility. If the internationally wrongful act of several States had contributed to the same injury, then each of those States had to repair the damage done as a whole, and they could then turn against the other responsible States, as in the *Phosphate Lands in Nauru* case.[82]

276. Concerning the subsidiary nature of domestic law analogies in the context of article 46 sexies, referred to in paragraph 275 of the report, it was noted that the general principles of law referred to in Article 38, paragraph 1 (*c*), of the Statute of ICJ were based on domestic law analogies. Others noted that such analogies were of limited relevance in this area because of the divergences in national approach and terminology.

277. As to the drafting of paragraph 1, it was suggested that the emphasis be placed on consequences, and not on determining responsibility. The Special Rapporteur explained that in referring to the "responsibility" of each State, he had intended to incorporate by reference the whole of the text.

278. In regard to paragraph 2, preference was expressed for redrafting the provision, and placing it elsewhere in article 44 on compensation. As to paragraph 2 (*a*), it was suggested that the rule against double recovery might apply not only to the case of plurality of responsible States, but also more generally; on the other hand no mention needed to be made of recovery by a "person or entity" other than the State, which was a matter more for the topic of diplomatic protection, it being understood that the State can be injured in the person of its nationals. In addition, a preference was expressed for making reference to reparation instead of compensation.

279. Different views were stated in relation to subparagraph (*b*) (i) on the question of a rule as to the admissibility of proceedings. While it was suggested that it be moved to the commentary since the draft articles need not concern themselves with the procedural aspects, support was also expressed for retaining the provision.

280. Regarding subparagraph (*b*) (ii), it was observed that the requirement for contribution was a common law notion not a civil law one. A preference was thus expressed for a more neutral formulation.

15. Special Rapporteur's concluding remarks on chapter I

281. The Special Rapporteur noted the general agreement in the Commission that the draft articles should include a chapter on invocation of the responsibility of a State, as distinct from the chapters dealing with the immediate consequences of an internationally wrongful act.

282. In relation to article 46 ter, he had intended that the term "notice" be less formal than "notification". There had been a divergence of views as to how formal the notification should be, and as to whether it should be in writing or not. He tentatively favoured the view of the majority of the Commission that it should not be.

283. The more substantial question was that of the election as between the forms of reparation. The situation was clearly different where the question of reparation, including restitution, was implicated with the question of the continued performance of the obligation. It could be that the injured State was not alone competent to release the responsible State from the continued performance of the obligation. No doctrine of election could override that situation.

284. Thus the Commission was concerned only with a situation where restitution as to the past was at stake, and where no requirement of continued compliance arose. The question was whether, in those circumstances, the injured State could freely elect the form of reparation, or whether—where restitution was possible—the responsible State could insist on restitution rather than compensation. If the injured State had already suffered financially assessable loss, which had not been fully compensated by restitution, could the responsible State insist on restitution? He was not aware that that situation had ever arisen, and the problem was not an easy one to resolve in the abstract. While he had chosen the word "validly" in relation to waiver, it also applied, at least by implication, in relation to election under article 46 ter.

285. As to whether the articles should have entered into more detail, both on the validity of an election and on the problem where there was more than one injured State and disagreement between them, he thought not, partly

[81] See footnote 62 above.

[82] See footnote 77 above.

because of the absence of guidance from State practice, and also because so much would depend on the particular circumstances and on the rules at stake. The inference to be drawn from chapter II of Part Two was probably that, in circumstances where restitution was available, each injured State had a right to restitution. It could be that that right prevailed over an election by another injured State—at least if that election had the effect of denying the right. But that should be left to inference, in his view, since it was impossible to envisage the range of cases.

286. The Special Rapporteur agreed with the majority view that paragraph 2 of article 46 ter should be retained as a separate article. It raised the more general question of the relationship between the draft on State responsibility and the draft on diplomatic protection. Diplomatic protection was not separate from State responsibility; a State acting on behalf of one of its nationals was nonetheless invoking State responsibility. If the exhaustion of local remedies rule were omitted there would be very significant concern amongst Governments, especially in view of its place in the draft articles adopted on first reading. Furthermore, the exhaustion of local remedies rule was applicable not only to diplomatic protection but also in the context of individual breaches of human rights, which did not form part of the law of diplomatic protection but did form part of the law of State responsibility. He therefore favoured a separate article incorporating the substance of paragraph 2, placed in Part Two bis, and without prejudice to the debate between the substantive and procedural theories of the exhaustion of local remedies.

287. As to article 46 quater on the loss of the right to invoke responsibility, the Special Rapporteur noted that there had been general support for article 46 quater, subparagraph (*a*), despite suggestions that the notion of settlement be treated as distinct from waiver. With regard to subparagraph (*b*), he noted the point had been raised that there was a distinction between a case of unconscionable delay amounting to laches or *mora*, and the case where a State's delay caused actual prejudice to the responsible State.

288. With regard to a plurality of injured States and of responsible States, the Special Rapporteur noted that the modest approach of the articles had attracted general support. No strong support had existed during the debate for a more categorical approach in favour of the doctrines of joint and several responsibility. As to the point that the *Corfu Channel* case[83] could have been interpreted as involving two separate wrongful acts resulting in the same damage, another interpretation could be given, i.e. that two States had colluded in a single wrongful act. However, he suggested that the Drafting Committee consider the question of the application of article 46 sexies in situations where there were several wrongful acts each causing the same damage.

289. Concerning paragraph 2 (*a*) of article 46 sexies, the Special Rapporteur opposed the suggested deletion of the reference to "person or entity". The situation clearly arose where the individual entity injured recovered, even in domestic proceedings or before some international tribunal. The principle of double recovery needed to be taken into account in such cases. On paragraph 2 (*b*), he agreed that subparagraph (i) was a rule of judicial admissibility and should not be included in the article. It could perhaps be the subject of a general saving clause in Part Four. The Special Rapporteur noted that there had been no disagreement regarding the substance of subparagraph (ii).

16. Introduction by the Special Rapporteur of Part Two bis: Implementation of State responsibility (*continued*)

Chapter II. Countermeasures

(a) *General comments on countermeasures*

290. The Special Rapporteur pointed out that chapter III, section D, of his third report was concerned only with the narrower question of the taking of countermeasures by an injured State, as provisionally defined in paragraph 2 of article 40 bis, and that the further question of collective countermeasures was considered in chapter IV of his report (see paragraphs 355 to 357 below).

291. He recalled that, while the draft articles adopted on first reading had made a linkage between the taking of countermeasures and dispute settlement, he had proceeded on the basis of the Commission's provisional agreement at its fifty-first session to draft the substantive articles on countermeasures without any specific link to any new provisions for dispute settlement, and to leave questions of dispute settlement under the draft articles to be dealt with in the light of the text as a whole.[84]

292. The proposed articles constituted a reconfiguration that sought to solve a number of conceptual and other difficulties while maintaining the substance of articles 47 to 50, adopted on first reading. Article 47 had been a hybrid in that it had purported to define countermeasures at the same time as trying to limit them, thereby creating problems. Article 48 created the problem of the relationship between the procedure of seeking reparation and the taking of countermeasures, which was the most controversial issue of the entire text, and which it had tried to solve by an unsatisfactorily formulated distinction between interim and other measures. Article 49 had been drafted as a double negative, and he proposed a stricter formulation in the light of the guidance given by ICJ in the *Gabcikovo-Nagymaros Project* case.[85] Article 50 had dealt with what were conceptually two different matters: the question which obligations could be suspended by way of the taking of countermeasures, and the question what effects countermeasures could not have in terms of, for example, a breach of human rights and a breach of the rights of third States.

293. The Special Rapporteur recalled that at the fifty-first session he had proposed the inclusion of an article 30 bis dealing with a version of the exception of non-perfor-

[83] See footnote 62 above.

[84] *Yearbook . . . 1999*, vol. II (Part Two), pp. 86–88, document A/54/10, paras. 426–453.

[85] See footnote 35 above.

mance as a circumstance precluding wrongfulness.[86] At the time, the Commission agreed to postpone its consideration of the draft article until its precise formulation and need could be assessed in the light of the articles on countermeasures to be considered at the present session. For the reasons explained in paragraphs 363 to 366 of his third report, he no longer proposed the inclusion of the provision in the draft articles.

(b) *Countermeasures as a circumstance precluding wrongfulness (article 30)*

294. The Special Rapporteur pointed out that the Commission had at its fifty-first session decided to retain an article on countermeasures in chapter V of Part One, as a circumstance precluding wrongfulness, but deferred finalizing the text of the article until its consideration of countermeasures in chapter III of Part Two, as adopted on first reading.[87] During the present session, the Special Rapporteur proposed a new, simpler, formulation for article 30.[88]

(c) *Purpose and content of countermeasures (article 47)*

295. The Special Rapporteur pointed to a fundamental distinction between the suspension of an obligation and the suspension of its performance. The 1969 Vienna Convention dealt with the suspension of treaty obligations, but did not stipulate how such obligations were to be reinstituted. Partly to avoid confusion with the suspension of treaties, the draft articles adopted on first reading had not used the word "suspension". Instead, article 47 had simply said that countermeasures occurred when a State did not comply with its obligations. But that approach was problematic, since a State "not complying with its obligations" covered all types of scenarios, including some which could be irreparable and permanent.

296. In the Special Rapporteur's view, the basic concept of a countermeasure was that it should be the suspension by the injured State of the performance of an obligation towards the responsible State with the intention of inducing the latter to comply with its obligations of cessation and reparation. This basic concept was incorporated into his proposal for article 47,[89] and was subject to the limitations specified in the other articles in chapter II.

297. The Special Rapporteur stressed that the countermeasures that could be taken were not reciprocal countermeasures, in the sense of that concept as used by former Special Rapporteur Riphagen,[90] where reciprocal countermeasures were taken in relation to the same or related obligation. The question was whether the notion of reciprocal countermeasures should be introduced either exclusively or at least in part as the basis for a distinction in the field of countermeasures. The Special Rapporteur agreed with the rejection of that distinction by the Commission on first reading.[91] Limiting countermeasures to the taking of reciprocal countermeasures would create a situation in which the more heinous the conduct of the responsible State, the less likely countermeasures were to be available, because the more heinous the conduct the more likely it was to infringe, for example, human rights obligations. The old maxim of "a tooth for a tooth" was not a basis for countermeasures in the modern world.

298. A further important element missing from the draft articles adopted on first reading had been the question of reversion to a situation of legality if the countermeasures had their effect and a settlement was reached. The Special Rapporteur proposed to deal with that question through the notion of suspension of the performance of an obligation, and not suspension of the obligation itself, contained in paragraph 2 of his proposal for article 47. The obligation remained in force, and there was no situation of its being in abeyance. The obligation was there as something by reference to which the countermeasures could be assessed. He noted that ICJ in the *Gabčíkovo-Nagymaros Project* case[92] had identified reversibility as a substantial element of the notion of countermeasures. He agreed with this idea as a matter of principle, the question was how to implement it, given that while they were in force, countermeasures would have adverse effects on the responsible State which no one suggested should be reversed retrospectively.

(d) *Obligations not subject to countermeasures and prohibited countermeasures (articles 47 bis and 50)*

299. The Special Rapporteur suggested that the content of article 50, as adopted on first reading, be split into two provisions. His proposed draft articles thus distinguished between obligations the performance of which could not be suspended as countermeasures in the first

[86] *Yearbook . . . 1999*, vol. II (Part Two), pp. 78–80, document A/54/10, paras. 334–347.

[87] Ibid., paras. 332–333, and pp. 86–88, paras. 426–453.

[88] The text of article 30 proposed by the Special Rapporteur reads as follows:

"The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if and to the extent that the act constitutes a lawful countermeasure as provided for in articles [47]–[50 bis]."

[89] The text of article 47 proposed by the Special Rapporteur reads as follows:

"*Article 47. Purpose and content of countermeasures*

"1. Subject to the following articles, an injured State may take countermeasures against a State which is responsible for an internationally wrongful act in order to induce it to comply with its obligations under Part Two, as long as it has not complied with those obligations and as necessary in the light of its response to the call that it do so.

"2. Countermeasures are limited to the suspension of performance of one or more international obligations of the State taking those measures towards the responsible State."

For the analysis of this article by the Special Rapporteur, see paragraphs 293 to 297 and 321 to 333 of his third report.

[90] See his sixth report (footnote 9 above), p. 10, art. 8.

[91] See *Yearbook . . . 1996*, vol. II (Part Two), p. 67, document A/51/10, footnote 200.

[92] See footnote 35 above.

place (art. 47 bis),[93] and obligations that could not be infringed in the course of taking countermeasures (art. 50).[94] It was an important distinction when considered from the point of view of the impact of countermeasures on human rights. Human rights obligations could not be suspended by way of countermeasures, since such measures were, by definition, taken against a State and not individuals. Problems nevertheless arose with regard to the possible effect of countermeasures on human rights obligations, a matter dealt with in article 50.

300. Subparagraph (*a*) of article 47 bis made it clear that countermeasures did not deal with forcible reprisals, belligerent reprisals or the use of force. As to subparagraph (*b*), on diplomatic and consular immunity, there had been little criticism of the first reading equivalent of the provision, which had been generally endorsed by Governments in their comments. Subparagraph (*c*), pertaining to obligations concerning the third party settlement of disputes, had been implied in article 48 adopted on first reading. It was obvious that a State could not suspend an obligation concerning the peaceful settlement of disputes by way of countermeasures. Article 50, adopted on first reading, had also dealt with human rights, stipulating that they could not be subject to the taking of countermeasures. However, it was clear from the definition of countermeasures in article 47 that human rights obligations themselves could not be suspended. Instead, the Special Rapporteur proposed subparagraph (*d*), which concerned the separate and narrower point relating to humanitarian reprisals. Subparagraph (*e*) had been retained in article 47 bis since the performance of obligations under peremptory norms of general international law could not be suspended under any circumstances other than as provided for in those obligations.

301. As regards article 50, the Special Rapporteur recalled that the reference in subparagraph (*b*), as adopted on first reading, to extreme economic or political coercion designed to endanger the territorial integrity or political independence of the responsible State, had attracted much criticism. Instead, he proposed a simpler formulation, as subparagraph (*a*), which stipulated that countermeasures could not endanger the territorial integrity or amount to intervention in the domestic jurisdiction of the responsible State.

302. The Special Rapporteur also noted that, even if lawful under the draft articles, countermeasures could not impair the rights of third parties. If third parties had a right as against the injured State, then the injured State was responsible to them for any breach of that right. Third parties included human beings, the addressees of basic human rights, so human rights were also covered by new subparagraph (*b*).

(e) *Conditions relating to the resort to countermeasures (article 48)*

303. The Special Rapporteur observed that, before a State took countermeasures, it should first invoke the responsibility of the responsible State by calling on it to comply; so much was agreed. In his proposal for article 48,[95] paragraph 1 reflected the basic obligation to make the demand on the responsible State. But in addition provision was made in paragraph 2 for the taking of provisional measures where necessary to preserve the injured State's rights. Article 48 avoided the "interim measures of protection" formula, which used the language of judicial procedure, in favour of the notion of the provisional implementation of countermeasures. Paragraph 3 included the further requirement that, if the negotiations did not lead to a resolution of the dispute within a reasonable time, the injured State could take full-scale countermeasures.

304. In the event the Commission decided against drawing a distinction between "provisional" and other countermeasures, the Special Rapporteur proposed an alternative provision that would replace paragraphs 1 to 3 of article 48.[96]

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[93] The text of article 47 bis proposed by the Special Rapporteur reads as follows:

"*Article 47 bis. Obligations not subject to countermeasures*

"The following obligations may not be suspended by way of countermeasures:

"(*a*) The obligations as to the threat or use of force embodied in the Charter of the United Nations;

"(*b*) Obligations concerning the inviolability of diplomatic or consular agents, premises, archives or documents;

"(*c*) Any obligation concerning the third party settlement of disputes;

"(*d*) Obligations of a humanitarian character precluding any form of reprisals against persons protected thereby; or

"(*e*) Any other obligations under peremptory norms of general international law."

For the analysis of this article by the Special Rapporteur, see paragraphs 334 to 343 of his third report.

[94] The text of article 50 proposed by the Special Rapporteur reads as follows:

"*Article 50. Prohibited countermeasures*

"Countermeasures must not:

"(*a*) Endanger the territorial integrity or amount to intervention in the domestic jurisdiction of the responsible State;

"(*b*) Impair the rights of third parties, in particular basic human rights."

For the analysis of this article by the Special Rapporteur, see paragraphs 311 to 319 and 347 to 354 of his third report.

[95] The text of article 48 proposed by the Special Rapporteur reads as follows:

"*Article 48. Conditions relating to resort to countermeasures*

"1. Before taking countermeasures, an injured State shall:

"(*a*) Submit a reasoned request to the responsible State, calling on it to fulfil its obligations;

"(*b*) Notify that State of the countermeasures it intends to take;

"(*c*) Agree to negotiate in good faith with that State.

"2. The injured State may, as from the date of the notification, implement provisionally such countermeasures as may be necessary to preserve its rights under this Chapter.

"3. If the negotiations do not lead to a resolution of the dispute within a reasonable time, the injured State acting in accordance with this Chapter may take the countermeasures in question.

"4. A State taking countermeasures shall fulfil its obligations in relation to dispute settlement under any dispute settlement procedure in force between it and the responsible State."

For the analysis of this article by the Special Rapporteur, see paragraphs 298 to 305 and 355 to 360 of his third report.

[96] The text of the alternative formulation of paragraphs 1 to 3 of article 48 proposed by the Special Rapporteur reads as follows:

"1. Before countermeasures are taken, the responsible State must have been called on to comply with its obligations, in accordance with article 46 ter, and have failed or refused to do so."

(f) *Proportionality (article 49)*

305. The Special Rapporteur stated that the proposed new formulation of article 49 sought to highlight the fact that proportionality was a *sine qua non* for legality.[97] The wording was thus meant to address some of the concerns expressed by States on the decisive role which proportionality should have. His proposal was based on the formulation of ICJ in the *Gabčíkovo-Nagymaros Project* case.[98]

(g) *Suspension and termination of countermeasures (article 50 bis)*

306. The Special Rapporteur recalled that article 48, as adopted on first reading, had provided for the possibility of the suspension of countermeasures once the internationally wrongful act had ceased and a binding dispute settlement procedure had been commenced. The text adopted on first reading had not mentioned the question of termination of countermeasures, and that several States had suggested the inclusion of such a provision. ICJ had indirectly referred to the matter in the *Gabčíkovo-Nagymaros Project* case, albeit from the viewpoint of the reversibility of countermeasures. He thus proposed article 50 bis,[99] which covered both the question of the suspension of countermeasures (paras. 1 and 2), and their termination (para. 3). As to suspension in paragraph 1, he retained the approach of the text adopted on first reading, which had been supported by Governments and which was based, in part, on the remarks of the Arbitral Tribunal in the *Air Service Agreement* case.[100]

[97] The text of article 49 proposed by the Special Rapporteur reads as follows:

"*Article 49. Proportionality*

"Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and its harmful effects on the injured party."

For the analysis of this article by the Special Rapporteur, see paragraphs 306 to 310 and 346 of his third report.

[98] See footnote 35 above.

[99] The text of article 50 bis proposed by the Special Rapporteur reads as follows:

"*Article 50 bis. Suspension and termination of countermeasures*

"1. Countermeasures must be suspended if:

"(*a*) The internationally wrongful act has ceased; and

"(*b*) The dispute is submitted to a tribunal or other body which has the authority to issue orders or make decisions binding on the parties.

"2. Notwithstanding paragraph 1, countermeasures in accordance with this chapter may be resumed if the responsible State fails to honour a request or order emanating from the tribunal or body, or otherwise fails to implement the dispute settlement procedure in good faith.

"3. Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act."

For the analysis of this article by the Special Rapporteur, see paragraphs 300, 305, 359 and 361 of his third report.

[100] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978 (UNRIAA, vol. XVIII (Sales No.E/F.80.V.7), p. 417).

17. Summary of the debate on Part Two bis (*continued*)

Chapter II. Countermeasures

(a) *General comments on countermeasures*

307. Support was expressed in the Commission for the draft articles proposed by the Special Rapporteur which were considered by some to be an improvement on those adopted on first reading, and were described as displaying a fair balance between the interests of injured States and those responsible for wrongful acts.

308. The provisions were also welcomed by some as an indication that countermeasures were a fact, which resulted from the international system which lacked the means for law enforcement found in domestic systems. Furthermore, customary international law recognized the lawfulness of countermeasures in certain circumstances, as a measure of last resort, and within the limits of necessity and proportionality. Indeed, it was recognized that the proliferation of legal rules in the international system had increased the likelihood of violation of international obligations, and therefore increased the likelihood of resort to countermeasures as a form of redress. The elaboration of a balanced regime of countermeasures was therefore more likely to be of use in controlling excesses than silence. At the same time a preference was expressed for drafting countermeasures in a negative sense, so as to emphasize their exceptional nature.

309. Several members continued to register their opposition to countermeasures and to their regulation in the text. It was argued that the inclusion of countermeasures limited the acceptability of the draft articles, especially in the view of smaller States that might suffer the consequences of the abuse of countermeasures by powerful States, although it was recognized that smaller countries did, as between themselves, also resort to countermeasures on occasion. It was also stated that there was not a sufficient basis in customary law for countermeasures. In addition, countermeasures were frequently not reversible as to their effects. If the Commission preferred to include the issue of countermeasures, the respective provisions needed to be of a general nature and brief.

310. Furthermore, recourse to countermeasures and the notions of interim countermeasures and proportionality were all sources of possible disagreement between the State that considered itself injured and the *allegedly* responsible State—responsibility being something that still remained to be determined. The reputedly injured State could not resolve the disagreement unilaterally. Resolution could thus be achieved only through the machinery for peaceful settlement of disputes. Hence, several members expressed a preference for a return to the linkage of countermeasures with dispute settlement, as proposed in the draft articles adopted on first reading, which would give countermeasures a more certain footing under international law. It was suggested that account should be taken of situations where there was no dispute settlement procedure between the States concerned.

311. Still others maintained that delinking countermeasures from dispute settlement was acceptable in the

light of the fact that the possible final outcome of the Commission's work was a flexible instrument—a declaration by the General Assembly—and because there was a growing number of particular regimes that sought to regulate the means by which to induce States to return to a situation of legality.

312. For his part, the Special Rapporteur was of the view that it would not be possible to establish an automatic link between the taking of countermeasures and dispute settlement, but that the articles should fit into existing and developing systems of dispute settlement, so that a State which was credibly alleged to have committed a breach of international law would be in a position to prevent any countermeasures by stopping or suspending the allegedly wrongful act and submitting the case to any available judicial procedure.

313. Numerous drafting suggestions were made, including reducing the provisions in number and including a legal definition of countermeasures. It was suggested that the draft articles explicitly distinguish between such closely related concepts as countermeasures, reprisals, retortion and sanctions. Other members proposed the express inclusion of the notions of reciprocal countermeasures and reversibility. According to some members, countermeasures were more suitable in relation to international delicts as opposed to breaches constituting international crimes; others took the contrary position.

314. There was general agreement with the Special Rapporteur's decision to withdraw his proposal, made at the fifty-first session, to include an article 30 bis in chapter V of Part One, relating to non-compliance caused by prior non-compliance by another State, as a circumstance precluding wrongfulness.

(b) *Countermeasures as a circumstance precluding wrongfulness (article 30)*

315. General support was expressed for the inclusion of an article 30 in chapter V of Part One recognizing the taking of lawful countermeasures as a circumstance precluding wrongfulness, based on the recognition of such a possibility by ICJ in the *Gabčíkovo-Nagymaros Project* case[101] and by the Arbitral Tribunal in the *Air Service Agreement* case.[102] To the contrary, it was suggested that, in the light of articles 47 bis and 50 bis, article 30 might not be necessary. In addition, it was felt that in reality the circumstance precluding wrongfulness was not the countermeasure itself, but the internationally wrongful act to which it responded.

(c) *Purpose and content of countermeasures (article 47)*

316. While support was expressed for the Special Rapporteur's proposal for article 47, several suggestions, mostly of a drafting nature, were made. For example, it was proposed that provision be made for the situations of breach of an obligation towards a third State, as had been provided for in paragraph 3 of the article adopted on first reading. Others thought this unnecessary, since by their very definition countermeasures were taken towards a defaulting State, and their preclusive effect was limited to that State. This could be made clear in the drafting of articles 30 and 47, but a separate article dealing with third parties was unnecessary and even confusing.

317. There was for the most part agreement with the Special Rapporteur's rejection of reciprocal countermeasures, since, in practice, it was virtually impossible for countermeasures to respond substantially to the obligation that had been breached. But there was support for including an express reference to the principle of reversibility in the text.

318. There was criticism of any language which implied that countermeasures were a positive or "subjective" right of the injured State. Accordingly, paragraph 1 could be redrafted in a negative or a more neutral formulation along the lines of "[a]n injured State may not take countermeasures unless", or alternatively along the lines of the text adopted on first reading. It was also proposed that the latter part of paragraph 1 either be deleted or redrafted more clearly so as, for example, to limit countermeasures to those strictly necessary under the circumstances. In no case could countermeasures be of a punitive nature. It was also considered advisable that before taking any countermeasures, it had to be absolutely certain that an internationally wrongful act had indeed occurred.

319. As regards paragraph 2, a preference was expressed for its deletion since it could lead to interpretative problems in practice, and because the question of suspension of performance had been deliberately left out by the Commission during the first reading. In that regard, the reference to the *Gabčíkovo-Nagymaros Project* case in support of the retention of the notion of suspension was considered inappropriate. Others suggested that the reference to suspension of performance was acceptable since it covered both the removal of a prohibition as well as the suspension of an affirmative obligation.

(d) *Obligations not subject to countermeasures and prohibited countermeasures (articles 47 bis and 50)*

320. A majority of the Commission did not support the Special Rapporteur's proposal to split article 50 as adopted on first reading into two separate articles, and preferred either returning to a single article on prohibited countermeasures or incorporating its content into article 48. Alternatively, it was suggested that, if the distinction were to be kept, article 47 bis would have to be placed immediately before article 50.

321. While support was expressed for article 47 bis, a preference was also voiced for a more general formulation instead of an enumerative listing of prohibited countermeasures. Alternatively, the list in article 47 bis could be simplified or shortened, by means of a single reference to peremptory norms of general international law, since most if not all of the exceptions concerned peremptory norms. It was further suggested that a general rule be incorporated confirming that countermeasures were prohibited when the obligation that would be breached affected the international community as a whole. In

[101] See footnote 35 above.

[102] See footnote 100 above.

response, the Special Rapporteur suggested the alternative of stating that countermeasures could only affect obligations in force between the responsible State and the injured State.

322. In relation to subparagraph (*a*), the view was expressed that the prohibition on the threat or use of force should have been formulated in the form of a prohibition.

323. On subparagraph (*c*), it was queried how an obligation concerning third party settlement of disputes could, in practice, be suspended by way of countermeasures. The failure of a party to appear before a compulsory dispute settlement procedure would not of itself halt the proceedings. Furthermore, it was maintained that the responsible State should as a general rule be allowed sufficient opportunity to make redress, particularly in cases where a treaty, containing the obligation in question, provided mechanisms for ensuring implementation or settlement of disputes. If such mechanisms proved inadequate, an injured State could justifiably resort to countermeasures on the basis of customary international law. It was also suggested that specific provision could be made for the situation in which a treaty explicitly prohibited the taking of countermeasures, as had been done in article 33 adopted on first reading which expressly allowed for the situation where a treaty provision could exclude resort to the defence of state of necessity.

324. It was suggested that subparagraph (*d*) be reformulated along the lines of the provision as adopted on first reading, or that an additional paragraph be inserted excluding reprisals in the context of human rights. It was also queried whether subparagraph (*e*) should be retained, since it was implicit in the notion of peremptory norms that no departure was permitted.

325. Concerning article 50, the proposed title could be amended to make it clear that it dealt with the effect of countermeasures. As to subparagraph (*a*), concern was expressed regarding the use of the word "intervention", since it was difficult to define in practice. Some preferred to return to the first reading formulation of article 50, subparagraph (*b*), i.e. "[e]xtreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act", which reflected language commonly used in General Assembly resolutions, and contained a principle important to developing States. Others agreed with the Special Rapporteur's approach of not making reference to "political independence of the State", since that was implicit in "territorial integrity". A further view was that the reference to "domestic jurisdiction of States" was not in line with developments in international law, where limits had been placed on the rule in Article 2, paragraph 7, of the Charter of the United Nations. This opinion was contested by some other members.

326. In relation to subparagraph (*b*), support was expressed for the Special Rapporteur's view that human rights obligations could not be subject to countermeasures. Concern was also expressed regarding the reference to basic human rights in the context of the expression "third parties", which was only applicable to States or other subjects of international law. Hence, it was suggested that human rights might better constitute the object of a separate provision. It was also pointed out that most countermeasures would have some impact on some human rights particularly in the social and economic field. Concerns were further expressed regarding the reference to "basic" human rights, and the possible divergence in interpretation that may arise in practice. It was also doubted whether every human rights violation implied a prohibition on equivalent countermeasures, or whether a distinction had to be drawn between different categories of rights. Support was expressed for an additional clause on prohibiting countermeasures that endanger the environment.

327. In response, the Special Rapporteur stressed that the analysis of human rights obligations was difficult in the case of countermeasures. A countermeasure which, per se, was lawful might constitute a violation of human rights if sustained over a long period of time, for example, a commercial embargo. The law on countermeasures needed to be coordinated with existing international human rights law. Therefore, he proposed that the effects on human rights be reserved, in a single article combining articles 47 bis and 50, without deciding whether some are basic or not, since the content of the rights themselves would determine the permissibility of countermeasures.

(e) *Conditions relating to the resort to countermeasures (article 48)*

328. As to paragraph 1, subparagraph (*a*), of article 48, it was noted that, in principle, countermeasures must be preceded by a demand by the injured State, which the responsible State had failed to meet. Such demand had to be so decisively expressed as to leave the responsible State with no doubt as to the seriousness of the implications involved. Concerning subparagraph (*b*), the view was expressed that notification of countermeasures before negotiations had taken place was premature. Furthermore, the subparagraph could be deleted since it might be counterproductive to inform the responsible State of the exact countermeasures that were to be taken. It was also suggested that the article be redrafted so that an offer to negotiate formed part of the process of giving notice. In relation to subparagraph (*c*) it was suggested that the word "agree" be replaced with "propose" or "offer". Furthermore, it was suggested that while the proposed article had rightly attached importance to the good faith of the responsible State, it had neglected the good faith of the injured State. If the responsible State accepted the offer of negotiations, or it agreed to the dispute being settled by a judicial or arbitral tribunal, the injured State could not be allowed to resort unilaterally to countermeasures.

329. With regard to paragraph 2, it was suggested that the distinction between "provisional" and other countermeasures be abolished, since, in the absence of a legal framework for "provisional countermeasures", such measures in fact and in practice encompassed all the elements of full-scale countermeasures. Rather the exceptional character of countermeasures of any kind should be stressed.

330. Concerning paragraph 3, the appropriateness of using the word "dispute" was questioned. Likewise, the reference to a "reasonable time" was considered too

vague. Others thought the term offered injured States a satisfactory safeguard against protracted and fruitless negotiations.

331. Some support was expressed for the shortened draft presented by the Special Rapporteur as an alternative to paragraphs 1 to 3.[103]

332. With regard to paragraph 4, the view was expressed that the notion of good faith required that a State which had entered into an obligation to arbitrate disputes or seek a judicial settlement, could not subvert it by acts that were otherwise illegal. Furthermore, where the States involved belong to an institutionalized framework which prescribed peaceful settlement procedures, the exhaustion of those procedures would be a prerequisite to the taking of countermeasures. In addition, it was suggested that paragraph 4 be strengthened to reflect the need to submit disputes to available dispute settlement procedures prior to the taking of countermeasures, so as to strike a proper balance by including a reference to third-party dispute settlement in the draft while finding a practical method of separating countermeasures and dispute settlement.

(f) *Proportionality (article 49)*

333. While general support was expressed for the new formulation of article 49 proposed by the Special Rapporteur, which was described as being simpler and clearer than that adopted on first reading, others thought the proposed wording merited further consideration. Lawfulness could not be guaranteed by such a provision since the injured State itself was effectively authorized to gauge the proportionality of its countermeasures. A more precise formulation of the proportionality requirement was necessary.

334. It was further stated as to the idea of a balance with the injury suffered or the gravity of the wrongful act, that countermeasures were tolerated to induce the wrongdoer to comply with its obligations, not by way of punishment or sanction. Thus, proportionality was concerned only with the degree of the measures necessary to induce compliance. The reference to the gravity of the internationally wrongful act and its effects on the injured party, added nothing of legal relevance.

(g) *Suspension and termination of countermeasures (article 50 bis)*

335. General support was expressed for the inclusion of article 50 bis, as proposed by the Special Rapporteur.

336. In relation to paragraph 1, a preference was expressed for referring to "terminated" as opposed to "suspended". It was queried whether subparagraph (*b*) applied equally to the decisions of the Security Council and the orders of ICJ. The Special Rapporteur indicated that Council decisions were not intended to be covered by the article. It was also pointed out that there was no reason why the submission of a dispute to a tribunal should automatically suspend countermeasures, when the submission of the same dispute to a tribunal at an earlier stage, as contemplated under article 48, did not automatically prevent their being taken in the first place. Furthermore, the provision required automatic suspension of countermeasures, even where a tribunal authorized to issue a suspension order did not do so.

337. As to paragraph 2, it was noted that the unqualified reference to "an order" from an international tribunal could give rise to the interpretation that even procedural orders were included, which should not be the case. It was thus proposed that the provision be qualified with a phrase such as "on the substance" or "on the merits of the case". Alternatively, it was suggested that paragraph 2 be deleted.

18. Special Rapporteur's concluding remarks on chapter II

338. The Special Rapporteur recalled that most States had, either reluctantly or definitively, accepted the elaboration of provisions on countermeasures. In spite of the reluctance with which countermeasures might be contemplated, he agreed with those who felt that it was preferable to have some regulation rather than none, since countermeasures constituted a fact of life. Furthermore, the Commission needed to draw a clear distinction between the general question of the position taken by the draft on dispute settlement and the specific connection between dispute settlement and countermeasures. The general question depended on the form that the draft would ultimately take. Until that decision was made, article 48 contained as close a connection between countermeasures and dispute settlement as was possible without introducing new forms of dispute settlement into the text.

339. With regard to article 30, the Special Rapporteur indicated that the general view had been favourable to its retention in a simplified form.

340. The Special Rapporteur acknowledged that his attempt to make a distinction between articles 47 bis and 50 had failed and that the contents of these articles should therefore be merged.

341. As regards article 47, the Special Rapporteur agreed that a clarification to stipulate that countermeasures might not be taken unless certain conditions were met would be helpful and thus leave any illegal effect to be regulated by article 30.

342. In relation to articles 47 and 47 bis, two questions had been raised: the first concerned the question of reversibility and the second that of the bilaterality of the suspended obligations. In the view of the Special Rapporteur, the Commission could even proceed to state that countermeasures must be reversible and must relate to obligations only as between the injured State and the target State.

343. As regards article 48, the Special Rapporteur noted that the text he had proposed constituted a reasonable compromise between the two opposing positions that pre-

[103] See footnote 96 above.

ferred either a simple provision or the non-recourse to countermeasures until negotiations had been exhausted. He agreed with the suggested deletion of article 48, paragraph 1 (*b*).

344. As regards article 49, the debate in the Commission had also reflected a general agreement on the inclusion in the draft articles of a reference to the need to be both proportionate and commensurate to the injury caused by the wrongful act, though the precise way to reflect them therein was subject to further consideration.

345. The Commission had generally endorsed article 50 bis and the Special Rapporteur was of the view that the provision should be retained irrespective of whatever decision might be made regarding article 48.

19. Introduction by the Special Rapporteur of the invocation of responsibility to a group of States or to the international community

(a) *General considerations*

346. The Special Rapporteur pointed out that chapter IV of his third report dealt with issues previously considered by the Commission during the current quinquennium, both in the context of the examination of article 19, as adopted on first reading, in his first report[104] and of the debate on article 40 bis during the present session.

347. The text adopted on first reading had moved beyond codification by including the controversial concept of State "crimes" in article 19, but had not developed that idea in any significant way. It had also implicitly established a regime of countermeasures in respect of not-directly injured States, by a combination of articles 40 and 47, which was far too broad, for example, by giving third States the right to take countermeasures in respect of any breach of human rights whatever.

348. The Special Rapporteur recalled the debate in the Commission at its fiftieth session on article 19, and its provisional decision to address the issue in the following way:

> . . . it was noted that no consensus existed on the issue of the treatment of "crimes" and "delicts" in the draft articles, and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that: (*a*) without prejudice to the views of any member of the Commission, draft article 19 would be put to one side for the time being while the Commission proceeded to consider other aspects of Part One; (*b*) consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (*erga omnes*), peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19.[105]

Progress had been made along the lines suggested at the fiftieth session, particularly through the disaggregation of the concept of international crime in various aspects of the draft articles, for example, by reconsidering article 40 and introducing into the draft articles, in a much more systematic manner, the notion of obligations owed to the international community as a whole, as well as the notion of peremptory norms. Chapter IV of his report focused on outstanding issues, and had to be considered in the light of all the work that had preceded it.

349. It had to be recognized that the primary means of addressing the problems referred to in article 19 was not the law of State responsibility. Faced with major catastrophes arising from wrongful conduct, such as genocide or invasion of a State, it could not be argued that the rules of State responsibility by themselves were sufficient to resolve those problems without any organizational response or coordinated action by the international community. The reference to "crime" in article 19 was historically a reference to the conduct of Governments which were unaccountable to their people, acting for their own ends, and often with their population as the primary or ancillary victims of their action. The idea that the entire population should be victimized in that situation was difficult to accept. Care had to be taken with the notion that the pronouncement of criminal conduct was by itself a sufficient response to those problems.

350. It was also significant that the international community had begun to adopt more rigorous methods of dealing with individuals responsible for those crimes, in particular through the Rome Statute of the International Criminal Court. The way forward could be to hold those individuals accountable for their acts, rather than holding the victimized population accountable through some concept of crime of State. It was not that the State was not responsible for their acts. Under classical rules of attribution, the State was responsible for such acts. Indeed, article 19 operated on the same principle of attribution as any other internationally wrongful act. However, if article 19 was concerned with "crimes" proper, it would have had its own rules of attribution, as in any criminal code.

351. As to the question of the right of every State to invoke the responsibility for breaches of obligations to the international community as a whole, the Commission had accepted that possibility, in principle, as a result of its discussion on his earlier proposals relating to article 40 bis. While such right had to be clearly spelled out in the draft articles, the question was how far it should extend. In his view, it clearly extended to cessation, i.e. all States were to be regarded as having a legal interest in the cessation of breaches of obligations to the international community; and as a corollary all States were entitled to that aspect of satisfaction that amounted to declaratory relief, even if they had no individual entitlement to the other forms of satisfaction. Furthermore, in his view, such States would at least be able to seek restitution on behalf of the victims of crimes.

352. Limitations had to be imposed on such a right, given that other considerations had to be taken into account. For example, it could become chaotic if a number of States began demanding different things under the rubric of State responsibility. In his view, three separate scenarios were discernable. First, in the context of the breach of an obligation to the international community as a whole, the primary victim might be a State, for example, a State which was the target of aggression. In that situation the victim State should control the responses by way of State responsibility, i.e. third States' responses should

[104] See footnote 18 above.

[105] *Yearbook. . . 1998*, vol. II (Part Two), p. 77, para. 331.

be secondary both within the context of countermeasures and of the invocation of responsibility. Such third States could demand cessation, but once the conduct had ceased, questions of the resolution of the dispute were in the first place a matter for the victim State to resolve. The second scenario, where there was no injured State in respect of such a breach, for example, in the context of where the population of, or a particular group within, the responsible State was the victim, such as in the situation of Cambodia. There was no State on whose behalf the international community would be responding. The notion that this was merely a deficiency in the State system, hence beyond the scope of State responsibility, was too narrow. The international community had to be able to intervene in that case, irrespective of the views of the responsible State, and seek cessation, a minimum element of satisfaction and restitution. The third situation was where no one was identifiably the victim of the breach. Examples included obligations in relation to the environment owed to the international community as a whole, where the whole of humanity was affected in the long term, but nobody was specifically affected by it, as in the case of global warming. In that situation, State members of the international community should be able at least to seek cessation.

353. Furthermore, if there were to be a regime of crimes in the international system, that should involve, as a minimum, notions of penalty. It might also involve other features of criminal systems, that were unenvisagable in the present international system. In regard to the question of penalty, the Special Rapporteur pointed to an example of a State being "fined" by an international tribunal, the European Court of Justice.[106] It was, however, the first experience of the European Union in that field, and it remained to be seen how it would develop. It did, however, demonstrate what was necessary to have a proper system of penalties, i.e. due process, compulsory jurisdiction, and proper procedures, all of which did not exist in the context in which the Commission was considering the draft articles on State responsibility.

354. The Special Rapporteur stressed the value of alternative formulations for "crimes", such as "international wrongful act of a serious nature", or "exceptionally serious wrongful act", some of which were distinct legal wrongs in themselves (e.g. aggression, genocide) and some of which were aggravated forms of breaches of general obligations (e.g. systematic torture). The acts covered by those phrases were thus determined by the context, the gravity of the breach as well as the content of the primary obligation. He proposed a further article to be included in chapter I of Part Two by way of clarification.[107]

[106] European Court of Justice, case C–387/97 (*Commission of the European Communities* v. *Hellenic Republic*), judgment of 4 July 2000.

[107] The text of the article proposed by the Special Rapporteur reads as follows:

"The obligations of the responsible State set out in this Part may be owed to another State, to several States, to all other States parties or to the international community as a whole, depending on the character and content of the international obligation and on the circumstances of the breach, and irrespective of whether a State is the ultimate beneficiary of the obligation."

(b) *Collective countermeasures (articles 50 A and 50 B)*

355. The Special Rapporteur distinguished between two situations in relation to the question of collective countermeasures: (*a*) where a State was the victim of the breach; and (*b*) where no State was the victim of the breach. In his view, where a State itself had the right to take countermeasures as a result of the breach of an obligation to the international community as a whole or any multilateral obligation, other States parties to the obligation should be able to assist it, at its request, and within the limits of the countermeasures it could have taken itself. That was a form of "collective" countermeasures, in that they could be taken by any of the States involved in some collective interest, and had a direct analogy to collective self-defence. The other States were themselves affected, because an obligation that was owed to them (as part of a group or as members of the international community) was breached.

356. The more difficult question was the taking of collective countermeasures in relation to the situation where there was no victim State. State practice in such regard was embryonic, partial, not clearly universal, and controversial. The *opinio juris* associated with that practice was also unclear. There was a case therefore for the Commission to decide to adopt instead a saving clause leaving it to the future. While such a saving clause remained an option if agreement could not be reached, in his view the Commission should make a concrete proposal with a view to receiving comments on it from the Sixth Committee, on the basis of which a final decision would be taken. He therefore proposed that the States parties to an obligation owed to the international community as a whole should have the right to take collective countermeasures in response to a gross and well-attested breach of such an obligation: in his view this was the least that could be done in the context of egregious breaches, such as genocide.

357. He proposed two articles on countermeasures, to be included in chapter III of Part Two bis before article 50 bis, the first dealing with countermeasures on behalf of an injured State (art. 50 A),[108] and countermeasures in cases of serious breaches of obligations to the international community as a whole (art. 50 B).[109]

[108] The text of article 50 A proposed by the Special Rapporteur reads as follows:

"*Article 50 A. Countermeasures on behalf of an injured State*

"Any other State entitled to invoke the responsibility of a State under [article 40 bis, paragraph 2] may take countermeasures at the request and on behalf of an injured State, subject to any conditions laid down by that State and to the extent that that State is itself entitled to take those countermeasures."

[109] The text of article 50 B proposed by the Special Rapporteur reads as follows:

"*Article 50 B. Countermeasures in cases of serious breaches of obligations to the international community as a whole*

"1. In cases referred to in article 51 where no individual State is injured by the breach, any State may take countermeasures, subject to and in accordance with this Chapter, in order to ensure the cessation of the breach and reparation in the interests of the victims.

"2. Where more than one State takes countermeasures under paragraph 1, those States shall cooperate in order to ensure that the conditions laid down by this Chapter for the taking of countermeasures are fulfilled."

(c) *Consequences of serious breaches of obligations to the international community as a whole (article 51)*

358. The Special Rapporteur noted that the additional legal consequences that, according to article 52 adopted on first reading, flowed from a "crime" within the meaning of article 19 had either been eliminated in the second reading review, or were trivial. However, if the breaches were egregious breaches of obligations owed to the international community as a whole, and in a situation where there was no injured State, it was arguable that other States, members of the international community, had to be able to seek at least aggravated damages on behalf of the actual victims, or the international community as a whole, and not on their own account. He proposed a new chapter III for Part Two, entitled "Serious breaches of obligations to the international community as a whole", containing a single article 51,[110] which was article 53, as adopted on first reading. But it would be bizarre if the only legal consequences of a serious breach were legal consequences for third States; he had accordingly proposed that a State responsible for such a breach should be obliged to pay punitive or expressive damages sought on behalf of the victims. A definition of serious breach should be included in article 51. Article 19, which performed no function at all in the rest of the draft articles, could be deleted. While there was much authority for the proposition that punitive damages did not exist in international law, he suggested that such a reference could nonetheless be included, at least as one alternative. He also proposed in paragraph 4 to reserve to the future such penal or other consequences that the breach may entail under international law, including developing international law. In addition, he proposed an additional paragraph to be included in article 40 bis, relating to what each of the basic categories of States, i.e. injured States and other States, could seek in that context.[111]

20. SUMMARY OF THE DEBATE ON THE INVOCATION OF RESPONSIBILITY TO A GROUP OF STATES OR TO THE INTERNATIONAL COMMUNITY

(a) *General considerations*

359. Agreement was expressed with the general approach of the Special Rapporteur, although numerous comments and suggestions for drafting improvements were made.

360. With regard to the compromise reached by the Commission at its fiftieth session, the view was expressed that a systematic development of obligations *erga omnes* and peremptory norms would constitute a satisfactory replacement for article 19. Conversely, it was stated that, while the Special Rapporteur had made a valiant attempt at reaching compromise in the Commission on the question of international crimes, his proposal was not entirely satisfactory to the proponents of international "crime". It was proposed that, while article 19 could be deleted, the reference to international crimes should be retained in the text in article 51, paragraph 1, since the notion had become part of the language of international law. By following the Special Rapporteur's approach, the Commission should not be seen to be abandoning the notion of crime; rather it was saying that its place was not, or not primarily, in the draft articles on State responsibility. Therefore, it was suggested that if article 19 were deleted, and no reference to "crime" were retained in the draft articles, a study of international crime could be included in the Commission's long-term programme of work.

361. Others strongly urged caution so as not to imperil the entire exercise. It was disputed that the term "State crime" had been accepted in international law, or that the deletion of article 19 necessarily meant the abandonment of the concept of international crime. Its deletion was preferable so as to avoid a lengthy debate on crime by instead focusing on the consequences that arose from serious breaches of international obligations, breaches determined, like all other obligations, in accordance with Part One of the draft articles.

362. Still others viewed the term "crime" as part of international law, albeit subject to widely differing interpretations. According to one interpretation, the word "crime" did not have a penal connotation in the context of international law. Instead it was a reference to the gravity of the conduct of the responsible State. The recognition of the existence of a crime arose from the basic proposition that crimes, such as genocide, could be committed by a State, and could not be equated with normal, albeit regrettable, breaches of international obligations.

[110] The text of article 51 proposed by the Special Rapporteur reads as follows:

"*Article 51. Consequences of serious breaches of obligations to the international community as a whole*

"1. This Chapter applies to the international responsibility that arises from the serious and manifest breach by a State of an obligation owed to the international community as a whole.

"2. Such a breach entails, for the State responsible for that breach, all the legal consequences of any other internationally wrongful act and, in addition, [punitive damages] [damages reflecting the gravity of the breach].

"3. It also entails, for all other States, the following further obligations:

"(*a*) Not to recognize as lawful the situation created by the breach;

"(*b*) Not to render aid or assistance to the State which has committed the breach in maintaining the situation so created;

"(*c*) To cooperate in the application of measures designed to bring the breach to an end and as far as possible to eliminate its consequences.

"4. Paragraphs 2 and 3 are without prejudice to such further penal or other consequences that the breach may entail under international law."

[111] The text of the additional paragraph to article 40 bis proposed by the Special Rapporteur reads as follows:

"A State referred to in paragraph 2 may seek:

"(*a*) Cessation of the internationally wrongful act, in accordance with article 36 bis;

"(*b*) On behalf of and with the consent of the injured State, reparation for that State in accordance with article 37 bis and chapter II;

"(*c*) Where there is no injured State:

"(i) Restitution in the interests of the injured person or entity, in accordance with article 43, and

"(ii) [Punitive damages] [Damages reflecting the gravity of the breach], in accordance with article 51, paragraph 2, on condition that such damages shall be used for the benefit of the victims of the breach."

363. In addition, the view was expressed that the text confused what were different categories, i.e. obligations arising from peremptory norms, *erga omnes* obligations, and collective obligations. It was proposed that further study be undertaken on breaches of peremptory norms, and that a saving clause be inserted in the text to the effect that the draft articles did not prejudge any further consequences which could arise in case of a breach of a peremptory norm of international law.

(b) *Collective countermeasures (articles 50 A and 50 B)*

364. While different views were expressed in the Commission regarding the notion of collective countermeasures as found in the text of proposed articles 50 A and 50 B, support was voiced for both articles.

365. The view was expressed that what the Commission was doing, rather than codifying the law of State responsibility, was constructing a system of multilateral public order, and that developments in the international legal order depended on progress in the international community and not just in the development of norms. Premature efforts to create rules about collective countermeasures could damage both the draft articles and the gradual development of the new notions that had been referred to.

366. It was also queried how much the question concerned the responsibility of States, as opposed to the maintenance of international peace and security. In the view of some, support for collective countermeasures was only possible in the context of the action of competent international organizations, whether regional or universal; an ad hoc delegation of the right to respond to a group of countries acting outside any institutional ambit was very difficult to accept. Furthermore, it was suggested that the draft articles failed to properly distinguish between individual countermeasures, whether taken by one State or by a group of States, on the one hand, and other existing institutions, such as collective self-defence and various collective security arrangements. Indeed a violation of obligations *erga omnes* could be of such magnitude as to prompt measures under Article 51 or Chapter VII or VIII of the Charter of the United Nations.

367. The view was further expressed that the analysis of State practice neither demonstrated nor justified the existence of a group of legal measures accepted by all States, so as to establish "collective countermeasures" as a new legal institution. On the other hand, issue was taken with the statement that such measures were limited to the actions of Western States. Various examples of collective countermeasures taken by non-Western States demonstrated the contrary. Others took the view that the review of State practice did not reveal the existence of collective countermeasures, but rather politically motivated measures. This view did not reflect a universal opinion among States, or in the decisions of, for example, the Commission on Human Rights. The Special Rapporteur noted that in giving examples of such collective measures, he had not taken, and he did not expect the Commission to take, any position on their lawfulness. He had cited them rather to illustrate the context in which the issues had arisen.

368. Others noted that, far from reflecting a dramatic new development, the scope of application of the regime being proposed would be very limited, since there were several regimes to regulate non-compliance in various areas of international law already in place, which excluded or severely limited such responses. Furthermore, collective countermeasures would be subject to the basic limitations on countermeasures in chapter II of Part Two bis, and would only apply to serious, manifest and well-attested breaches. A feasible regime of pacific collective countermeasures could be a viable alternative to the use of forceable measures to induce a State to return to legality.

369. The preference was expressed for circumscribing the group of possible States entitled to take collective countermeasures, to include only a group of States in the same region. It was also proposed that whenever a procedure of collective decision-making was required, such procedure had to be resorted to before embarking on collective countermeasures. In addition, the principle of *non bis in idem* could be applied by analogy so as to prevent the possibility of multiple sanctions for the breach. Furthermore, the term "collective countermeasures" was considered a misnomer, since it implied a link to bilateral countermeasures. Instead, the action envisaged was a reaction to a violation of collective obligations, and could be undertaken by a single State or by a group of States. Support was expressed for an alternative formulation such as "multilateral sanctions".

370. As to the scope of such measures, the view was expressed that, in most if not all cases, they were resorted to only to induce cessation of the allegedly wrongful act, and not reparation. Therefore, it was proposed that the purpose of collective countermeasures be limited in the draft articles to seeking cessation and assurances and guarantees of non-repetition. In response, the Special Rapporteur expressed the view that it was difficult to limit collective countermeasures to cessation, since there may be situations of restitution after the wrongful act ceased. For example, after a crime against humanity had ceased, its consequences, such as massive displacement of the target population, continued.

371. Some members pointed out that article 50 A raised the same concerns as those in cases of an invitation by a State to others in the exercise of self-defence, or intervention by invitation in humanitarian cases. Caution was advised: where a State suffered no direct harm, there was a need to limit its involvement. However, article 50 A was open-ended and could be misused. In addition, a reference to the gravity of the breach was necessary, since the proposed text seemed to allow such collective countermeasures irrespective of the gravity of the breach, and subject only to the test of proportionality. Indeed it was suggested that the distinction between articles 50 A and 50 B was marginal and even artificial. The two proposals shared the same point of departure: that there was a breach of an essential and important rule that concerned the international community as a whole, and which justified a reaction by all the members of the community. States other than the injured State intervened not on its behalf, under article 50 A, but as members of the international community, whose interests had been threatened. Such action could be aimed at the cessation of the breach, guarantees

and assurances of non-repetition and reparation. If the obligation was owed to the international community as a whole all States could take collective countermeasures under article 50 A. By contrast the Special Rapporteur pointed out that article 50 A covered a completely different situation than article 50 B. Article 50 A related to the situation where there was an obligation to a group of States, and a particular State was specifically injured by that breach. The other States parties to that obligation could take collective countermeasures on behalf of that State, to the extent that State agreed, and within the sphere of action open to that State. Several States, sharing the same collective interest, were responding to a single breach on behalf of the particular victim. This had nothing to do with grave breaches of community obligations covered by article 51. As formulated, article 50 B was concerned only with the case where there was no injured State in the sense of article 40 bis, paragraph 1. As such, article 50 A had a much wider application.

372. Regarding article 50 B, the view was expressed that the philosophy underlying the judgment of ICJ, in the *South West Africa* cases,[112] that States could only act where their national interest was involved had been a blow to international law, and the disavowal of that approach implied by the various articles under discussion was welcomed. It was queried whether the concept of the interest of the international community as a whole had become a fixed concept, and whether it necessarily implied the existence of a dispute settlement procedure to ascertain such interest. Furthermore, the question was posed whether it was correct to make reference to the interests of the victims. In cases such as genocide, the entire international community was concerned. Others disagreed; the concrete interest of the victims of such a breach should be paramount, and therefore provision should be made to allow intervention on behalf of the victims, and to obtain reparation on their behalf.

373. As to the formulation of article 50 B, the view was expressed that its title was too broad, since it could equally cover cases under article 50 A. Paragraph 1 should also refer to assurances and guarantees of non-repetition. The term "victims" had criminal connotations, and could be replaced by another formula.

(c) *Consequences of serious breaches of obligations to the international community as a whole (article 51)*

374. A measure of agreement was expressed with the proposal of the Special Rapporteur, which was generally considered to be an improvement on article 19, and represented a balanced compromise. Others disagreed strongly: creating distinctions in Part Two based on qualitative distinctions in the primary rules, was little different from creating new rules. It amounted to reintroducing article 19 through the back door and was outside the scope even of progressive development, let alone codification. Furthermore, article 51 presupposed the establishment of a system of collective sanctions of an essentially punitive nature, identifiable with the enforcement measures provided for in the Charter of the United Nations. There was no imperative need to create such a parallel system.

375. Others thought the proposals did not go far enough. While the commission of a crime could not in itself be a basis for the autonomous competence of international courts, it opened the way for an *actio popularis*. Furthermore, it was possible to foresee a form of dispute settlement on the analogy of article 66 of the 1969 Vienna Convention. Moreover, the existence of the crime had implications with regard to the choice as between forms of reparation: in particular, the State directly injured could not renounce full restitution, since it was the interests of the international community as a whole that were being protected.

376. With regard to paragraph 1, it was observed that the title of chapter III, "Serious breaches of obligations to the international community as a whole" did not correspond to the formula used in paragraph 1, which referred to "serious and manifest" breach. The word "manifest" was considered problematic since it implied that blatant actions by a State were qualitatively worse than subtle or concealed ones. It was suggested that the breach be qualified as "well-attested" or "reliably attested".

377. The view was further expressed that paragraph 1 should constitute a separate article, and that its contents be expanded along the lines of article 19, paragraph 2, as adopted on first reading. Furthermore, the article could contain a non-exhaustive enumeration of most of the serious breaches, as had been the case in article 19, paragraph 3. The Special Rapporteur agreed with the idea of separating article 51 into two articles, with additional elements included within it. However, in common with many members, he was opposed to including an article in Part One, or to giving specific examples in the text as distinct from the commentary.

378. Concerning paragraph 2, while caution was advised when dealing with the reference to "punitive damages", support was expressed for retaining the reference in the text, which rectified an omission in article 19. However, the view was expressed that such reference had too great a penal connotation, and was not confirmed by existing practice. The example of article 228 of the Treaty establishing the European Community (revised numbering in accordance with the Treaty of Amsterdam), cited in paragraph 382 of the third report, was considered a special case and not at all indicative of a trend in general international law. Doubt was further expressed regarding the practicalities of implementing the provision, since it was linked to the possibility of an institutionalized response to international crimes of States. Preference was expressed for the alternative formulation "damages reflecting the gravity of the breach".

379. In relation to paragraph 3, subparagraph (*a*), it was pointed out that the obligation of non-recognition was based on extensive practice, and that such non-recognition in the legal context was more a reaction to the invalidity of an act, not only to its illegality.

380. The question was raised whether subparagraph (*b*) was not covered by article 27, in chapter IV of Part One, since it entailed participation in the wrongful act. In response, the Special Rapporteur noted that the emphasis

[112] See footnote 67 above.

in article 27 was on aid or assistance in respect of the commission of the wrongful act, whereas the emphasis in subparagraph (*b*) was the situation created as a result of the act. In many cases it would not make a difference because the primary obligation, which was a continuing obligation, would be breached in relation to the continuing situation. However, other cases could be envisaged, for example, past behaviour amounting to a crime against humanity causing a population to flee to another State. The question was whether the population was to be allowed to return once the behaviour had ceased. In such contexts subparagraph (*b*) had a role to play.

381. The view was expressed that subparagraph (*c*) was problematic since it could lead to the interpretation that States would be obliged to cooperate with another State unilaterally taking countermeasures. Likewise, its implications for the law of neutrality were not clear. As a minimum, subparagraph (*c*) should be limited only to those actions which the responding State was entitled to take under international law.

382. As to paragraph 4, the view was expressed that it was not clear what "penal consequences" were being referred to. Strong reservations were expressed regarding the existence of "penal" consequences in international law with regard to States. It was further considered appropriate to leave the indication of further consequences to future developments, although it had to be recognized that it was likely that such developments would occur in regard to specific types of breaches. Indeed, paragraph 4 was strictly unnecessary since, irrespective of the form of the draft articles, they could not prevent the development of either customary or conventional law.

383. It was further suggested that provision be made in article 51 to the effect that individuals involved in the commission of a serious breach by a State would not be entitled to rely, in criminal or civil proceedings in another State, on the fact that they had acted as State organs; it was paradoxical for international law to protect conduct which at the same time it particularly condemned. Moreover such a provision would insert a significant deterrent aspect into the text. In response, the Special Rapporteur noted that such proposal was not properly a matter of State responsibility, but rather one of individual criminal responsibility. Furthermore, he did not support the idea that the State became "transparent" only in extreme cases. Instead, for breaches of international law a State was always transparent *qua* State, i.e. it was always accountable for its acts, and individuals, whether or not they undertook State functions, were generally accountable for their acts in terms of the existing rules of international criminal law. It would be confusing to deprive them of an immunity which international criminal law had never, since 1945, recognized.

21. Special Rapporteur's concluding remarks on the debate on the invocation of responsibility to a group of States or to the international community

384. The Special Rapporteur referred to the views of those members who had expressed scepticism or doubt about the compromise approach being proposed, and who had proposed alternative solutions, such as encapsulating the issue in a single saving clause. While he shared some of the concerns expressed, he felt it worthwhile to proceed along the lines of his compromise proposal, at least for the purposes of receiving comments from the Sixth Committee, and because it reflected a compromise position between the starkly contrasting views expressed in the Commission. While the time was not yet ripe for an elaborated regime of "crimes", there was general agreement that it was appropriate to include the basic concept that there were obligations which States held to the international community as a whole, and which were by definition serious, and their breach therefore concerned all States. While minor breaches of such obligations could occur (e.g. isolated cases of inhuman treatment, not warranting any multilateral response), in other cases the definition of the obligations themselves, such as with genocide and aggression, ensured that the breaches in question would be serious.

385. With regard to collective countermeasures, the Special Rapporteur pointed to the significant level of approval of his proposals for articles 50 A and 50 B, notwithstanding some of the concerns that had been expressed. There was clear practice to the effect that where a State was individually injured and was individually entitled to take countermeasures, another State with a legal interest in the norm violated could be allowed to assist.

386. Article 50 B was a modified and reduced form of what existed on first reading, and was broadly accepted, this acceptance extending to several members who seemed to favour countermeasures only when they were multilateral. While he did not favour limiting those forms of multilateral reactions to a single region, he accepted the point that such measures undertaken in a single region may be a reflection of a community concern. He also agreed with the view that responses to breaches of obligations to the international community as a whole could be responses taken by one State, although they could also be taken by a number of States.

387. In connection with article 51, the Special Rapporteur noted that general support was expressed for transmitting the text to the Drafting Committee, and he indicated his willingness to consider splitting the article into two or more provisions, as had been suggested. He did not favour the idea of relabelling article 51 by reference to the notion of "essential" obligations. There were many obligations which were "essential" to the international community, but the individual relationships were essentially bilateral, e.g. in the case of diplomatic immunity. Instead, the core concept had to be that of the *Barcelona Traction* case,[113] i.e. obligations to the international community as a whole in which every State individually had an interest in compliance.

388. He fully accepted that the definition of the category in article 51, paragraph 1, could be improved by reference to some of the content of article 19, paragraph 2, as adopted on first reading. Although article 51, paragraph 4, was not necessary in the light of article 38, as adopted on first reading, he preferred its retention

[113] See footnote 43 above.

given future possibilities in the field. However, he did not feel strongly about the term "penal", especially since its deletion would not affect the operation of the provision. Neither did he oppose the deletion of the reference to "punitive" consequences.

389. With regard to the question of the "transparency" of the State, and the alleged consequence of serious breaches of essential obligations involving individual criminal responsibility, he reiterated the view that the issue should not be included in the draft articles, since it was concerned either with the category of individual criminal responsibility of persons, or alternatively the category of State immunity. He preferred to reserve the legal position, which had, at any rate, been under consideration in the context of the Rome Statute of the International Criminal Court, particularly in the context of article 27 combined with article 98.

22. Introduction by the Special Rapporteur of the general provisions (Part Four)

(a) *Special provisions made by other applicable rules (article 37)*

390. The Special Rapporteur stated that the Commission had agreed to the inclusion of a *lex specialis* provision, based on article 37 adopted on first reading. He proposed a reformulation of article 37[114] since it was not enough that there was a provision in an international treaty or elsewhere that dealt with the particular point for it to be *lex specialis*. Instead, it had to deal with the point in such a manner that it could be said on the interpretation of the provision that it intended to exclude other consequences. That aspect was missing from the formulation on first reading and was incorporated in his proposal.

(b) *Responsibility of or for the conduct of an international organization (article A)*

391. Article A,[115] dealing with the responsibility of or for the conduct of an international organization, had been provisionally adopted by the Drafting Committee at the fiftieth session,[116] and had been generally supported by the Commission.

(c) *Rules determining the content of any international obligation (article B)*

392. The Special Rapporteur suggested that the Commission could consider a complementary provision to article 30, paragraph 5, of the 1969 Vienna Convention, saving the law of treaties. However, the draft articles on State responsibility were not concerned with the existence or content of a primary obligation, but instead with the consequences of the breach. He thus proposed a more general formulation, as article B,[117] applying not only to the law of treaties, but also to customary international law.

(d) *Relationship to the Charter of the United Nations (article 39)*

393. Article 39, as adopted on first reading, had been the subject of severe criticism, including by the previous Special Rapporteur, Mr. Arangio-Ruiz. The current Special Rapporteur agreed with those criticisms, and therefore proposed a simpler version of article 39,[118] which could not be viewed as a covert amendment to the Charter of the United Nations.

(e) *Other saving clauses*

394. In the Special Rapporteur's view, the above-mentioned saving clauses were the only necessary clauses. For the reasons stipulated in paragraph 428 of his report, he did not support the inclusion of saving clauses on diplomatic protection, or relating to questions of invalidity and non-recognition, or non-retroactivity. A definition clause was also unnecessary. However, if the Commission eventually were to decide in favour of a set of draft articles in the form of a draft convention, other provisions would be needed.

23. Summary of the debate on the general provisions (Part Four)

(a) *Special provisions made by other applicable rules (article 37)*

395. Support was expressed for the Special Rapporteur's reformulation of the provision. It was pointed out that the legal solution based on interpretation, as sug-

[114] The text of article 37 proposed by the Special Rapporteur reads as follows:

"*Article 37. Special provisions made by other applicable rules*

"The provisions of these articles do not apply where and to the extent that the conditions for or the legal consequences of an internationally wrongful act of a State have been exclusively determined by other rules of international law relating to that act."

For the analysis of this article by the Special Rapporteur, see paragraphs 415 to 421 of his third report.

[115] The text of article A proposed by the Special Rapporteur reads as follows:

"*Article A. Responsibility of or for the conduct of an international organization*

"These articles shall not prejudge any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization."

[116] See *Yearbook . . . 1998*, vol. I, 2562nd meeting, p. 288, para. 72.

[117] The text of article B proposed by the Special Rapporteur reads as follows:

"*Article B. Rules determining the content of any international obligation*

"These articles are without prejudice to any question as to the existence or content of any international obligation of a State, the breach of which may give rise to State responsibility."

[118] The text of article 39 proposed by the Special Rapporteur reads as follows:

"*Article 39. Relationship to the Charter of the United Nations*

"The legal consequences of an internationally wrongful act of a State under these articles are without prejudice to article 103 of the Charter of the United Nations."

For the analysis of this article by the Special Rapporteur, see paragraphs 422 to 426 of his third report.

gested by the Special Rapporteur, was the sole plausible approach to the question of the relationship between the *lex specialis* regimes and the general regime of State responsibility. Different views were expressed as to the term "to the extent that": some thought it confusing and unnecessary, others thought it useful since other rules of international law could be partially applicable to the same wrongful conduct. Therefore, the word "exclusively" was inappropriate. It was also queried whether the words "the conditions for or the legal consequences of an internationally wrongful act" included the definition of such an act, the general principles, the act of the State under international law and the breach itself.

(b) *Responsibility of or for the conduct of an international organization (article A)*

396. Support was expressed for the proposed article, and it was noted that the topic of the responsibility of international organizations could be taken up by the Commission in the future.

(c) *Rules determining the content of any international obligation (article B)*

397. Support was expressed for the inclusion of the provision in the draft articles.

(d) *Relationship to the Charter of the United Nations (article 39)*

398. Support was expressed for the Special Rapporteur's reformulation of the provision, which was considered to be a better text than that adopted on first reading. The view was also expressed that if the draft articles were to be adopted in the form of a declaration, there would be no need for the inclusion of a provision on the relationship with the Charter of the United Nations. Moreover, Article 103 of the Charter was sufficient to resolve the matter, and article 39 would not be needed. According to a different view, article 39 was particularly important to ensure that Article 103 would prevail over the instrument in which the draft articles were to be embodied.

399. In addition, it was observed that the issue was more complex since the draft articles on State responsibility and the Charter of the United Nations were situated on different levels. Support was therefore expressed for retaining such an article, albeit in a less restrictive form since the proposed text for article 39 was limited to the consequences of an internationally wrongful act. Likewise, there was no reason to confine it to Article 103 of the Charter. While that was understandable under the 1969 Vienna Convention, since Article 103 had to do with the precedence of treaties among each other, that was not the case in the context of State responsibility. All that needed to be stated was that it was without prejudice to the Charter.

(e) *Other saving clauses*

400. While support was expressed for the Special Rapporteur's proposal not to include a saving clause on diplomatic protection, a preference was expressed for including such a clause, although in Part Two bis, not Part Four.

401. It was observed that, if the final text of the draft articles were to take the form of a declaration, a provision on non-retroactivity should not be included, in the expectation that the draft articles would be considered declaratory of existing law, and therefore would have a retroactive effect. Conversely, if the final form was a treaty then more provisions, including a non-retroactivity clause, would be needed.

24. Special Rapporteur's concluding remarks on the general provisions (Part Four)

402. The Special Rapporteur noted that there had been general approval of the texts he had proposed for Part Four.

403. For the reasons given by some of the members, he did not favour the deletion of article 39, especially in regard to the extensive debate the article had attracted during the first reading. Instead, a simple version was more appropriate.

404. Concerning article 37, and in response to the suggestion that the word "exclusively" was not necessary in the light of the reference to "the extent that", while the matter was more one of drafting, it had to be accepted that the fact that a particular norm attached a particular consequence was not by itself sufficient to trigger the *lex specialis* principle. An additional element was required, i.e. that the provision intended to exclude other consequences, which was conveyed by the phrase "exclusively".

405. In completing this review of the draft articles adopted on first reading, he thanked the members of the Commission for their patience faced with a large volume of material and many difficult issues, as well as the secretariat and his own assistants.

ANNEX

DRAFT ARTICLES PROVISIONALLY ADOPTED BY THE DRAFTING COMMITTEE ON SECOND READING[119]

STATE RESPONSIBILITY

Part One

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I

GENERAL PRINCIPLES

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

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2 [3].[120] *Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) Is attributable to the State under international law; and

(*b*) Constitutes a breach of an international obligation of the State.

Article 3 [4]. Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II

THE ACT OF THE STATE UNDER INTERNATIONAL LAW

Article 4 [5]. Attribution to the State of the conduct of its organs

1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State.

Article 5 [7]. Attribution to the State of the conduct of entities exercising elements of the governmental authority

The conduct of an entity which is not an organ of the State under article 4 [5] but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question.

Article 6 [8]. Attribution to the State of conduct in fact carried out on its instructions or under its direction or control

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 7 [8]. Attribution to the State of certain conduct carried out in the absence of the official authorities

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 8 [9]. Attribution to the State of the conduct of organs placed at its disposal by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ was acting

[119] For the statement of the Chairman of the Drafting Committee introducing its report, see *Yearbook . . . 2000*, vol. I, 2662nd meeting.

[120] The numbers in square brackets correspond to the numbers of the articles adopted on first reading.

in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

Article 9 [10]. Attribution to the State of the conduct of organs acting outside their authority or contrary to instructions

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

Article 10 [14, 15]. Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement, which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 [5] to 9 [10].

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

Conduct which is not attributable to a State under articles 4 [5], 5 [7], 6 [8], 7 [8], 8 [9], or 10 [14, 15] shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Chapter III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 12 [16, 17, 18]. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13 [18]. International obligation in force for the State

An act of a State shall not be considered a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14 [24]. Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with what is required by that obligation.

Article 15 [25]. Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Chapter IV

RESPONSIBILITY OF A STATE IN RESPECT OF THE ACT OF ANOTHER STATE

Article 16 [27]. Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 17 [28]. Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 18 [28]. Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(*b*) The coercing State does so with knowledge of the circumstances of the act.

Article 19. Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of the present articles, of the State which commits the act in question, or of any other State.

Chapter V

Circumstances precluding wrongfulness

Article 20 [29]. Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21. Compliance with peremptory norms

The wrongfulness of an act of a State is precluded if the act is required in the circumstances by a peremptory norm of general international law.

Article 22 [34]. Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 23 [30]. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with its international obligations to another State is precluded if and to the extent that the act constitutes a countermeasure directed towards the latter State under the conditions set out in articles 50 [47] to 55 [48].

Article 24 [31]. Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) The occurrence of *force majeure* results, either alone or in combination with other factors, from the conduct of the State invoking it; or

(*b*) The State has assumed the risk of that occurrence.

Article 25 [32]. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question had no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) The situation of distress results, either alone or in combination with other factors, from the conduct of the State invoking it; or

(*b*) The act in question was likely to create a comparable or greater peril.

Article 26 [33]. State of necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(*a*) Is the only means for the State to safeguard an essential interest against a grave and imminent peril; and

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

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(*a*) The international obligation in question arises from a peremptory norm of general international law;

(*b*) The international obligation in question excludes the possibility of invoking necessity; or

(*c*) The State has contributed to the situation of necessity.

Article 27 [35]. Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness under this chapter is without prejudice to:

(*a*) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) The question of compensation for any material harm or loss caused by the act in question.

Part Two

CONTENT OF INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I

GENERAL PRINCIPLES

Article 28 [36]. Legal consequences of an internationally wrongful act

The international responsibility of a State which arises from an internationally wrongful act in accordance with

the provisions of Part One entails legal consequences as set out in this Part.

Article 29 [36]. Duty of continued performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30 [41, 46]. Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(*a*) To cease that act, if it is continuing;

(*b*) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31 [42]. Reparation

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

2. Injury consists of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State.

Article 32 [42]. Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Article 33 [38]. Other consequences of an internationally wrongful act

The applicable rules of international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part.

Article 34. Scope of international obligations covered by this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending on the character and content of the international obligation and on the circumstances of the breach, and irrespective of whether a State is the ultimate beneficiary of the obligation.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which accrues directly to any person or entity other than a State.

CHAPTER II

THE FORMS OF REPARATION

Article 35 [42]. Forms of reparation

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

Article 36 [43]. Restitution

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

(*a*) Is not materially impossible;

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

Article 37 [44]. Compensation

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

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

Article 38 [45]. Satisfaction

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

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

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

Article 39. Interest

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

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

Article 40 [42]. Contribution to the damage

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

Chapter III

SERIOUS BREACHES OF ESSENTIAL OBLIGATIONS TO THE INTERNATIONAL COMMUNITY

Article 41. Application of this chapter

1. This chapter applies to the international responsibility arising from an internationally wrongful act that constitutes a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation, risking substantial harm to the fundamental interests protected thereby.

Article 42 [51, 53]. Consequences of serious breaches of obligations to the international community as a whole

1. A serious breach within the meaning of article 41 may involve, for the responsible State, damages reflecting the gravity of the breach.

2. It entails, for all other States, the following obligations:

(*a*) Not to recognize as lawful the situation created by the breach;

(*b*) Not to render aid or assistance to the responsible State in maintaining the situation so created;

(*c*) To cooperate as far as possible to bring the breach to an end.

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

Part Two bis*

THE IMPLEMENTATION OF STATE RESPONSIBILITY

Chapter I

INVOCATION OF THE RESPONSIBILITY OF A STATE

Article 43 [40]. The injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(*a*) That State individually; or

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

(i) Specially affects that State; or

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

Article 44. Invocation of responsibility by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(*a*) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(*b*) What form reparation should take.

Article 45 [22]. Admissibility of claims

The responsibility of a State may not be invoked if:

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

(*b*) The claim is one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted.

Article 46. Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(*a*) The injured State has validly waived the claim in an unequivocal manner;

(*b*) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 47. Invocation of responsibility by several States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 48. Invocation of responsibility against several States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(*a*) Does not permit any injured State to recover, by way of compensation, more than the damage suffered;

* The Commission has set aside Part Three (Settlement of Disputes) of the draft articles adopted on first reading. Hence the gap.

(*b*) Is without prejudice to any right of recourse towards the other responsible States.

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

1. Subject to paragraph 2, any State other than an injured State is entitled to invoke the responsibility of another State if:

(*a*) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest;

(*b*) The obligation breached is owed to the international community as a whole.

2. A State entitled to invoke responsibility under paragraph 1 may seek from the responsible State:

(*a*) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30 [41, 46];

(*b*) Compliance with the obligation of reparation under chapter II of Part Two, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 44, 45 [22] and 46 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II

COUNTERMEASURES

Article 50 [47]. Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the suspension of performance of one or more international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall as far as possible be taken in such a way as not to prevent the resumption of performance of the obligation or obligations in question.

Article 51 [50]. Obligations not subject to countermeasures

1. Countermeasures shall not involve any derogation from:

(*a*) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(*b*) Obligations for the protection of fundamental human rights;

(*c*) Obligations of a humanitarian character prohibiting any form of reprisals against persons protected thereby;

(*d*) Other obligations under peremptory norms of general international law;

(*e*) Obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

2. A State taking countermeasures is not relieved from fulfilling its obligations under any applicable dispute settlement procedure in force between it and the responsible State.

Article 52 [49]. Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 53 [48]. Conditions relating to resort to countermeasures

1. Before taking countermeasures, the injured State shall call on the responsible State, in accordance with article 44, to fulfil its obligations under Part Two.

2. The injured State shall notify the responsible State of any decision to take countermeasures, and offer to negotiate with that State.

3. Notwithstanding paragraph 2, the injured State may take such provisional and urgent countermeasures as may be necessary to preserve its rights.

4. Countermeasures other than those in paragraph 3 may not be taken while the negotiations are being pursued in good faith and have not been unduly delayed.

5. Countermeasures may not be taken, and if already taken must be suspended within a reasonable time if:

(*a*) The internationally wrongful act has ceased; and

(*b*) The dispute is submitted to a court or tribunal which has the authority to make decisions binding on the parties.

6. Paragraph 5 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 54. Countermeasures by States other than the injured State

1. Any State entitled under article 49, paragraph 1, to invoke the responsibility of a State may take countermeasures at the request and on behalf of any State injured by the breach, to the extent that that State may itself take countermeasures under this chapter.

2. In the cases referred to in article 41, any State may take countermeasures, in accordance with the present chapter in the interest of the beneficiaries of the obligation breached.

3. Where more than one State takes countermeasures, the States concerned shall cooperate in order to ensure that the conditions laid down by this chapter for the taking of countermeasures are fulfilled.

Article 55 [48]. Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Part Four

GENERAL PROVISIONS

Article 56 [37]. Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law.

Article 57. Responsibility of or for the conduct of an international organization

These articles are without prejudice to any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58. Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting in the capacity of an organ or agent of a State.

Article 59 [39]. Relation to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a State under these articles are without prejudice to the Charter of the United Nations.