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REPORT ON THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS FIFTIETH SESSION (1998)

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Secretariat memorandum
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The Work of the International Law Commission at Its Fiftieth Session (1998)

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1. Introduction

The International Law Commission held its fiftieth session in two parts: the first in Geneva from 20 April to 12 June 1998 and the second in New York from 27 July to 14 August 1998.

The "new"[1] Commission, under the chairmanship of its Brazilian member, Mr. Joao Clemente Baena Soares, managed to do substantive work on all of the six topics on its agenda, four of which it had inherited from its predecessor (International liability for injurious consequences arising out of acts not prohibited by international law, State responsibility, reservations to treaties, nationality in relation to the succession of States), while another two (Diplomatic protection, unilateral acts of States) had been formally included in its agenda only in 1997.

As regards the "International liability" topic, the Commission adopted on first reading a set of 17 draft articles with commentaries on the subject of "Prevention of transboundary damage from hazardous activities" (see infra 2) and transmitted these draft articles to Governments for comments and observations.

Concerning the topic of "State responsibility", the Commission embarked upon the process of second reading of draft articles developed in the course of several decades[2]. Articles 1-15 of Part One of the draft were considered by the Drafting Committee (see infra 3).

With regard to "Reservations to treaties", the Commission adopted on first reading eight draft guidelines on the definition of reservations (see infra 4).

Regarding "Nationality in relation to the succession of States", the Commission examined at the level of a Working Group the feasibility of taking up the topic of nationality of legal persons (see infra 5).

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Attention: The present report was prepared without recourse to the draft report of the Commission, that is, on the basis of individual documents and the author's own notes. Particularly the texts reproduced in the Annexes I-IV should therefore be checked against the Commission report.

[1] In November 1996, no less than 18 new members had been elected.

[2] The "old" Commission had provisionally adopted 60 draft articles (plus two annexes) on this subject in 1996.

With respect to the new topics of "Diplomatic protection" and "Unilateral acts of States", the Commission considered the respective first reports submitted by the two Special Rapporteurs appointed in 1997 (see infra 6 and 7).

In response to paragraph 12 of General Assembly Resolution 52/156, the Commission indicated specific issues for each of the six topics mentioned on which expressions of views by Governments either in the Sixth Committee or in writing would be of particular interest in providing effective guidance for the Commission on its further work (see infra Annex IV).

A short overview of other matters dealt with by the Commission or concerning its activity is given at the end of the present report (see infra 8).

2. International liability for injurious consequences arising out of acts not prohibited by international law: Draft Articles on "Prevention of transboundary damage from hazardous activities"

2.1. Introductory remarks

At its 49th (1997) session, the Commission had decided to proceeed with its project on the topic of liability by first dealing with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities", because this subject was generally considered to be less contentious than questions of liability proper, and also bcause the ILC's work on prevention was already at an advanced stage. In particular, a Working Group established by the "old" Commission had in 1996 elaborated a complete set of draft articles with commentaries on prevention, understood in a wide sense[3]. In 1997, the Indian member of the Commission, Mr. S.P. Rao was appointed Special Rapporteur on the topic.

At the Commission's fiftieth session, Mr. Rao presented his first report[4]. The report reviewed the work of the ILC on the topic of liability since it was first

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[3] The "liability" topic originated from the Commission's discussion on State Responsibility, particularly on draft article 35 of Part One. It was placed on the ILC's agenda in 1978; Mr Quentin Baxter was appointed Special Rapporteur. Between 1980 and 1984, Mr Quentin Baxter submitted five reports. After his death he was succeeded by Mr. J. Barboza, who between 1985 and 1996 provided the Commission with no less than 12 reports which, from 1988 onwards, contained draft articles on various aspects of the topic. In 1992 the Commission established a Working Group to consider the scope of the topic, the approach to be taken and the possible direction of future work. On the basis of recommendation from this Working Group, the Commission decided in the same year to continue its work on the topic in stages, namely, first to complete work on prevention of transboundary harm and then to proceed with remedial measures. In 1994 and 1995, several draft articles were provisionally adopted by the Commission on first reading. In 1996, the Working Group mentioned in the text was established, which, at the same session submitted a report containing a complete picture of the topic, relating not only to prevention proper but also including liability for compensation or other relief, in the form of draft articles with commentaries (for the text see Report of the International Law Commission on the work of its forty-eighth session, General Assembly Official Records, Fifty-First Session, Suppl. No. 10[A/51/10], pp. 235 ff.).

[4] Docs. A/CN.4/487 and Add.1.

placed on the agenda in 1978, focusing in particular on the question of the scope of the draft articles to be elaborated, followed by an analysis of the procedural and substantive obligations which the general duty of prevention entailed. The report discussed the following principles relating to procedural aspects: prior authorization, international environmental impact assessment, cooperation, exchange of information, notification, consultation and negotiation in good faith. As to substantive obligations, the Special Rapporteur considered the precautionary principle, the polluter-pays principle as well as the principles of equity, capacity-building and good governance.

The Special Rapporteur recommended that, once agreement was reached on the general orientation of the topic, the Commission review the draft articles adopted by the 1996 Working Group mentioned above and decide on their possible inclusion in the new draft to be elaborated on prevention.

On the basis of such review by the plenary of the Commission as well as by a special Working Group established to consider draft articles 3 to 22 of 1996, and following the report of its Drafting Committee, the Commission adopted on first reading a set of 17 draft articles on prevention of transboundary damage from hazardous activities, together with commentaries[5]. The Commission invites comments and observations by Governments on its product until 1 January 2000, including indications as to what final legal format the draft articles should assume.

Considering the fact that in 1997 the Commission had envisaged to finish the first reading by 1999, the completion of the draft on prevention already at the fiftieth session must be considered a remarkable achievement. Basically, the draft articles were drawn from the articles elaborated by the Commission's 1996 Working Group[6]. The same is valid for the commentaries. However, the entire text was subjected to careful scrutiny which resulted in a number of more or less substantial changes.

2.2. General structure and main objectives of the draft articles

Increased concern for the environment in the context of sustainable development has encouraged the codification and progressive development of international law on this topic. Throughout the draft articles, the Commission seeks to balance the economic interests of States of origin and the interests of States likely to be affected. In defining obligations under the draft articles, the Commission has taken into consideration the specific problems and needs of developing countries.

Prevention is the preferred policy of protection because it is often difficult to restore harmed persons, property or the environment to their prior condition. Prevention, as an objective of international law, is emphasized in Principle 2 of the Rio Declaration[7] and in the advisory opinion of the International Court of

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[5] See Annex I of the present paper for the text of the draft articles.

[6] Cf. supra note 3.

[7] Report of the United Nations Conference on Environment and Development, (Rio de Janeiro, 3-14 June 1992), A/CONF.151/26/Rev.1 (vol. I), p.3.

Justice on the Legality of the Threat or Use of Nuclear Weapons[8].

The obligation of due diligence is the core base of the provisions, affecting every stage related to the conduct of the activity. The obligation placed on the State is therefore of a continuous nature. Good faith and cooperation are also emphasized throughout the draft.

2.3. Specific issues arising throughout the discussion of the draft articles

The Commission was in general agreement about the structure and scope of the draft articles. A provision was added to the 1996 acquis, dealing with the consequences of an operator's failure to conform to the requirements of an authorization under Article 7. Concerning this article, some Commission members expressed concern regarding the burden placed on the State of origin by requiring it to authorize also pre-existing activities.

At the request of some members, the Commission emphasizes in the commentary that while the distribution of costs of preventive measures should be a consideration that could likely produce the greatest benefit, the principle that the operator of the activity and the State of origin are expected to bear the costs prevails.

2.4. The provisions of the draft

Article 1 defines the scope of the draft by limiting it to activities not prohibited by international law which create a risk of significant transboundary harm through their physical consequences[9]. This definition contains four criteria.

The first criterion, referring to "activities not prohibited by international law", is crucial for the distinction between the Commission's project on prevention and that on State responsibility arising from internationally wrongful conduct.

The second criterion, found in the definition of the "State of origin" in Article 2, subparagraph (d), is that the activities to which preventive measures are to be applied are "[carried out] in the territory or otherwise under the jurisdiction or control of a State". Paragraphs 4 to 11 of the Commentary contain clarifications of the concepts of "territory", "jurisdiction" and "control".

The third criterion is that the activities under consideration must involve a "risk of causing significant transboundary harm". The limit of risk is intended to exclude from the scope of the draft those activities which in fact cause transboundary harm (such as creeping pollution) in their normal operation. The limit of transboundary harm is to exclude activities wich cause harm to the territory of the State within which the activity is undertaken, or activities harming the global commons per se but not any other State. The phrase "risk of causing significant transboundary harm" is to be taken as a single term, as defined in Article 2.

The fourth criterion is that the significant transboundary harm must have

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[8] Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 15, paragraph 29.

[9] At some stage, the Commission will have to bring the title of the draft articles in line with their scope by expressly incorporating the limitation in scope to activities which are per se legal.

been caused by the physical consequences of activities under consideration. This understanding is consistent with the long-standing view of the Commission that the topic of prevention should remain within a manageable scope and that, therefore, transboundary harm which might be caused by policies of States in economic, monetary, socio-.economic or similar fields should be excluded from the scope of the draft. The activities in question should therefore have physical consequences which in return result in significant harm.

Article 2 on "Use of terms" defines five more commonly used terms in the draft. Three of these terms, namely those in subparagraphs (a), (c) and (d), are identical to the terms used in article 2 of the 1996 text, while subparagraph (b) was included in 1998, and subparagraph (e) modified vis-à-vis the 1996 text.

Subparagraph (a) defines the concept of "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous harm and a high probability of causing other significant harm. The adjective "significant" applies to both risk and harm. For the purposes of the draft articles, "risk" refers to the combined effect of the probability of the occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of those two elements that sets the threshold: this combined effect should reach a level that is deemed significant. The word "encompasses" is intended to highlight the fact that the spectrum of activities covered is limited and does not, for example, include activities where there exists only a low probability of causing significant transboundary harm.

Subparagraph (b) does not provide a definition but rather a scope for the term "harm", by indicating that harm includes harm caused to persons, property or the environment - a clarification that to the Commission seemed to be useful in the text.

Subparagraph (c) defines "transboundary harm " as harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned shared a common border. The definition is self-explanatory and makes it clear that the articles do not apply to circumstances where harm affects the "global commons" per se. It includes, however, activities conducted under the jurisdiction or control of a state, for example on the high seas, with effects in the territory of another State or in places under the jurisdiction or control of a State with injurious consequences on, for example, ships of another State on the high seas.

Subparagraph (d) defines "State of origin" as the State in the territory or otherwise under the juridsdiction or control of which the activities referred to in Article 1 are carried out.

Finally, subparagraph (e) defines "State likely to be affected" as the State in the territory of which the significant transboundary harm is likely to occur or which has jurisdiction or control over any other place where this is likely to happen.

Article 3, entitled "Prevention", sets forth the general obligation on which the entire set of draft articles is based. It departs from the corresponding 1996 text

in as far as the present Article 3 does not deal anymore with the obligation to take all appropriate measures to minimize the effects of harm once it has occurred. The Commission considered that this obligation (of "prevention ex post") related to the liability aspect of the topic.

Article 3 imposes on the State a duty to take all necessary measures to prevent, or to minimize the risk of, significant transboundary harm. It thus establishes an obligation of due diligence[10], structured as an obligation of conduct rather than result[11]. The duty enshrined in Article 3 could involve, inter alia, taking such measures as are appropriate by way of abundant caution, even if full scientific certainty does not exist, to avoid or prevent a risk of causing serious or irreversible damage. This so-called "precautionary approach" is well-articulated in Principle 15 of the Rio Declaration on Environment and Development[12] and is subject to the capacity of States concerned. The Commission took note that a more optimal and efficient implementation of the duty of prevention would require upgrading the input of technology in the activity as well as the allocation of adequate resources for the management and monitoring of the activities in question.

With regard to costs, the operator of the activity is expected to bear the costs of prevention to the extent that he or she is responsible for the operation. The State of origin is also expected to undertake the necessary expenditure to put in place the administrative, financial and monitoring mechnisms referred to in Article 5 (infra).

Article 4, entitled "Cooperation", is based on the corresponding article 6 of the 1996 text. However, once again, the issue of the minimization of the effects of harm that has occurred was considered to be outside the scope of the present exercise. The Commission felt that cooperation, as expressed in Article 4, is essential in designing and implementing effective policies of prevention.

The Commentary points out that the organizations referred to in this article are those which have the competence to assist the States concerned in preventing, or in minimizing the risk of, significant transboundary harm[13]. It also explains that, in addition to rendering such assistance, international organizations can provide a framework for States to fulfill their obligation of cooperation in the field of prevention under this article[14].

Article 5 is based on article 7 of the 1996 draft. It states the obvious, namely that once a State has become a party to the present draft articles, it will be required to take the necessary measures to implement them. Such measures may be of legislative, administrative or other character. They will have to include the

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[10] On this standard cf. the Commentary, paragraphs (5) to (10).

[11] Cf. Paragraph (4) of the Commentary.

[12] (Supra note 7), p. 11.

[13] Paragraphs (7) and (8).

[14] Paragraph (9).

establishment of suitable monitoring mechanisms -- a phrase which emphasizes the continuing character of the duty under the articles on prevention.

Article 6 represents a simplified version of article 8 of the 1996 draft: The present draft articles are without prejudice to the existence, operation or effect of any other rule of international law, whether treaty-based or deriving from customary international law, relating to an act or omission to which these articles might otherwise, that is, in the absence of such a rule, apply.

Article 7 is entitled "Authorization"[15]. The first part of the first sentence of paragraph 1 sets forth the basic rule that activities within the scope of the draft articles require the prior authorization of the State of origin. The Commission felt it necessary to also spell out in that sentence an element that was previously included in the commentary to the corresponding article 9 of the 1996 text[16], namely that prior authorization is also required for a major change planned in a hazardous activity that has already been authorized. As explained in the commentary to Article 7, a "major change" would be one that increases the risk or alters its nature or scope[17].

The second sentence of paragraph 1 addresses a different type of change, namely one that transforms an activity without risk into one that involves a risk of transboundary damage. The Commission deleted the qualifier "major" which existed in the 1996 text, since any change that would result in an activity falling within the scope of the draft articles would trigger the requirement of prior authorization.

Paragraph 2 deals with activities within the scope of the draft articles that are already carried out before these articles become applicable. Under the 1996 draft, this issue was addressed in a separate article, i.e. article 11. The present paragraph 2 is couched in more general terms than the 1996 provision which spelled out the various procedural steps involved.

The Commission considered it important to include approvision dealing with the consequences of the operator's failure to conform to the requirements of the authorization. Indeed, the rule of (prior) authorization embodied in Article 7 would lose much of its practical effect if the State of origin did not also have the obligation to ensure that an activity was subsequently carried out in accordance with the conditions established by that State when authorizing the activity. The manner in which this obligation is to be fulfilled is left to the discretion of States. Paragraph 3 of Article 7 indicates, nevertheless, that in some cases the operator's action or inaction may result in the termination of the authorization.

Article 8 is based on article 10 of the 1996 text (which spoke of "risk

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[15] The Drafting Committee had retained the 1996 title which included the adjective "prior". This adjective was deleted by the Plenary, however, because the article also envisages instances of authorization that apply to pre-existing activites.

[16] 1996 Commentary (loc.cit. note 3), paragraph 3, last sentence.

[17] 1998 Commentary, paragraph (5).

assessment"). It provides that, before the State of origin grants the authorization for an activity within the scope of the present draft articles, an assessment of the transboundary impact of the activity must be carried out. This assessment is to enable the State to determine the extent and the nature of the risk involved in an activity and, consequently, the type of preventive measures it must take. The question who should conduct the assessment is left to States. Neither does the article specify what the content of the risk assessment should be. Obviously the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead.

Article 9 (based on article 15 of the 1996 text) requires that States provide the public likely to be affected with information relating to the risk of harm that might result from an activity subject to authorization, in order to ascertain their views. This article is inspired by the new trends in international environmental law of seeking to involve in the State's decision-making processes those people whose lives, health and property might be affected, by providing them with a chance to present their views to those responsible for making the ultimate decisions. The obligation contained in the article is circumscribed by the phrase "by such means as are appropriate". The States thus have a choice of the means by which information can be provided to the public.

Article 10 corresponds to article 13 of the 1996 text. It addresses a situation where the assessment conducted under Article 8 indicates that the activity planned does indeed pose a risk of causing significant transboundary harm. This article, together with Articles 11 and 12, provides for a set of procedures which are essential in attempting to balance the interests of all the States concerned by giving them reasonable opportunity to find a way to undertake satisfactory measures of prevention.

The core idea of this article is that it is the duty of the State of origin to notify those States that are likely to be affected by the planned activity. The State of origin is required, "pending any decision on the authorization of the activity, [to] provide the the States likely to be affected with timely notification" of that activity. The 1996 text spoke of notification "without delay". The new text is considered more nuanced and more flexible.

As regards the timing within which a response from the States likely to be affected should be forthcoming, the 1996 text provided that in its notification, the State of origin should indicate a time within which a response would be required. Under the new draft, there is no such requirement. In accordance with paragraph 2, the States likely to be affected should provide a response within "a reasonable time". Again this formula was considered more flexible.

It is, however, the understanding of the Commission that the expression "reasonable time", so far as it applies to prescribed time-limits for procedures before undertaking an activity, should be interpreted in the sense that no authorization may be granted prior to the lapse of the so-called "reasonable time".

Article 11, entitled "Consultations on preventive measures" and based on

the corresponding article 17 of the 1996 text, deals with the question of consultations between States concerned in respect of measures which should be taken in order to prevent the risk of causing significant transboundary harm. The provision attempts to strike a balance between two equally important considerations. First, it is to be kept in mind that the article deals with activities that are not prohibited by international law and that, normally, are important to the economic development of the State of origin. But second, it would be unfair to other States to allow those activites to be conducted without consulting them and taking adequate preventive measures. The article provides neither a mere formality which the State of origin has to go through, with no real intention of reaching a solution acceptable to the other States, nor does it provide for a right of veto for the State that is likely to be affected. To maintain balance, the article places emphasis on the manner in which, and the purpose for which, the parties enter into consultations. They must do so in good faith and take into account each other's legitimate interests.

The question was raised in the Commission whether, if the dispute settlement procedure evisaged in Article 17 has been put in motion as a result of the failure of consultations, the State of origin has to await the result of this procedure before proceeding to authorize the activity. The majority of members was of the view that, since the draft relates to activities not prohibited by international law, such a condition would put an undue burden on the State of origin.

Article 12 corresponds to article 19 of the 1996 text. The purpose of this article is to provide some guidance for States in their consultations about an equitable balance of interests. In reaching such a balance, the States concerned will have to establish many facts and weigh all the relevant factors and circumstances. However, this article should be interpreted in the light of the rest of the draft articles, in particular of Article 3 which places the obligation of prevention on the State of origin.

Article 12 sets forth a non-exhaustive list of relevant factors and circumstances. The wide diversity of types of activities covered by the draft articles, and the different situations and circumstances in which they will be conducted, makes it impossible to compile an exhaustive list of factors relevant to all individual cases. Furthermore, no priority of weight is assigned to the factors and circumstances listed.

Subparagraph (a) compares the degree of risk of significant transboundary harm to the availability of means of preventing harm or minimizing the risk thereof. For example, the degree of risk of harm may be high, but there may be measures that can prevent or reduce that risk, or there may be good possibilities for repairing the harm. The comparisons here are both quantitative and qualitative.

Subparagraph (b) compares the importance of the activity in terms of its social, economic and technical advantages for the State of origin and the potential harm to the States likely to be affected.

Subparagraph (c) compares, in the same fashion as paragraph (a), the risk of harm to the environment and the availability of means of preventing or

minimizing such risk and the possiblity of restoring the environment.

Subparagraph (d) takes into account the fact that States concerned frequently embark on negotiations concerning the distribution of costs for preventive measures. In doing so, they proceed from the basic principle derived from Article 3 according to which these costs are to be assumed by the operator or the State of origin. However, these negotiations mostly occur in cases where there is no agreement on the amount of resonable preventive measures and where the affected State contributes to the costs of these measures in order to ensure a higher degree of protection that it desires over and above what is essential for the State of origin to ensure. To reflect this link between the distribution of costs and the amount of preventive measures is the raison d'être of subparagraph (d).

Subparagraph (e) provides that the economic viability of the activity in relation to the costs of prevention and the possiblity of carrying out the activity elsewhere or by other means or replacing it with an alternative activity should be taken into account.

Subparagraph (f) compares the standard of prevention demanded of the State of origin to that applied to the same or comparable activities in the State likely to be affected. The rationale is that, in general, it might be unreasonable to demand that the State of origin should comply with a much higher standard of prevention than do the States likely to be affected. This factor, however, is not in itself conclusive.

Article 13, entitled "Procedures in the absence of notification", addresses the situation in which a State has reasonable grounds to believe that an activity planned or carried out in another State may pose a risk of causing significant transboundary harm although it has not received any notification to that effect. This issue was dealt with in article 18 of the 1996 text, but the Commission thought it to be preferable to use in this connection the language of Article 18 of the Convention on the Law of the Non-Navigational Uses of International Watercourses[18], where a more progressive mechanism is envisaged. Thus, instead of immediately proceeding to request consultations as in the 1996 text, the State which believes that it is likely to be affected would first request the State of origin to notify the activity and to transmit relevant information. It is only if the State of origin refuses, on the ground that it is not required to do so - in other words that, in its view, the activity does not bear a risk of causing significant transboundary harm - that consultations may take place at the request of the other State.

The Commission felt that it was necessary to specify in paragraph 2 that the response of the State of origin must be given "within a reasonable time". Indeed, consultations are preempted as long as this response is not forthcoming, and the State which believes that an activity in the State of origin may pose a risk of causing significant transboundary harm would be left without recourse.

According to paragraph 3, the State of origin is obliged, if so requested by the other State, to "take appropriate and feasible measures to minimize the risk", and, where appropriate, to suspend the activity in question for a period of six months unless otherwise agreed. There is thus a sliding scale of measures that can

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[18] General Assembly Resolution 51/229 of 21 May 1997, Annex.

be taken by the State of origin. Moreover, the commentary will make it clear that of course these measures will also depend on whether the activity in question is still proceeding or whether it has been completed.

Article 14 deals with steps to be taken while an activity is being under way. The purpose of these measures, as of the previous ones, is to prevent, or minimize the risk of, significant transboundary harm.

This article requires the exchange of information between the State of origin and the States that are likely to be affected while the activity involving risk is being carried out. Prevention of transboundary harm and minimizing the cause thereof is not something that can be effected once and for all. Rather, it is a continuing effort. Therefore the duties of prevention do not terminate after authorization of the activity has been granted; they continue for as long as the activity itself continues.

The information that is required to be exchanged under this article comprises whatever would be useful and relevant for the purpose of prevention. Contrary to article 14 of 1996, the provision now speaks of "all available [relevant] information". This addition was found useful by the Commission to alleviate the burden on the State of origin which would otherwise have been required to provide "all [relevant] information".

Under Article 14 such relevant information should be exchanged in a "timely manner". Hence, when the State becomes aware of such infomation, it should inform the other State quickly so that there will be enough time for all States concerned to consult on appropriate preventive measures. The requirement of this article becomes operational only when States do possess information relevant to preventing or minimizing transboundary harm.

Article 15, entitled "National security and industrial secrets", reproduces the corresponding article 16 of the 1996 text without changes. The Commission felt that Article 15 reflected in an adequate manner a narrow exception to the obligation of the State of origin to provide information under other articles of the draft. This type of clause is in fact not unusual in treaties which require an exchange of information, including the Watercourses Convention. However, Article 31 of that Convention only deals with national defense or security information, while the present Article 14 also protects industrial secrets. Indeed, in the context of this topic, it is highly probable that some of the activities might involve the use of sophisticated technology protected under domestic legislation as industrial secrets. As in all provisions in the present draft, an attempt has been made to balance the legitimate interests of all States concerned. Thus, the State of origin, while allowed to withhold certain information, must "cooperate in good faith with the other States concerned to provide as much information as can be provided under the circumstances".

Article 16 is based on Article 32 of the Convention on the Law of the Non-Navigational Uses of International Watercourses. It sets out the principle that the State of origin is to grant access to its juridical and other procedures

without discrimination on the basis of nationality, residence or the place where the damage occurred. The article obligates States to ensure that any person, whatever his or her nationality or residence, should, regardless of where the harm may occur, receive the same treatment as that afforded by the State of origin to its own nationals under its domestic law. This article should be understood as preventing the States from discrimination based on their legal systems; it should not be understood as a general non-discrimination clause in respect to human rights. In fact, the provision deals with equal access by nationals and non-nationals and by residents and non-residents to courts and administrative agencies of the States concerned.

The final provision of the draft, Article 17, entitled "Settlement of disputes", has no equivalent in the 1996 draft. It is inspired by Article 33 of the Watercourses Convention in that it envisages compulsory resort to a fact-finding-commission at the request of one of the parties if the dispute has not been settled by any other means within a period of six months.

As regards the fact-finding procedure, the Commission is aware of the basic obligation in article 17 for the parties to "have recourse to the appointment of an independent and impartial fact-finding commission" will not be sufficient in practice for the actual establishment of such a commission. Indeed, in binding international instruments this type of provision is normally accompanied by a detailed procedure on the appointment and functioning of the commission, as far example in the already mentioned Article 33 of the Watercourses Convention. However, since the legal format of the draft articles on the topic of prevention that the Commission is in the course of elaborating has not yet been decided, it was felt premature to set out such a detailed procedure in the text at this stage.

3. State responsibility

3.1. Introductory remarks

The first reading of the draft articles on State responsibility elaborated by the Commission over a period of 40 years[19] was completed in 1996. At its 1997 session, the "new" Commission established a Working Group on the topic to set the stage for the second reading; further, it appointed Professor J. Crawford as Special Rapporteur.

In the course of its 1998 session, the Commission had before it a number of comments and observations on the 1996 draft received from Governments[20], as well as the First Report of Mr. Crawford[21]. The Commission again established a

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[19] Cf. paragraphs 202-214 of the Commission's 1998 Report.

[20] Docs. A/CN.4/488 and Add. 1-3.
In paragraph 5 of its Resolution 51/160 of 16 December 1996, the General Assembly had urged member States to submit their comments and observations on the draft articles by 1 January 1998, as requested by the Commission. In its 1998 list of issues on which comments would be of particular interest, the Commission again invites Governments which have not yet done so to submit their comments now (see infra Annex IV, at the end of No.12).

[21] Docs. A/CN.4/490 and Add.1-7.

Working Group to assist the Special Rapporteur in the consideration of the major issues involved in the second reading.

The Commission's discussion at the fiftieth session was devoted to three issues: (1) general questions, like the eventual form of the draft articles, or the distinction between primary rules and secondary rules (on State responsibility); (2) the distinction between international "crimes" of States and "delictual" responsibility; and (3) Part One of the 1996 draft articles, including the provisions on the attribution of internationally wrongful acts to States (Articles 1-15).

Concerning (3), the respective proposals of the Special Rapporteur were referred to the Drafting Committee which presented its report at the end of the session (see further infra 3.4.2.).

3.2. General issues

As to the question of whether the draft articles should be proposed as a convention or rather in the format of a declaration on State responsibility to be adopted by the General Assembly, the views of Governments range widely. Considering the normal working method of the Commission, the Special Rapporteur recommended to prepare the Commission's proposal in the form of draft articles and leave it until the completion of the process to decide on the eventual form of the text, because the treatment of issues such as countermeasures and international crimes will not lead to clear results until that time.

Some members supported the Special Rapporteur's proposal on the ground that a lengthy procedural debate at this stage might detract the Commission's attention from substantive work on the topic, and that the Commission had not received conclusive guidance from Governments in this respect. Other members, however, were not completely persuaded by this argument, insisting that the eventual form of the draft articles and the issues excluded or insufficiently developed are closely linked.

There was some support for considering the successive elaboration of two instruments, in the form of a declaration and then of a convention. On the other hand, however, against this two-track approach the concern was expressed that it might not ensure the adoption of the second, binding, instrument unless there was a clear linkage between these two instruments, causing further delays.

As regards the distinction between primary and secondary rules, the prevailing view in the Commission was that this distinction, despite its imperfections in some respects, had facilitated the ILC's task by freeing it from fruitless doctrinal debates.

Another general issue was whether the draft articles were at present sufficiently broad in scope. Noting the commments received from Governments, the Special Rapporteur suggested three matters that might require further elaboration: (1) reparation, particularly the payment of interest; (2) obligations erga omnes, presently dealt with in the draft article on "injured States"; and (3) responsibility arising from the joint action of States. The Commission agreed but the view was also expressed that a better balance ought to be achieved by pruning the unduly detailed Part One, especially the "negative" articles on attribution and some aspects of Chapter III dealing with the distinctions between different

primary rules, while filling the gaps in Part One concerning important issues, such as the joint action of States (solidary liability), and giving more weight to rather superficially treated aspects of Part Two, which ignored essential, technical questions, such as calculating interest, and was too general to answer the needs of States. It was suggested that, in considering Part One of the draft, a careful distinction should be drawn between those provisions which were and those which were not hallowed by State practice in order to avoid eliminating provisions on which some international judgment or arbitral award was already based.

On the other hand, the Special Rapporteur noted that some Governments had expressed concerns regarding the inclusion of detailed provisions on countermeasures in Part Two and on dispute settlement in Part Three, and that the Commission would consider these issues at a later stage in accordance with its timetable for the consideration of this topic.

A last issue concerned the relationship between the draft articles and other rules of international law. The Special Rapporteur noted that some Governments believed that the draft articles did not fully reflect their residual character and had therefore suggested that article 37 (lex specialis) be made into a general principle. That proposal seemed valid, leaving aside any issues of *jus cogens*. He suggested that the Commission discuss the draft articles on the assumption that, where other rules of international law, such as specific treaty regimes, provided their own framework for responsibility, that framework would ordinarily prevail.

The Commission was in general agreement with the Special Rapporteur on these points.

3.3. The distinction between "criminal" and "delictual" responsibility (draft article 19)

The most controversial issue in the draft articles is to be found in the distinction betweeen international crimes and international delicts. These two concepts were first introduced in 1976, when article 19 was adopted by the Commission. In the process of the discussions in the Sixth Committee from 1976 to 1980, a majority of Governments supported this distinction. However, comments submitted by Governments thus far show a wide range of views on this issue, revealing sharply the arguments both for and against. Some States seriously doubt the practicality and the effectiveness of the concept of international crimes, and oppose the concept mostly because of the lack of any consistent international practice and its potential of undermining the whole system of State responsibility. Other States, however, support the concept on the ground that a certain distinction between more and less serious wrongful acts should be introduced into the regime of state responsibility, albeit recognizing the embryonic stage of development of the concept. But both sides seem to recognize, for example, that Article 19 is an exercise not of codification but rather of "progressive development" and that an eventual definition of international crimes needs further clarification. Also there seems to be no or little disagreement with the proposition that the law of international responsibility of States is neither civil nor criminal but genuinely international. Thus, no State seems to support the idea of establishing a

"criminal" system of State responsibility in the proper sense of the term. The Special Rapporteur, on his part, drew attention to several grave problems in the concept of crimes of States at present embodied in the draft articles. In addition to the circularity and ambiguity of the way in which the concept is defined, he mentioned, inter alia, that the draft articles do not contain anything resembling a complete set of distinctive consequences of crimes nor do they lay down any authoritative procedure for determinig that a crime has been committed[22].

After examining the relations between the international criminal responsibility of States and concepts such as jus cogens and obligations erga omnes, as well as other important issues such as the relevance of Chapter VII of the United Nations Charter, the Special Rapporteur drew attention to five possible approaches for dealing with international crimes of States, namely, (a) maintaining the approach embodied in the draft articles, (b) replacing it by the concept of "exceptionally serious wrongful acts", (c) devising a full-scale regime of criminalizing State responsibility, (d) the complete rejection of a regime of criminal responsibility, and (e) the exclusion of the notion from the draft articles[23].

After discussing the arguments pro and contra all these approaches, the Special Rapporteur made it clear that, as far as he was concerned, he preferred the further course of "de-criminalizing" the regime of State responsibility.

The debate in the Commission, extremely controversial and very lively, mirrored the division in the comments and observations of Governments as well as in the rich literature on State crimes. It was the impression of the present author that the majority of members of the Commission more or less expressly shared the position of the Special Rapporteur (even though this, too, turned out to be controversial), particularly if in the further work on the topic the Commission, while deleting Article 19, would take the implications of obligations erga omnes and of jus cogens into adequate consideration.

In his concluding remarks, the Special Rapporteur made five major points. First, there undeniably was dissatisfaction with the distinction between international crimes and international delicts, which had been the subject of many criticisms including the confusing penal law connotations of the term "crime" and the inappropriateness of the domestic law analogy. The Commission appeared to be ready to envisage other ways of resolving the problem than of establishing a categorical distinction between crimes and delicts.

Second, there was general agreement concerning the relevance of the established categories of jus cogens and erga omnes obligations and the narrower scope of the first category as compared to the second.

Third, there was general agreement that the present draft articles did not do sufficient justice to those fundamental concepts, particularly in article 40,

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[22] Indeed, detailed - and extremely far-reaching - proposals submitted by former Special Rapporteur G. Arangio-Ruiz had been rejected by the Commission in 1995 and 1996.

[23] The last-mentioned approach understood to be without prejudice to the general scope of the draft articles and the possible further elaboration of the notion of crimes of States in another text.

which would certainly have to be redrafted.

Fourth, there was general agreement that the draft articles created significant difficulties of implementation which needed further reflection, such as the problems of dispute settlement and the relationship between the directly injured State and other States.

Fifth, general agreement had emerged between the two groups of members who had expressed diverse views in the discussion, that Article 19 did not envisage a distinct penal category, and that at the current stage of the development of international law the notion of "State crimes" in the penal sense was hardly recognized. Both sides had endorsed the proposal, which the Commission had itself approved in 1976, namely that State responsibility was in some sense a unified field, notwithstanding the fact that distinctions were made within it between the obligations of interest to the international community as a whole and obligations of interest to one or several States. The Special Rapporteur retained the firm conviction that, in the future, the international system might develop a genuine form of corporate criminal liability for entities, including States. Most members of the Commission had refused to envisage that hypothesis and had spoken out in favour of a two-track approach which entailed developing the notion of individual criminal liability through the mechanism of ad hoc tribunals and the International Criminal Court, acting in complementarity with State courts, on the one hand, and developing within the field of State responsibility the notion of responsibility for breaches of the most serious norms of concern to the international community as a whole, on the other.

After renewed vigorous discussion the Commission adopted the following interim conclusions on draft Article 19:

"Following the debate, and taking into account the comments of the Special Rapporteur, 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 obligations could be sufficient to resolve the issues raised by article 19; (c) this consideration would occur, in the first instance, in the Working Group established on this topic and also in the Special Rapporteur's Second Report; and (d) in the event that no consensus was achieved through this process of further consideration and debate, the Commission would return to the questions raised in the First report as to draft article 19, with a view to taking a decision thereon"[24].

3.4. Review of Part One of the draft articles (other than article 19)

3.4.1. Explanatory remark

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[24] 1998 Report of the Commission, paragraph 331.

With regard to this portion of the State responsibility project, Professor Crawford's First Report offers an initial consideration of Chapters I (General principles) and II (The act of the State under international law) of Part One, together with some observations on terminology and general and saving clauses. After intensive discussion in the plenary, the draft articles proposed by the Special Rapporteur were referred to the Drafting Committee. Since the Commission only took note of the work done by the Drafting Committee[25], the 1997 Commission Report does not contain the text ot the provisions as they emerged there. However, I decided to publish the text as an Annex to my present report and provide a brief comment upon it, in order to initiate discussion as early and by as many observers as possible.

The draft articles adopted by the Drafting Committee cover the issues dealt with in articles 1-15 of the 1996 text in [now] articles 1, 3, 4, 5, 7, 8, 8*bis*, 9, 10, 15, 15 *bis* and A. As to 1996 articles 2,6 and 11-14, they were deleted by the Drafting Committee. The changes made upon the 1996 text and the deletion of no less than one third of it have made the draft articles more user-friendly, more streamlined as well as more precise, and have freed them from considerable dead weight. Nevertheless, the Drafting Committee maintained the original structure of Chapters I and II adopted on first reading. This structure and the placement of the original articles will have to be figured out at a later stage, after at least most of the articles have been considered by the Drafting Committee. The same is valid for the title of Part One.

3.4.2. Part One as worked out in the Drafting Committee

3.4.2.1. Chapter I. General principles

Article 1 entitled "Responsibility of a State for its internationally wrongful acts", embodies the fundamental principle which constitutes the cornerstone of the draft articles. Heeding the advice of the Special Rapporteur, the Drafting Committee did not change the text of the article as adopted on first reading by the Commission. The Committee recognized that the use of the word "act" was not an ideal solution in this context, since this term normally relates to an action rather than an omission, while the article is intended to cover both. However the attempt to find an English equivalent of the French term "fait" or the Spanish word "hecho", which better convey this message, was unsuccessful. This point will be explained in the commentary, but in any event, article 3 dispels any doubt as it clearly states that an "act" may consist of "an action or omission".

Also on the recommendation of the Special Rapporteur, the Drafting Committee decided to delete former draft article 2 entitled "Possibility that every State may be held to have committed an internationally wrongful act", which was adopted on first reading. It agreed that the notion that no State is immune from the principle of international responsibility was implicit in Article 1, and relevant

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[25] In conformity with its established practice, the Commission will adopt the draft articles on second reading as a whole, that is, once all the articles have been discussed in the plenary and worked out by the Drafting Committee. This practice takes account of the possiblity that changes on articles considered later may have consequential effects on those worked out earlier.

portions of the commentary of the deleted article will be included in the commentary to Article 1. Inasmuch as the deleted article raises other issues, these are outside the scope of the question of international responsibility as such.

Concerning Article 3, entitled "Elements of an internationally wrongful act of a State", the Drafting Committee only introduced a cosmetic change to the text adopted on first reading by moving the words "conduct consisting of an action or omission" into the chapeau, so as to avoid the repetition of the word "conduct". It was agreed that no other requirement, such as the element of damage or fault, should be included in the general rule in Article 3. The Drafting Committee further considered it preferable to retain the term "attributable", which implied a legal operation, rather than to replace it with the term "imputable" which appears to refer to a mere causal link. It was also felt useful to retain the emphasis placed in paragraph (a) on the notion that the attribution of a certain conduct to a State is made "under international law". In the light of the text of Article 3, it was not considered necessary to add a reference to international law also in paragraph (b); the commentary will make clear, however, that the determination that a particular conduct constitutes a breach of an international obligation is to be made under international law.

As to Article 4, the Special Rapporteur proposed no changes, neither did comments by Governments indicate any difficulty with it. During the discussion in the plenary, the article was considered useful because it stated a very general principle of public policy. It covers two elements. The first is the positive statement that the characterization of an act as internationally wrongful is governed by international law. The second, an analogy to Article 27 of the Vienna Convention on the Law of Treaties, is the principle that internal law cannot be invoked as a ground for avoiding international responsibility. There is yet a further concern, namely, to avoid, in this article, language too similar to Chapter V of Part One (on circumstances precluding wrongfulness).

The Drafting Committee redrafted the first sentence without affecting its basic proposition. This was done to clarify the meaning of the first sentence and in particular to make its drafting clearer in other languages. The first sentence no longer speaks of an act of a State being "only....characterized as internationally wrongful by international law". It now speaks of the characterization of an act of a State as internationally wrongful being "governed by international law". The words "governed by international law" have the advantage of not only setting forth the decisive role of international law in this context, but also of not rendering other laws irrelevant.

3.4.2.2.Chapter II. The act of the State under international law

This chapter originally comprised draft articles 5 to 15. The Special Rapporteur, in his First Report, suggested the deletion of articles 6 and 11 to 14, the contents of these articles having either been merged with other articles or found unnecessary for the purposes of the draft. The Commission agreed with that suggestion.

Article 5 sets forth the principles governing the attribution of conduct to the State under international law. The opening clause of paragraph 1, "[f]or the

purposes of the present articles", indicates that Chapter II deals with attribution for the purposes of the law of State responsibility, in contrast to other areas of international law such as the law of treaties.

Article 5 combines in a single provision the substance of former draft articles 5, 6 and 7 paragraph 1. It embodies the general principle that any conduct of any State organ acting as such is attributable to the State. The general presumption to this effect is reflected in the phrase "acting in that capacity". The remaining clauses of paragraph 1 confirm the application of this general principle of attribution with respect to State organs irrespective of the classification of the function performed by the State organ, of its position within the organizational structure of the State and of its character as an organ of the central government or of a territorial unit of the State. The commentary will explain that the term "territorial unit" is used in a broad sense to cover the various governmental, administrative, local, constituent or other units of a State that may exist in different legal systems.

Paragraph 2 recognizes the significant role played by internal law in determining the status of a person or an entity within the structural framework of the State. This role of internal law is decisive when it makes an affirmative determination that a person or an entity constitutes an organ of the State. The commentary will explain that the term "internal law" is used in a broad sense to include practice and convention. The commentary will also explain the supplementary role of international law in situations in which internal law does not provide any classification or provides an incorrect classification of a person or an entity which in fact operates as a State organ within the organic structure of the State.

As to Article 7, the Special Rapporteur had proposed the deletion of paragraph 1 as adopted on first reading because, as explained earlier, the reference to territorial governmental entities is now contained in Article 5. This leaves us with former paragraph 2 of Article 7 which deals with the important issue of "separate entities" which are not part of the formal structure of the State in the sense of Article 5. Paragraph 2, as redrafted, now constitutes Article 7. In addition, the title of the article has been slightly redrafted to correspond to its content.

Draft article 8 adopted on first reading contained two paragraphs dealing with two completely different situations. The Drafting Committee therefore decided to divide it into two separate articles, Article 8 and Article 8 *bis*.

The new Article 8 deals with the question addressed in paragraph (a) of article 8 adopted on first reading. The most important change introduced by the Drafting Committee was to replace the phrase "acting on behalf of that State" with "acting on the instructions of , or under the direction and control of, that State in carrying out the conduct." As pointed out by the Special Rapporteur, the former concept was rather vague for the purposes of attribution and required further clarification. Obviously, this provision was intended to cover the conduct of a person or group of persons acting " on the instructions" of a State. But it would have been unduly restrictive to limit the applicability of Article 8 to this situation, since in practice it would be very difficult to demonstrate the existence

of express instructions. It was therefore desirable to also cover situations where a person or group of persons is acting "under the direction or control" of a State.

We are here in presence of alternative requirements: the Drafting Committee did not believe that the scope of Article 8 should be restricted through a cumulative requirement in this regard. However, for the purposes of attribution, it is not sufficient that such "direction or control" be exercised at a general level; it must be linked to the specific conduct under consideration, as indicated by the addition of the words "carrying out the conduct."

The Drafting Committee, on the recommendation of the Special Rapporteur, deleted the phrase "if it is established", since this is a general requirement for attribution, and there is no specific reason to highlight it only in Article 8.

Article 8 *bis* addresses the issue dealt with in paragraph (b) of former article 8. The use of the word "certain" [conduct] in the title already provides an indication that the circumstances envisaged in this article are of an exceptional nature, a point which will be further elaborated in the commentary.

The Drafting Committee was of the view that the expression "in the absence of " was not wide enough as it seemed to cover only the situation of a total collapse of the State while the provision was also intended to apply to other cases where the official authorities are not exercising their functions. The term "carence" in French in fact best conveys this point but the Drafting Committee was unable to find an exact equivalent in English other than by using two terms instead of one: "in absence or default of."

Regarding the expression "official authorities", it will be explained in the commentary that this term covers both organs of the State within the meaning of Article 5 and entities exercising elements of the governmental authority within the meaning of Article 7. It will further be pointed out that this article does not apply as long as there exists some "official authority", even if said "authority" is not competent to exercise the particular functions under domestic law; the latter sitation is actually dealt with in Article 10.

On the advice of the Special Rapporteur, the Drafting Committee introduced another change to the text adopted on first reading: the replacement of the verb "justified" by "called for". It was felt that it may be misleading to use the term "justified" in connection with wrongful conduct. The term "called for" also better conveys the idea that some exercise of governmental functions was called for under the circumstances, but not necessarily the conduct in question. Finally, as another indication of the exceptional nature of the circumstances in which Article 8 *bis* would apply, the Drafting Committeee decided to use the phrase "in circumstances such as to call for" rather than "in circumstances which called for".

Article 9, as adopted on first reading, dealt both with organs of other States and of international organizations placed at the disposal of a State. The Special Rapporteur deleted the references to international organizations throughout the articles. The Commission agreed with that approach (on the new Article A see infra).

Article 9 is an exception to Article 5 and deals with special situations. In

the opinion of the Drafting Committee, these special situations occur more often than is reported and therefore it is useful to retain the article, at least for the time being. However, it may need to be reconsidered in the light of the articles in Chapter IV of the draft.

The meaning of the words "at the disposal of" was subject of some discussion in the Commission. In the view of the Drafting Committee, the commentary should explain this meaning more clearly. For example, when an organ of a State is placed at the disposal of another State, that organ must be acting for the benefit of the receiving State and as such will be reporting to that State. On the other hand, cases where an organ of a State is acting on behalf or for the benefit of another State do not fulfil the requirement of being put at the disposal of that State and are not covered by Article 9. Such situations would rather fall within the scope of Articles 5 and 8.

The Drafting Committee noted that the case of joint representation of States should also be addressed somewhere in the draft, preferably in Chapter IV. These are situations where a State would represent one or more States, for example, in the territory of another State.

Article 10 deals with the important question of unauthorized or ultra vires acts. In the comments by Governments hitherto received, no concerns were expressed regarding this text. Hence, the Special Rapporteur suggested the retention of the text as adopted on first reeading, with the exception of a few minor drafting suggestions.

In the Commission's discussion the issue was raised as to whether the article should cover an agency which overtly conducts unlawful acts but under the cover of its official status. The Drafting Committee was of the view that it is better to retain the article as it is and cover that problem in the commentary.

Concerning articles 11 to 14 of the 1996 draft, the Special Rapporteur noted that all they provided was that conduct was not attributable to the State unless otherwise foreseen by other articles. Such negative formulations were largely devoid of content, and ought therefore to be deleted. The Commission agreed and deleted articles 11 to 14. Whatever substance there was in these "negative attribution" clauses has been shifted to other articles. In the same vein, the relevant portions of the commentary on the deleted articles will be incorporated in the new commentary.

Article 15 is entitled "Conduct of an insurrectional or other movement." It covers questions dealt with in article 14, paragraph 2, and article 15 adopted on first reading. Paragraphs 1 and 3 of article 14 have been deleted on the recommendation of the Special Rapporteur: Paragraph 3 was considered to fall outside the scope of the draft articles on State responsibility since it dealt with the international responsibility of insurrectional movements as such. As for paragraph 1, it contained a "negative attribution" clause, and, as just mentioned, it was decided in general not to include such provisions. The commentary to Article 15 will, however, make reference to the principle that the conduct of an insurrectional movement established in the territory of a State or in any other territory under its administration shall not be considered as such an act of that State under international law. It is only in the circumstances set forth in Article 15

that the conduct of an insurrectional or other movement is attributable to a State.

The word "conduct" is used in Article 15 instead of the word "act" for purposes of consistency. The expression "under international law" has been included for the same reason. The Drafting Committee debated whether reference should be made to "an organ" of an insurrectional movement but concluded that it was better not to do so, given the fact that some movements which should be covered by this article may not be sufficiently structured so as to have "organs". It will be explained in the commentary that Article 15 applies in respect of conduct of a movement as such, but not to individual acts of their members in their own capacity.

Paragraph 1 of Article 15 corresponds to the respective paragraph as adopted on first reading. The Drafting Committee decided that it was preferable not to qualify the term "insurrectional movement" as proposed by the Special Rapporteur, taking into account the wide variety of such movements that exist in practice and which should be covered by the provision of paragraph 1. The Committee also concluded that the phrase "which becomes the new government" was the most appropriate in this context. The commentary will explain that in practice the result may not be as clear-cut. For instance, in some cases, the new government may include some members of the previous one. As for the second sentence in the previous version of paragraph 1, it has been deleted since it is subsumed under paragraph 3 of the new version.

In the context of paragraph 2, the Drafting Committee felt that the concept of "insurrectional movement" may be too restrictive, as there exists a greater variety of movements whose action may result in the formation of a new State. It was thus decided to use the phrase "movement, insurrectional or other,". The words "other" indicate that the intention is to cover ejusdem generis movements. Thus, as will be stated in the commentary, the actions of a group of citizens advocating separation carried out within the framework of the legal system established in the State, will not be covered by paragraph 2. The Drafting Committee also replaced the phrase "whose actions results in the formation of" with "which succeeds in establishing", which was considered to better express the underlying idea. The commentary will explain that, while paragraph 2 only envisages the case of the formation of a new State, its provision would apply, mutatis mutandis, to the case where an entity of a State secedes and becomes part of another State.

During the dabate in the Commission, a number of members expressed the view that paragraph 2 of article 14 should become part of article 15. The Drafting Committee agreed with that suggestion since it makes the article more complete.

The resulting paragraph 3 is a without-prejudice clause. The words "however related to that of the movement concerned" are intended to give a broader meaning to the word "related".

The Drafting Committee considered the Special Rapporteur's proposal for a new Article 15 *bis* which was referred to it by the Commission. This article is intended to fill a significant lacuna in the draft articles which, in their 1996 version, failed to cover situations such as the Hostages case. The article is

entitled "Conduct which is acknowledged and adopted by the State as its own."

Article 15 *bis* provides for the attribution to a State of conduct that was not attributable to it under the other articles contained in Chapter II but that the State acknowledged and adopted as its own. The conditions of acknowledgement and adoption are cumulative, as indicated by the word "and". The order of the two conditions indicates the normal sequence of events in such cases. It is not sufficient for the State to acknowledge the factual existence of the conduct, rather, the State must acknowledge and adopt the conduct "as its own". The State in effect accepts responsibility for conduct that would not otherwise be attributable to it rather than merely giving its general approval thereof. The commentary will explain that this article covers cases in which a State accepted responsibility for conduct which it did not approve of or even regretted. At the same time, this article recognizes a limited principle of attribution as indicated by the phrase "to the extent that".

Other situations of complicity in which one State approves of and supports the conduct of another State will be addressed in Chapter IV.

The Special Rapporteur deleted the references to international organizations throughout the articles. However, to avoid any misunderstanding, the Special Rapporteur proposed a respective saving clause. This clause was adopted by the Drafting Committee as Article A, modelled on Article 73 of the Vienna Convention of the Law of Treaties. The purpose of the provision is to make clear that the State responsibility articles are not intended to apply to questions involving the responsibility of international organizations or of any State for the conduct of an international organization. The expression "international organization" will be defined in the commentary to the article. It will, however, include only such organizations that have a separate legal personality. The placement of the article will have to be determined at a later stage.

4. Reservations to Treaties

4.1. Introductory Remarks

The topic of reservations to treaties had returned to the Commission's agenda in 1993.[26] At its fiftieth session the Commission considered Special Rapporteur

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[26] Through Resolution 48/31 of 9 December 1993 the General Assembly endorsed the ILC's decision to include the subject of reservations to treaties on its agenda. The Commission appointed Professor Alain Pellet as Special Rapporteur and considered his first report (Docs.A/CN.4/470 and Corr.1) at its forty-seventh session in 1995. The Commission agreed that it should adopt a guide to practice concerning reservations but that the guide should not tamper with the definitions or regimes found in the three Vienna Conventions on the Law of Treaties (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), paragraph 491). The Commission also authorized the Special Rapporteur to draft an extensive questionnaire to be submitted to States to determine international practice as regards reservations, and through Resolution 50/45, the General Assembly invited States and international organizations to respond. Although the Special Rapporteur briefly presented his second report in 1996 (A/CN.4/477 and Add. 1; see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), paragraphs 108-140, the Commission

Alain Pellet's Third Report[27] but due to lack of time, was not able to address the totality of issues presented therein.[28] The report was divided into two chapters: the first devoted to the Commission's earlier work on the topic and the second addressing the definition of reservations (and interpretative declarations). In the first chapter, the Special Rapporteur reiterated the task set forth in the previous sessions, namely to draft a Guide to Practice elucidating the definition and legal regime of reservations to treaties. The report adopted as its premise the Commission's previously expressed desire "that in principle the Vienna regime should be preserved and that all that was needed was to remedy its ambiguities and fill in the lacunae in it."[29]

The second chapter introduced the first portion of the draft guidelines and was divided into two separate parts. Part One addressed the definition of reservations and interpretative declarations and Part Two treated reservations and interpretative declarations in the context of bilateral treaties.[30] The Special Rapporteur advanced a two-pronged methodology for determining the current state of international law regarding reservations to treaties: the presentation of each section of the draft guidelines consists of an analysis of the travaux préparatoires leading to the adoption of the relevant sections of the three Vienna Conventions, followed by an empirical study of state practice in the particular field.[31] The Special Rapporteur also resolved to deal with the question of interpretative declarations in parallel with his study of reservations, although admitting that this endeavor would be purely empirical given the silence of the Vienna Conventions on the issue.[32]

The Commission discussed intensively the guidelines presented in Doc.INFORMAL/11, i.e. Add. 3, of Special Rapporteur Pellet's report, and after much debate adopted on first reading guidelines 1.1, 1.1.1 to 1.1.4, 1.1.7, and an

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was not able to consider it until its forty-ninth session in 1997. After discussing the report, the Commission adopted "Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties including Human Rights Treaties" (*Official Records of the General Assembly, Fifty-second Session* (A/52/10), paragraph 157). General Assembly Resolution 52/156 of 15 December 1997 invited States and relevant multilateral treaty bodies to comment on the ILC's conclusions. The Special Rapporteur will present his own conclusions on these comments in his fifth report, after the ILC's consideration of substantive questions concerning the reservations regime (cf. Third Report on Reservations to Treaties, A/CN.4/491, paragraph 23).

[27] Third Report on Reservations to Treaties, A/CN.4/491 of 30 April 1998, Add. 1 of 5 May 1998, Add. 2 of 22 May 1998, ILC (L)/INFORMAL/11 (i.e. the later Add. 3) of 26 May 1998, Add. 4 of 2 July 1998, Add. 5 of 17 July 1998, and Add. 6 of 19 July 1998.

[28] The Commission was not able to consider Add. 5 on reservations to bilateral treaties, and will thus include it in its discussions at the 1999 session.

[29] A/CN.4/491, paragraph 13. The Sixth Committee had expressed a similar desire (see the "Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its Fifty-second Session", A/CN.4/483, paragraphs 61, 65, 90-91).

[30] Cf. supra note 28.

[31] A/CN.4/491, paragraph 32.

[32] Ibid.

as yet unnumbered saving clause, on the definition of reservations to treaties.[33] Due to time constraints, the Commission was only able to give cursory attention to the draft guidelines on interpretative declarations and their distinction from reservations.

4.2. General Structure and Main Objectives of the Draft Guidelines

The purpose of the Draft Guidelines is to provide representatives of States and international organizations with a user's guide to practice regarding reservations to treaties. The Guide to Practice will thus contain a number of draft articles with commentaries on various aspects of reservations. In certain cases, the Commission will also include model clauses to serve as templates for States and international organizations in their own practice.[34]

The guidelines will also address the question of interpretative declarations. As already mentioned, the Special Rapporteur advocated approaching the two subjects in parallel, thus providing a useful clair - obscur for both. Hence, the draft guidelines on each will be presented in tandem under particular topic headings applicable to both, eg. definitions or legal regimes. Due to lack of time, however, the propriety of this approach was not fully explored, and thus not fully agreed upon, by the Commission.

As stated, the Commission and the Sixth Committee have agreed not to alter the reservations regimes contained within the three Vienna Conventions on the law of treaties.[35] Thus, on issues directly addressed within the Conventions, the guidelines will merely act to dispel confusion and provide auxiliary definitions to fill in the gaps left open by the Vienna regimes. However, in those areas on which the Conventions are silent, such as interpretative declarations, the guidelines will take on the traditional role of the Commission's draft articles – the codification of international practice.[36]

The Commission agreed to maintain, for the time being, the form and structure of the guidelines proposed by the Special Rapporteur, thus attempting to make a clear distinction, even in a visual sense, between guidelines and articles of a normative character.

4.3. Main elements of the draft guidelines adopted by the Commission and specific issues arising during their discussion

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[33] For the complete text see infra Appendix.
The Commission saw itself unable to adopt Guidelines 1.1.5. and 1.1.6. proposed by the Special Rapporteur; see infra 4.4.1.

[34] See *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), paragraph 491..

[35] See supra notes 26 and 29. The Special Rapporteur's report concludes that the rules in the Vienna Conventions in essence only codify existing customary law, thus reinforcing the inherent limitations of the Commission's task (see A/CN.4/491/Add.2, paragraphs 119-120).

[36] A/CN.4/491, paragraph 33.

4.3.1. Definition of reservations (guideline 1.1)

The Commission adopted unchanged the definition of reservations presented as guideline 1.1 in Professor Pellet's Third Report. Due to general agreement in both the Commission and the Sixth Committee that the definitions and regimes of reservations presented in the three Vienna Conventions on the law of treaties should remain unchanged, the Special Rapporteur forged a single composite definition from Article 2, paragraph 1(d) of the 1969 Convention[37], Article 2, paragraph 1(j) of the 1978 Convention dealing with state succession to treaties[38], and Article 2, paragraph 1(d) of the 1986 Convention dealing with treaties of international organizations[39].

In analyzing the definition of reservations, the Special Rapporteur noted that it contained two formal elements (unilateral statement, made at the moment when the State or international organization expresses consent to be bound) and one substantive element (purporting to exclude or modify the legal effects of certain provisions of the treaty).[40]

Although some members of the Commission initially expressed a desire to simplify the definition contained in 1.1 by eliminating the bulky list enumerating the limits ratione temporis of reservations, the commitment to remain true to the wording contained in the Conventions prevented any redrafting beyond the consolidation of the three definitions in a common text.[41] Guideline 1.1 is thus not a guideline in the proper sense but merely a point of reference for the (genuine) guidelines that follow. The desire for completeness and harmony with Article 11 of the 1969 and 1986 Conventions[42], is given outlet in 1.1.2 of the draft

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[37] The text reads:"'reservation' means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State".

[38] The text reads:"'reservation means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty or when making a notification of succession to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State" (emphasis added to show addition made to the 1969 text).

[39] The text reads:"'reservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State or to that organization" (emphasis added to show additions made to the 1969 text).

[40] INFORMAL/11, paragraph 2.

[41] The Special Rapporteur adamantly opposed any redrafting, asserting that Guideline 1.1 could be made to include the full text of the definitions from all three conventions, rather than the composite, if necessary.

[42] The 1969 text reads:"The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, accceptance, approval or accession, or by any other means if so agreed".

The 1986 text reads "1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed. 2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of

guidelines commented upon below.[43]

4.3.2. Guidelines elaborating the definition of reservations (1.1.1-1.1.4, 1.1.7)

Guideline 1.1.1 [1.1.4][44] (Object of reservations) addresses the disparities between state practice and the phrase "certain provisions" contained in the Vienna definitions. Although formal adherence to the text of the Vienna Convention suggests that reservations must be both specific and limited to one or more provisions, the practice of States and international organizations is replete with examples of so-called "transverse" reservations which relate to a treaty in its entirety or limit the application ratione loci, ratione personae, or otherwise, of the treaty as a whole.[45] Thus, the Commission was faced with the questions of whether this latter class of unilateral statements were indeed reservations to which the Vienna regime should be applicable and if so , whether such statements were to be permissible or not. As to the first question, the Commission decided, after long discussion, on the less formal approach, although the members could not agree on the appropriate limits to be placed on these types of reservations. Most of the members felt that a reservation could relate to the treaty as a whole rather than certain provisions; however, consensus could not be reached on the subject of general reservations proper. Some members of the Commission thought that the phrase "the way in which the State intends to apply" intruded on the realm of interpretative declarations and was inappropriately located in a guideline elucidating the positive definition of reservations.[46] Thus, the Commission provisionally adopted the guideline as worded on first reading but decided to re-examine it after discussion of the definition of interpretative declarations. It is clear, however, that the use of the word "may" must not be interpreted as having any effect on the question of permissibility of "transverse" reservation.

Guideline 1.1.2 (Cases in which reservations may be formulated) attempts to remedy the confusion created by the Vienna Conventions' use of a seemingly exhaustive list to define the limits ratione temporis for the formulation of reservations. The inconsistencies found within the Vienna Conventions themselves between their definition of reservations and the broader list contained in Article 11 of the 1969 and 1986 Conventions on means of expressing consent to be bound by a treaty[47] have rendered the confusion more potent. The Commission agreed with the Special Rapporteur that a formalist reading of the list contained in the definitions was inadvisable and that "[t]his list does not cover all the means of expressing consent to be bound by a treaty, but the spirit of this

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formal confirmation, acceptance, approval or accession, or by any other means if so agreed".

[43] See infra discussion on 1.1.2 accompanying notes 21-23.

[44] Numbers in brackets indicate the numbers originally given the draft guidelines by the Special Rapporteur.

[45] For examples see discussion in INFORMAL/11, paragraph 37.

[46] Others felt that because this guideline belonged among the guidelines on the definition of reservations, it did not address interpretative declarations.

[47] See text supra note 42.

provision is that the State may indeed formulate (or confirm) a reservation when it expresses such consent and this is the only time at which it may do so"[48]. Thus, guideline 1.1.2. harmonizes the Vienna definitions with Article 11 and reassures States that a rigid formalism will not prevent reservations from being labeled reservations if different instances and methods of formulating them are agreed upon.[49]

Guidelines 1.1.3 and 1.1.4 deal with problems involved in the territorial application of a treaty about which the language of the Vienna texts is itself equivocal. Guideline 1.1.3 [1.1.8] (Reservations having territorial scope) identifies as a reservation those unilateral statements by which a State purports to exclude the application of certain provisions, or of the treaty as a whole[50], to one or more territories under its control. The Commission grappled with the fact that most such reservations in the past have been so-called "colonial reservations", and it did not want to lend tacit approval to such practice through adoption of the guideline. However, the Commission acknowledged that current practice furnished a number of non-colonial examples and that concerns of propriety should be taken up in the discussion of permissibility rather than definition of reservations[51]. The Commission also discussed the guideline's relation to Article 29 of the 1969 Vienna Convention which states that, "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." Some members of the Commission interpreted this provision very narrowly to preclude reservations of territorial scope unless provided for by the treaty; however, this concern was again dismissed as a matter of validity rather than definition. Furthermore, because such statements necessarily purport to partially exclude or modify the legal effect of the treaty or certain provisions, they satisfy the substantive requirement of the Vienna definitions. Thus, the Commission could not find a compelling reason for a definitional distinction between reservations ratione materiae and those ratione loci.

Guideline 1.1.4 [1.1.3] (Reservations formulated when notifying territorial application) simply adds a new element ratione temporis to the list. A State's territory may change, or a State may acquire control of territories to which its current treaty obligations do not extend. In either case, the State may wish to apply its current treaties to the new territory by making a notification of territorial application to the appropriate depository. Because Guideline 1.1.3 acknowledges

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[48] INFORMAL/11, paragraph 21.

[49] In his discussion of this problem, the Special Rapporteur emphasized that the Vienna Convention texts are themselves only default rules from which States can always agree to derogate in treaty relations; thus, explicit mention of the phrase "or by any other means if so agreed" in Article 11, although helpful, is not necessary (see INFORMAL/11, paragraphs 18-20).

[50] This alternative was contested by at least one member of the Commission. Hence, the Commission agreed to provisionally adopt the text of 1.1.3 as it stands but to review it together with Guideline 1.1.1., at the next session.

[51] See infra on Saving Clause.

that unilateral statements excluding the application of certain provisions of a treaty to specific territory(s) are in fact reservations, it follows that a State should be allowed to formulate reservations concerning the application of the treaty to that territory at the time of its notification of territorial application. Hence, Guideline 1.1.4 is a logical consequence of Guidelines 1.1.2 and 1.1.3.

Guideline 1.1.7 [1.1.1] (Reservations formulated jointly) anticipates the possibility that groups of States or international organizations might dedicate issue jointly formulated reservations. Although the Special Rapporteur found no examples of such practice, he noted a few incidents of joint formulation of both interpretative declarations and objections to reservations, and the Commission recognized the potential for such statements in the future, given the consolidation of entities such as the European Union. The guideline serves the simple purpose of assuring states that jointly formulated reservations remain unilateral in nature, thereby satisfying the first requirement of the Vienna definition of reservations.[52]

4.3.3. Saving Clause[53]

Because of the temptation to confuse the definition of reservations with the issue of their permissibility, the Commission decided to include a clause already at this early stage to ensure that none of its guidelines would be interpreted as prejudicing the legality or illegality of certain kinds of reservations.[54] The Commission left open both the title and location of the guideline awaiting its subsequent discussions on interpretative declarations and the regimes for determining the validity of both reservations and interpretative declarations. Thus, the guidelines will first define what is a reservation, thereby determining what unilateral statements are subject to the regime on validity. The guidelines will then describe the regime, that is, the process, by which the legality of those reservations is determined. Perhaps the completed Guide to Practice will render the saving clause moot once the entirety of the edifice is revealed.

4.4. Elements of other Guidelines discussed but not adopted by the Commission

4.4.1. Guidelines 1.1.5. and 1.1.6. dealing with the problem of "extensive reservations"

In his report, the Special Rapporteur had given special attention to the implications of the word "modify" contained in the substantive element of the Vienna definitions. The Commission agreed that the term certainly comprehends statements made by States or international organizations purporting to limit or

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[52] A number of members raised concerns about the implications of joint reservations on the process of their withdrawal, but the Commission determined that such questions were best discussed in the context of formulation and withdrawal to be addressed in the future.

[53] This guideline has no title ("...") or number as adopted and awaits further discussion. The present report uses the title "Saving Clause" simply as a convenient referent.

[54] In this regard, the word "may" contained in guideline 1.1.1[1.1.4] should be understood as descriptive rather than permissive, cf. supra.

restrict the effects, and resultant obligations, of treaty provisions. In fact, most reservations act in such a manner[55]. The Special Rapporteur then introduced two other ways in which a statement may seek to modify effects and obligations under the provisions of a treaty: (1) the author of the statement accepts additional obligations not required under the treaty, and (2) the author attempts to strengthen the obligations owed by other States or parties to the treaty[56]. Such statements have been termed "extensive reservations".

The Special Rapporteur produced two draft guidelines to address the potential confusion created by these two possibilities. Guideline 1.1.5[57] characterized statements that seek to increase the author's obligations as unilateral declarations to be governed by the regime suggested in the Nuclear Test Cases. Besides noting the rarity of such a practice[58], the Special Rapporteur felt that statements representing voluntary decisions to undertake greater obligations than required could be formulated at any time, thus not fitting the limits ratione temporis of the Vienna definitions. Furthermore, the extra obligations assumed are themselves independent, whereas reservations are non-autonomous vis-à-vis the treaty[59]. Thus, 1.1.5 was itself a definition in the negative, identifying what is not reservation.

Guideline 1.1.6. was to the effect that a statement designed "to limit the obligations imposed on [the author] by the treaty and the rights which the treaty creates for the other parties constitutes a reservation, unless it adds a new provision to the treaty"[60]. Thus, the Special Rapporteur acknowledged that nearly all reservations seek to increase the rights or decrease the obligations of its author. The distinction between reservations proper and so-called extensive reservations therefore becomes a matter of how the author seeks to achieve that desire. A State can only increase rights and decrease obligations under the treaty; hence, it can only use reservations to divest actual provisions of their affect. It can not rightly add obligations that do not themselves exist in the treaty itself. Thus, the proposed guideline rather awkwardly warns that a reservation cannot add a new provision to the treaty[61].

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[55] See INFORMAL/11, paragraph 89.

[56] Ibid,. paragraph 90.

[57] A/CN.4/491/Add.6. The proposal is worded as follows: "A unilateral statement made by a State or an international organization by which that State or that organization undertakes commitments going beyond the obligations imposed on it by a treaty does not constitute a reservation [and is governed by the rules applicable to unilateral legal acts], even if such a statement is made at the time of the expression by that State or that organization of its consent to be bound by the treaty".

[58] See discussion of a South African "reservation" made upon signature of the GATT in 1948 (INFORMAL/11, paragraphs 94-96).

[59] Ibid., paragraph 97.

[60] A/CN.4/491/Add.6.

[61] See INFORMAL/11, paragraph 105:"[The State] may seek to increase its rights under the treaty and/or to reduce those of its partners under the treaty, but it cannot legislate via reservations and the Vienna Convention definition precludes this risk by stipulating that the author of the reservation must seek to exclude or modify the legal effect of certain provisions of the treaty and not of certain rules of general international law".

The two proposals created a great deal of substantive controversy within the Commission. A number of members felt it premature to introduce the specter of unilateral legal acts into a set of guidelines on reservations, especially given the topic's preliminary and often obscure underpinnings. The situation was not eased by the introduction during the debate of still another possibility, namely that of a State attempting to substitute for an obligation provided in the treaty another one by way of a unilateral statement. Some members also questioned the distinction created among Guidelines 1.1.5. and 1.1.6., finding no necessary legal definitional difference between statements designed to increase and those seeking to limit an author's obligations. Because the Vienna definitions use the word "modify", such a parsing of types would suggest a prejudice not contained within the text of the Conventions. Many members also criticized the wording of Guideline 1.1.6. as a mere recapitulation of the definition of reservations, and the Special Rapporteur himself noted the clumsiness of its last clause. Hence, the Commission decided not to adopt the two draft guidelines and postponed further discussion until next year. It also decided to include a question concerning the problem underlying draft Guidelines 1.1.5. and 1.1.6. in the list of issues on which it seeks guidance from States (see Annex IV).

4.4.2. Reservations relating to non-recognition

The Special Rapporteur had also proposed draft Guideline 1.1.7. which stated that "[a] unilateral statement by which a State purports to exclude the application of a treaty between itself and one or more other States which it does not recognize constitutes a reservation, regardless of the date on which it is made[62]. The large majority of the Commission rejected the guideline, feeling that such statements should be governed by the rules on recognition of States rather than the rules on reservations. Statements designed to exclude application of a treaty due to non-recognition operate to preclude treaty relations, thereby excluding the Vienna regime, which is posited upon acceptance, and then, existence of such relations.

5. Nationality in relation to the succession of States

Work on this topic had led to the most important product of the Commission's 49th (1997) session, namely to a set of 27 draft articles with commentaries on nationality of natural persons in relation to the succession of States adopted on first reading[63].

At the 1998 session, the Commission considered Special Rapporteur W. Mikulka's Fourth Report, dealing with the second part of the topic, i.e., the question of the nationality of legal persons in relation to State succession (Doc.A/CN.4/489). The main point raised by the Special Rapporteur was that of the possible orientation to be given to future work on this issue. This was

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[62] A/CN.4/Add.6.

[63] Cf. my report on "The Work of the International Law Commission at Its Forty-Ninth Session (1997)", *Nordic Journal of International Law* 66 (1997), pp. 527 ss. (Text of the draft articles on pp. 544 ff.).

discussed in a Working Group, which restricted its consideration from the outset to the methodological question thus raised. The Working Group expressed the opinion that, as the definition of the topic now stands, the issues involved are too specific and the practical need for their solution is not evident. Therefore, the Working Group considered suggesting to the Commission not to undertake work on this part of the topic at all. However, should the Commission and member States desire to pursue consideration of this topic, the Working Group suggested two possible alternatives, both of which would require a new formulation of the mandate.

The first option would consist in expanding the topic to study the question of the nationality of legal persons in international law in general. It was noted that such a broadening of scope would, due to the wide diversity of national laws on the matter, confront the Commission with problems similar to these arising during the consideration of the topic of jurisdictional immunities. It could also lead to an overlap with other areas currently under consideration in the Commission such as diplomatic protection. Further, it would be difficult to keep such a study within manageable limits.

The second option would limit the study to the context of the succession of states, but would expand the scope beyond the issue of nationality to include the status of legal persons and possibly also the conditions of operation of legal persons flowing from the succession of states. Members of the commission seemed to favor the second option but emphasized the problems presented in such an appoach, such as, again, the diversity of national laws on the subject and establishing a new delimitation of the topic, once enlarged in this direction.

The preliminary conclusion of the Working Group, endorsed by the Commission, was that the Commission should not undertake consideration of the second part of the topic unless States react favorably to one of the two options proposed. Thus, the General Assembly is called upon to once again[64] encourage states to submit comments in this regard.
The Commission, on its part, included a respective question in its list of specific issues on which governmental comments would be of particular interest[65] and is now awaiting reactions from member states regarding the alternatives suggested before making its final decision on the future of this part of the topic.

6. Diplomatic Protection

In the view of the Commission, there is hardly any other topic that is as ripe for codification as diplomatic protection and on which there is such a comparatively sound body of "hard" law.

Diplomatic protection was included in the Commission's agenda in 1997[66]; Mr. M. Bennouna was appointed Special Rapporteur.

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[64] The Assembly has already done so in Resolutions 51/160 (paragraph 8) and 52/156 (paragraph 5), without great success.

[65] See Annex IV.

[66] Cf. my Report on the 1997 session (op.cit.supra note 63), pp. 541 f.

At the 1998 session, the Commission considered Mr. Bennouna's Preliminary Report (Doc.A/CN.4/484), first in the Plenary and then at the level of the Working Group on the topic established the year before.

The Preliminary Report raised a number of basic issues which were divided into two broad categories: (a) the legal nature of diplomatic protection; and (b) the nature of the rules governing diplomatic protection. Within the framework of these issues, the Special Rapporteur asked the Commission to consider (1) whether the State, by bringing an international claim, is enforcing its own right or the right of its injured individual, and (2) whether the Commission is going to take a rigorous or a flexible approach to the nature (secondary v. primary) of the rules relating to the topic of diplomatic protection.

As regards the first point, in his Report Mr. Bennouna thought that the traditional view according to which the endorsement of a claim is a discretionary right of the State of nationality[67], is based largely on a fiction of law. If the State of nationality is deemed to be enforcing its "own" right at the international level, such a right is frequently modeled on the right accorded to the national concerned at the local level; compensation is based on the damage inflicted on the foreign national and the conduct of the individual is taken into account ("clean hands" rule.)

The Special Rapporteur stated that the fiction might have played a positive role at a time when it had represented the only means of advancing the case of an individual in the international sphere and invoking the international responsibility of the host State in its relations with that individual. But that situation, according to Mr. Bennouna, no longer applies. Nowadays, a large number of multilateral treaties recognize the right of individual human beings to protection independently from intervention by States and directly by the individuals themselves through access to international forums. In addition, the Special Rapporteur also referred to the recognition of basic human rights as creating obligations erga omnes. These developments, together with bilateral investment promotion agreements and the creation of claims commissions, whereby a national of one State could present a claim against another State, created a legal framework outside the traditional area of diplomatic protection.

The Special Rapporteur suggested that the concept of diplomatic protection could be seen as a discretionary power of the State to bring international proceedings, not necessarily to assert its own right but to secure observance of international rules operating in favor of its nationals, and to invoke the international responsibility of the host State. The discretionary nature of this right has also been recognized under domestic law, even though a certain degree of judicial review is increasingly being recognized in a number of States.

In the Commission's debate, some members disagreed with the Special Rapporteur's view of diplomatic protection involving a legal fiction. They thought that there was nothing artificial in seeing the home State as having a right to ensure that its nationals were treated in conformity with an international standard

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[67] Formulated in the case of the Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2 (1924), p. 12.

or with human rights.

The main question was as to who held the right exercised by way of diplomatic protection - the State of nationality or the injured victim. According to the traditional Mavrommatis view, diplomatic protection was a right exclusively of the home State. It could also be said that a person is linked to a State by nationality and that the totality of nationals forms one of the State's constituent elements which it has the fundamental obligation to protect. At the same time, the State defended the specific rights and interests of the national that had been "injured" by another State. Therefore, no rigid distinctions can be drawn between the rights of the State and the rights of the individual. According to yet another view, the State exercised vicariously a right originally conferred in the individual. This distinction between the possession of the right and its exercise might be useful to reconcile the traditional law and the developments.

The suggestion was made that the right to diplomatic protection should be seen as a human right. In a contentious debate the point was stressed that to jettison diplomatic protection in favor of human rights would be, in some instances, to deprive individuals of a protection which they had previously enjoyed. In this sense it was recommended that human rights could serve to buttress the diplomatic protection exercised by the State of nationality rather than constitute the new focus. Comments were made that illustrated the parallel nature of the two approaches and the possibility that there was at least a theoretical link between the two.

As to the preconditions for the exercise of diplomatic protection, they had been established in the Mavrommatis judgment. Among them was the condition that the injured subjects must have been unable to obtain satisfaction through domestic remedies which afforded the State an opportunity to avoid a breach of its international obligations by making timely reparation. It was noted, however, that there was no need to exhaust local remedies when there was no prior voluntary connection with the jurisdiction. There was general agreement that diplomatic protection is rooted in customary law.

The Working Group summarized the extensive debate by stating that the exercise of diplomatic protection is the right of the state. However, in the exercise of this right, the State should take into account the rights and interests of its national for whom it is exercising diplomatic protection. In this context, the project on diplomatic protection should take into consideration the development in international law of increasing recognition and protection of the rights of individuals. The Working Group, having noted that some domestic laws do recognize the right of nationals to diplomatic protection by their Governments, was also of the view that the discretionary right of the State to exercise diplomatic protection does not prevent it from committing itself to its nationals to exercise such a right. In this regard, the Commission is now requesting Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection.

Concerning the second large issue, that of the nature of the rules governing diplomatic protection, the Commission reaffirmed its intention to confine the

discussion to the secondary rules of international law, i.e. the consequences of an internationally wrongful act which had caused an indirect injury to the State because of injury to its nationals. The Working Group recognized that a certain overlap of primary and secondary rules could not be avoided, as e.g. in the case of the "clean hands" doctrine. However, primary rules will only be considered when their clarification is essential to providing guidance for a clear formulation of a specific secondary rule.

The Working Group on diplomatic protection encapsulated the essential points of the discussion thus summarized in a series of conclusions in its report to the Plenary[68], on which the Commission welcomes comments and observations by Governments. As already mentioned, the Commission also requests Governments to provide it with materials documenting domestic law and practice relevant to diplomatic protection[69].

7. Unilateral acts of States

This topic became part of the Commission's agenda only at the 49th (1997) session[70]. At the 1998 session the Commission had before it a First Report by Special Rapporteur V. Rodriguez-Cedeno (Doc.A/CN.4/486). The Commission considered the report both in plenary and at the level of the Working Group established last year.

The objective of the Special Rapporteur's first report was to arrive at a definition of a strictly unilateral act. The Special Rapporteur suggested to limit the scope of the topic to unilateral acts of States issued for the purpose of producing international legal effects, thereby excluding acts of States of a purely non-legal nature (as, e.g., unilateral political acts), unilateral acts of the State which are linked to a specific legal regime, acts of other subjects of international law, such as international organizations, as well as those attitudes, acts and conduct of States which, though voluntary, were not performed with the intention of producing specific effects in international law. The Commission members generally endorsed the Rapporteur's suggestions. Opinions differed as to whether the scope of the topic extended to unilateral acts of States issued in respect of subjects of international law other than States or erga omnes, and on whether, under the present topic, the effects of unilateral acts issued in respect of States could also be extended to other subjects of international law. Furthermore, doubts were expressed whether the topic was a unified subject which would allow a single, all-embracing definition of the acts which it might be understood to include. Instead, it was suggested to divide the topic into various types or categories of unilateral acts which varied from one another in terms of their characteristics. The comment was made that any definition which tried to transcend these categories would have to be set at too high a level of abstraction for it to be of any use. Nevertheless, the Working Group recommended that the Commission request the Special Rapporteur, when preparing his second report, to submit draft articles on the definition of unilateral acts and the scope of the draft

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[68] Doc.A/CN.4/L.553.

[69] See infra Annex IV.

[70] Cf. my report, op. cit. supra note 63, at pp. 540 f.

articles. This recommendation was endorsed by the Commission.

Regarding the latter point, the Working Group suggested to state that the draft articles would apply to unilateral acts of States. There was agreement that the study encompass unilateral acts of promise, recognition, renunciation and protest.

The members of the Commission generally agreed that the topic should be confined to unilateral acts of States which are an autonomous and notorious expression of the will of a State, issued for the purpose of producing international legal effects. Part of the discussion focused on whether the term "unilateral act" should be confined to declarations, as proposed by the Special Rapporteur, or whether issues such as silence, acquiescence and estoppel should also be examined in the context of unilateral acts.

With respect to the limits of the topic, the Working Group recommended that it ought not to encompass unilateral acts of a State which are linked to a pre-existing international agreement, such as, for instance, acts governed by the law of treaties, by the law of the sea, by the law of international arbitral or judicial procedure or by other specific legal regimes. Acts of subjects of international law other than States should also be excluded.

Reflecting the discussion in the plenary, the Working Group agreed to an elaboration of aspects relating to the element "purpose of producing legal effects." The element is not only part of the definition of a unilateral act but also pertains to future draft articles on the effects of such acts. Then, the Commission could also examine the possible effects of the act, such as the creation of international obligations for the State concerned (in case of a promise), the renunciation of its rights, and the declaration of opposability or non-opposability to it of the claim of another State or of a particular legal situation (namely, recognition or protest). Further, clarification will be needed on whether in order for the act to produce legal effects, the addressee has to accept it or subsequently behave in such a way as to signify such acceptance.

In addition, the Working Group suggested that the Special Rapporteur should also examine, at the appropriate time, the question of estoppel and the question of silence, with a view to determine what rules, if any, could be formulated in this respect.

It was suggested by various members that notwithstanding certain case law and State practice there did not yet exist any coherent theory of unilateral acts and that the work of the Commission would accordingly partake more of the nature of progressive development than of straightforward codification.

The Commission endorsed the wish of the Working Group that the Special Rapporteur submit draft articles on the definition of unilateral acts and the scope of the future work. He is thus expected to proceed with an examination of the elaboration and conditions of validity of unilateral acts of States.

In Chapter III of its Report, the Commission is asking governments for comments and observations on whether the scope of the topic shoud be limited to declarations, as proposed by the Special Rapporteur in his first report, or whether the scope should encompass other unilateral expressions of the will of the State. Furthermore, the Commission would also welcome comments on whether the scope of the topic should be limited to unilateral acts of States issued to other States, or whether it should also extend to unilateral acts issued to other subjects of international law[71].

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[71] See infra Annex IV.

8. Other Matters

8.1. Work programme for the Quinquennium

In paragraph 221 of its 1997 Report, the Commission had set out a rather ambitious work programme for the remainder of the quinquennium, that is, the years 1998-2001, on a year-by-year basis. A comparison of this programme with the achievements of the 1998 session described in the present report demonstrates that it will not be easy for the ILC to meet the goals that it made so unabashedly transparent last year. The Commission did, however, affirm that this programme should be complied with to the extent possible.

The main responsibility in this regard lies with the Special Rapporteurs. The Commission decided that they should submit their reports to the Secretariat in time so as to ensure the availability of the reports - in all languages - before the beginning of the session. The Commission further decided that, in the future, candidates for Special Rapporteurs should be reminded of the demands made in terms of time and effort upon their appointment.

8.2. Future sessions

The 1999 session of the Commission will be held at Geneva from 3 May to 23 July (12 weeks). Taking into account the heavy workload to be expected subsequent to 1999, the Commission agreed that, barring unforeseen circumstances, the sessions in 2000 and 2001 should take place in two rather evenly split parts, with a reasonable period in between, for a total of 12 weeks. Thus, regarding its session in 2000, the Commission decided to hold it in Geneva from 24 April to 2 June and from 3 July to 11 August.

8.3. Celebration of the 50th anniversary of the Commission

The 50th anniversary of the ILC gave occasion to several scientific gatherings with a view for members of the Commission and interested scholars to assess the work of the ILC from a more detached and future-oriented standpoint. Thus, a Colloquium on the Progressive Development and Codification of International Law was held on 28-29 October 1997 at UN headquarters in New York. Its proceedings, together with other relevant documentation, were published in May 1998 under the title "Making Better International Law: The International Law Commission at 50". (Sales No. E/F.98.V.5).

In Geneva, a Seminar was held on 21-22 April 1998 (i.e., during the first week of the split session) on the same topic. Its proceedings will also be published.

The UN Legal Office's Codification Division presented the Commission in July 1998 with a birthday present of its own: an "Analytical Guide to the Work of the International Law Commission, 1949-1997" (Doc.ST/LEG/GUIDE/1, Sales No. E.98.V.10) which complements the publication "The Work of the International Law Commission" (currently 5th ed. 1996).

The Codification Division further created an International Law Commission Website, including, inter alia, the just mentioned "Analytical Guide" (see Annex V).

8.4. Long-term programme of work

The Commission's Planning Group established a Working Group in this regard which in the course of the session reviewed a considerable number of subjects with a

view on their suitability as future topics of work (cf. the report of the Working Group, annexed to the Commission's Report). It selected the following topics for inclusion in the long-term programme of work: "Responsibility of international organizations", "The effect of armed conflict on treaties", "Shared natural resources (confined groundwater and single geological structures of oil and gas)", and "Expulsion of aliens". The Working Group intends to prepare a syllabus on those topics for consideration by the Planning Group at the next session of the Commission. The Working Group also decided to prepare a feasibility study on a number of other topics to be considered by the Working Group at the next session of the Commission.

8.5. Cooperation with other bodies

During the 1998 session visits to the Commission were paid (in chronological order) by the Secretary-General of the Asian-African Legal Consultative Committee (AALCC), the President of the International Court of Justice, as well as by observers for the Inter-American Juridical Committeee (IAJC) of the Organization of American States and for the Ad Hoc Committee of Legal Advisors on Public International Law (CAHDI) of the Council of Europe. Finally, an informal working session was held in Geneva between members of the Commission and the legal services of both the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies.

8.6. Representation at the UN Conference on the establishment of an International Criminal Court

The ILC was represented at the Rome Conference by Mr J. Crawford, who had chaired the Commission's Working Group entrusted with the preparation of the original draft of the ICC Statute. The Conference expressed its deep gratitude to the Commission for this outstanding contribution.

8.7. International Law Seminar

For the 34th time, a training seminar was held in Geneva, with 23 participants, all of different nationalities and mostly from developing countries.

8.8 Gilberto Amado Memorial Lecture

The 14th memorial lecture was given by Ambassador R.S. Guerreiro, former Foreign Minister of Brazil.

ANNEX I

Draft Articles on International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law
(Prevention of Transboundary Damage from Hazardous Activities)

Article 1. Activities to which the present articles apply
The present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2. Use of Terms
For the purposes of the present articles:
(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;
(b) "harm" includes harm caused to persons, property or the environment;
(c) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;
(d) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out;
(e) "State likely to be affected" means the State in the territory of which the significant transboundary harm is likely to occur or which has jurisdiction or control over any other place where such harm is likely to occur.

Article 3. Prevention
States shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm.

Article 4. Cooperation
States concerned shall cooperate in good faith and as necessary seek the assistance of one or more international organizations in preventing, and minimizing the risk of, significant transboundary harm.

Article 5. Implementation
States shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present articles.

Article 6. Relationship to other rules of international law
Obligations arising from the present articles are without prejudice to any other obligations incurred by States under relevant treaties or principles of international law.

Article 7. Authorization
1. The prior authorization of a State is required for activities within the scope of the present articles carried out in its territory or otherwise under its jurisdiction or control as well as for any major change in an activity so authorized. Such authorization shall

also be required in case a change is planned which may transform an activity into one falling within the scope of the present articles.
2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present articles.
3. In case of failure to conform to the requirements of the authorization, the authorizing State shall take such actions as appropriate, including where necessary terminating the authorization.

Article 8. Impact Assessment
1. Any decision in respect of the authorization of an activity within the scope of the present articles shall be based on an evaluation of the possible transboundary harm caused by that activity.

Article 9. Information to the Public
States shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 10. Notification and information
1. If the assessment referred to in article 8 indicates a risk of causing significant transboundary harm, the State of origin shall, pending any decisions on the authorization of the activity, provide the States likely to be affected with timely notification thereof and shall transmit to them the available technical and other relevant information on which the assessment is based.
2. The response from the States likely to be affected shall be provided within a reasonable time.

Article 11. Consultations on Preventive Measures
1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent, and minimize the risk of, significant transboundary harm.
2. States shall seek solutions based on an equitable balance of interests in the light of article 12.
3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of States likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

Article 12. Factors involved in an equitable balance of interests
In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 11, the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm and minimizing the risk thereof or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing such harm and minimizing the risk thereof or restoring the environment;

(d) the degree to which the State of origin and, as appropriate, the States likely to be affected are prepared to contribute to the costs of prevention;

(e) the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(f) the standards of prevention which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Article 13. Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the territory or otherwise under the jurisdiction or control of another State may have a risk of causing significant transboundary harm, the former State may request the latter to apply the provision of article 10. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide notification under article 10, it shall so inform the other State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations in the manner indicated in article 11.

3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a period of six months unless otherwise agreed.

Article 14. Exchange of Information

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information relevant to preventing, and minimizing the risk of, significant transboundary harm.

Article 15. National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 16. Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of activities within the scope of the present articles, a

State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Article 17. Settlement of Disputes

1. Any dispute concerning the interpretation or application of the present articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties, including submission of the dispute to mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of one of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be considered by the parties in good faith.

ANNEX II

Draft articles on State responsibility provisionally adopted by the Drafting Committee

Part One ...

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]
[deleted]

Article 3. 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 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 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 I, an organ includes any person or body which has that status in accordance with the internal law of the State.

[Article 6]
[deleted]

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

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

Article 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.

[Articles 11 to 14]
[deleted]

Article 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 5 to 10.

Article 15 *bis*. Conduct which is acknowledged and adopted by the State as its own

Conduct which is not attributable to a State under articles 5, 7, 8, 8 *bis*, 9 or 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.

Article A. Responsibility of or for conduct of an international organization

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

ANNEX III

Draft guidelines of the Guide to Practice in respect of reservations to treaties

1. Definitions

1.1 Definition of reservations

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 [1.1.4.] Object of reservations

A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which the State or international organization intends to implement the treaty as a whole.

1.1.2. Cases in which a reservation may be formulated

The cases in which a reservation may be formulated contained in guideline 1.1 include all the means of expressing consent to be bound by a treaty referred to in article 11 of the 1969 and 1986 Vienna Conventions on the Law of Treaties.

1.1.3 [1.1.8] Reservations having territorial scope

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement, constitutes a reservation.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to a territory in respect of which it is notifying the territorial application of the treaty constitutes a reservation.

1.1.7 [1.1.1] Reservations formulated jointly

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

.....

The definition of a unilateral statement as constituting a reservation does not prejudge its permissibility or its effects in the light of the rules governing reservations[72].

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[72] The title and the location of this guideline will be determined at a later stage.

ANNEX IV

Specific issues on which comments would be of particular interest to the Commission

1. In response to paragraph 12 of General Assembly resolution 52/156, the Commission would like to indicate the following specific issues for each topic on which expressions of views by Governments either in the Sixth Committee or in written form would be of particular interest in providing effective guidance for the Commission on its further work.

A. Diplomatic Protection

2. The Commission would welcome the comments and observations by Governments on the conclusions drawn by the Working Group contained in paragraph 108 of the report.

3. The Commission would also request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection.

B. Unilateral Acts of States

4. The Commission would welcome comments on whether the scope of the topic should be limited to declarations, as proposed by the Special Rapporteur in his first report, or whether the scope of the topic should be broader than declarations and should encompass other unilateral expressions of the will of the State.

5. Comments are also welcome on whether the scope of the topic should be limited to unilateral acts of States issued to other States, or whether it should also extend to unilateral acts of States issued to other subjects of international law.

C. International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities)

6. Given the fact that the Commission intended to separate activities which have a risk of causing significant harm from those which actually cause such a harm for the purpose of developing and applying the duty of prevention, the question arises as to the kind of regime which is or should be made applicable to the latter type of activities.

7. It is generally understood so far that the duty of prevention is an obligation of conduct and not of result. Accordingly, it is suggested that non-compliance with duties of prevention in the absence of any damage actually occurring would not give rise to any liability. Now that the Commission decided to recommend a regime on prevention, separating the same from a regime of liability, should the duty of prevention be treated as an obligation of conduct or failure to comply be responded with suitable consequences under the law of State responsibility or civil liability or both where the

state of origin and the operator are both accountable for the same? If the answer to the latter question is in the affirmative, what type of consequences are appropriate or applicable?

8. What form should the draft articles take - a convention, framework convention or a model law?

9. What kind or form of dispute settlement procedure is most suitable for disputes arising from the application and interpretation of the Draft Articles?

D. State Responsibility

10. With respect to Part One of the draft, is all conduct of an organ of a State attributable to that State under article 5, irrespective of the jure gestionis or jure imperii nature of the conduct?

11. As regards Part Two of the draft, what is the appropriate balance to be struck between the elaboration of general principles concerning reparation and of more detailed provisions, in particular relating to compensation?

12. The Commission has already received very helpful comments from a number of Governments on the Draft articles or particular aspects thereof (see A/CN.4/488 and Adds. 1-3). These comments have dealt with a number of key issues, including:

(a) whether the rules of attribution in Part One, Chapter 2 deal adequately with such matters as the role of internal law in determining the status of an "organ" of the State for the purposes of article 5, and the position of privatised entities exercising governmental functions (draft article 7 (b));

(b) whether Draft article 19 should be retained or replaced, or whether the idea of serious breaches of norms of interest to the international community as a whole can better be developed in the Draft articles in other ways than through a distinction between "crimes" and "delicts" (as to which see paragraph 91A)[73];

(c) the extent to which the circumstances precluding wrongfulness dealt with in Part One, Chapter V should be treated as entirely precluding responsibility for the conduct in question;

(d) the definition of "injured State" in draft article 40, especially as it concerns breaches of obligations owed erga omnes or to a large number of States;

(e) whether the draft articles should seek to regulate counter-measures in detail, and in particular the link between counter-measures and resort to third party dispute-

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[73] Quoted in full in my Report supra at the end of 3.3.

settlement;

(f) the provisions of Part Three dealing with dispute settlement in general.

Governments which have not yet commented on the Draft articles may wish to note that it is not too late to do so, and that comments on these or any other issues will be welcomed.

E. Nationality in relation to the succession of States

13. The Commission would welcome comments on the question raised in the report of the Working Group contained in paragraph 468 of the report as regards the future, if any, of the second part of the topic of Nationality in relation to the succession of States dealing with legal persons.

14. The Commission further wishes to reiterate its request to Governments for written comments and observations on the draft articles on Nationality of natural persons in relation to the succession of States adopted on first reading in 1997, so as to enable it to begin the second reading of the draft articles at its next session.

F. Reservations to treaties

15. The Commission would welcome comments and observations by Governments on whether unilateral statements by which a State purports to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself, would or would not be considered as reservations.

16. The Commission would appreciate receiving any information or materials relating to States practice on such unilateral statements .

G. Protection of the environment

17. The International Law Commission explored the possibility of dealing with special issues relating to international environmental law. In this connection, the Commission would like to have views and suggestion of states as to which specific issues in this regard they might consider to be the most suitable for the work of the Commission.

ANNEX V

WEBSITE OF THE INTERNATIONAL LAW COMMISSION

("http://www un org/law/ilc/index.htm")

The Codification Division of the Office of Legal Affairs has established the **Website of the International Law Commission**. The website, which was prepared as part of the activities of the Division commemorating the fiftieth anniversary of the establishment of the International Law Commission, will be maintained by the Division.

A pilot version of the website has already been posted at the above internet address, and the following information is currently available:

- **Information regarding the fiftieth session of the Commission**, including,
  - a *list of scheduled meetings* during the second part of the session currently being held in New York;
  - a *Daily Bulletin* summarizing the discussions of the Commission;
  - an updated *list of documents* issued during the fiftieth session, including *online copies of selected official documents* circulated during the session; and
  - a *list of the current members* of the Commission.
- An **introduction to the Commission**, including a brief historical synopsis and a discussion regarding article 13(1)(a) of the Charter, the object of the Commission, and its relationship with Governments, as well as with other bodies.
- **Composition and membership** of the Commission, including information regarding the election of members, duration of office, etc. A complete list of current members, as well as of all the members of the Commission is also available.
- **Activities of the Commission** for the forty-eighth, forty-ninth, and fiftieth sessions.
- **Programme of work and methods of work** of the Commission.
- **Commission's reports** to the General Assembly submitted following its forty-eighth (1996) and forty-ninth (1997) sessions.
- **Analytical Guide to the Work of the International Law Commission, 1949-1997**. A Quick-Search function is provided allowing the user to search the Guide for specific information.
- **Texts** of conventions, and draft articles (together with commentaries). This section is still under development with new links to be added as the electronic
  versions of texts are made available.
- **Activities** in connection with the fiftieth anniversary of the Commission's creation: the *Colloquium on the Codification and Progressive Development of International Law* held in October 1997, and the seminar on international held in Geneva in April 1998.

The Codification Division will continue to update the website, including adding information from past sessions of the Commission. All suggestions and comments on the website are welcome and should be addressed to:

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