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The Work of the International Law Commission at Its 52nd Session (2000)

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I. INTRODUCTION

The International Law Commission held its fifty-second session in Geneva from 1 May to 9 June and 10 July to 18 August. Under the chairmanship of its Japanese member, Mr. Chusei Yamada, the Commission addressed five topics: State responsibility, Diplomatic protection, Unilateral acts of States, Reservations to treaties and International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities).

Concerning the topic "State responsibility", the Commission considered the third report of Special Rapporteur James Crawford containing his proposals for Part Two (legal consequences of an internationally wrongful act of a State), as well as for a new Part Two bis (the implementation of State responsibility) and Part Four (general provisions), of the draft articles. The draft articles in chapters I (general principles), II (the forms of reparation) and III (serious breaches of obligations to the international community as a whole) of Part Two, chapters I (invocation of responsibility) and II (countermeasures) of Part II bis, as well as Part Four of the third report were referred to the Drafting Committee. The Drafting Committee presented its report, including a full set of draft articles at the end of the session (see Chapter II of the present paper and the provisional text of the draft articles *infra* in Annex I).

With regard to the topic "Diplomatic protection", the Commission considered the first report of Special Rapporteur John R. Dugard, dealing with issues of definition and scope of the topic, the nature and conditions under which diplomatic protection may be exercised, in particular the requirement of nationality and the modalities for diplomatic protection, addressed in Articles 1 to 8. To follow up on the discussions and the suggestions made in the plenary, the Commission referred Articles 1,3 and 6 to open-ended informal consultations chaired by the Special Rapporteur. Taking into account the report of these consultations, the Commission referred draft Articles 1, 3 and 4 to 8 to the Drafting Committee (see infra Chapter III and for the full text of all draft articles *infra* Annex II).

As regards the topic "Unilateral acts of States", the Commission examined the third report of Special Rapporteur Victor Rodriguez Cedeño. The Special Rapporteur proposed a new draft Article 1 on the definition of unilateral acts, the deletion of the previous draft article 1 on the scope of the draft articles, a new draft Article 2 on the capacity of States to formulate unilateral acts, a new draft Article 3 on persons authorized to formulate unilateral acts on behalf of the State and a new draft Article 4 on subsequent confirmation of an act formulated by a person not authorized for that purpose. He also proposed the deletion of previous draft Article 6 on expression of consent, and a new draft Article 5 on the invalidity of unilateral acts. The Commission decided to refer new draft Articles 1 to 4 to the Drafting Committee and new draft Article 5 to the Working Group on Unilateral Acts of States, for further consideration and study (see *infra* Chapter IV and Annex III).

With respect to the topic "Reservations to treaties", the Commission considered the fifth report of Special Rapporteur Alain Pellet concerning alternatives to reservations and

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interpretative declarations and the formulation, modification and withdrawal of reservations and interpretative declarations. The Commission adopted five draft guidelines pertaining to reservations made under exclusionary clauses, unilateral statements made under an optional clause, unilateral statements providing for a choice between the provisions of a treaty and alternatives to reservations and interpretative declarations (see *infra* Chapter V and Annex IV).

With regard to the topic of "International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)", the Commission established a Working Group to examine the comments and observations made by States on the draft articles on the sub-topic of prevention which had been adopted on first reading by the Commission in 1998. On the basis of the discussion in the Working Group, Special Rapporteur Pemmaraju Sreenivasa Rao presented his third report containing a draft preamble and a revised set of draft articles on prevention, along with the recommendation that they be adopted as a framework convention. Furthermore, the third report addressed questions such as the scope of the topic, its relationship with liability, the relationship between an equitable balance of interests among States concerned and the duty of prevention, as well as the duality of the regimes of liability and State responsibility. The Commission considered the report and decided to refer the draft preamble and draft articles contained therein to the Drafting Committee (see *infra* Chapter VI and for the new text of the revised draft articles Annex V).

In response to paragraph 13 of General Assembly resolution 54/111 of 9 December 1999 the Commission indicated specific issues for the five topics mentioned 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 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* Chapter VII).

II. STATE RESPONSIBILITY[1]

A. Introductory Remarks

With the aim of finishing the second reading of the topic of State responsibility within the present quinquennium (i.e., until 2001), the Commission spent the majority of its plenary debates and almost the entire time in the Drafting Committee on the preparation of a complete set of draft articles. Since Part One had been provisionally adopted at its fifty-first session (1999), this year the Commission focused on the reconsideration of Part Two of the draft articles as adopted on first reading in 1996 (hereinafter, "1996 draft").

During its fifty-second session in 2000, the Commission had before it Professor Crawford's third Report[2], completely restructuring and revising Part Two of the 1996 draft, as well as addressing issues like international crimes, obligations *erga omnes* and countermeasures.

The Commission referred all the draft articles proposed by the Special Rapporteur to the Drafting Committee. The Drafting Committee presented its report, including a full text of the draft articles, at the end of the session. The Commission only took note of them, postponing their formal adoption until next year in order to first receive comments from UN member States in the Sixth Committee and in writing. However in order to give UN member

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[1] In response to General Assembly resolution 799 (VIII) of 1953, requesting the Commission to undertake the codification of the principles of international law concerning State responsibility, the Commission at its seventh session in 1955 decided to take up the topic. Mr. F. V. Garcia Amador was appointed Special Rapporteur. He focused on the codification of substantive rules of injuries to aliens and property. For the six reports of the Special Rapporteur from 1956 to 1961, see Yearbook … 1969, vol. II, p. 229. In 1963, the Commission appointed Mr. Robert Ago as new Special Rapporteur, and abandoned the approach of dealing with primary rules, instead focusing on the secondary rules of State responsibility (i.e., rules governing the legal regime of breaches of international law and their consequences). For the eight reports of Special Rapporteur Ago, see Yearbook … 1969, vol. II, doc. A/CN.4/217 and Add. 1, pp. 125-156; Yearbook … 1970, vol. II, doc. A/CN.4/233, pp. 177-198; Yearbook … 1971, vol. II (Part One), doc. A/CN.4/246 and Adds. 1-3, p. 199; Yearbook … 1972, vol. II, doc. A/CN.4/264 and Add. 1, p. 71; Yearbook … 1976, vol. II (Part One), doc. A/CN.4/291 and Add. 1-2, pp. 3-55; Yearbook … 1977, vol. II (Part One), doc. A/CN.4/302 and Add. 1-3; Yearbook … 1978, vol. II (Part One), doc. A/CN.4/318 and Add. 1-4 and Yearbook … 1980, doc. A/CN.4/318/Add. 5-7. At its thirty-second session in 1980, the Commission provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". See Yearbook … 1980, vol. II, (Part Two), pp. 26-63, doc. A/35/10, chap. III. From 1980 to 1986 the Commission received seven reports from Mr. Willem Riphagen, the successor as Special Rapporteur to Mr. Ago, dealing with Parts Two and Three of the topic. See, Yearbook … 1980, vol. II (Part One), p. 107, doc. A/CN.4/330; Yearbook … 1981, vol. II (Part One), p. 79, doc. A/CN.4/334; Yearbook … 1982, vol. II (Part One), p. 22, doc. A/CN.4/354; Yearbook … 1983, vol. II (Part One), p. 3, doc. A/CN.4/366 and Add. 1; Yearbook … 1984, vol. II (Part One), p. 1, doc. A/CN.4/380; Yearbook … 1985, vol. II (Part One), p. 3, doc. A/CN.4/389; and Yearbook … 1986, vol. II (Part One), p. 1, doc. A/CN.4/397 and Add. 1. In 1987 the Commission appointed Mr. Arangio-Ruiz as new Special Rapporteur. For the eight reports he presented, see Yearbook...1988, vol. II (Part One), p.6, doc. A/CN.4/416 and Add.1; Yearbook...1989, vol. II (Part One), p.6, doc. A/CN.4/425 and Add.1; Yearbook...1991, vol. II (Part One), p.1, doc. A/CN.4/440 and Add.1; Yearbook...1992, vol. II (Part One), p.1, doc. A/CN.4/444 and Add. 1-3; Yearbook...1993. vol. II (Part One), p.1, doc. A/CN.4/453 and Add.1 and Corr. 1-3 and Add.2 and 3; doc A/CN.4/461 and Add. 1-3; doc. A/CN.4/469 and Add. 1 and 2 and doc. A/CN.4/476 and Add.1. At its forty-eight session in 1996, the Commission completed the first reading of the draft articles of Part Two and Three. For the text see the 1996 report of the Commission, Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), pp. 125-151. In 1997, the Commission appointed Mr. James Crawford as Special Rapporteur and started with the process of the second reading. Mr. Crawford presented his first report in 1998 (A/CN.4/490 and Add. 1- 6) and his second report in 1999 (A/CN.4/498 and Add. 1- 4). In 1998, taking into account the comments of governments, the Commission completed the second reading of Chapters I and II of Part One. In 1999, the Commission completed the second reading of Part One. At its fifty-second session in 2000, the Commission considered the draft articles in light of comments by governments (see A/CN.4/488 and Add. 1-3 and A/CN.4/492), as well as developments in judicial decisions and the literature, focusing on Part Two. For this purpose the Commission had before it the third Report of the Special Rapporteur.

[2] Doc. A/CN.4/507 and Add. 1 – 4. Hereinafter, "3rd Report".

States the opportunity to comment on the extensive revisions, the Commission broke with its rule not to include in its report to the General Assembly any text not officially adopted, and decided to append the text of the draft articles, now contained in Doc A/CN.4/L.600, to its 2000 report together with a footnote clarifying that the report of the Drafting Committee has not yet been discussed by the Commission in plenary.

Further, Governments will receive by early September the text of the draft articles together with the very extensive explanatory statement of the Chairman of the Drafting Committee, Mr. Gaja, and a cover note, describing the (unfinished) status of the draft articles and requesting comments before the end of January 2001.

The text of the draft articles can also be found in Annex I of the present paper. In the following they will be commented upon, in order to initiate discussion as early and by as many observers as possible.

The Drafting Committee renumbered the articles of the entire draft for easier reading, with the article numbers used on first reading appearing in square brackets after the new numbers. Our comments and the text reproduced in the Annex follow the numbering system thus set forth.

B. Structure

Based on proposals by the Special Rapporteur, the Drafting Committee substantially restructured the articles formerly contained in Part Two on "Content, forms and degrees of international responsibility": a distinction was made between obligations that arise by operation of law upon the commission of an internationally wrongful act (now embodied in Part Two), and secondary consequences that flow from action by the injured State (now embodied in Part Two bis).

Part Two, now entitled "Content of international responsibility of a State", contains three chapters: Chapter I deals with "General principles", comprising Articles 28 to 34; Chapter II, comprising Articles 35 to 40 on "The forms of reparation", elaborates on the ways in which "full reparation" may be achieved; while Chapter III (Articles 41 and 42) sets up the special category of "serious breaches of essential obligations to the international community".

Part Two bis, entitled "The implementation of State responsibility", contains two chapters: Chapter I deals with "invocation of responsibility" (Articles 43 to 49) and addresses issues such as the definition of an injured State, the formalities for invocation and cases involving a plurality of States. Chapter II provides limitations and regulations for bilateral and "collective" countermeasures (Articles 50 to 55).

The highly controversial Part Three of the 1996 draft, setting up a comprehensive system for dispute settlement, was completely deleted. At present the Commission views such a system as unnecessary because most likely the draft articles will not be adopted as a convention.

Finally, the Commission introduced a new Part Four with four general provisions that apply to the whole of the draft (Articles 56 to 59).

C. Reconsideration of the Draft Articles

1. Part One

Article 23 [30] is the only article of Part One that the Drafting Committee submitted to the plenary this year. Last year the Commission had deferred consideration of (then) Article 30 until the outcome of this year's discussion on countermeasures.

Article 23 [30] is a short, general article spelling out countermeasures among the circumstances precluding wrongfulness (Part One, Chapter V), while indicating that this article must be understood in the context of Chapter II of Part Two bis.

2. Part Two, Chapter I: General Principles

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

The plenary agreed with the Special Rapporteur that paragraph 1 of Article 36 of the 1996 draft stand as a separate formal introductory article to Part Two.

Article 28 [36] restates that international responsibility, arising from an internationally wrongful act in accordance with Part One, entails legal consequences as set out in Part Two.

Art. 29 [36]: Duty of continued performance

Article 29 [36] corresponds to Article 36, paragraph 2 of the 1996 draft. Although the Special Rapporteur had proposed that this provision stand as the first paragraph of a general principle on cessation,[3] the Drafting Committee decided that a separate article was needed to emphasize that the continuing duty of the responsible state to perform the primary obligation breached remains distinct from the legal consequences of the breach.

The Drafting Committee redrafted Article 36, paragraph 2, of 1996 to make the language more precise. Thus, it reformulated the provision from a "without-prejudice clause" to a "does-not-affect clause". It changed "State which has committed an internationally wrongful act" to "responsible State"; replaced "these provisions" with "this Part"; and changed "international obligations" to "obligation breached". Finally, the title was made more accurate.

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

The Drafting Committee combined Articles 41 (Cessation of wrongful conduct) and 46 (Assurances and guarantees of non-repetition) of the 1996 draft into a single article comprising two paragraphs and titled "Cessation and non-repetition". These two issues are logically linked since they are both future-oriented and concerned with the continuation and repair of the legal relationship breached, as opposed to the remedial function of reparation.[4]

Subparagraph (a) embodies Article 41 of the 1996 draft dealing with the obligation of the cessation of the wrongful act. The Commission reformulated the phrase "where it is engaged in a continuing wrongful act" to "cease that act, if it is continuing" in order to broaden the concept to include situations where a state violates an obligation on a *series* of occasions.

The obligation to provide assurances and guarantees of non-repetition contained in subparagraph (b), corresponding to Article 46 of the 1996 draft, generated considerable discussion in the plenary. The Commission agreed with the Special Rapporteur that what is called for is a modest and flexible provision. Comments of governments were supportive, but differed on the scope and the purpose of the provision.[5]

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[3] See 3rd Report, para. 119.

[4] See 3rd Report, paras. 53, 54, 57; commentary to Art. 46 (1996 draft), para.1.

[5] See A/CN.4/488, pp. 104, 114, 115; 3rd Report, para. 56.

Members of the plenary agreed that modern practice provided sufficient examples of appropriate assurances and guarantees, but supported the important qualification that this remedy was not available in every instance. Thus, the Drafting Committee changed the vague phrase "where appropriate" to "if circumstances so require". The Commentary will refer to influential factors, often decided by a competent third party,[6] such as the risk of repetition, the gravity of the wrongful act, and the nature of the obligation breached.

Art. 31 [42]: Reparation

The general principle on reparation in Article 31 [42] contains two paragraphs: paragraph 1 states the obligation to provide "full reparation" for the injury caused by the wrongful act, while paragraph 2 defines "injury".

Paragraph 1 of Article 31 [42] is a more concise version of Article 42, paragraph 1 of the 1996 draft. The Drafting Committee clarified the language, and structured the provision in terms of an obligation of the responsible State, instead of an entitlement of the injured State. Likewise, the Drafting Committee addressed the question of causality,[7] but limited its embodiment in the text to the notion of "full reparation for the injury caused by the internationally wrongful act".

Paragraph 2 of Article 31, which has no predecessor in the 1996 draft nor in Crawford`s report, defines the concept of injury as "any damage, whether material or moral..." This broad definition encompasses the types of injury giving rise to satisfaction as well as restitution and compensation. Paragraph 2 likewise reflects the requirement of a causal link, and thus only covers injuries "arising in consequence of the internationally wrongful act".

Art. 32 [42]: Irrelevance of internal law

The Special Rapporteur proposed the deletion of Article 42, paragraph 4 of the 1996 draft, regarding the irrelevance of reliance on internal law as justification for the failure to provide full reparation, because he considered the principle covered by Article 4 of Part One adopted on second reading.[8] However, the plenary determined that the respective issues in Part Two were not adequately covered by Article 4, which addressed the irrelevance of internal law in the *characterization* of an act as wrongful. Thus, the Drafting Committee reformulated Article 42, paragraph 4, of the 1996 draft into Article 32 [42], applying to all "obligations under this Part" (Part Two), as opposed to only "the obligation of full reparation".

Art. 33 [38]: Other consequences of an internationally wrongful act

While the Special Rapporteur had proposed the deletion of Article 38 adopted in first reading,[9] members of the plenary expressed general support for its retention, in order to preserve the application of rules of customary international law on State responsibility not reflected in the draft.

The new article also attempts to preserve: (1) the application of rules of customary international law of State responsibility that may not be entirely reflected in the draft articles, and (2) some effects of a breach of an international obligation which do not flow from the rules of State responsibility proper, but stem from the law of treaties or other areas of international law.

This broadening of the scope of Article 33 [38], and the approach taken in Article 31 [42], dictated changing "customary international law" to "applicable rules of international law".

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[6] See 3rd Report, paras. 55-59; commentary to Art. 46 (1996 draft) paras. 185.

[7] See 3rd Report, paras. 27-29.

[8] See 3rd Report, para. 43.

[9] See 3rd Report, paras. 60-65.

Likewise, the title was changed from "Customary international law" to "Other consequences of an internationally wrongful act".

Art. 34: Scope of international obligations covered by this Part

Article 34, which has no corresponding article in the 1996 draft, is a general concluding provision of the chapter on general principles.

Paragraph 1 provides that the obligations of the responsible State may be owed either to another State, several States or the international community as a whole. The identification of the State(s) towards which the obligation is owed depends on the primary obligation and the circumstances of the breach. The obligation may be owed to a State even though the ultimate beneficiary is not a State (e.g., in human rights cases).

Paragraph 2 is a without-prejudice clause preserving rights arising from the international responsibility of a State that accrue to entities other than States. This paragraph indicates that Part Two has a more limited scope than Part One, since Part One covers all cases in which a State commits a wrongful act.

3. Part Two, Chapter II: The forms of reparation

Introduction

Chapter II contains, besides an introductory article, three articles, each dealing with a different form of reparation (restitution, compensation and satisfaction), as well as two articles on the important and related issues of interest and contribution to the damage.

As noted above, the Commission agreed with the Special Rapporteur's proposal to reformulate the general principle of reparation as an "obligation" of the responsible State, rather than an entitlement of the injured State as in the 1996 draft.[10] Accordingly, Articles 35[42] through 38[45] are reformulated in this manner.

Art. 35 [42]: Forms of reparation

Article 35 [42], derived from Article 42, paragraph 1, of the 1996 draft constitutes a formal introductory article, lists the forms that full reparation shall take, and leaves to Articles 36 [43] to 38 [45] to specifically deal with each form.

The Drafting Committee changed the title to "Forms of reparation", and deleted reference to assurances and guarantees now treated in Chapter I, Article 30 subparagraph (b). The commentary will explain that "either singly or in combination" means that full reparation might require all or some of the forms, depending on the nature and extent of the injury and the impact of the primary rule.

Art. 36 [43]: Restitution

The plenary debated the phrase "re-establish the situation which existed before the wrongful act was committed",[11] and decided to retain this narrow, factual formulation adopted on first reading, leaving its complex applications for the commentary. The Commission likewise agreed with the Special Rapporteur to change "restitution in kind" in the title and text to the narrower term "restitution".

Article 43 of the 1996 draft contained four exceptions to restitution in subparagraphs

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[10] See 3rd Report, paras. 25,26, arguing that this reformulation, focusing on the obligation of the responsible State, (1) addresses situations involving a plurality of injured States, (2) conveys that the obligation of reparation arises automatically upon the breach, and (3) emphasizes in Part Two *bis* on the implementation of responsibility (Art. 44) the injured State's "choice" of the form of reparation.

[11] See 3rd Report, para. 125; commentary to Art. 43 (1996 draft), para. 2, discussing the different definitions.

(a) to (d). The Drafting Committee retained subparagraph (a) on "material impossibility", which includes *some* situations of legal impossibility, to be explained in the commentary.

The Drafting Committee deleted subparagraph (b) of the 1996 draft, as the Commission agreed with the Special Rapporteur that realistic examples where restitution involved a breach of a peremptory norm were inconceivable, and Article 21 [29bis] adequately addressed the overriding nature of peremptory norms.[12]

New subparagraph (b) corresponds to subparagraph (c) of the 1996 draft. The Drafting Committee changed "benefit which the injured state would gain" to "benefit deriving from restitution" to cover situations where there are a plurality of injured States or beneficiaries other than States.

As recommended by the Special Rapporteur,[13] the Drafting Committee deleted subparagraph (d) of the 1996 draft, which addressed situations where restitution would seriously jeopardize the "political independence or economic stability" of the responsible State. Members of the plenary agreed that this provision offered opportunity for abuse,[14] and valid examples were hard to envision, but would in any case be covered by new subparagraph (b).

Art. 37 [44]: Compensation

Article 37 on "Compensation", corresponds to Article 44 of the 1996 draft. Although the Special Rapporteur proposed reformulating the article into a single sentence of general principle,[15] the plenary favored the more detailed approach in the 1996 draft. Thus, the Drafting Committee retained the 1996 structure, with the first paragraph stating the general principle of compensation, and the second providing detail on what compensation should consist of.

Throughout the article, the Drafting Committee clarified ambiguous language. The Committee deleted reference to "interest" since the concept is now treated in a separate provision (Article 39).

In light of the broad definition of injury in paragraph 2 of Article 31 [42] on reparation, and to avoid overlap with Article 38 [45] on satisfaction, the Drafting Committee changed the phrase "compensation covers any assessable damage" to "compensation shall cover any financially assessable damage".

The Drafting Committee retained the reference to "loss of profits". Although the Committee agreed that full reparation did not necessarily cover loss of profits in every case, the Committee decided to change the vague qualifier "where appropriate" to the less speculative "insofar as it is established".

Art. 38[45]: Satisfaction

This form of reparation initiated extensive debate in the plenary.

Paragraph 1 addresses the character of satisfaction, and the injury for which it may be granted. Since members of the plenary criticized the ambiguity of the obligation to "offer" satisfaction in paragraph 1 of the Special Rapporteur's proposal,[16] the Drafting Committee brought paragraph 1 into line with previous articles in Chapter II: "The State responsible . . .

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[12] See 3rd Report, paras. 128 (a), 144 (b).

[13] See 3rd Report, para. 144 (d).

[14] See A/CN.4/488, pp. 106, 107; A/CN.4/504, p.19, para.70, presenting government criticism of this provision.

[15] See 3rd Report, paras. 154-160, justifying this proposal by the dynamism and diversity of state practice, often intertwined with primary rules.

[16] See 3rd Report, p. 40, para. 223.

is under an obligation to give satisfaction".

Members of the plenary agreed with the Special Rapporteur[17] that reference to "moral damage" in the 1996 draft was problematic. The Drafting Committee's reformulation, "injury caused by that act insofar as it cannot be made good by restitution or compensation," intends to convey more clearly that satisfaction is an exceptional remedy, not available in every case, and only covers injuries that are not financially assessable (e.g., affronts to the State).

Paragraph 2 describes the modalities of satisfaction. The Drafting Committee was of the view that this paragraph in the 1996 draft was unnecessarily detailed, and shortened it to one sentence, listing "acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality". This list is non-exhaustive, and the appropriate modality contingent upon the circumstances.

Paragraph 3 sparked heated debate in the plenary, with some members referring to historical practices of unreasonable and coercive demands by powerful States, and even questioning the entire legal concept. Alternatively, other members stated that proportionality was implicit throughout the text, and the limitation of "dignity" in the 1996 draft and "humiliating" in the Special Rapporteur's proposal were subjective and undermined the legal principle of "full reparation." Ultimately, the plenary agreed that appropriate examples in modern State practice did support the doctrine, and the Drafting Committee kept important limitations foreseen in the Special Rapporteur's proposal in light of past political coercion inconsistent with the equality of States.

Art. 39: Interest

Cursorily referred to in Article 44 (2) of the 1996 draft on compensation, the Drafting Committee expanded on the issue in a separate Article 39, entitled "Interest".[18]

The Commission decided that interest was not necessarily part of compensation, but neither was it an autonomous form of reparation. Thus, paragraph 1 provides that interest shall be payable "on any principal sum"[19]. Furthermore, interest shall be payable "when necessary in order to ensure full reparation", and therefore is not automatic.

The Drafting Committee formulated the article in flexible terms, without specifying a detailed formula for the "interest rate and mode of calculation."[20]

Paragraph 2 indicates the date from which interest is to be calculated: from "when the principal sum should have been paid" "until the date the obligation to pay is fulfilled".

Art. 40[42]: Contribution to the damage

This separate article on contributory negligence was introduced by the Drafting Committee. Reformulated into one single sentence, it corresponds to Article 42 (2) of the 1996 draft.

As in the 1996 provision, contribution to the damage by "wilful or negligent action or omission" shall be taken into account in determining reparation[21]. However, the Drafting

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[17] See 3rd Report, paras. 173, 179-181.

[18] See 3rd Report, para. 214, upon which the present article is based; see also A/CN.4/488, pp.102,108,109; A/CN.4/496, p. 18 para. 125, and A/CN.4/504, p. 19, para. 71, for government comments requesting more detailed treatment of this issue.

[19] See 3rd Report, para. 213.

[20] See 3rd Report, paras. 201-212; commentary to Article 44 (1996 draft), paras. 24-26; Arangio Ruiz, 2nd Report (1989) pp. 23-30, paras. 77-105, discussing the diversity of approaches in practice and literature.

[21] See Commentary to article 42 (1996), para. 7, stating this phrase is drawn from Art. VI, para.1 of the

Committee reformulated "a national of that state on whose behalf the claim is brought" (1996 draft) into "in relation to whom reparation is sought" since reference to a "claim" seemed out of place in Chapter II.

The words "account shall be taken of" indicates that factors such as the degree of contribution to the damage and the factual circumstances are capable of reducing reparation. The Drafting Committee felt that the obligation of mitigation of damage was not clearly supported by international law, and will address this issue in the commentary.

4. Part Two, Chapter III: Serious breaches of essential obligations to the international community

Introduction

Chapter III of Part Two deals with the particular category of serious breaches of obligations of special importance, as introduced by the (in)famous Article 19 of the 1996 draft. The draft articles as adopted on first reading thus distinguished the category of "international crimes", defined as breaches "[…] of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime", from "international delicts", and in cases of "crimes" foresaw special consequences for the responsible State as well as for other States in Articles 51 to 53 of the 1996 draft.

This concept generated extensive debate in the literature[22] and numerous comments from governments,[23] as well as a highly controversial discussion in the Commission at its 1998 session.[24] The Commission turned out to be about evenly split on this issue and concluded its debate by adopting a compromise formula on how to further proceed in this matter.[25] In this year's session, the Commission had to resolve this difficult issue.

In his third report, the Special Rapporteur proposed to move away from the distinction between crimes and delicts and instead concentrate on obligations towards the international community as a whole and on the consequences that a serious breach of such obligations would entail. The Special Rapporteur offered this approach as a middle way on which consensus could be reached.

The Drafting Committee followed this proposal and deleted Article 19 as adopted on first reading while introducing a new Chapter III of Part Two on "Serious breaches of essential obligations to the international community". This chapter embodies two articles, the first providing a definition of this category of breaches (Article 41) and the second dealing with the specific consequences of those breaches for the responsible State and for other States (Article 42 [51, 53]).

Art. 41: Application of this Chapter

Convention on International Liability for damages caused by space objects.

[22] See 3rd Report, FN 722, para. 369, citing numerous recent publications.

[23] See A/CN.4/496 (1998), paras. 100 – 115; A/CN.4/504 (1999), paras. 23, 78 – 81.

[24] See Crawford's First Report (A/CN.4/490), paras. 43 – 101; and I.L.C. Report 1998 (A/53/10), paras. 241–331.

[25] The Commission addressed the issue in the following way: "… it was noted that no consensus existed on the issue of 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 question 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 and a possible category of the most serious breaches of international obligations could be sufficient to resolve the issue raised by Article 19 …". I.L.C. Report 1998 (A/53/10), para. 331.

Article 41 provides that Chapter III applies to State responsibility for "serious breaches of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests".

Paragraph 1 defines this special category of breaches with a three-part test: First, the breached obligation must be owed to the international community as a whole.

Second, the obligation must be essential for the protection of the fundamental interests of this community, and finally, the breach must be serious.

Paragraph 2 provides further clarification of the notion of "serious", by stating two criteria: The breach must involve "a gross or systematic" failure by the responsible State to fulfil the obligation, risking, second, "substantial harm to the fundamental interests protected thereby". The Drafting Committee chose the words "gross" and "systematic" to emphasize the quality and severity of the failure of the responsible State and to clarify that this paragraph does not intend to cover minor or disputed breaches.

Art. 42 [51,53]: Consequences of serious breaches of obligations to the international community as a whole

Article 42 [51,53] addresses the specific consequences arising from the serious breaches defined in the previous article. As in the articles of the 1996 draft, a distinction is drawn between additional damages for the responsible state (addressed in paragraph 1), and consequences for other States (paragraph 2). Paragraph 3 provides a without-prejudice clause reserving the consequences of Chapter II (on the forms of reparation) as well as other consequences which may arise under international law.

With regard to the additional consequences for the responsible State, the Special Rapporteur observed[26] that the consequences provided by Article 52 of the 1996 draft had either been eliminated during the second reading, or were trivial. After substantial discussion in the plenary[27] the Drafting Committee decided to introduce in paragraph 1 of Article 42 [51,53] the concept of "damages reflecting the gravity of the breach". The word "may" was chosen to convey that such damages were exceptional in practice and often subject to special regimes. Paragraph 1 intends to leave open the question whether damages reflecting the gravity of the breach are additional to those that are owed by the responsible state under Article 37 [44].

Paragraph 2 of Article 42 corresponds to Article 53 of the 1996 draft and provides three sets of obligations for other states in cases of serious breaches as defined in the previous article: Under subparagraph 2 (a) other states shall not recognize as "lawful" the situation created by the breach. Subparagraph 2 (b) provides that other states shall not "render aid or assistance to the responsible state in maintaining the situation … created" by the breach. Finally, subparagraph 2 (c) requires other states "to cooperate as far as possible to bring the breach to an end".

5. Part Two *bis*, The implementation of State responsibility

Chapter I: Invocation of the responsibility of a State

Introduction

Chapter I of Part Two *bis* deals with the invocation of the responsibility of States, and includes provisions on the definition of the "injured State" (Articles 43[40] and 49), on the

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[26] See 3rd Report, para. 408.

[27] See A/CN.4/L.593/Add.6, para. 32.

formalities of invocation (Articles 44, 45[22] and 46), and situations involving a plurality of states (Articles 47 and 48).

The key provisions correspond to Article 40 of the 1996 draft, defining the "injured State". The Commission agreed that Article 40 of 1996 was defective in several respects,[28] particularly in defining the "injured State" too broadly and thus entitling far too many States to claim the whole spectrum of remedies and take countermeasures. To solve these problems, the Special Rapporteur proposed the following distinction: On the one hand, there are "injured States" affected in their individual capacity, on the other, there are States not directly harmed but with a legal interest in the performance of the obligation.[29] Hence, the Drafting Committee addressed this distinction in two separate articles, Article 43[40] ("The injured State"), and Article 49 ("Invocation of responsibility by States other than the injured State").

Art. 43[40]: The injured State

Article 43[40] defines the State entitled to invoke responsibility in the narrow sense of the distinction. The article presents two ways in which a state can be "injured": subparagraph (a) covers the (rather unproblematic) bilateral context, in particular, breaches of obligations under a bilateral treaty, or under a multilateral treaty that gives rise to a bundle of bilateral relations.

Subparagraph (b) on the other hand distinguishes two different ways in which injury may come about in the multilateral context: (i) when the State is "specially affected"[30] by the breach (e.g., as the victim of an armed attack); (ii) when the breach affects "the enjoyment of the rights or the performance of the obligations of all the States concerned". The latter situation covers the exceptional cases of so-called "integral" or "interdependent" obligations, in case of which every State is affected because every State is complying with such obligations only on the assumption of reciprocal performance by other States (e.g. in the case of a disarmament treaty).

Art. 44: Invocation of responsibility by an injured State

Following the model of Article 65 of the Vienna Convention on the Law of Treaties, the Special Rapporteur proposed setting up formal requirements for an "injured State" to invoke responsibility, such as giving notice and specifying the form reparation should take.[31] The Commission, however, determined that rigid formal requirements in this area were not necessary because quiet diplomacy may be more effective in certain situations, and the International Court of Justice has not attached much significance to formalities.[32]

Thus, Article 44, paragraph 1, states only that the injured State "shall give notice" of its claim to the responsible State. The word "may" in paragraph 2 signifies that this provision sets forth optional requirements, such as the specification of the particular conduct sought regarding cessation (subparagraph 2(a)) and the forms of reparation elected (subparagraph 2(b)).

Art. 45[22]: Admissibility of claims

Article 45[22] embodies two established principles of international law regarding admissibility of claims. The responsibility of a State may not be invoked if the claim is not brought in accordance with the applicable rules on "nationality of claims" (subparagraph (a)) or

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[28] See 3rd Report, para. 96, discussing arguments such as the focus only on breaches of bilateral obligations and inconsistency of terminology; see also A/CN.4/L.593, Add.2, para. 6.

[29] See 3rd Report, para. 93.

[30] The wording "specially" affected, drawn from Article 60 (2) (b) of the Vienna Convention on the Law of Treaties, stresses the special adverse effect of the wrongful act on the injured State

[31] See 3rd Report, para. 238.

[32] See Case concerning Certain Phosphate Lands in Nauru, I.C.J. Reports, 1992 p. 240 at p. 253 (para. 31).

if the rule of exhaustion of local remedies applies, and available and effective local remedies have not been exhausted (subparagraph (b)).

Subparagraph (a) does not specifically identify applicable rules on nationality of claims; rather, these will be considered in the project on diplomatic protection by Special Rapporteur Dugard[33].

Subparagraph (b) corresponds to Article 22 of the 1996 draft, which has been deleted from Part One.

Art. 46: Loss of the right to invoke responsibility

Based on Article 45 of the Vienna Convention on the Law of Treaties, Article 46 deals with the "loss of the right to invoke responsibility".

Subparagraph (a) provides that a waiver is only effective if a claim is "validly waived" in an "unequivocal manner".

In subparagraph (b) the Drafting Committee introduced a flexible concept of unreasonable delay, focusing on the "conduct" of the injured State: Responsibility may not be invoked any longer if such conduct is considered as valid acquiescence in the lapse of the claim.

Art. 47 and Art. 48: Plurality of states

The Commission broadly agreed on the need to explicitly address the issue of a plurality of states in the context of State responsibility, and to distinguish cases dealing with a plurality of injured States (Article 47, "Invocation of responsibility by several States") from the cases involving a plurality of responsible States (Article 48, "Invocation of responsibility against several States").

Article 47 provides that where there are several injured states, each of them may "separately" invoke the responsibility for the wrongful act. Article 48, paragraph 1, states that, where there are several states responsible for the same wrongful act, "the responsibility of each state may be invoked in relation to that act".

Article 48, paragraph 2, provides a safeguard against double recovery, and a without-prejudice clause reserving the right of recourse towards other responsible States.

Art. 49: Invocation of responsibility by States other than the injured State

Returning to the distinction already noted in the introduction to this chapter, Article 49 deals with circumstances under which "any State other than an injured State" (as defined in article 43[40]) is entitled to invoke responsibility.

The Drafting Committee structured the article into three paragraphs: Paragraph 1 defines the category of "other States" thus entitled; paragraph 2 lists the various entitlements which these States may seek from the responsible State; and paragraph 3 is a link to the requirements set forth in Articles 44, 45 and 46.

The definition provided in paragraph (1) consists of two different settings.

Under subparagraph (a) the obligation breached must meet two criteria: First, it must be owed to a group of States including that State; and, second, it must be established for the protection of a "collective interest" of that group.

Subparagraph (b) refers to breaches of obligations "owed to the international community as a whole". The Drafting Committee avoided direct use of the wording "obligations *erga omnes*" as introduced by the International Court of Justice in the Barcelona

[33] See Chapter III of the present paper.

Traction judgement[34] because the Commission disagreed over the precise meaning of this phrase.

Paragraph (2) limits the entitlements of States not directly injured to cessation and assurances and guarantees (subparagraph (2) (a)) and allows reparation only in the interest of the (State resp. non-State) victims (subparagraph (2) (b)).

6. Part Two *bis*, Chapter II: Countermeasures

Introduction

Chapter II of Part Two *bis* addresses the controversial issue of countermeasures. Several members of the Commission continued to voice concern that smaller States might suffer the abuse of countermeasures by powerful States. However, the Commission agreed that in light of the use of countermeasures in actual State practice and the lack of generally applicable enforcement mechanisms in the international system, a well-regulated and balanced regime of countermeasures would be helpful in curbing abuse.

Thus the Drafting Committee decided to reformulate Chapter III of Part Two as adopted in 1996. It was moved to the newly introduced Part Two *bis* and now contains six articles.

Art. 50[47]: Object and limits of countermeasures

Article 50[47] defines the purpose of countermeasures and operates as a condition on Article 23[30] of Part One. The article contains three paragraphs.

Paragraph 1 states that the purpose of countermeasures is "to induce … [the wrongdoing state] to comply with its obligations under Part Two". Thus, countermeasures must not have a punitive function.[35] The opening clause indicates the exceptional character of countermeasures by using the phrase "may only". Since the Drafting Committee decided not to qualify "the wrongful act" as "manifest", the clause must be understood on the basis of objective criteria.

Paragraph 2 sets out the legal nature of countermeasures and their bilateral character, thus addressing the concerns of the Drafting Committee that countermeasures not target third States. The use of the word "suspension" of performance of obligations emphasizes the temporary nature of countermeasures.[36] The commentary will explain that the limitations and conditions for taking countermeasures do not apply to the distinct concept of retorsion.

Paragraph 3, inspired by Article 72 (2) of the Vienna Convention on the Law of Treaties, deals with the question of reversibility.[37] The Drafting Committee, however, did not state that all countermeasures must be reversible, which would have been too extreme a limitation. Hence, the limitation is that the "performance of the obligation" not be prevented from "resumption". The qualifying phrase "as far as possible" indicates the flexibility of this requirement.

Art. 51[50]: Obligations not subject to countermeasures

In his third report the Special Rapporteur suggested a distinction between obligations, "not subject to countermeasures" [proposed Article 47bis] and "prohibited

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[34] See ICJ Reports, 1970, p.3, at p.32 (paras. 33-35).

[35] See 3rd Report, para. 287.

[36] See 3rd Report, para. 324.

[37] See 3rd Report, para. 330.

countermeasures" [proposed Article 50]. However, the Commission did not maintain this distinction, and the Drafting Committee merged the proposed two articles into a single one, bearing the above title and addressing five categories of obligations.

The Drafting Committee divided the article into two paragraphs. The opening clause of Paragraph 1 provides that "[c]ountermeasures shall not involve any derogation" from the obligations listed in subparagraphs (a) – (e). The broad verb "involve" covers the subject, object and consequences of countermeasures. The word "derogation" indicates that countermeasures do not override the obligations in subparagraphs (a) – (e).

Subparagraph (a), corresponding to paragraph (a) of Article 50 of 1996 prohibits the threat or use of force as embodied in the Charter of the United Nations.

The Drafting Committee deleted paragraph (b) of the 1996 draft, involving "the territorial integrity and political independence of a State", since in the view of the Drafting Committee this issue is covered by subparagraph (a).

New subparagraph (b), corresponding to paragraph (d) of the 1996 draft, addresses the issue of human rights. The Drafting Committee preferred the qualifier "fundamental" instead of the broader term "basic"[38]. The provision is also to emphasize that countermeasures should remain essentially a matter between States, and have only minimal effects on private individuals.

In subparagraph (c), the Drafting Committee addresses the issue of humanitarian law with regard to reprisals. The Commission supported the view that this issue should be kept apart from subparagraph (b) on fundamental human rights[39].

Subparagraph (d), corresponding to subparagraph (e) of the 1996 draft, deals with peremptory norms of general international law. The Commission found that the language used in Article 43[40] and derived from the Barcelona Traction judgement, i.e., "obligations towards the international community as a whole", would be too broad and therefore kept the narrower concept of "peremptory norms".

Subparagraph (e) covers the "inviolability of diplomatic or consular agents, premises, activities and documents" and does not contain significant changes from paragraph (c) in the 1996 draft.

The Drafting Committee emphasized the significance of the reordering of the subparagraphs. The rewording and replacement of subparagraph (d) now indicates that the preceding subparagraphs (a) – (c) clearly relate to peremptory norms, while the subsequent subparagraph (e) is not. This implies that subparagraph (b) includes only "fundamental" human rights as peremptory norms.

Paragraph 2 provides that "applicable" dispute settlement mechanisms cannot be subject to countermeasures, and operate autonomously.

Art. 52 [49]: Proportionality

Article 52 [49] sets forth the basic requirement of proportionality as a condition for a lawful countermeasure.[40] The Drafting Committee reformulated the double-negative clause of the 1996 draft ("shall not be out of proportion"), and attempted to address the concern in the plenary that the article on proportionality incorporate the purpose of countermeasures,

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[38] The term "basic human rights" was criticised by States for not being clearly defined. A/CN.4/492, p. 16 (Japan); A/CN.4/488, p. 132 (United States).

[39] See 3rd Report, para, 341.

[40] See 3rd Report, para. 307, 308, citing government comments that the principle of proportionality is part of customary law, and crucial in preventing abuse stemming from the factual inequality of States.

namely to induce performance. Based on the wording in the Gabčíkovo-Nagymaros Case,[41] Article 52 [49] now requires that countermeasures be "commensurate with the injury suffered..." Although the article thus relates countermeasures primarily to the injury suffered, two further criteria must be "taken into account": the gravity of the wrongful act, and the rights in question. The Commentary will explain the broad scope of "rights in question" and affirm that these criteria are non-exhaustive.

Art. 53 [48]: Conditions relating to resort to countermeasures

Article 53 [48] generated a widespread divergence of opinion in the plenary, with particular controversy surrounding the link between countermeasures and dispute settlement in the 1996 draft. Disagreement also surfaced regarding the maintenance of "effective" countermeasures and "preventing premature resort" thereto[42]. Finally, the Drafting Committee structured the article in six paragraphs, following the sequence of the development of a dispute.

The first stage is encompassed in paragraph 1: Before taking any countermeasures, an injured State must call on the responsible State to comply with its obligations under Part Two. Thus, the target State must be given notice of its wrongful act, in light of the exceptional nature and potential damage of countermeasures.

Paragraph 2 requires that before taking countermeasures, the injured State must notify the responsible State of its "decision to take countermeasures" and "offer to negotiate with that State". Notification as provided in paragraph 1 could incorporate the announcement to take countermeasures, and thus also fulfil the action required by Paragraph 2[43].

Paragraph 3 deals with the thorny issue of "interim measures of protection" foreseen in Article 47 (1) of the 1996 draft. The Drafting Committee changed the terminology to "provisional and urgent countermeasures", thus emphasizing that these measures are subject to the same limitations as full-blown "countermeasures" to the extent that their purpose is not defeated. Accordingly, provisional and urgent countermeasures are subject to the limitations foreseen in paragraph 1, but not to those in paragraph 2. The word "urgent" conveys the crucial temporal element, since the injured State must act quickly "to preserve its rights".

The purpose of paragraph 4 is to discourage countermeasures while "negotiations are being pursued in good faith and have not been unduly delayed." This provision, however, does not apply to provisional and urgent countermeasures.

Paragraph 5 is a stricter formulation of Article 48 (3) of the 1996 draft. Countermeasures must cease, or if taken must be suspended, if two conditions are met: (a) "the internationally wrongful act has ceased", *and* (b) "the dispute is submitted to a court or tribunal which has the authority to make decisions, binding on the parties."

Paragraph 6 states in general and flexible terms that the limitations in paragraph 5 do not apply if the responsible State fails to implement the dispute settlement procedures "in good faith". This provision covers not only situations where a competent tribunal gives an indication or order of provisional measures and the responsible State fails to comply, but also situations where a State party fails to cooperate in the establishment of the relevant tribunal, or fails to appear once such a tribunal has been established.

Article 54: Countermeasures by States other than the injured State

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[41] I.C.J. Reports 1997 p. 7 at p. 56 (para. 85).

[42] See 3rd Report, para. 299.

[43] The requirement to "offer to negotiate" is less stringent than the requirement in the 1996 draft, that a State "shall fulfil its obligation to negotiate".

The Special Rapporteur noted that the Draft articles adopted on first reading allowed any injured State, broadly defined, to take countermeasures on its own account, without regard to the actions of other States or the views or responses of the victim State.[44] To limit these deficiencies, and to address other issues in this complex area of law, the Special Rapporteur proposed two new articles, 50A and 50B, dealing with countermeasures on behalf of an injured State, and countermeasures in cases of serious breaches of obligations to the international community as a whole, respectively.[45] The plenary agreed with the general approach of the Special Rapporteur, but extensive debate ensued over suggestions for improvement.

The Drafting Committee reformulated the Special Rapporteur's proposals into a single Article 54, consisting of three paragraphs. One of the central questions regarding countermeasures in cases involving a multiplicity of affected states is the distinction between types of breaches: breaches of obligations affecting several states (Article 54, paragraph 1), and serious breaches of obligations owed to the international community as a whole (Article 54, paragraph 2). The Drafting Committee viewed these two situations as potentially overlapping, since a State entitled to take countermeasures under paragraph 2 may also be entitled to take countermeasures under paragraph 1.

Paragraph 1 states that "Any State entitled under Article 49, paragraph 1 to invoke the responsibility of a State" (i.e., States parties to a multilateral obligation "other than the injured State") may take countermeasures. Furthermore, according to paragraph 1, in cases of multilateral obligations *not* involving serious breaches of obligations owed to the international community as a whole under Article 41, States entitled to invoke responsibility under Article 49 may only take countermeasures if there is an "injured State". This requirement attempts to avoid the abuse of countermeasures for minor breaches.[46] Finally, in order to emphasize the significant role of the "injured State",[47] paragraph 1 sets forth two conditions: Countermeasures may only be taken "at the request and on behalf" of the injured State, and only "to the extent that that State [the injured State] may itself take countermeasures under this Chapter".

According to paragraph 2, involving cases of serious breaches of obligations owed to the international community as a whole (e.g., within the scope of Article 41), "any State may take countermeasures . . . in the interest of the beneficiaries of the obligation breached". The Special Rapporteur had limited his proposed Article 50B to situations where "no individual State is injured" by the breach. The Drafting Committee felt that this formulation was too narrow, and thus the "beneficiaries" mentioned in paragraph 2 may include State or non-State actors.

Paragraph 3 addresses the important concern of the Commission to "coordinate" the actions of each State taking countermeasures, especially in light of the key requirement of proportionality.[48] Due to a host of complex questions, including the rapid evolution of international law on this issue, and its high dependence on the factual circumstances, the Drafting Committee formulated paragraph 3 generally and flexibly, merely requiring that the "States concerned shall cooperate" in order to ensure that the conditions for taking countermeasures under this chapter are fulfilled.

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[44] See 3rd Report, paras. 109, 104, 390.

[45] See 3rd Report, para. 413.

[46] See 3rd Report, para. 399, noting that "despite the selectiveness of practice [involving collective countermeasures], none of the instances concerns isolated or minor violations of collective obligations."

[47] See 3rd Report, para. 400, assessing State practice: "the victim State's reaction seems to have been treated as legally relevant, if not decisive, for all other States."

[48] See 3rd Report, para. 402.

Article 55[48]: Termination of countermeasures

This article corresponds to article 48, paragraphs 3 and 4 of the 1996 draft. Article 55 requires the termination of countermeasures when the responsible State has complied with its obligations under Part Two.

7. Part Four: General Provisions

Introduction

As mentioned earlier, Part Four combines, as a concluding part, four articles of a general character under the title "General Provisions", to clarify certain matters with which the draft articles do not deal, and to spell out certain relationships between the draft articles and other areas of international law.

Article 56 [37]: Lex specialis

Article 56 [37] indicates the relationship between the draft articles on State responsibility, which are to codify and develop the general international law on the matter and more specific rules or regimes of responsibility. To the extent that such "special rules of international law" on State responsibility apply, those rules override the draft articles.

Article 57: Responsibility of or for conduct of an international organization

Article 57 did not exist in the draft articles as adopted on first reading. Already in 1998[49], however, the Commission agreed a to include a without-prejudice clause on "the responsibility under international law of an international organization, or of any state for the conduct of an international organization".

Article 58: Individual responsibility

This provision intends to clarify that the draft articles do not address the "question of the individual responsibility under international law of any person acting in the capacity of an organ or an agent of a state".

Article 59[39]: Relation to the Charter of the United Nations

In the Plenary discussion some members expressed the view that article 39 of the 1996 draft could be deleted for the reason that Article 103 of the Charter of the United Nations sufficiently resolved the matter. However, the Drafting Committee preferred to retain it as a "without-prejudice" clause, and broadened its scope by stating that these articles are without prejudice to the "Charter of the United Nations", rather than only "the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security", as formulated in the 1996 draft.

[49] See I.L.C. Report… 1998 (A/53/10), para. 424.

III. DIPLOMATIC PROTECTION[50]

A. Introductory Remarks

During its fifty-second session, the International Law Commission considered the Special Rapporteur's first report[51] on Diplomatic Protection. Following the discussion in plenary of eight draft articles, the Commission convened an informal consultation to discuss Articles 1,3 and 6.[52] The Commission then considered the results of this consultation and decided to refer draft articles 1,3 and 5 to 8 to the Drafting Committee.

B. The Proposed Articles[53]

Article 1:

Draft Article 1 describes the topic of diplomatic protection. Accordingly, much of the Commission's discussion was of a general nature. For example, there was disagreement about the process to be used to invoke diplomatic protection. There was also a difference of opinion about whether diplomatic protection included steps to prevent an injury or only steps to remedy an injury that had already occurred. Similarly, there was discussion about whether diplomatic protection was a right of an individual or of a State.

There was considerable discussion about the term "action". Several decisions of the Permanent Court of International Justice and the International Court of Justice distinguish between "diplomatic protection" and "judicial proceedings" as forms of action, while the majority of academic scholarship regards these as indistinguishable.[54] According to the Special Rapporteur, a clearer definition of the term is needed.

Other comments focused on the relationship between state responsibility and diplomatic protection, especially in terms of synchronizing the Commission's use of terminology in its treatment of these two topics. Members also offered drafting suggestions to prevent confusion between diplomatic protection and the privileges and immunities enjoyed by diplomats. It was agreed that a more precise delineation of the scope of the topic was needed.

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[50] Diplomatic protection is a relatively new topic for the Commission. At its forty-eighth session (1996), the I.L.C. decided that diplomatic protection was ripe for codification and progressive development (*Official Records of the General Assembly, Fifty-first Session*, A/51/10, para. 249) The current report speaks of "one of the most controversial subjects in international law." *Report*, para 10.

That same year, the UN General Assembly invited the Commission to discuss the topic and to indicate its future direction (Resolution 51/160 of December 16, 1996). In 1997, the Commission appointed Mr. Mohamed Bennouna as Special Rapporteur on the topic. In resolution 52/156 of December 15, 1997, the General Assembly endorsed the Commission's decision to include the topic on its agenda for the quinquennium.

In 1998, the Commission considered Special Rapporteur Bennouna's preliminary report on the topic. (A/CN.4/484) It then established a Working Group to consider approaches to the topic, given the conclusions and questions raised in the report. The Commission approved the recommendations of the Working Group.

Mr. Bennouna was subsequently elected as a judge to the International Criminal Tribunal for the Former Yugoslavia and resigned from the Commission. In 1999, the Commission appointed Professor Christopher J. R. Dugard as Special Rapporteur for the subject. In addition, the Commission considered the topic in an informal working group the same year.

As a note of introduction, and in contrast to the previous presentation of the topic, the present Special Rapporteur in his first report emphasized that he considered diplomatic protection a "weapon in the arsenal of human rights protection" and had formulated the draft articles with this perspective in mind. *Report*, para 32.

[51] A/CN.4/506 and Corr. 1 and Add. 1 [hereinafter referred to as "1st *Report"*]. Due to time constraints, consideration of the Addendum was deferred until next year's session.

[52] See A/CN.4/L.594 para. 89 for a summary of the consultations.

[53] See Annex II for the full text of the draft articles.

[54] See 1st Report, para 42.

Article 2

Not surprisingly, draft Article 2, which addresses the threat or use of force by a State in order to protect its nationals, provoked a heated debate. Professor Dugard noted that his report was different from that of the previous Special Rapporteur which had declared categorically that States had no right to resort to the use of force in situations of diplomatic protection.[55] The Special Rapporteur agreed that Article 2, paragraph 4, of the Charter of the United Nations prohibits the use of force except in cases of self-defense. However, in his view, self-defense includes the right of a State to protect its nationals. In his view, the proposed article more closely reflected State practice than the view of his predecessor.[56]

Commission members expressed severe concerns. First, some were troubled by the lack of an absolute rejection of the use of force, especially in view of the historical abuse of force by powerful States. Second, some members stated that the issue of use of force was not part of diplomatic protection pure and simple and was therefore beyond the scope of the ILC mandate. Finally, other members commented that diplomatic protection should be explicitly defined as a procedure for the peaceful settlement of disputes, thereby removing the need to include any discussion of the use of force in the article.

The Special Rapporteur maintained that States do and will continue to use force to protect their nationals abroad. Although the draft article had attempted to limit the scope of this practice, it was clear that most members of the Commission had concerns about it. Accordingly, this article was not referred to the Drafting Committee.

Article 3

This draft article addresses a State's right to decide whether and how to engage in diplomatic protection. It also attempts to codify the fiction that diplomatic protection deals with injuries to States as mediated through injuries to their nationals. According to the Special Rapporteur, this perspective, although it contained internal inconsistencies, was accepted as customary international law and should therefore be retained.[57]

Generally, members agreed with the principle behind article 3. However, several questions were raised. First, there was concern that the traditional fiction was being too narrowly construed. Second, some members wondered whether the expansion of the legal rights of individuals might in some way compromise the *Mavrommatis* doctrine.[58] Finally, some were concerned that the discretionary power of States to exercise diplomatic protection was not stated with sufficient clarity.

Article 4

Draft Article 4 is among the more controversial sections of the report. Traditionally, States have had unlimited discretion in deciding whether to undertake diplomatic protection. However, recent scholarship has challenged this liberty.

The Special Rapporteur's draft article questions the traditional view by providing individuals with a right to invoke the diplomatic protection of their State of nationality. However, the article circumscribes this right to only the most serious cases, particularly when there is a breach of *jus cogens* norms;[59] the right does not extend to cases where a State's overriding

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[55] See 1st Report, para 51.

[56] See 1st Report, paras 52, 58.

[57] See generally the Mavrommatis Palestine Concessions, the Panevezys-Saldutiskis Railway and the Nottebohm cases. Furthermore, the Special Rapporteur emphasized that article 3 is " more concerned with the utility of the traditional view than its soundness in logic."; 1st Report, para. 68.

[58] For example, in human rights law.

[59] See 1st Report, para 89.

interests conflict;[60] where an individual has access to any competent international court or tribunal;[61] where an individual enjoys protection by another State;[62] and finally, where the injured person does not possess the effective and dominant nationality of the State concerned.

During the debate, some members were concerned that too little State practice and no *opinio juris* existed on the matter of diplomatic protection as of right. To others, the description of the scholarly challenge to existing law was overstated. Some other members were concerned about the open-ended scope of the new right. Finally, according to some, this draft article, like draft Articles 1 and 3, seemed too narrowly concerned with transforming diplomatic protection into a tool for human rights protection. Ultimately, the article was not referred to the Drafting Committee.

Article 5

This draft article clarifies and expands the *Nottebohm* principle that there should be an "effective" or "genuine" link between the State of nationality and the individual seeking protection. While he recognized *Nottebohm* as controlling, the Special Rapporteur explained that two recurring challenges to the case demand a clarification of this principle.[63]

According to the Special Rapporteur, the modern world is fundamentally different from earlier times because of the greater quantity and complexity of international migration. People sometimes have no effective link with any State and therefore are unable to request diplomatic protection, thereby limiting the *Nottebohm* principle's usefulness. Thus, creating a broader definition of "effective link" would benefit those who could otherwise not utilize this provision.

Most members agreed that the phrase "by birth, descent or bona fide naturalization" contained appropriate and acceptable criteria for assessing the necessary connection to a State. Some members thought, however, that specifying these three avenues for acquiring nationality was misleading.

Similarly, some members stated that Article 5 did not consider situations which eliminate the ability of a person to demonstrate any effective link with a State.[64]

There was some discussion about the importance of residence for diplomatic protection. Some members questioned limiting such protection to a tie of nationality, observing that residence is often as strong a connection as nationality. Opposing this viewpoint, other members disagreed with giving residence too much significance. Proponents of this perspective raised the concern that a person might lose the possibility of diplomatic protection by residing in another country for a long time.

As a drafting point, the Special Rapporteur agreed with the suggestion to remove the explicit listing of birth, descent and naturalization. He concluded that there had been no significant challenge to the principle expressed.

Article 6

Dual or multiple nationality is a reality of contemporary international society, even if State practice exhibits contradictory approaches to these phenomena. Therefore, defining the relationship between two or more States of nationality in cases of diplomatic protection is important. In particular, it is critical to decide whether one State can assert diplomatic protection against a second or third State of nationality. Judicial opinion and scholarship are divided on this

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[60] *Id*., para 90.

[61] *Id*., para 91.

[62] *Id*., para 92.

[63] First, there had been concern about the legality of Liechtenstein's conferral of nationality on Nottebohm. Second, Nottebohm clearly had closer ties with Guatemala than with Liechtenstein.

[64] Such as illiteracy, or a lack of travel documents due to war, or unregistered births.

matter, but some recent writing and jurisprudence seems to support the principle that one home State could take action against a second home State of a person with dual nationality, depending on the dominant nationality of the claimant.

The discussion highlighted a divergence of opinion. Some members supported the article and the general use of the reference to "dominant and effective nationality." Others, however, expressed general concern with the principle. Another group approved of the principle but wanted specific changes in the clauses. There was also some debate whether the principle in Article 6 accurately reflected relevant customary international law.

A part of the discussion focused on the meaning and use of the phrases "dominant" and "effective" nationality. Case law has often treated these terms as different ways of expressing the same concept. In the discussion, however, "dominant" carried more weight with the majority of the members. They stated that the phrase expressed a strength and supremacy of relationship that the latter term lacked.

The Special Rapporteur concluded that there was great variety of opinion on this draft article. While acknowledging its controversial aspects, he believed, however, that the topic must be included in the draft articles because of the problematic implications if the question was left unanswered. In the informal consultation held on this issue it was accepted that the principle embodied in Article 6 accorded with current trends in international law. As a drafting matter, it was suggested to move this provision so that it followed current draft Article 7.

Article 7

Draft Article 7 addresses the capacity of States to exercise diplomatic protection against third states on behalf of nationals with dual citizenship. Importantly, it allows States to forgo proving an effective link with a national. Because of the variety of opinions on this matter, the Special Rapporteur called his proposal a "compromise rule".[65]

Most members agreed with the concept of the draft article. However, some commented that its assumptions conflicted with the emphasis on the principle of dominant or effective nationality recognized in Article 6. Because of this ambiguity, it was recommended that an escape clause be added to prevent a State from exercising diplomatic protection in cases where there was no genuine or effective link with an individual asserting the claim.

Article 8

As an example of progressive development, draft Article 8 extends diplomatic protection to groups that may have minimal or no ties of nationality to any State. Traditionally, international law did not provide for the diplomatic protection of refugees and stateless people.[66] However, recent developments point in a different direction.

There was considerable support for the rule expressed in draft Article 8. However, several members doubted whether this article should be included in the report. Their view rested on the premise that States deliberately did not want to extend protection to these groups. Other members were concerned about the possible burden that this article might put on States which admitted refugees. They questioned whether this requirement might have negative long-term results, as States might begin to refuse to admit refugees if it appeared that providing diplomatic protection was a step toward granting nationality.

The Special Rapporteur rejected several of the counterarguments. He said that host

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[65] See 1st Report, para 170. However, the term "compromise" was challenged during plenary discussion as giving a limited and incorrect view of the state of contemporary law.

[66] See Dickson Car Wheel Company v. United Mexican States, 4. R.I.A.A. 699, p. 678, which stated that "[a] State. . .does not commit an international delinquency in inflicting an injury upon an individual lacking nationality. . . "

States always had discretion to exercise protection. Furthermore, he did not believe that this provision would be abused, given the reality of refugees' lives upon arriving in a host State.

C. Future Work:

The Special Rapporteur's report listed several matters that would be addressed at a later date, including a discussion about the relationship of obligations *erga omnes* with diplomatic protection, or about the requirement of continuous nationality and the transferability of claims.[67] Furthermore, future reports might deal with the exhaustion of local remedies, the waiver of diplomatic protection on behalf of an injured person, the denial of consent to diplomatic protection on behalf of an injured person, and the protection of corporations.

IV. UNILATERAL ACTS OF STATES[68]

A. Introductory Remarks

At its 52nd session, the ILC continued the work on the topic of unilateral acts of states, begun in 1997. It considered Special Rapporteur Mr. V. Rodríguez Cedeño's third report,[69] which made several revisions to the second report[70] of the previous year.

To provide the Special Rapporteur with a basis for assessing state practice, in 1999 the Commission had requested the Secretariat to distribute a questionnaire to Governments regarding their practice in the area of unilateral acts.[71] In particular, the questionnaire inquired as to the categories of such acts, capacity to act on behalf of the State through unilateral acts, formalities for such acts, their content, legal effects, importance, usefulness and value, rules of interpretation that apply to such acts, and their duration and possible revocability. The questionnaire was transmitted to Governments on 30 September 1999 with a request for a reply by 1 March 2000. At the time of the preparation of the third report, no information had yet been received from governments. However, as of 6 July 2000, 12 governments had transmitted replies.[72]

The third report restructured the organization of the topic presented in the second report and made several additions. The report deleted former draft Article 1, concerning the scope of the draft articles, and replaced it by a new draft Article 1 on the definition of unilateral acts. The report further presented preliminary issues such as the relevance of the topic, its relationship to the law of treaties, and the question of estoppel. It revised the definition of unilateral acts in Article 1 (replacing previous draft Article 2). It also revised the

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[67] These two topics are the subject of A/CN.4/506/Add.1 (Draft Article 9) which was not considered this year.

[68] In 1996 the General Assembly, in Resolution 51/60, para. 13, invited the Commission to examine the topic "Unilateral Acts of States" and to indicate its scope and content. At its forty-ninth session, in 1997, the Commission appointed Mr. Victor Rodríguez Cedeño as Special Rapporteur. At its fiftieth session, in 1998, the Commission considered the Special Rapporteur's first report and decided to reconvene the Working Group on the topic. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of unilateral acts and the future work of the Special Rapporteur. The Commission considered and endorsed the report of the Working Group. At its fifty-first session, in 1999, the Commission considered the Special Rapporteur's second report on the topic.

[69] A/CN.4/505. Hereinafter, "3rd Report". For the text of the draft articles proposed in the third report see *infra* Annex III.

[70] A/CN.4/500 and Add.1.

[71] See 3rd Report, para. 5.

[72] Argentina, Austria, El Salvador, Finland, Georgia, Germany, Israel, Italy, Luxembourg, Netherlands, Sweden, and the United Kingdom of Great Britain and Northern Ireland. *See* A/CN.4/511, para. 2.

draft articles dealing with the capacity of States to formulate unilateral acts (Article 2), persons authorized to formulate unilateral acts on behalf of the state (Article 3), and the subsequent confirmation of an act formulated by a person not authorized for that purpose (Article 4). In addition, the Special Rapporteur proposed a new version of a draft article on the invalidity of unilateral acts (Article 5).

B. Discussion in Plenary

In plenary debate, while some members of the Commission renewed their doubts about the suitability of the topic for codification at the present time, given its abstract nature, the enormous diversity in state practice and the unsatisfactory response by member States to the ILC's questionnaire, ultimately there was general agreement that the Commission should continue its task.

There was substantial debate on the definition of unilateral acts proposed in new draft Article 1, particularly concerning the requirements of the unequivocal nature of the act, its autonomy, and the intent of the acting State to produce legal effect. Further extensive debate focused on the legal effects of silence in connection with unilateral acts and their acceptance by other States. New draft Article 5, on the invalidity of unilateral acts, was criticized by members who felt that the Commission should first deal with the concept of validity of unilateral acts before considering a draft article on their invalidity. One member expressed the potential promise and pitfalls of Article 5 by describing it as "either a gold mine or a minefield."[73] Further criticism focused on the Special Rapporteur's proposal in paragraph 7 of Article 5 relating to invalidity of an unilateral act in case of conflict with a decision of the Security Council.

At the conclusion of its debate, the Commission decided to reconvene the Working Group on unilateral acts to continue consideration and study of draft Article 5. Draft Articles 1 to 4 were referred to the Drafting Committee.[74] However, due to time constraints, the Drafting Committee had to defer treatment of the subject to the 2001 session.

V. RESERVATIONS TO TREATIES[75]

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[73] ILC plenary debate 31 May 2000.

[74] See A/CN.4/L.595, para. 125.

[75] In its Resolution 48/31 of 9 December 1993, the General Assembly endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties." At its forty-seventh session in 1995, the Commission, after discussing the first report of Special Rapporteur, Professor Alain Pellet (A/CN.4/470 and Corr.1), determined that work on this topic should result in a user-friendly Guide to Practice that would supplement the relevant provisions of the 1969, 1978, and 1986 Vienna Conventions on the Law of Treaties. In 1997, following debate on the Special Rapporteur's second report (A/CN.4/477 and Add.1), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. At its fiftieth session (1998), the Commission had before it the Special Rapporteur's third report, which dealt with definitions of reservations and interpretative declarations. The Commission considered part of the report and referred eleven draft guidelines to the Drafting Committee. On the recommendation of the Drafting Committee, the Commission provisionally adopted six additional draft guidelines, along with commentaries to accompany all the draft guidelines adopted. At its fifty-first session (1999), the Commission again had before it that part of the Special Rapporteur's third report that it had been unable to consider at the fiftieth session, and the Special Rapporteur's fourth report, which continued to deal with the definition of reservations and interpretative declarations. The Commission referred eleven draft guidelines to the Drafting Committee. On the recommendation of the Drafting Committee, the Commission adopted on first reading seventeen of the proposed draft guidelines and a new version of two previously adopted draft guidelines.

A. Introductory Remarks

At its 52nd session, the ILC considered Special Rapporteur Alain Pellet's fifth report.[76] The ultimate goal of the ILC project on reservations to treaties is to produce a Guide to Practice relating to the legal regime of reservations and interpretative declarations.[77] It is the hope and expectation of the Commission that such a Guide would be useful to states, as reservations are both widely employed in state practice, and, in certain regards, highly controversial.

The fifth report reviews the earlier work of the Commission, including the outcomes of the first and second reports, the consideration of the third report by the Commission, and the consideration of all earlier reports by the Sixth Committee. It also discusses action taken by the Asian-African Legal Consultative Committee and the Council of Europe in response to the Commission's work. In terms of subject-matter, the fifth report deals with alternatives to reservations and interpretative declarations, and with the formulation modulation and withdrawal of reservations and interpretative declarations.[78]

Over the course of the session the Special Rapporteur presented four addenda to his report. Addendum 1 deals with alternatives to reservations and interpretative declarations; specifically, different procedures for modifying or interpreting treaty obligations, and the distinction between reservations and other procedures for modifying the effects of a treaty. [79] These matters were discussed in plenary and then referred to the Drafting Committee.

Addendum 2 contains the consolidated text of all draft guidelines dealing with definitions adopted on first reading or proposed in the fifth report.[80]

Addenda 3 and 4 deal with the issue of how to formulate, modify, and withdraw a reservation or interpretative declaration, including the question of how to treat "late" reservations. Although the ILC had originally intended to take up these matters at the present session, time constraints led the Commission to defer general debate until 2001.

B. The Draft Guidelines

The Drafting Committee revised and adopted several of the draft guidelines proposed by the Special Rapporteur.[81] Specifically, the Drafting Committee adopted draft guidelines 1.1.8, 1.4.6, 1.4.7, 1.7.1, and 1.7.2.

Draft Guideline 1.1.8

Draft guideline 1.1.8 classifies as a reservation a unilateral statement by a State or international organization made under an exclusionary clause of a treaty, i.e., a clause that expressly authorizes the parties to exclude or to modify the legal effects of certain provisions of the treaty. The title of the draft guideline was changed from "Reservations *formulated* under exclusionary clauses" to "Reservations *made* under exclusionary clauses." The

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[76] A/CN.4/508 and Add.1-4. Hereinafter "5th Report".

[77] See 5th Report, para. 25. Some members expressed concern that the Guide to Practice would assist states in limiting their treaty obligations by providing them with a "how-to manual" in how to avoid maximum commitment. However, the Special Rapporteur defended the proposed Guide, arguing that it would merely systematize actual State practice. In addition, he pointed out that reservations and their alternatives are useful, as their employment increases the number of States willing to become party to a particular treaty.

[78] A/CN.4/L.596, para. 16.

[79] A/CN.4/508/Add.1.

[80] A/CN.4/508/Add.2.

[81] The texts adopted by the Drafting Committee can be found in A/CN.4/L.599 and A/CN.4/L.596/Add.2, as well as *infra* Annex IV.

Special Rapporteur explained that, in accordance with the terminology of the 1969 Vienna Convention, the term "formulate" referred to a stage at which reservations did not yet meet all the conditions required to produce their full effects, while the term "made" included the stage at which full effect was achieved.[82]

A further change made by the Drafting Committee consisted in the deletion of language relating to reservations put forward by a State when making a notification of succession. It was decided that there was no need to supplement the Vienna Conventions' treatment of the subject of state succession.

Draft Guideline 1.4.6

Draft guideline 1.4.6 (merging former draft guidelines 1.4.6 and 1.4.7) considers unilateral statements made under an optional clause[83] and classifies such statements as lying outside the scope of the Guide to Practice. It also states that a restriction or condition contained in such a statement does not constitute a reservation. The Drafting Committee simplified the Special Rapporteur's language by revising the original text, "an obligation that is not imposed on them solely by the entry into force of the treaty" to read, "an obligation that is not otherwise imposed by the treaty."

Draft Guideline 1.4.7

Draft guideline 1.4.7. (replacing former draft guideline 1.4.8) states that a unilateral statement made by a State or an international organization, in accordance with a clause contained in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is also outside the scope of the present Guide to Practice.

Draft Guideline 1.7.1

Draft guideline 1.7.1 (merging former draft guidelines 1.7.1, 1.7.2, 1.7.3 and 1.7.4) deals with alternative procedures that States or international organizations may employ in order to achieve results comparable to those achieved by reservations. These are listed in two sub-headings in the new draft guideline:

(1) The insertion in the treaty of restrictive clauses purporting to limit its scope or application

(2) The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

Former draft guideline 1.7.1 was revised by replacing "modify the effects of provisions of a treaty" with "achieve results comparable to those effected by reservations" and replacing "contracting parties" with "States or international organizations." Several of the proposed alternatives to reservations in former draft guideline 1.7.2 were deleted. These include the proposed sub-headings dealing with:

(1) escape clauses that allow the contracting parties not to apply general obligations in specific instances and for a specific period of time;

(2) statements made under the treaty by which a contracting party expresses its willingness to be bound by obligations that are not imposed on it solely by its expression of consent to be bound by the treaty;

(3) the suspension of treaty obligations in accordance with the relevant provisions of the 1969 and 1986 Vienna Conventions; and

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[82] A/CN.4/L.596/Add.1, para. 23.

[83] An optional clause is defined as "a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty."

(4) amendments to the treaty entering into force for only certain parties.

Former draft guideline 1.7.3, which had stated that restrictive clauses within a treaty (i.e. clauses that purport to limit the scope or application of the obligations created by the treaty) do not constitute reservations, was deleted. Former draft guideline 1.7.4 concerning so-called "bilateralized reservations" was revised by the Drafting Committee and incorporated into the second sub-heading of the new draft guideline 1.7.1.

Draft Guideline 1.7.2

Draft guideline 1.7.2 (replacing former draft guideline 1.7.5) deals with alternative procedures that States or international organizations may employ in order to achieve results comparable to those effected by interpretative declarations. These include (1) the insertion in the treaty of provisions purporting to interpret the same treaty; and (2) the conclusion of a supplementary agreement. The Drafting Committee substituted the term "States or international organizations" for "the contracting parties" and added the word "also" for clarity. The two alternatives were offset into two distinct sub-headings, and the language was altered slightly for ease of comprehension.

VI. INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES) [84]

At its fifty-second session the Commission had before it a Report of the UN Secretary-General containing the comments and observations received from Governments on the set of 17 draft articles adopted at first reading in 1998.[85] The Commission also received the third report by the Special Rapporteur, containing, in an Annex, revisions to the text of the draft articles proposed in consequence of the discussion in a Working Group established in May 2000; the entire product to be adopted in the form of a Framework Convention.[86]

The revised text starts with a preamble, which was felt to be appropriate for such a convention. It seeks to accommodate the views of several States that favored placing emphasis on the right to development. The preamble also seeks to express ideas that pervade the draft articles, i.e., balancing of the right to development with the concern for environment, as well as the importance of international cooperation and the limits to freedom of States. There was a view in the Commission during the plenary discussion, however, that the preamble needs to contain references to positive international law, since there existed a number of conventions containing provisions that bear on the draft articles. There was also an observation that the preamble favored freedom of action too heavily.

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[84] The "liability" topic originated from the Commission's discussions on state responsibility, particularly on draft Article 35 (now 27) of Part One. It was placed on the ILC's agenda in 1978, at which time Mr. Quentin-Baxter was appointed Special Rapporteur. Between 1980 and 1984, Mr. Quentin-Baxter submitted five reports. After his death, he was succeeded as Special Rapporteur by Mr. Julio Barboza, who provided the Commission with 12 reports between 1985 and 1996. From 1988 onwards these reports contained draft articles on various aspects of the topic. In 1992 the Commission established a Working Group to consider the scope of the topic, and, on the basis of its recommendations, decided in the same year to complete work on prevention of transboundary harm first and then to proceed with remedial measures. In 1994-5, the Commission at first reading provisionally adopted several draft articles. In 1996, a new Working Group was established, which, at the same session, submitted a report containing a complete picture of the topic, relating not only to the issue of prevention 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*, Supplement No.10 (A/51/10), pp.235ff.).

In 1997, at its forty-ninth session, the "new" Commission decided to divide the "liability" topic. Since the Commission thought that there was a need for substantial comments from Governments on the issue of liability, it decided to postpone consideration of that issue and meanwhile to concentrate on prevention, which was less contentious and which had already received considerable attention in the ILC. At the same session Mr. Pemmaraju Sreenivasa Rao was appointed as Special Rapporteur.

Mr. Rao's first report (Docs. A/CN.4/487 and Add.1), presented to the Commission in 1998, reviewed the work done by the ILC on the topic since 1978, focusing on the scope of the draft articles to be elaborated and on the analysis of a number of substantive and procedural obligations. Since the Commission already had before it the complete set of draft articles with commentaries on prevention provisionally adopted in 1996, Mr. Rao recommended that Commission review these articles as a starting point for its future work on the topic. Therefore, the Commission adopted at the first reading a set of 17 draft articles on Prevention of Transboundary Damage from Hazardous Activities (see Report of the International Law Commission on the work of its fiftieth session, 20 April-12 June 1998, 27 July-14 August 1998. *General Assembly Official Records, Fifty-third Session*, Suppl. No. 10 (A/53/10), pp.18ff.), and invited at the same time comments and observations by Governments. The articles were drawn from the text of the 1996 articles; however, the text was subjected to careful scrutiny resulting in a number of changes.

Mr. Rao's second report, presented at the fifty-first session in 1999 (Doc. A/CN.4/501), discussed the questions submitted to Governments and their reactions. The report also addressed the obligation of due diligence and reviewed the treatment of the topic of liability in the work of the Commission. The Commission itself reviewed in 1999 three options for its future work and chose to finish prevention instead of terminating the work altogether or proceeding with work on liability.

[85] A/CN.4/509

[86] For the text see infra Annex V.

Following substantial analysis in his report, the Special Rapporteur spoke out in favour of deleting the phrase "not prohibited by international law" from Article 1 of the draft. This provoked most debates in the Commission, with members split roughly equally for and against deletion. The Special Rapporteur thought that the deletion of the clause would not pose grave problems and might even secure greater consensus among States. His reasoning was that the clause was neither necessary nor appropriate, since the draft articles were concerned with risk management and the principle of engagement at the earliest possible stage, as opposed to clarifying the nature of various activities. In the instance when an activity was illegal, it was not for the draft articles to deal with the consequences; rather, the rules of State responsibility went into effect, thus leaving no overlap. According to another argument voiced in the Commission, why should it matter whether the activity was prohibited, and for reasons which might be totally unrelated to the risk?

On the opposite side, one concern was that there might be a need to review the entire text of the draft articles should the phrase be deleted. Another was that the deletion would broaden the topic excessively and might even require approval by States in the Sixth Committee. Additional concerns were: (1) the States engaged in illegal activities would not, most likely, notify other countries; (2) the phrase was needed as a link between the sub-topics of prevention and liability; (3) the use of the phrase released the victim from the necessity to prove that the loss resulted from wrongful or unlawful conduct. Also, it was argued that the phrase helped to maintain the distinction between the topics of international liability and State responsibility.

Mr. Rao's third report introduced a number of further changes to the draft articles, most of them being of mere drafting nature. In Article 2, paragraph (a) was redrafted, and paragraph (f) added in order to define the frequently-used term "States concerned." The word "competent" was inserted in Article 4, highlighting that not all international organizations were expected to be involved in the regime. Article 6 dealing with the principle of prior authorization was heavily redrafted, but the changes were purely cosmetic. Article 7 now contained the word "environmental", and the term "States concerned" had been introduced into Article 8. Article 9 brought out the requirement of suspending any final decision on prior authorization of the hazardous activity until the response from the States likely to be affected was received within a reasonable time. Article 10 left it to the States to define the time-frame for the duration of the consultations; another provision inserted in the draft article emphasized that the state of origin might agree to suspend the activity in question for a reasonable period of time instead of the period of six months which had been suggested earlier.

The Special Rapporteur also suggested some reordering of the articles. New Articles 16 and 17 were added in response to suggestions made by States, since contingency measures were required to be put in place by every State as a measure of prevention or precaution. The content of these two articles was essentially based on similar articles contained in the Convention on the Non-Navigational Uses of International Watercourses.[87]

Article 18 reproduced the text of article 6 as adopted on first reading and had been moved in the interest of better presentation. The text of Articles 11,12,13,15 and 19 corresponded to that of Articles 12,13 (with the exception of the removal of paragraph 3), 14, 16, and 17 as adopted on first reading.

Although the issues of the global commons or areas beyond national jurisdiction were not be covered at the present stage, the opinion was voiced in the Commission that there should be a reference in the preamble or in a "without-prejudice" provision to show awareness of this problem.

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[87] General Assembly resolution 51/229 of 21 May 1997.

The Commission concurred with Mr. Rao that a convention would be appropriate as the final form to be given to the draft articles. Regarding a proposal to revise the draft articles in order to incorporate recent developments in international environmental law, the Special Rapporteur suggested that it would be better to keep the scope of the articles the same in order to limit the topic to manageable proportions. The Commission formally agreed to refer the revised draft articles and the preamble to the Drafting Committee, for consideration in 2001.

VII. OTHER MATTERS:

A. Long-Term Programme of Work

The Commission agreed with the conclusions of the planning group that the following five topics were appropriate for inclusion in the long-term programme of work: (1) Responsibility of international organizations, (2) Effects of armed conflicts on treaties, (3) Shared natural resources of States, (4) Expulsion of aliens, and (5) Risks ensuing from fragmentation of international law.

B. Cooperation with Other Bodies

Representatives of the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee, and the European Committee on Legal Cooperation and the Legal Advisers on Public International Law (CAHDI) of the Council of Europe addressed the Commission during the present session. Judge Guillaume, President of the International Court of Justice, also addressed the Commission, and an informal exchange of views followed. Finally an informal exchange of views was held with members of the legal services of the International Committee of the Red Cross on topics of mutual interest.

C. Date and place of the fifty-third session

The Commission's next session will be a 12-week split session, held in the United Nations Office in Geneva, from 23 April to 1 June and from 2 July to 10 August 2001.

D. Representation at the fifty-fifth session of the General Assembly

The Commission decided that it should be represented at the fifty-fifth session of the General Assembly by its Chairman, Mr. Chusei Yamada, and by Mr. Pemmaraju Sreenivasa Rao, its Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities).

E. International Law Seminar

For the 36th time this seminar was held in Geneva with 24 participants of different nationalities, mostly from developing countries.

ANNEX I. [88] ***Text of the draft articles on State responsibility provisionally adopted by the Drafting Committee on second reading****

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I

General principles

Article 1

Responsibility of a State for its internationally wrongful acts

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

Article 2 [3]*

Elements of an internationally wrongful act of a State

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

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

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

Article 3 [4]

Characterization of an act of a State as internationally wrongful

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

CHAPTER II

The act of the State under international law

Article 4 [5]

Attribution to the State of the conduct of its organs

1. For the purposes of the present articles, the conduct of any State organ acting in that

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[88] Doc. A/CN.4/L.600 of 11 August 2000. Footnotes with an asterisk refer to the original notes of the said document.

* Incorporating the reports of the Drafting Committee at its fiftieth and its fifty-first sessions contained in documents A/CN.4/L.569 and A/CN.4/L.574 and Corrs. 1 (English only), 2 (French only), 3 and 4 (Spanish only).

* The numbers in square brackets correspond to the numbers of the articles adopted on first reading.

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

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

Article 5 [7]

Attribution to the State of the conduct of entities exercising elements of the governmental authority

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

Article 6 [8]

Attribution to the State of conduct in fact carried out on its instructions or under its direction or control

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

Article 7 [8][89]

Attribution to the State of certain conduct carried out in the absence of the official authorities

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

Article 8[9]

Attribution to the State of the conduct of organs placed at its disposal by another State

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

Article 9 [10]

Attribution to the State of the conduct of organs acting outside their authority or contrary to instructions

The conduct of an organ of a State or of an entity empowered to exercise elements of

[89] This Article was originally proposed by the Special Rapporteur as Article 8bis.

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

Article 10[14, 15]

Conduct of an insurrectional or other movement

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

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

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

Article 11[90]

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

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

CHAPTER III

Breach of an international obligation

Article 12 [16, 17,18]

Existence of a breach of an international obligation

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

Article 13 [18]

International obligation in force for the State

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

Article 14 [24]

Extension in time of the breach of an international obligation

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

[90] This Article was proposed by the Special Rapporteur as Article 15bis.

continue.

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

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

Article 15 [25]

Breach consisting of a composite act

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

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

CHAPTER IV

Responsibility of a State in respect of the act of another State

Article 16 [27]

Aid or assistance in the commission of an internationally wrongful act

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

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

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

Article 17 [28][91]

Direction and control exercised over the commission of an internationally wrongful act

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

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

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

Article 18 [28]

Coercion of another State

[91] This Article was proposed by the Special Rapporteur as Article 27bis.

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

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

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

Article 19[92]

Effect of this Chapter

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

CHAPTER V

Circumstances precluding wrongfulness

Article 20 [29]

Consent

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

Article 21[93]

Compliance with peremptory norms

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

Article 22 [34][94]

Self-defence

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

Article 23 [30]

Countermeasures in respect of an internationally wrongful act

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

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[92] This article was originally proposed by the Special Rapporteur as Article 28bis.

[93] This article was originally proposed by the Special Rapporteur as Article 29bis.

[94] This article was originally proposed by the Special Rapporteur as Article 29ter

Article 24 [31]

Force majeure

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

2. Paragraph 1 does not apply if:

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

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

Article 25 [32]

Distress

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

2. Paragraph 1 does not apply if:

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

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

Article 26 [33]

State of necessity

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

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

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

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

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

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

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

Article 27 [35]

Consequences of invoking a circumstance precluding wrongfulness

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

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

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

PART TWO

CONTENT OF INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I

General principles

Article 28 [36]

Legal consequences of an internationally wrongful act

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

Article 29 [36][95]

Duty of continued performance

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

Article 30 [41, 46][96]

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;

(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31 [42][97]

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

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[95] This article was originally proposed by the Special Rapporteur as Article 36bis.

[96] This article was originally proposed by the Special Rapporteur as Article 36ter.

[97] This article was originally proposed by the Special Rapporteur as Article 37bis.

2. Injury consists of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State.

Article 32 [42][98]

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Article 33 [38]

Other consequences of an internationally wrongful act

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

Article 34[99]

Scope of international obligations covered by this Part

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

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which accrues directly to any person or entity other than a State.

CHAPTER II

The forms of reparation

Article 35 [42][100]

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of the present Chapter.

Article 36 [43]

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

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[98] This article was originally proposed by the Special Rapporteur as Article 37ter.

[99] This article was originally proposed by the Special Rapporteur as Article 40bis (3) in FN 801 of his 3rd Report.

[100] This article was originally proposed by the Special Rapporteur as Article 42bis.

(a) Is not materially impossible;

(b) Would not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 37 [44]

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 38 [45]

Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 39[101]

Interest

1. Interest on any principal sum payable under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 40 [42][102]

Contribution to the damage

In the determination of reparation, account shall be taken of the contribution to the damage by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III

Serious breaches of essential obligations to the international community

[101] This article was originally proposed by the Special Rapporteur as Article 45bis.

[102] This article was originally proposed by the Special Rapporteur as Article 46bis.

Article 41 [19][103]

Application of this Chapter

1. This Chapter applies to the international responsibility arising from an internationally wrongful act that constitutes a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation, risking substantial harm to the fundamental interests protected thereby.

Article 42 [51, 53][104]

Consequences of serious breaches of obligations to the international community as a whole

1. A serious breach within the meaning of article 41 [19] may involve, for the responsible State, damages reflecting the gravity of the breach.

2. It entails, for all other States, the following obligations:

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

(b) Not to render aid or assistance to the responsible State in maintaining the situation so created;

(c) To cooperate as far as possible to bring the breach to an end.

3. This article is without prejudice to the consequences referred to in Chapter II and to such further consequences that a breach to which this Chapter applies may entail under international law.

PART TWO *bis*[*]

THE IMPLEMENTATION OF STATE RESPONSIBILITY

CHAPTER I

Invocation of the responsibility of a State

Article 43 [40]

The injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) That State individually; or

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[103] This article was originally proposed by the Special Rapporteur as Article 51 para. (1).

[104] This article was originally proposed by the Special Rapporteur as Article 51 paras. (2)-(4).

[*] The Commission has set aside Part Three (Settlement of Disputes) of the draft articles adopted on first reading.

(b) To a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) Specially affects that State; or

(ii) Is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned.

Article 44[105]

Invocation of responsibility by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(b) What form reparation should take.

Article 45 [22][106]

Admissibility of claims

The responsibility of a State may not be invoked if:

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

(b) The claim is one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted.

Article 46[107]

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(a) The injured State has validly waived the claim in an unequivocal manner;

(c) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 47[108]

Invocation of responsibility by several States

Where several States are injured by the same internationally wrongful act, each injured

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[105] This article was originally proposed by the Special Rapporteur as Article 46ter (1).

[106] This article was originally proposed by the Special Rapporteur as Article 46ter (2).

[107] This article was originally proposed by the Special Rapporteur as Article 46quater.

[108] This article was originally proposed by the Special Rapporteur as Article 46quinquies.

State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 48[109]

Invocation of responsibility against several States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) Does not permit any injured State to recover, by way of compensation, more than the damage suffered;

(b) Is without prejudice to any right of recourse towards the other responsible States.

Article 49[110]

Invocation of responsibility by States other than the injured State

1. Subject to paragraph 2, any State other than an injured State is entitled to invoke the responsibility of another State if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest;

(b) The obligation breached is owed to the international community as a whole.

2. A State entitled to invoke responsibility under paragraph 1 may seek from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30 [41, 46];

(b) Compliance with the obligation of reparation under Chapter II of Part Two, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 44, 45 [22] and 46 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II

Countermeasures

Article 50 [47]

Object and limits of countermeasures

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[109] This article was originally proposed by the Special Rapporteur as Article 46sexies.

[110] This article was originally proposed by the Special Rapporteur as Article 40bis (2) in FN 810 of his 3rd Report.

1. An injured State may only take countermeasures against a State

which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

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

3. Countermeasures shall as far as possible be taken in such a way as not to prevent the resumption of performance of the obligation or obligations in question.

Article 51 [50][111]

Obligations not subject to countermeasures

1. Countermeasures shall not involve any derogation from:

(a) The obligation to refrain from the threat or use of force as embodied in

the Charter of the United Nations;

(b) Obligations for the protection of fundamental human rights;

(c) Obligations of a humanitarian character prohibiting any form of reprisals

against persons protected thereby;

(d) Other obligations under peremptory norms of general international law;

(e) Obligations to respect the inviolability of diplomatic or consular agents,

premises, archives and documents.

2. A State taking countermeasures is not relieved from fulfilling its obligations under any applicable dispute settlement procedure in force between it and the responsible State.

Article 52 [49]

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 53 [48]

Conditions relating to resort to countermeasures

1. Before taking countermeasures, the injured State shall call on the responsible State, in accordance with article 44, to fulfil its obligations under Part Two.

2. The injured State shall notify the responsible State of any decision to take countermeasures, and offer to negotiate with that State.

3. Notwithstanding paragraph 2, the injured State may take such provisional and

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[111] This article was proposed by the Special Rapporteur as Articles 47bis and 50.

urgent countermeasures as may be necessary to preserve its rights.

4. Countermeasures other than those in paragraph 3 may not be taken while the negotiations are being pursued in good faith and have not been unduly delayed.

5. Countermeasures may not be taken, and if already taken must be suspended within a reasonable time if:

(a) The internationally wrongful act has ceased, and

(b) The dispute is submitted to a court or tribunal which has the authority to make decisions binding on the parties.

6. Paragraph 5 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 54[112]

Countermeasures by States other than the injured State

1. Any State entitled under article 49, paragraph 1 to invoke the responsibility of a State may take countermeasures at the request and on behalf of any State injured by the breach, to the extent that that State may itself take countermeasures under this Chapter.

2. In the cases referred to in article 41, any State may take countermeasures, in accordance with the present Chapter in the interest of the beneficiaries of the obligation breached.

3. Where more than one State takes countermeasures, the States concerned shall cooperate in order to ensure that the conditions laid down by this Chapter for the taking of countermeasures are fulfilled.

Article 55 [48]

Termination of countermeasures

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

PART FOUR

GENERAL PROVISIONS

Article 56 [37][113]

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law.

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[112] This article was proposed by the Special Rapporteur as Article 50 A and 50 B.

[113] This article was originally proposed by the Special Rapporteur as Article 50bis.

Article 57[114]

Responsibility of or for the conduct of an international organization

These articles are without prejudice to any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58[115]

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting in the capacity of an organ or agent of a State.

Article 59 [39]

Relation to the Charter of the United Nations

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

[114] This article was originally proposed by the Special Rapporteur as Article 37.

[115] This article was originally proposed by the Special Rapporteur as Article A.

ANNEX II. *Draft articles on diplomatic protection proposed by the Special Rapporteur in his first report*

Article 1

Scope

1. In the present articles diplomatic protection means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.

2. In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national.

Article 2

The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where:

(a) The protecting State has failed to secure the safety of its nationals by peaceful

means;

(b) The injuring State is unwilling or unable to secure the safety of the nationals of

the protecting State;

(c) The nationals of the protecting State are exposed to immediate danger to their

persons;

(d) The use of force is proportionate in the circumstances of the situation;

(e) The use of force is terminated, and the protecting State withdraws its forces, as

soon as the nationals are rescued.

Article 3

The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to article 4, the State of nationality has a discretion in the exercise of this right.

Article 4

1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State.

2. The State of nationality is relieved of this obligation if:

(a) The exercise of diplomatic protection would seriously endanger the overriding

interests of the State and/or its people;

(b) Another State exercises diplomatic protection on behalf of the injured person;

(c) The injured person does not have the effective and dominant nationality of the State.

4. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.

Article 5

For the purposes of diplomatic protection of natural persons, the "State of nationality" means the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization.

Article 6

Subject to article 9, paragraph 4,[116] the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual's [dominant] [effective] nationality is that of the former State.

Article 7

1. Any State of which a dual or multiple national is a national, in accordance with the criteria listed in article 5, may exercise diplomatic protection on behalf of that national against a State of which he or she is not also a national.

2. Two or more States of nationality, within the meaning of article 5, may jointly exercise diplomatic protection on behalf of a dual or multiple national.

Article 8

A State may exercise diplomatic protection in respect of an injured person who is stateless and/or a refugee when that person is ordinarily a legal resident of the claimant State [and has an effective link with that State?]; provided the injury occurred after that person became a legal resident of the claimant State.

[116] The provision to be discussed in 2001, reads: "Diplomatic protection may not be exercised by a new State of nationality against a previous State of nationality for injury incurred during the period when the person was a national only of the latter State".

ANNEX III. *Draft articles on unilateral acts of States proposed by the Special Rapporteur in his third report*

Article 1

Definition of unilateral acts

For the purposes of the present articles, “unilateral act of a State” means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization.

Article 2

Capacity of States to formulate unilateral acts

Every State possesses capacity to formulate unilateral acts.

Article 3

Persons authorized to formulate unilateral acts on behalf of the State

1. Heads of State, heads of Government and Ministers of Foreign Affairs are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf.

2. A person is also considered to be authorized to formulate unilateral acts on behalf of the State if it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as authorized to act on behalf of the State for such purposes.

Article 4

Subsequent confirmation of an act formulated by a person not authorized for that purpose

A unilateral act formulated by a person who is not authorized under article 3 to act on behalf of a State is without legal effect unless expressly confirmed by that State.

Article 5

Invalidity of unilateral acts

A State may invoke the invalidity of an unilateral act:

1. If the act was formulated on the basis of an error of fact or a situation which was assumed by that State to exist by the time when the act was formulated and formed an essential basis of its consent to be bound by the act. The foregoing shall not apply if the State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error;

2. If a State has been induced to formulate an act by the fraudulent conduct of another State;

3. If the act has been formulated as the result of corruption of the person formulating it,

through direct or indirect action of another State;

5. If the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him;

6. If, at the time its formulation, the unilateral act conflicts with a peremptory norm of international law;

7. If, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council;

8. If the unilateral act as formulated conflicts with a norm of fundamental importance of the domestic law of the State formulating it.

ANNEX IV.[117] *Draft guidelines on reservations to treaties (provisionally adopted by the Drafting Committee)*

1.1.8 [1.1.8][118] Reservations made under exclusionary clauses

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

…

1.4.6. [1.4.6, 1.4.7] Unilateral statements made under an optional clause

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty

A unilateral statement made by a State or an international organization, in accordance with a clause contained in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

…

1.7 Alternatives to reservations and interpretative declarations

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations

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[117] Doc. A/CN.4/L.599.

[118] The numbers in square brackets correspond to the original numbers proposed by the Special Rapporteur.

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- The insertion in the treaty of restrictive clauses purporting to limit its scope or application;

- The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

1.7.2 [1.7.5] Alternatives to interpretative declarations

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

– The insertion in the treaty of provisions purporting to interpret the same treaty;

– The conclusion of a supplementary agreement to the same end.

ANNEX V.[119] *Draft preamble and revised draft articles referred to the Drafting Committee by the Commission at its fifty-second session[120] on the "liability" topic*

CONVENTION ON THE PREVENTION OF SIGNIFICANT TRANSBOUNDARY HARM

The General Assembly,

Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations,

Recalling its resolution 1803 (XVII) of 14 December 1962, containing the Declaration on permanent sovereignty over natural resources,

Recalling also its resolution 41/128 of 4 December 1986, containing the Declaration on the Right to Development,

Recalling further the Rio Declaration on Environment and Development of 13 June 1992,

Bearing in mind that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,

Recognizing the importance of promoting international cooperation,

Expressing its deep appreciation to the International Law Commission for its valuable work on the topic of the prevention of significant transboundary harm,

Adopts the Convention on the Prevention of Significant Transboundary Harm, annexed to the present resolution;

Invites States and regional economic integration organizations to become parties to the Convention.

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[119] Annex to Doc. A/CN.4/L.597.

[120] Changes to the text adopted on first reading have been indicated in bold or strikeout.

Article 1

Activities to which the present draft articles apply

The present draft 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" means such a risk ranging from a high probability of causing significant harm to a low probability of causing disastrous 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 draft 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;

(f) "States concerned" means the State of origin and the States likely to be affected.

Article 3

Prevention

States of origin 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 competent international organizations in preventing, or in minimizing the risk of, significant transboundary harm.

Article 5

Implementation

States **concerned** shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present draft articles.

Article 6 [7][121]

Authorization

1. The prior authorization of a State *of origin* shall be required for:

(a) all activities within the scope of the present draft articles carried out in the territory or otherwise under the jurisdiction or control of a State;

(b) any major change in an activity referred to in subparagraph (a);

(c) a plan to change an activity which may transform it into one falling within the scope of the present draft 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 draft articles. **Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present draft articles.**

3. In case of a failure to conform to the requirements of the authorization, the ~~authorizing~~ State **of origin** shall take such actions as appropriate, including where necessary terminating the authorization.

Article 7 [8]

***Environmental i*mpact assessment**

Any decision in respect of the authorization of an activity within the scope of the present draft articles shall**, in particular,** be based on an **assessment** of the possible transboundary harm caused by that activity.

Article 8 [9]

Information to the public

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

Article 9 [10]

Notification and information

1. If the assessment referred to in article **7** [8] indicates a risk of causing significant transboundary harm, the State of origin shall~~, pending any decision on the authorization of the activity,~~ provide the States likely to be affected with timely notification **of the risk and the assessment** and shall transmit to them the available technical and **all** other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on prior authorization of the activity pending the receipt, within a reasonable time and in any case within a period of six months, of the response from the States likely to be affected.

~~[2. The response from the States likely to be affected shall be provided within a reasonable time.]~~

Article 10 [11]

Consultations on preventive measures

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[121] Article 6 has been moved towards the end of the draft articles and the remaining draft articles have been renumbered accordingly. The previous number of the draft articles appears between square brackets.

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, or to minimize the risk of, significant transboundary harm. **The States concerned shall agree, at the commencement of such consultations, on a reasonable time-frame for the duration of the consultations.**

2. **The** States **concerned** shall seek solutions based on an equitable balance of interests in the light of article **11** [12].

2 *bis*. **During the course of the consultations, the State of origin shall, if so requested by the other States, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a *reasonable* period ~~of six months unless otherwise agreed~~.**[122]

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 11[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 **10** [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, or minimizing the risk thereof or 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, or minimizing the risk thereof or restoring the environment;

(d) the degree to which the State of origin and, as appropriate, 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 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 12 [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 **State of origin** ~~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 **9** [10]. The request shall be accompanied by a

[122] Former article 13, paragraph 3, with the addition of the term "***reasonable***".

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 a notification under article **9** [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 **10** [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.**~~[123]

Article 13 [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, or minimizing the risk of, significant transboundary harm.

Article 14 [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 **or concerning intellectual property** 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 15 [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 draft 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 16

Emergency preparedness

States *of origin* shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other States likely to be affected and competent international organizations.

Article 17

Notification of an emergency

States of origin shall, without delay and by the most expeditious means available, notify ~~other~~ States likely to be affected by an emergency concerning an activity within the scope of the present draft articles.

Article 18 [6]

Relationship to other rules of international law

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[123] This paragraph has been moved to article 11, paragraph 2 *bis*.

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

Article 19 [17]

Settlement of disputes

1. Any dispute concerning the interpretation or application of the present draft 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 VI.[124] *Specific issues on which comments would be of particular interest to the Commission*

1. In response to paragraph 13 of General Assembly resolution 54/111 of 9 December 1999, 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. State responsibility

2. The Commission completed its preliminary consideration of the draft articles adopted on first reading and received from the Drafting Committee a complete text of revised articles. It seeks views on the entire text of the draft articles, in particular on any aspect which it may need to consider further with a view to its completion of the second reading in 2001.

B. Diplomatic protection

3. The Commission would appreciate receiving from Governments comments and observations in answer to the following questions:

(a) May a State exercise diplomatic protection on behalf of a national, who has acquired nationality by birth, descent or bona fide naturalization, when there is no effective link between the national and the State?

(b) Is a State that wishes to exercise diplomatic protection on behalf of a national obliged to prove that there is an effective link between the individual and that State?

(c) May a State exercise diplomatic protection on behalf of a national who has an effective link with that State when that national is also a national of another State, with which it has a weak link?

(d) Is it permissible for a State to protect a dual national against a third State of which the injured individual is not a national without proving an effective link between it and the individual?

(e) Should the State in which a stateless person has lawful and habitual residence be permitted to protect such a person against another State along the lines of diplomatic protection?

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[124] doc. A/CN.4/L.592.

(f) Should the State in which a refugee has lawful and habitual residence be permitted to protect such a refugee along the lines of diplomatic protection?

C. Unilateral acts of States

4. The Commission would particularly welcome comments on points (a), (b) and (c) of paragraph 127 of chapter VI of its draft report (document A/CN.4/L.595/Add.1).

D. Reservations to treaties

5. The Commission would welcome any comments and observations by Governments on the 14 draft guidelines included in the part of the fifth report of the Special Rapporteur concerning formulation of reservations and interpretative declarations (A/CN.4/508/Add.3 and Add.4) and on which the Commission decided to postpone the debate to the next session due to lack of time.

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

6. The Commission would like to draw attention to paragraphs 9 to 54 of chapter VIII of its draft report (document A/CN.4/L.597), and, in particular, the annex containing the draft preamble and draft articles referred to the Drafting Committee. The Commission would welcome any comments that Governments may wish to make in that respect.

Website of the Commission: www.un.org/law/ilc