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# First report on State responsibility

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**Addendum**

## Contents



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# II. Review of draft articles in Part One (other than article 19)

## A. Preliminary issues

102. The present report turns now to the initial consideration of the draft articles in Part One (other than article 19). It can only be an initial consideration for several reasons. First, so far only relatively few Governments have commented in detail on individual draft articles, and it will be necessary to consider further comments and suggestions as they are made. Secondly, so far there has been no systematic coordination of the draft articles in Part One with those in Parts Two and Three, and it is desirable not to finalize Part One until the latter articles have been reviewed. Thirdly, the Commission's normal practice on second reading is to maintain all the articles formally under review in the Drafting Committee until the text and the commentaries are completed. There is every reason to adopt this procedure in the case of State responsibility. For these reasons, the second reading will involve a process of "rolling review" of the draft articles until their completion.[129]

### 1. Questions of terminology

103. Unlike many other of the Commission's texts, the draft articles contain no separate definition clause. Instead terms are explained as they are used (see, e.g., articles 3, 19 (3), 40, 43, 44 (2), 47 (1)). In general this is a satisfactory and even elegant technique, which should be retained. One point that does, however, require review is the range of terms used throughout the text to describe the responsibility relationship. The most important of these are set out in table 1 below. Generally these terms are used consistently in the draft articles, and appear to present no problem either in English or, as far as can be ascertained, in the other official languages. A question of substance arises with respect to the notion of "circumstances precluding wrongfulness": this will be dealt with in the context of the relevant articles. Several of these terms do, however, merit some further consideration.

104. *The "State which has committed an internationally wrongful act"*. This term, which is used frequently in the draft articles,[130] raises a question of substance and one of terminology.

(a) As a matter of substance, the term perhaps creates the impression that in a given case it will be clear that the State concerned *has* committed an internationally wrongful act. In many disputes both parties deny responsibility, while asserting that it is the other which is in the wrong. Both may have committed some wrongful act, as the International Court has found on several occasions.[131] But at the time of the dispute it may well be disputed and disputable where responsibility lies, and the use of the term "the State which has

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[129] A further difficulty is that no final decision can be made as to the articles in Part One until it is decided whether to retain the distinction between crimes and delicts. For the reasons given in paragraph 83, significant changes to Part One will be necessary if that distinction is retained. These would include, *inter alia*, changes to articles 1, 3 and 10. The discussion in this section of the report proceeds on the basis that the recommendation made in paragraph 101 may be adopted in some form, even if provisionally.

[130] Viz, in articles 28 (3), 36, 42 (1) and (4), 43 (twice), 44 (1), 45 (1) and (3), 46, 47 (1) and (3), 48 (2), (3) and (4), 50 and 53.

[131] E.g., the *Corfu Channel Case, I.C.J. Reports 1949*, p. 4 (where Albania was held to be internationally responsible for the damage to the British ships, but the United Kingdom was held to have acted unlawfully in conducting its subsequent unilateral mine-sweeping operation in Albanian waters); *Case concerning the Gabcikovo-Nagymaros Project, I.C.J. Reports 1997* (where Hungary was held not to be justified in suspending and terminating work on the project but Slovakia was held to have acted unlawfully in continuing the unilateral operation of a unilateral diversion scheme, Variant C).

committed an internationally wrongful act" may tend to obscure this reality. On the other hand, this is a general problem within the field of international law, one which can only finally be resolved by appropriate procedures for dispute settlement. It certainly cannot be resolved by any different description of the States whose responsibility is invoked;

(b) As a matter of terminology, however, the term "the State which has committed an internationally wrongful act" is cumbersome, and the use of the past tense may imply, wrongly, that it concerns only completed rather than continuing wrongful acts. The shorter and more convenient term "wrongdoing State" was used by the International Court in the *Case concerning the Gabcikovo-Nagymaros Project*, and for both these reasons is to be preferred.[132] Table 2 below sets out that term in the various official languages. The Drafting Committee should consider whether to substitute it for the longer phrase.

105. *Injury and damage.* Two terms which also need preliminary mention are "injury" and "damage". The draft articles do not use the term "injury", but the term "injured State" is defined in article 40 and is thereafter used repeatedly. The term "damage" is used to refer to actual harm suffered;[133] a further distinction is drawn between "economically assessable damage" and "moral damage" in articles 44 and 45. The term "damages" is also used twice, to refer to the amount of monetary compensation to be awarded (article 45 (2) (b) and (c)). More detailed questions of terminology can be left to the discussion of Part Two, where the issues mostly arise. As to the basic distinction between "injury" and "damage", it is clear that the concept of "injury" in the term "injured State" involves the concept of a "legal injury" or *injuria*, whereas the term "damage" refers to material or other loss suffered by the injured State. The substantive question whether damage is a necessary component of injury, is considered in the context of article 1.[134] Whatever conclusion may be reached on that question, the terminological distinction is useful and should be retained.

## 2. General and savings clauses

106. The draft articles do not contain the range of general and savings clauses which have often been included in texts prepared by the Commission. There are no equivalents to the following articles contained in the Vienna Convention on the Law of Treaties:

Article 1: Scope of the present Convention

Article 2: Use of terms

Article 3: International agreements not within the scope of the present Convention

Article 4: Non-retroactivity of the present Convention

On the other hand, chapter I of Part Two does contain certain clauses which are arguably appropriate to the draft articles as a whole, and which could therefore be included in an introductory group of articles. They are:

Article 37: *Lex specialis*

Article 38: Customary international law

Article 39: Relationship to the Charter of the United Nations

[132] *I.C.J. Reports 1997*, para. 87.

[133] The term is used in articles 35, 42, 44 (1) and 45 (1).

[134] See below, paras. 112-120.

Several Governments have noted that article 37, in particular, should be made applicable to the draft articles as a whole.[135] This seems clearly right in principle. However, it is convenient to consider the formulation and placement of these articles in the context of the review of Part Two. At the same time, it will be necessary to consider which, if any, further preliminary and savings clauses may be desirable.[136]

107. Part One is entitled "Origin of State responsibility".[137] It consists of five chapters:

Chapter I: General principles (articles 1-4)

Chapter II: The "act of the State" under international law (articles 5-15)

Chapter III: Breach of an international obligation (articles 16-26)

Chapter IV: Implication of a State in the internationally wrongful act of another State (articles 27-28)

Chapter V: Circumstances precluding wrongfulness (articles 29-35).

## B. Part One, Chapter I: General principles (articles 1-4)

108. According to the commentary, chapter I is intended to cover "rules of the most general character applying to the draft articles as a whole".[138] It would perhaps be more accurate to say that chapter I lays down certain general propositions defining the basic conditions for State responsibility, leaving it to Part Two to deal with general principles which determine the consequences of responsibility.

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

#### (a) General observations

109. The first such proposition, stated in article 1, is that:

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

On an initial reading, article 1 seems only to state the obvious. But there are several things it does not say, and its importance lies in these silences. First, it does not spell out any general preconditions for responsibility in international law, such as "fault" on the part of the wrongdoing State, or "damage" suffered by any injured State.[139] Secondly, it does not identify the State or States, or the other international legal persons, to which international responsibility is owed. It thus does not follow the tradition of treating international responsibility as a secondary legal relationship of an essentially bilateral character (a relationship of the wrongdoing State with the injured State, or if there happens to be more

[135] See the views expressed by the United Kingdom (A/CN.4/488, p. 28), Germany (ibid., p. 33) and France (ibid., p. 93).

[136] For example, France suggests that article 1 should contain a without-prejudice clause with respect to "questions which may arise with respect to injurious consequences arising out of acts not prohibited by international law".

[137] The use of the term "origin" has been criticized. France proposes instead using the term "basis", which has the merit of focusing on the legal basis for responsibility rather than, for example, on the historical or even psychological origins.

[138] *Yearbook ... 1973*, vol. II, p. 173.

[139] These silences pertain to article 3 as much as, or even more than, article 1, since they relate to the question whether there has been a breach of an international obligation. For the sake of convenience, the issues are discussed here.

than one injured State, with each of those States separately). Rather it appears to present the situation of responsibility as an "objective correlative" of the commission of an internationally wrongful act.

110. Before turning to these two aspects, certain less controversial points may be noted about article 1; a number of these are already dealt with in the commentary.

(a) The term "internationally wrongful act" is intended to cover all wrongful conduct of a State, whether it arises from positive action or from an omission or a failure to act.[140] This is more clearly conveyed by the French and the Spanish than by the English text, but the point is made clear also in article 3, which refers to "conduct consisting of an action or omission";

(b) Conduct which is "internationally wrongful" entails international responsibility. Draft articles 29 to 34 deal with circumstances which exclude wrongfulness and, thus, international responsibility in the full sense. Article 35 reserves the possibility that compensation may be payable for harm resulting from acts otherwise unlawful, the wrongfulness of which is precluded under certain of these articles. The commentary to article 1 goes further; it leaves open the possibility of "'international responsibility' – if that is the right term – for the harmful consequences of certain activities which are not, at least for the moment, prohibited by international law".[141] Since 1976, the Commission has been grappling with the question of "liability" for harmful consequences of acts not prohibited by international law. Its relative lack of success in that endeavour is due, in part at least, to the failure to develop a terminology in languages other than English which is capable of distinguishing "liability" for lawful conduct causing harm, on the one hand, and responsibility for wrongful conduct, on the other. That experience tends to suggest that the term "State responsibility" in international law is limited to responsibility for wrongful conduct, even though article 1 was intended to leave that question open. Obligations to compensate for damage not arising from wrongful conduct are best seen either as conditions upon the lawfulness of the conduct concerned, or as discrete primary obligations to compensate for harm actually caused. In any event, except in the specific and limited context of article 35, such obligations fall entirely outside the scope of the draft articles;[142]

(c) In stating that every wrongful act of a State entails the international responsibility of *that* State, article 1 affirms the basic principle that each State is responsible for its own wrongful conduct. The commentary notes that this is without prejudice to the possibility that another State may also be responsible for the same wrongful conduct, e.g., if it has occurred under the control of the latter State or on its authority.[143]Some aspects of the question of the involvement or implication of a State in the wrongful conduct of another are dealt with in articles 12, 27 and 28. By contrast, other aspects, in particular the question of so-called "joint responsibility" and its possible implications for reparation and countermeasures, are not dealt with.[144] Whether they should be covered, either in chapter IV of Part One or in Part Two, is a question. But it casts no doubt on the formulation of article 1 itself.

[140] Commentary, para. (14).

[141] Commentary, para. (13).

[142] See above, paragraph 106, note 136, for the French suggestion of a without-prejudice clause with respect to the injurious consequences of lawful conduct.

[143] Commentary, paras. (7), (11).

[144] Such issues were raised, for example, in the *Case concerning Certain Phosphate Lands (Nauru v. Australia), ICJ Reports 1992*, p. 240.

111. Turning to the two issues (identified in paragraph 109) as to which article 1 is silent, the first of these is the question whether the draft articles should specify a general requirement of fault (*culpa* or *dolus*), or of damage to another State, as a condition of responsibility.

**(b) A general requirement of fault or damage?**

112. A number of Governments question whether a specific requirement of "damage" should not be included in article 1 or 3.

(a) *Argentina* calls for article 3 to be reconsidered. In its view:

> "in the case of a wrongful act caused by one State to another ... the exercise of a claim makes sense only if it can be shown that there has been real financial or moral injury to the State concerned. Otherwise, the State would hardly be justified in initiating the claim. In a similar vein, it has been stated that even in the human rights protection treaties ... the damage requirement cannot be denied. What is involved is actually a moral damage suffered by the other States parties ... [T]he damage requirement is, in reality, an expression of the basic moral principle which stipulates that no one undertakes an action without an interest of a legal nature."[145]

(b) *France* likewise argues strongly that responsibility could only exist vis-à-vis another injured State, which must have suffered moral or material injury. In its view:

> "the existence of damage is an indispensable element of the very definition of State responsibility ... International responsibility presupposes that, in addition to an internationally wrongful act having been perpetrated by a State, the act in question has injured another State. Accordingly, if the wrongful act of State A has not injured State B, no international responsibility of State A with respect to State B will be entailed. Without damage, there is no international responsibility."

It thus proposes the addition to article 1 of the words "vis-à-vis injured States", and a comprehensive redrafting of article 40 to incorporate the requirement of "material or moral damage" in all cases except for breaches of fundamental human rights.[146]

113. A number of other Governments, by contrast, approve the principles underlying articles 1 and 3. They include Austria, Germany, Italy, Mongolia, the Nordic countries and the United Kingdom of Great Britain and Northern Ireland. Germany, for example, regards article 1 as expressing a "well-accepted general principle".[147]

114. No Government has argued in favour of the specification of a general requirement of fault. Nonetheless the question of "fault" has figured prominently in the literature, and it is a question of the same order as the question whether "damage" is a prerequisite for responsibility. Both questions need to be discussed, the more so since, it is suggested, the same answer should be given to both.

115. An initial point to make is that, if the recommendation in Part One of the present report (para. 101) is accepted, the draft articles will no longer seek to deal directly with the question of international crimes. Were they to do so, there would be good reasons for spelling out

[145] See A/CN.4/488/Add.1, pp. 4-5.

[146] See A/CN.4/488, pp. 31-32 and 99-100.

[147] Ibid., pp. 31 (Austria, Denmark on behalf of the Nordic countries), 32 (Germany), 34 (United Kingdom), 35 (Mongolia);A/CN.4/488/Add.2, p. 2 (Italy).

a requirement of fault: a State could not possibly be considered responsible for a crime without fault on its part. Equally there would be compelling reasons not to add any distinct requirement of damage or harm to other States. State conduct would not be considered criminal by reason of the damage caused to particular States but by reason of the character of the conduct itself. These questions will have to be revisited if the Commission should decide to undertake a full-scale treatment of "international crimes" within the scope of these draft articles.

116. *Damage as a general prerequisite.* Neither article 1 nor article 3 contains a general requirement of "damage" to any State or other legal person as a prerequisite for a wrongful act, still less any requirement of material damage. This position has been generally approved in the literature on these articles since their adoption in 1973.[148] So far as subsequent case law is concerned, the most directly relevant decision is the *Rainbow Warrior Arbitration*, which concerned the failure by France to keep two of its agents in confinement on the island of Hao, as had been previously agreed between France and New Zealand.[149] It was argued by France that its failure to return the agents to the island did not entitle New Zealand to any relief. Since there was no indication that "the slightest damage has been suffered, even moral damage", there was no basis for international responsibility. New Zealand referred, *inter alia,* to articles 1 and 3 of the draft articles, and denied that there was any separate requirement of "damage" for the breach of a treaty obligation. In oral argument France accepted that in addition to material or economic damage there could be "moral and even legal damage". The Tribunal held that the failure to return the two agents to the island "caused a new, additional non-material damage ... of a moral, political and legal nature".[150]

117. Although the Tribunal was thus able to avoid pronouncing directly upon articles 1 and 3, the breadth of its formulation ("damage ... of a moral, political and legal nature") does not suggest that there is any logical stopping place between, on the one hand, the traditional and relatively narrow concept of "moral damage" and, on the other hand, the broader conception of legal damage arising from the breach of a State's right to the performance of an obligation. It has long been accepted that States may assume international obligations on virtually any subject and having, in principle, any content.[151] Within those broad limits, how can it be said that a State may not bind itself, categorically, not to do something? On what basis is that obligation to be reinterpreted as an obligation not to do that thing only if one or more other States would thereby be damaged? The other States that are parties to the agreement, or bound by the obligation, may be seeking guarantees, not merely indemnities. But as soon as that possibility is conceded, the question whether damage is a prerequisite for a breach becomes a matter to be determined by the relevant primary rule. It may be that many primary rules do contain a requirement of damage, however defined. Some certainly do. But there is no warrant for the suggestion that this is necessarily the case, that it is an a priori requirement.

[148] See, e.g., Reuter, "Le dommage comme condition de la responsibilité internationale" in *Homenaje al Professor Miaja dela Muela* (1979), vol. II, p. 837; Tanzi, "Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?" in M. Spinedi and B. Simma (eds.), *United Nations Codification of State Responsibility* (Oceana, New York, 1987), p. 1.

[149] *Case concerning the Rainbow Warrior Affair*, Arbitral Award of 30 April 1990, *Reports of International Arbitral Awards*, vol. XX, p. 217.

[150] Ibid. at pp. 266-267.

[151] See above, paragraph 46. This is subject to any limitations which may be imposed by peremptory norms of general international law.

118. Similar reasoning is set out, albeit rather briefly, in the commentary to article 3.[152] This points out that all sorts of international obligations and commitments are entered into, covering many fields in which damage to other individual States cannot be expected, would be difficult to prove or is not of the essence of the obligation. This is not only true of international human rights (an exception allowed by France in its comments), or of other obligations undertaken by the State to its own citizens (another example given by the Commission in its commentary to article 3). It is true in a host of areas, including the protection of the environment, disarmament and other "preventive" obligations in the field of peace and security, and the development of uniform standards or rules in such fields as private international law. For example, if a State agrees to take only a specified volume of water from an international river, or to adopt a particular uniform law, it breaches that obligation if it takes more than the agreed volume of water, or if it fails to adopt the uniform law, and it does so irrespective of whether other States or their nationals can be shown to have suffered specific damage thereby. In practice, no individual release of chlorofluorocarbons (CFCs) or other ozone-depleting substances causes identifiable damage: it is the phenomenon of diffuse, widespread releases that is the problem, and the purpose of the relevant treaties is to address that problem. In short, the point of such obligations is that they constitute, in themselves, standards of conduct for the parties. They are not only concerned to allocate risks in the event of subsequent harm occurring.

119. There is a corollary, not pointed out in the commentary to article 3. If damage was to be made a distinct prerequisite for State responsibility, the onus would be on the injured State to prove that damage, yet in respect of many obligations this may be difficult to do. The "wrongdoing State" could proceed to act inconsistently with its commitment, in the hope or expectation that damage might not arise or might not be able to be proved. This would tend to undermine and render insecure international obligations establishing minimum standards of conduct. There is also the question by what standard "damage" is to be measured. Is any damage at all sufficient, or is "appreciable" or "significant" damage required? This debate already occurs in specific contexts;[153] to make damage a general requirement would inject it into the whole field of State responsibility.

120. It may be argued that failure to comply with international obligations creates a "moral injury" for other States in whose favour the obligation was assumed, so that the requirement of damage is readily satisfied.[154] But the traditional understanding of "moral damage" was

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[152] Article 3, commentary, para. (12). Somewhat disconcertingly, the commentary to article 1, para. (3), cites with approval the following resolution of the 1930 Hague Codification Conference:

> "International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State"

The commentary goes on to identify that resolution with the "fundamental principle" enunciated in article 1: ibid., para. (4).

[153] E.g., article 5 of the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, General Assembly resolution 51/229, of 21 May 1997, annex.

[154] Cf the French response in the *Rainbow Warrior* arbitration: above, para. 116. In its comments on the draft articles, the French Government notes that it:

> "is not hostile to the idea that a State can suffer legal injury solely as a result of a breach of a commitment made to it. However, the injury must be of a special nature, which is automatically so in the case of a commitment under a bilateral or restricted multilateral treaty. By contrast, in the case of a commitment under a multilateral treaty, the supposedly injured State must establish that it has suffered special material or moral damage other than that resulting from a simple violation of a legal rule. A State cannot have it established that there has been a violation and receive reparation in that connection if the breach does not directly affect it."

A/CN.4/488, p. 96. But it is not the function of the draft articles to say in respect of which treaties, or which category of treaties, particular requirements of damage may exist. Exactly the same commitment

much narrower than this, as the commentary to article 3 points out. The reason why a breach of fundamental human rights is of international concern (to take only one example) is not because such breaches are conceived as assaulting the dignity of other States; it is because they assault human dignity in ways which are specifically prohibited by international treaties or general international law.

121. For these reasons the decision not to articulate a separate requirement of "damage", either in article 1 or in article 3, in order for there to be an internationally wrongful act seems clearly right in principle. But too much should not be read into that decision, for the following reasons:

(a) First, as already noted, particular rules of international law may require actual damage to have been caused before any issue of responsibility is raised. To take a famous example, principle 21 of the Stockholm Declaration of 1972 is formulated in terms of preventing "damage to the environment of other States or of areas beyond national jurisdiction";[155]

(b) Secondly, articles 1 and 3 do not take a position as to whether and when obligations are owed to "not-directly injured States", or to States generally, or to the international community as a whole. That question is dealt with, at present, in articles 19 and 40. The requirement of damage as a prerequisite to a breach could arise equally in a strictly bilateral context, as it did in the *Rainbow Warrior* arbitration;

(c) Thirdly, articles 1 and 3 do not, of course, deny the *relevance* of damage, moral and material, for various purposes of responsibility.[156] They simply deny that there is a categorical requirement of moral or material damage before a breach of an international norm can attract responsibility.

122. *"Fault" as a general requirement.* Similar arguments apply to the suggestion that international law imposes any general requirement of "fault" *(culpa, dolus)* as a condition of State responsibility. Again the answer is that the field of State obligations is extraordinarily wide and that very different elements and standards of care apply to different obligations within that field. Thus, there is no a priori requirement of particular knowledge or intent on the part of State organs which applies to all obligations, and could be stated as a prerequisite in article 1 or article 3. The point was made, for example, by Denmark on behalf of the Nordic countries: "If the element of fault is relevant in establishing responsibility, it already follows from the particular rule of international law governing that situation, and not from being a constituent element of international responsibility."[157]. A similar conclusion is now drawn in the literature, despite certain earlier tendencies to the contrary.[158]

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(e.g., to compensation for expropriation, or to the protection of a linguistic minority) may be made in a bilateral and in a multilateral treaty. As soon as it is accepted that a State may suffer legal injury as a result of a commitment made to it, the question whether this is the case becomes a matter for the interpretation and application of the particular commitment, i.e. a matter for the primary rules.

155 Similar language is used in principle 2 of the Rio Declaration on Environment and Development of 1992. Cf., however, the International Court's formulation of the principle in the advisory opinion concerning *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, para. 29 (the text of the advisory opinion is also reproduced in A/51/218, annex).

156 In Part Two, damage is relevant, *inter alia*, under articles 43 (c), 44 and 49.

157 A/CN.4/488, p.31.

158 See I. Brownlie, *State Responsibility, Part I* (1983), pp. 38-48, and authorities there cited.

### (c) Relationship between internationally wrongful conduct and injury to other States or persons

123. The second question identified in paragraph 109 with respect to article 1 is the absence of any specification of the States or entities *to whom* responsibility is owed. As noted, France criticizes the draft articles for not specifying that "the injured State is the State that has a subjective right corresponding to obligations incumbent on clearly identified States", and it proposes changes to articles 1 and 40 to resolve this question. Argentina suggests that the question of the responsibility of the wrongdoing State to the injured State is the *ratio legis* of the draft articles.[159]

124. An initial point which needs to be stressed is that the draft articles are not limited to State responsibility arising from primary obligations of a bilateral character, or from obligations owed by one State to another in any defined field of "inter-State relations" (even assuming that such a field could be defined a priori). This seems to be accepted in all the comments from Governments received so far, as well as by commentators.

125. It is another question whether the draft articles are limited to secondary responsibility relationships between States (even if those relationships arise from primary rules which are general in their scope, e.g. under multilateral treaties or general international law in the field of human rights). The commentary to article 1 notes that:

> "by using the term 'international responsibility' in article 1, the Commission intended to cover every kind of new relations which may arise, in international law, from the internationally wrongful act of a State, whether such relations are limited to the offending State and the directly injured State or extend also to other subjects of international law, and whether they are centred on the duty of the guilty State to restore the injured State in its rights and repair the damage caused, or whether they also give the injured State itself or other subjects of international law the right to impose on the offending State a sanction admitted by international law. In other words, the formulation adopted for article 1 must be broad enough to cater for all the necessary developments in the chapter which is to be devoted to the content and forms of international responsibility."[160]

This needs to be read in the light of the following passage in the commentary to article 3:

> "in international law the idea of breach of an obligation can be regarded as the exact equivalent of the idea of infringement of the subjective rights of others ... The correlation between legal obligation on the one hand and subjective right on the other admits of no exception".[161]

126. It should be noted that the term "injured State" is not used in Part One. On the other hand, it is a central term in Part Two, which defines most of the obligations of restitution and reparation in terms of the entitlements of an "injured State". The definition of an "injured State" in article 40 is thus pivotal to the draft articles; careful attention will have to be given to that definition in due course.

127. As to the question of scope raised by article 1, the draft articles deal with the responsibility *of* States, and not with the responsibility of other legal persons such as international organizations. Part Two goes on to deal with the rights and entitlements of injured States arising from the responsibility of a wrongdoing State. But the focus in Part

[159] A/AC.4/488/Add.1, p. 4.

[160] Commentary to article 1, para. (10).

[161] Commentary to article 3, para. (9).

One on the wrongdoing State was not intended to imply that State responsibility can exist, as it were, in a vacuum. In its commentary to paragraph (3), the Commission expressly accepted that all cases of State responsibility have as a correlative an infringement of the actual rights of some other person. The reason this was not spelt out expressly in article 1 was that "the formulation adopted for article 1 must be broad enough to cater for all the necessary developments in the chapter which is to be devoted to the content and forms of international responsibility".[162] In the event, that chapter (which became Part Two) did not take full advantage of the broad formulation of article 1.

128. Thus, there are again two questions: one of substance and one of form. At the level of substance, the question is whether something more is required in Part Two to cover the ground pegged out in article 1, and specifically the question of the responsibility of States to other persons. At the level of form, the question is whether the persons to whom responsibility is owed should be identified in Part One, and specifically in article 1.

129. The Special Rapporteur's tentative view is that no change is required in either respect. At the level of substance, it would be very difficult and would significantly expand the scope of the draft articles if Part Two were to deal with the rights and entitlements of injured persons other than States. At the level of form, the commentary already makes it clear that State responsibility involves a relationship between the wrongdoing State and another State, entity or person whose rights have been infringed. Thus, there is no question of a merely abstract form of responsibility; responsibility is always *to* someone. On the other hand, to limit Part One to obligations owed exclusively to States would be unduly to limit the scope of the draft articles, and to do so at a time when international law is undergoing rapid changes in terms of the scope and character of obligations assumed and the range of persons and entities engaged by those obligations or concerned with their performance. No specific difficulties have been pointed to which arise from the present open-ended formulation of article 1. Again, however, the matter will need to be revisited in the context of article 40.

### (d) Recommendation

130. For these reasons, it is recommended that article 1 be adopted unchanged. The question of its relation to the concept of "injured State", as defined in article 40 and applied in Part Two, should, however, be further considered in that context.

## 2. Article 2: Possibility that every State may be held to have committed an internationally wrongful act

### (a) Observations

131. Article 2 provides that:

> "Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility."

As expressed, article 2 is a truism. No State is immune from the principle of international responsibility. That proposition is implicit in articles 1 and 3, which apply to every internationally wrongful act of every State. It is affirmed in the commentaries to those articles, which could be reinforced. It is therefore very doubtful whether article 2 is necessary.[163]

[162] Commentary to article 1, para. (10); see above, para. 125.

[163] Its deletion was proposed by the United Kingdom (A/CN.4/488, p. 34).

132. The commentary[164] cites no writer and no decision supporting the contrary view to article 2, and this is not surprising. The proposition that a particular State was in principle immune from international responsibility would be a denial of international law and a rejection of the equality of States, and there is no support whatever for that proposition. Instead the commentary discusses a number of different issues. These include the problem of "delictual capacity" in national law (as in the case of minors); the question of the responsibility of the component units of a federal State; the responsibility of a State on whose territory other international legal persons are operating; and the issue of circumstances precluding wrongfulness. It concludes that none of these situations constitutes an exception to the principle of the international responsibility of every State for internationally wrongful conduct attributable to it. This conclusion is obviously correct.

133. Most of the issues identified in the commentary are dealt with elsewhere in the draft articles and do not need to be discussed here.[165] As to the question of "delictual capacity", the Commission in 1973 decided not to formulate article 2 in such terms, since it was paradoxical to assert that international law could confer the "capacity" to breach its own rules.[166] A further difficulty with the notion of "delictual capacity" is its undue focus on the question of breach. In the case of non-State entities, a bundle of questions about their legal personality, to what extent international law applies to them and their international accountability for possible breaches do indeed arise. So far as States are concerned, however, the position is clear: all States are responsible for their own breaches of international law, subject to the generally available excuses or defences which international law itself provides and which are dealt with in chapter V of Part One. The draft articles deal only with the international responsibility of States, and accordingly it is not necessary to discuss the broader range *of* questions.

### (b) Recommendation

134. Article 2 deals only with the possibility of responsibility, which in the context of draft articles dealing with State responsibility is an unnecessarily abstract notion. The proposition affirmed in article 2 is unquestioned and unquestionable. It will be sufficient to confirm it in the commentaries to articles 1 and 3. Article 2 is unnecessary and can be deleted.

## 3. Article 3: Elements of an internationally wrongful act of a State

### (a) Observations

135. According to article 3:

> "There is an internationally wrongful act of a State when:
>
> (a) conduct consisting of an action or omission is attributable to the State under international law; and
>
> (b) that conduct constitutes a breach of an international obligation of the State."

136. Though in a sense axiomatic, this is a basic statement of the conditions of State responsibility. The issues it raises have already been discussed in relation to article 1.

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[164] *Yearbook ... 1973*, vol. II, pp. 176-179.

[165] For the component units of a federal State, see article 7. For the responsibility of a State on whose territory other international legal persons are operating, see articles 12 and 13. For circumstances precluding wrongfulness, see articles 29 to 35.

[166] Commentary to article 3, para. (10).

Indeed, there is a case for placing article 3 before article 1, since article 3 defines the general prerequisites for the responsibility which article 1 proclaims.

137. The inclusion of both acts and omissions within the scope of the phrase "internationally wrongful act" has already been discussed. In addition, France proposes that it be made clear that the phrase extends both to "legal acts and material conduct"; by "legal acts" is meant "acts in law" (e.g., the legal act of enacting a law, or denaturalizing a person), not "lawful acts".[167] Acts in law are certainly intended to be covered, but it seems sufficient to make this clear in the commentary.

138. Article 3 has the further important role of structuring the draft articles that follow. Chapter II deals with the requirement of attribution of conduct to the State under international law. Chapter III deals, so far as the secondary rules can do so, with the breach of an international obligation. Chapters IV and V deal with more specific issues, which do not need to be referred to in the text of article 3; their relationship to the basic principle can be made clear in the commentary.

### (b) Recommendation

139. Essentially for the reasons given in relation to article 1 and on the same basis, it is recommended that article 3 be adopted unchanged.

## 4. Article 4: Characterization of an act of a State as internationally wrongful

### (a) Observations

140. Article 4 provides:

> "An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law."

141. There appears to be no objection to or difficulty with this basic but important proposition. The second sentence does not of course mean that issues of "internal" law are necessarily irrelevant to international law: for example, national law may be relevant as a fact in an international tribunal.[168] But the characterization of conduct as lawful or not is an autonomous function of international law. The long line of authorities supporting this proposition is surveyed in the commentary.[169]

142. So far none of the governmental comments raises doubts about or proposes changes to article 4.[170]

### (b) Recommendation

143. It is recommended that article 4 be adopted unchanged.

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[167] A/CN.4/488, p. 34.

[168] As for example in the *ELSI Case (United States v. Italy), I.C.J. Reports 1989*, p. 15.

[169] Commentary to article 4, paras. (3)-(13). The commentary convincingly explains why the language of article 27 of the Vienna Convention on the Law of Treaties ("A party may not invoke the provisions of its internal law as justification for its failure to invoke a treaty") was not more closely reflected in article 4 (see paras. (15)-(17).

[170] See A/CN.4/488, p. 35.

Table 1

KEY TERMS IN THE DRAFT ARTICLES ON STATE RESPONSIBILITY

| English | Arabic | Chinese | French | Russian | Spanish |
|---|---|---|---|---|---|
| 1. internationally wrongful act | فعل غير مشروع دولياً | 国际不法行为 | fait internationalement illicite | Международно-противоправное деяние | Hecho internacionalmente ilícito |
| 2. breach of an international obligation | انتهاك التزام دولي | 违背国际义务 | violation d'une obligation internationale | Нарушение международного обязательства | Violación de una obligación internacional del Estado |
| 3. act of a State | فعل الدولة | 国家的行为 | fait d'un Etat | Деяние государства | Hecho de un Estado |
| 4. attribution | التحميل | 归于 | attribution | Присвоение | Atribución |
| 5. circumstances precluding wrongfulness | الظروف النافية لعدم المشروعية | 解除不法行为的情况 | circonstances excluant l'illicéité | Обстоятельства, исключающие противоправность | Circunstancias que excluyen la ilicitud |
| 6. injured State | الدولة المضرورة | 受害国 | Etat lésé | Потерпевшее государство | Estado lesionado |
| 7. the State which has committed an internationally wrongful act | الدولة التي ارتكبت الفعل غير المشروع دولياً | 实行国际不法行为的国家 | l'Etat qui a commis un fait internationalement illicite | Государство, которое совершило международно-противоправное деяние | El Estado que haya cometido el hecho internacionalmente ilícito |
| 8. damage | الأضرار | 损害 | dommages | Ущерб | Daño |

## Table 2

KEY TERMS RELEVANT TO THE DRAFT ARTICLES ON STATE RESPONSIBILITY

| | | |
|---|---|---|
| ١- الدولة المرتكبة للفعل غير المشروع | 不法行为国 | the wrongdoing State |
| l'Etat fautif | El Estado infractor | государство-нарушитель |