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Third report on State responsibility

by Mr. James Crawford, Special Rapporteur

Addendum

Contents

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III. Structure of the remaining parts of the draft articles*

224. In earlier sections of this Third Report, the general principles and forms of reparation were proposed, based largely on the draft articles adopted on first reading but with modifications in response to later developments and to the comments of Governments. The Commission has also tentatively supported some ideas put forward by the Special Rapporteur for the structure of the remaining parts and chapters.[423] These involve, *inter alia*:

- A new Part Two *bis*, dealing with the invocation of responsibility, which would include the articles on countermeasures;
- Possible provisions on the plurality of injured States;
- Further consideration of the category of serious breaches of obligations to the international community as a whole;
- Deferring consideration of the form of the draft articles, and of the related question of settlement of disputes (present Part Three);
- A new Part Four, bringing together the various saving clauses and other general provisions.

225. Against this background, the present section of the report considers questions of the invocation of responsibility in what may be described as the "normal" case, i.e., the invocation of responsibility by an injured State (as defined in the proposed article 40 *bis*, or in a similar way[424]) against a responsible State. The section then considers the question of the invocation of responsibility in cases where there is a plurality of responsible States, or of injured States.

226. In a further section of this report the articles on countermeasures are considered, in terms of both the taking of countermeasures by an injured State and the more complex situation where there are several or many States claiming to take countermeasures; this involves the key remaining issue: what difference it makes if what is at stake is a serious breach of an obligation to the international community as a whole. Finally, the report considers the question of a general part (Part Four) containing saving clauses and any other general provisions applicable to the draft articles as a whole (including articles 37 and 39 as adopted on first reading).

IV. Invocation of responsibility by an injured State

A. General considerations

227. Proposed Part Two *bis* is predicated upon a distinction between the secondary consequences which flow by operation of law from the commission of an internationally wrongful act and the various ways in which those consequences can be brought to bear or (for that matter) waived or reduced. One of the problems with

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* The Special Rapporteur wishes to acknowledge the assistance of Pierre Bodeau, Jacqueline Peel, Christian Tams, Carole Moal, Johanne Poirier and Arnaud Macé in the preparation of this addendum.

423 See paras. 5-10 above.

424 See para. 119 above.

Part Two as adopted on first reading was that it appeared to conceive of all the corollaries of an internationally wrongful act as arising by operation of law, i.e., as part of the new secondary legal relationship which arises immediately upon the commission of such an act. On this assumption, it was necessary to define those consequences a priori and in terms which apparently allowed for no element of choice or response on the part of other States, or indeed on the part of the responsible State itself. On this assumption, countermeasures are as much a part of the secondary legal relation as reparation. Yet the way the regime of responsibility is worked out in practice will depend upon the subsequent conduct of the parties involved. To take a simple example, in the case of breach of a normal bilateral inter-State obligation, it is open to the injured State in effect to forgive the breach, or to waive the right to invoke its consequences, or to elect to receive compensation rather than restitution, or to focus only on cessation and future performance. A text which defines restitution as the normal consequence of an internationally wrongful act but fails to make it clear that the injured State in such cases may validly elect to prefer compensation does not reflect international law or practice.

228. Accordingly there are good reasons for distinguishing between the consequences that flow as a matter of law from the commission of an internationally wrongful act (Part Two) and those further consequences which depend upon the subsequent reactions of the parties, whether they take the form of a refusal to make reparation (leading to the possibility of countermeasures) or of waiver by the injured State (leading to the loss of the right to invoke responsibility), or to various intermediate possibilities. The latter are the subject of Part Two *bis*.

229. It is proposed that the title to Part Two *bis* should be "The implementation of State responsibility". There is no need for the French term "*mise en œuvre*" to be included in brackets in the English text, although it is a suitable equivalent of the term "implementation" and can be included in the French text.

230. The Special Rapporteur has already foreshadowed that former article 40 (new article 40 *bis*) should be placed at the beginning of this part.[425] If, as has been suggested, proposed article 40 *bis* is subdivided into two or three articles, they should be distributed as appropriate within the part. In what follows, the focus will be on the "injured State" as that term is proposed to be defined in article 40 *bis*.

231. In the first place, evidently, each injured State on its own account is entitled to invoke responsibility.[426] However a number of issues arise as to the modalities of and limits upon such invocation, and these are candidates for inclusion in a first general chapter of this part.[427] They include the following:

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[425] See paras. 9 and 117-119.

[426] See paras. 102 and 107 above. See paras. 279-281 below for consideration of cases where responsibility is invoked by more than one injured State in respect of the same act.

[427] The Vienna Convention on the Law of Treaties of 1969 deals with analogous issues separately in relation to each particular subject. For example, the procedure regarding reservations is dealt with in article 23, following the articles dealing with the formulation of reservations and their legal effect. Section 1 of Part V brings together a number of provisions dealing with the invocation of grounds for invalidity, suspension or termination of a treaty: see, e.g. articles 44 (separability of treaty provisions), 45 (loss of the right to invoke a ground for invalidating … a treaty). Further issues of procedure are dealt with in section 4 of the same part, and section 5 deals with the consequences of such invocation.

- The right of the injured State to elect the form of reparation (e.g., to prefer compensation to restitution);
- Minimum formal requirements for the invocation of responsibility (e.g., a demand in writing);
- Questions associated with the admissibility of claims (e.g., exhaustion of local remedies, nationality of claims);
- Limits on the rights of the injured State as concerns reparation (e.g., the *non ultra petita* rule, the rule against double recovery);
- Loss of the right to invoke responsibility.

These are dealt with in turn.

1. The right of the injured State to elect the form of reparation

232. In general, an injured State is entitled to elect as between the available forms of reparation. Thus it may prefer compensation to the possibility of restitution, as Germany did in the *Chorzów Factory* case,[428] or as Finland eventually chose to do in its settlement of the *Case concerning the Great Belt*.[429] Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. In the first reading text, the right to elect as between the forms of reparation was accepted. It was reflected in the formula "The injured State has the right …" That formula is not proposed for the various articles which embody the principle of full reparation. For reasons given above, these should be expressed in terms of the obligation(s) of the responsible State.[430] But in any event it is desirable to spell out the right of election expressly, the more so since the position of third States interested in (but not specifically injured by) the breach will be affected by any valid election of one remedy rather than another by an injured State.

233. The question whether there are any limitations on the right of election of the injured State has already been referred to.[431] There are certainly cases where a State could not, as it were, pocket the compensation and walk away from an unresolved situation, especially one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. However, such situations on analysis seem to concern questions of cessation, or of the continuing performance of obligations, and not questions of reparation properly so called. Reparation is concerned with the wiping out of *past* injury and harm. Insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations. These refinements can, however, be reflected in the language of the text and referred to in the commentary. By analogy with article 29 (consent), it is sufficient to refer to a "valid" election by an injured State in favour of one of the forms of reparation rather than another, leaving

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[428] See para. 23 above.

[429] See paras. 136-137 above, and for the terms of the settlement see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *A.F.D.I.*, 1992, pp. 905-947, especially pp. 940ff.

[430] See paras. 25-26 above.

[431] See para. 134 above.

the conditions of validity to be determined by general international law. Under the draft articles, such an election should be given effect.

2. Formal requirements for the invocation of responsibility

234. Although the secondary legal relationship of responsibility may arise by operation of law on the commission of an internationally wrongful act, in practice it is necessary for any other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation, through formal protest, consultations, etc. Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or extinctive prescription.

235. There is an analogy with article 65 of the Vienna Convention on the Law of Treaties, which provides that:

> "1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
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> "2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
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> "3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.
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> "4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.
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> "5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation."

236. Care needs to be taken not to over-formalize the procedure, or to imply that the normal consequence of the non-performance of an obligation is the lodging of a statement of claim. In many cases quiet diplomacy may be more effective in ensuring performance, and even reparation. Nonetheless an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

237. It is not the function of the draft articles to specify in detail the form which an invocation of responsibility should take. In practice claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. Moreover, the International Court has sometimes been satisfied with rather informal modes of invocation. For

example, in the *Case concerning Certain Phosphate Lands in Nauru*, Australia argued that Nauru's claim was inadmissible because "it had not been submitted within a reasonable time".[432] That raised two issues: first, when the claim had actually been submitted; secondly, whether the lapse of time before its submission (or, indeed, the subsequent lapse of time before Nauru had done anything effective to pursue its claim) was fatal. The Court dismissed the objection. It referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to "press reports" that the claim had been mentioned by the new President of Nauru in his Independence Day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However the Court also noted that:

> "It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to 'seek a sympathetic reconsideration of Nauru's position'."[433]

The Court summarized the communications between the parties as follows:

> "The Court … takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of the rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of the relations between Australia and Nauru, as well as the steps thus taken, Nauru's application was not rendered inadmissible by the passage of time."[434]

It seems from this passage that the Court did not attach much significance to formalities. It was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence. But despite its flexibility and its reliance on the context provided by the relations between the two States concerned, the Court does seem to have had regard to the fact that the claimant State had effectively notified the respondent State of the claim.

238. In the Special Rapporteur's view, this approach is correct as a matter of principle. There must be at least some minimum requirement of notification by one State against another of a claim of responsibility, so that the responsible State is aware of the allegation and in a position to respond to it (e.g., by ceasing the breach and offering some appropriate form of reparation). No doubt the precise form the claim takes will depend on the circumstances. But the draft articles should at least require that a State invoking responsibility should give notice thereof to the responsible State. In doing so, it would be normal to specify what conduct on its part is required by way of cessation of any continuing wrongful act, and what form any reparation sought should take. In addition, since the normal mode of inter-State

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[432] *I.C.J. Reports 1992*, p. 240, para. 31.
[433] Ibid., para. 35.
[434] Ibid., para. 36.

communication is in writing, it seems appropriate to require that the notice of claim be in writing.[435]

3. Certain questions as to the admissibility of claims

239. If a State having protested at a breach is not satisfied by any response made by the responsible State, it is entitled to invoke the responsibility of that State by seeking such measures of cessation, reparation, etc., as are provided for in Part Two. Presumably the draft articles should say so, by analogy with articles 63 (2)-(4) and 65 of the 1969 Vienna Convention. The question is whether any provision in Part Two *bis* should address issues of the admissibility of claims of responsibility.

240. In general the draft articles are not concerned with questions of the jurisdiction of international courts and tribunals, or of the conditions for the admissibility of cases. Rather they define the conditions for establishing the international responsibility of States, and for the invocation of that responsibility by States. Thus it is not the function of the draft articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as *lis alibi pendens* or *electa una via* as they may affect the jurisdiction of one international tribunal over another.[436] By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character: they are conditions for invoking the responsibility of a State in the first place. The most obvious examples are the requirements of exhaustion of local remedies and nationality of claims.

(a) Exhaustion of local remedies (article 22)

241. The exhaustion of local remedies rule was already embodied as article 22, adopted on first reading, and it was discussed by the Commission in 1999 on the basis of the Special Rapporteur's Second Report.[437] As adopted on first reading, article 22 embodied what has been termed the "substantive" understanding of the exhaustion of local remedies, according to which, in any case in which the exhaustion of local remedies applies, the breach does not occur until local remedies have been exhausted. But there are certainly cases in which this is not so: for example, an individual victim of police torture has to exhaust local remedies, but torture is a breach both of human rights and of the minimum standard of treatment of aliens. The Special Rapporteur had proposed that, in lieu of article 22, a saving clause should be inserted either at the end of Part One, chapter III, or in the

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[435] Cf. Vienna Convention on the Law of Treaties, 1969, art. 23 (reservations, express acceptances of reservations and objections to reservations must be formulated in writing); art. 67 (notification of invalidity, termination or withdrawal from a treaty must be in writing).

[436] For a discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale: étude des notions fondamentales de procédure et des moyens de leur mise en œuvre*, Pedone, Paris, 1967, 279 p.; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Grotius, Cambridge, 1986, especially vol. II, chap. VII, pp. 427-575; S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Nijhoff, The Hague, 3rd ed., 1997, vol. II, "Jurisdiction".

[437] See Second Report, A/CN.4/498, paras. 136-148, and for an account of the discussion, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), paras. 223-243.

proposed Part Two *bis*, reserving cases covered by the exhaustion of local remedies rule.[438] On further consideration he believes that the appropriate place for such a clause is Part Two *bis*. The saving clause should be in quite general terms: it should cover any case to which the exhaustion of local remedies rule applies, whether under a treaty or under general international law. Correspondingly it should not be limited, as former article 22 was limited, to cases of diplomatic protection, i.e., to cases "concerning the treatment to be accorded to foreign nationals or corporations".[439] It is not necessary to define in any detail in the draft articles the modalities of the application of the rule. Nor is it necessary to deal with such questions as: (a) whether the rule applies to injuries inflicted outside the territory of the respondent State; (b) whether it applies to injuries inflicted, for example, in commercial or economic fields (*iure gestionis*), on foreign States and their organs; (c) whether particular remedies are to be considered as "available" for this purpose; and (d) what amounts to exhaustion. In the context of the work on the topic of diplomatic protection, such matters will no doubt be dealt with in more detail.

(b) Nationality of claims

242. A second possible ground of inadmissibility which could be included in Part Two *bis* is the nationality of claims. Again it should be noted that the detailed elaboration of the nationality of claims rule is a matter for the topic of diplomatic protection. But since the nationality of claims rule is a general condition for the invocation of responsibility, and is not only concerned with the jurisdiction or admissibility of claims before judicial bodies, it seems desirable to treat it in a similar way to the rule of exhaustion of local remedies. A simple provision to that effect is accordingly proposed.[440]

4. Limits on the recovery of reparation

243. Limitations applicable to the principle of full reparation should be embodied in Part Two, which defines the obligations of the responsible State in that regard, and which takes into account such issues as contributory fault. Within the context of the invocation of responsibility, however, certain additional limitations may exist. Two matters should be mentioned.

(a) The *non ultra petita* principle

244. International courts and tribunals quite frequently apply, or at least refer to, the principle *non ultra petita*, that is, the principle that a State will not be awarded by way of reparation more than it has actually claimed. For example, in the *Corfu Channel* case *(Assessment of Compensation)*, the United Kingdom of Great Britain and Northern Ireland claimed £700,087 for the replacement value of the destroyer *Saumarez*, sunk by mines. The Court's experts assessed the true replacement cost at a slightly higher figure (£716,780). The Court awarded the lower figure, stating that

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[438] For the proposed text see Second Report, A/CN.4/498, para. 156.

[439] Under article 41 (1) (c) of the International Covenant on Civil and Political Rights, inter-State communications concerning breaches of human rights may only be dealt with by the Human Rights Committee "after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law". See also Optional Protocol, article 2, and the equivalent provisions of the regional human rights conventions.

[440] For the text of the provision see para. 284 below.

"it cannot award more than the amount claimed in the submissions of the United Kingdom Government".[441] The Court has applied such a principle in a range of cases, sometimes accounting for it as a function of the procedural rules associated with the formal submissions of the parties,[442] sometimes regarding it as inherent in the judicial process.[443]

245. The rule that the claim of an injured State imposes a limit upon the form and quantum of reparation that can be awarded is supported also by arbitral jurisprudence. For example, in the *Spanish Zone of Morocco Claims*, there was a British demand for compound interest at 7 per cent; Spain's position was that only simple interest at 5 per cent was payable. The Rapporteur, Max Huber, stated:

> "The rate of 5 per cent would certainly be too low. By contrast one could well envisage in certain cases a rate higher than 7 per cent. That being so, one must nevertheless respect the judicial principle according to which it is impermissible to go beyond the claims of the parties. Despite the special character of the inquiry with which he has been entrusted, the Rapporteur considers … that as far as possible he should take account of the principles governing judicial procedure. That is why he adopts a rate of 7 per cent as the maximum as well as the minimum."[444]

To say the least, this was a rather mechanical application of the principle. The United Kingdom had sought a rate of 7 per cent compounded, and to separate the interest rate from the method of its calculation seems quite unjustified. A higher rate of interest calculated as simple interest would not have been beyond the scope of the amounts actually sought by the United Kingdom as interest.[445]

246. It is established that the *non ultra petita* principle represents, as it were, an outer limit to the final award or decision open to a court or tribunal, and does not limit the grounds of its decision within that limit. Thus the International Court has always asserted the freedom not merely to choose on which grounds it will decide a case, but also to characterize the essence of the Applicant State's claim.[446] Difficulties can, however, arise where a party seeks to circumscribe its claims or submissions with a view to limiting the Tribunal, for example, to restitution rather than compensation. In the *Rainbow Warrior* arbitration, New Zealand sought only the return of the two agents to the island, and specifically disavowed any claim to

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[441] *I.C.J. Reports 1949*, p. 244, at p. 249. By contrast the Court awarded the full claim for repairs for the second damaged ship, the *Volage*, notwithstanding that the experts' assessment was slightly lower; ibid.

[442] As in the *Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case, I.C.J. Reports 1950*, p. 395, at p. 402 (referring to "the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but to abstain from deciding points not included in those submissions"). In fact the Statute of the Court focuses on the "claim" of the Applicant State: see especially art. 53. It is the Rules which treat the formal submissions as embodying and limiting this claim: see arts. 49, 60 (2),79 (2), 95 (1); similarly for counter-claims: art. 80 (2).

[443] As in *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal (Fasla case), I.C.J. Reports 1973*, p. 166, para. 87.

[444] *U.N.R.I.A.A.*, vol. II, p. 650 (1924).

[445] A rather more flexible approach, still upholding the basic principle, was that of the Romano-German Mixed Arbitral Tribunal in *Golgan v. Germany, Recueil des décisions des tribunaux arbitraux mixtes*, vol. V (1926) p. 945, in 3 Ann. Dig. p. 419.

[446] See e.g. the review of the case law offered by the Court in the *Nuclear Tests Cases, I.C.J. Reports 1974*, para. 29 *(Australia v. France)*, and para. 30 (*New Zealand v. France*).

compensation in lieu.[447] The Tribunal appears to have accepted this as a constraint upon its powers of decision, although the relevant passage is not free from ambiguity. It said:

> "New Zealand has not however requested the award of monetary compensation — even as a last resort should the Tribunal not make the declarations and orders for the return of the agents. The Tribunal can understand that position in terms of an assessment made by a State of its dignity and sovereign rights. The fact that New Zealand has not sought an order for compensation also means that France has not addressed this quite distinct remedy in its written pleadings and oral arguments, or even had the opportunity to do so. Further, the Tribunal itself has not had the advantage of the argument of the two parties … on … relevant matters, such as the amount of damages."[448]

The Tribunal accordingly decided "not to make an order for monetary compensation".[449] But it did make a recommendation to similar effect, in effect evading the rule.

247. In the Special Rapporteur's view, the *non ultra petita* rule is, in effect, the procedural complement of the more basic principle that an injured State is entitled to elect from among the remedies available to it in the context of full reparation. Assuming that the underlying right of election of the injured State is clearly expressed in Part Two *bis*, there is no need for the principle to be spelled out in any further detail. Moreover, to do so may limit the flexibility of international tribunals in deciding on the combination of remedies appropriate to the particular case, especially if, as Rapporteur Huber did, in the *Spanish Zones of Morocco* case, it is applied severally to the different aspects of reparation sought. The error of doing so should be explained in the commentary, but no separate article embodying the principle is necessary.

(b) The rule against double recovery

248. A second possible limitation on the invocation of responsibility is the rule against double recovery. It is generally accepted that the award of compensatory damages should not lead to a situation of "double recovery", i.e., to the recovery by the injured party of more than its assessed damage or injury. The need to "arrive at a just appreciation of the amount, and avoid awarding double damages" was treated as axiomatic, for example, by the Permanent Court in the *Chorzów Factory* case *(Merits)*.[450] That principle has been reaffirmed by other international tribunals[451] and in State practice.[452] In some contexts it affects the quantum of compensation

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[447] See para. 132 above.

[448] *U.N.R.I.A.A.*, vol. XX (1990), p. 272 (para.119).

[449] Ibid., pp. 272, 274 (paras. 120, 124-128).

[450] *P.C.I.J., Series A*, No. 17 (1928), p. 49. See also p. 45, where the Court observed that in the circumstances "there seems to be no doubt that Poland incurs no risk of having again to pay the value of the factory to the Reparation Commission, if, in accordance with Germany's claim, she pays this value to that State".

[451] See, e.g., *Harza v. Islamic Republic of Iran, U.S.-Iran C.T.R*, vol. 11 (1986) p. 76, para. 30; *Itel Corporation v. Government of the Islamic Republic of Iran, U.S.-Iran C.T.R*, vol. 28 (1992), p. 159, paras. 31-32; *Seaco, Inc. v. Islamic Republic of Iran, U.S.-Iran C.T.R*, vol. 28 (1992) p. 198, paras. 55-56.

[452] This can be seen, for example, from the practice of national compensation commissions, which

itself, and thus concerns issues already dealt with in chapter II of Part Two. For example, compensation for loss of profits and for interest on the capital sum which earns those profits cannot be awarded in respect of the same period.[453] But in other cases, there may be a potential entitlement of the claimant State to full reparation, which has to be qualified at the level of invocation in order to avoid double recovery. This will often be so where different persons or entities are entitled to bring what is effectively the same claim before different forums. Again the *Chorzów Factory* case provides an example, since the property in question there was the subject at the same time of claims by the (former) owners before mixed arbitral tribunals, and of a claim by Germany before the Permanent Court. The Court rejected a Polish argument that this circumstance made the German claim inadmissible, on the formal ground that the parties were not the same, and on the substantive ground that Germany's complaint related to property seized in breach of a treaty, whereas the tribunals' jurisdiction related to properties lawfully expropriated. However, it is quite clear that any compensation payable to the companies would have been taken into account in assessing the amount of compensation payable to Germany.

249. For most purposes the principle against double recovery is subsumed in the general principle of full (equitable) reparation, which generally implies that reparation should be no more than necessary to compensate the injured State for the loss, and be not inequitable in the circumstances. In one case, however, it may be necessary to make the principle explicit, i.e., where the same claimant is entitled to reparation as against several States responsible for essentially the same damage. This concerns the question of a plurality of responsible States, and it is dealt with below in that context.[454]

5. Loss of the right to invoke responsibility

250. Finally, under the rubric of the invocation of responsibility by an injured State, the question arises of the loss of the right to invoke responsibility. Again an analogy is provided by article 45 of the Vienna Convention on the Law of Treaties, which deals with loss of the right to invoke a defect in a treaty. It provides that:

> "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty… if, after becoming aware of the facts:
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> (a) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
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> (b) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

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in distributing lump sum payments by way of compensation are required to have regard to any amounts received or which (if the individual claimant had exercised due diligence) would have been received in respect of the loss in question from any other source; see, e.g., Foreign Compensation (Egypt) Order 1971 (U.K.) *S.I.*, 1971 No. 2104, Art. 10 (2) (b); Foreign Compensation (Romania) Order 1976 (U.K.) *S.I.*, 1976 No. 1154, Art. 10.

[453] See, e.g., *Uiterwyk Corporation v. Government of the Islamic Republic of Iran, U.S.-Iran C.T.R*, vol. 19 (1988) p. 107, para. 188.

[454] See para. 279 below.

This deals with issues such as waiver of a material breach. It suggests that a similar provision in Part Two *bis* may be useful.

251. The question is what elements this should include. In the first place it seems necessary to distinguish between the position of an injured State and other States concerned. Thus, for example, a valid waiver or settlement of the responsibility dispute between the responsible State and the injured State (or, if there is more than one, all the injured States) may preclude any claim for reparation or threat of countermeasures by other States.

252. Even in the bilateral context, however, issues of loss of the right to invoke responsibility can arise. Possible grounds include: (a) waiver, (b) delay, (c) settlement and (d) the termination or suspension of the underlying obligation breached. There is room for the view that all these legal categories (including delay) are modes of waiver, and that a general provision along the lines of article 45 of the Vienna Convention would be sufficient to cover the field. Before reaching that conclusion, a brief review may be made of the various possibilities.

(a) Waiver

253. The first and most obvious ground for loss of the right to invoke responsibility is that the injured State has waived either the breach itself, or its consequences. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State. No doubt as with other forms of State consent, questions of validity could arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter arising perhaps from a misrepresentation of those facts by the responsible State. Such questions should be resolved in the same way as with the proposed article 29 dealing with consent as a circumstance precluding wrongfulness.[455] Thus reference should be made to a "valid waiver", leaving to the general law the question of what amounts to a valid waiver in the circumstances.

254. The question may be raised as to whether there is a difference between subsequent consent as to the breach itself and consent to waive the consequences of the breach. According to the commentary to article 29 as adopted on first reading, "if the consent is given only after the commission of the act (ex post facto), it will simply be a waiver of the right to assert responsibility and the claims arising therefrom. But with such a waiver, the wrongfulness of the prior act still remains".[456] Of course, where the waiver postdated the act in question, that act will by definition have been unlawful at the time of the breach. But it is not clear why (at least in respect of obligations owed only as between the waiving State and the responsible State) the former cannot consent retrospectively to the conduct in question, thus effectively legitimizing it for all purposes. On the other hand, the case envisaged in the commentary certainly could occur: a State might be willing to overlook the consequences of a breach — as it were, prospectively — without going so far as to excuse the conduct from its inception. In either case, it seems reasonable that a valid and unqualified waiver should entail the loss of the right to invoke responsibility.

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[455] For a discussion of article 29, see Second Report, A/CN.4/498/Add.2, paras. 230-241.

[456] Commentary to article 29, para. (16).

255. In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum (corresponding to the capital amount of a loan), without any reference to interest or damages for delay. Turkey having paid the sum demanded, the Tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.[457] The decision relates as much to the effect of settlement as to waiver in the general sense, but clearly, any formulation of the principle of waiver should allow for the waiver of part of a claim in this way.[458]

256. Although it may be possible to infer a waiver from the conduct of the States concerned, or from a unilateral statement, the conduct or statement must be clear and unequivocal. In the *Phosphate Lands* case, Australia argued that the Nauruan authorities before independence had waived the rehabilitation claim (a) by concluding the Agreement relating to the Nauru Island Phosphate Industry of 14 November 1967, and (b) by statements made at the time of independence. As to the former, it was true that that Agreement met a key Nauruan demand for control over the phosphate industry as from independence, but the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements included the remark that future royalties "would … make it possible to solve the [rehabilitation] problem".[459] The Court rejected the Australian argument. As to the 1967 Agreement, it said:

> "The Court does not deem it necessary to … consider whether any waiver by the Nauruan authorities prior to accession to independence is opposable to the Republic of Nauru. It will suffice to note that in fact those authorities did not at any time effect a clear and unequivocal waiver of their claims".[460]

As to the statement by the Nauruan Head Chief, it noted that "notwithstanding some ambiguity in the wording, the statement did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations".[461] The context of the negotiations, and the de facto inequality of the parties, emphasized the need for any waiver to be clear and unequivocal: in case of doubt, a waiver is not to be presumed.[462] The proposed provision should equally make this clear.

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[457] *U.N.R.I.A.A.*, vol. XI (1912), p. 446.

[458] In this sense, some cases of waiver are cognate to the settlement of a claim by the offer and acceptance of partial reparation. See para. 259 below.

[459] Cited at *I.C.J. Reports 1992*, p. 240, para. 17.

[460] Ibid., para. 13.

[461] Ibid., para. 20.

[462] In a different context see the *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, p. 6, at p. 24, where the Court held that the language of the relevant treaty was clear and unequivocal.

(b) Delay[463]

257. Somewhat more controversial is the question of loss of the right to invoke responsibility arising from delay in the bringing of a claim. The existence of a principle of extinctive prescription as a ground for the inadmissibility of a claim of responsibility seems to be generally accepted. It was endorsed, for example, by the International Court in the *Phosphate Lands* case, in the following passage:

> "The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible."[464]

The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru's application was not inadmissible on this ground.[465]

258. *Phosphate Lands* involved a State-to-State claim, but many of the judicial decisions on this question concern diplomatic protection claims pursued some or even many years after the incidents giving rise to them. The effect of these authorities may be summarized as follows:

- The first element that must be present before any question of undue delay can arise is obviously the lapse of a considerable period of time. But no generally accepted time limit, expressed in terms of years, has ever been laid down. The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.[466] Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.[467] None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.[468] Indeed, it would be practically impossible to establish any single limit, given the variety of situations, obligations and conduct likely to give rise to a particular claim.

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[463] For a useful review see A.R. Ibrahim, "The Doctrine of Laches in International Law", *Virginia L. Rev.* 647 (1997), with references to jurisprudence and the literature. Earlier accounts include R. Pinto, "La prescription en droit international", *Recueil des cours,* vol. 87 (1955-I), pp. 438-448.

[464] *I.C.J. Reports 1992*, p. 240, para. 32.

[465] Ibid., para. 36. The relevant passage is cited in paragraph 237 above. Judge Oda dissented, on the ground that Nauru's silence (as he regarded it) about its claim for more than 15 years after independence "makes it inappropriate for the Court to entertain it … if only on grounds of judicial propriety"; ibid., para. 28.

[466] Communiqué of 29 December 1970, reproduced in (1976) 32 *Schweizerisches Jahrbuch für Internationales Recht,* p. 153.

[467] C. Fleischhauer, "Prescription", in *Encyclopedia of Public International Law*, vol. III (R. Bernhardt, ed., Amsterdam, 1997) p. 1107.

[468] A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides the *Certain Phosphates Case*, see e.g. *Gentini Case*, *U.N.R.I.A.A.*, vol. X, p. 561 (1903); *Ambatielos Arbitration*, (1956) 23 I.L.R. p. 306 at pp. 314-317.

- There are of course many cases where time limits are laid down for specific categories of claim arising under specific treaties,[469] notably in the field of private law.[470] By contrast it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limit.

- Once a claim has been notified to the respondent State, delay in its prosecution (e.g., before an international tribunal) will not usually be regarded as rendering it inadmissible.[471] Thus, in the *Phosphate Lands* case, the International Court held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.[472] In the *Tagliaferro* case, Umpire Ralston likewise held that despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.[473]

- Indeed, international practice suggests that the lapse of time *as such* is not sufficient to render a claim inadmissible. A significant concern of the rules on delay seems to be the additional difficulties caused to the respondent State due to the lapse of time (e.g., as concerns the collection and presentation of evidence). Thus in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness were advanced.[474] In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not establish the existence of any prejudice on its part.[475]

- The distinction between the notification of a claim and the commencement of proceedings before an international court or other body arises in part because of the absence of any general availability of third-party dispute settlement in international law. Often the only way in which a State's responsibility could be invoked was by the bringing of a claim through diplomatic channels, without any possibility of compulsory resort to any third party. Evidently it would be unfair to prejudice a claimant by holding a claim to be stale when the claimant (or the claimant's State) had done everything possible to prosecute the claim. But even when that State at all relevant times had an international forum available to it, the distinction has still been applied. For example, in the *LaGrand Case*, the International Court accepted the German application for

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[469] E.g., the six-month time limit for individual applications under article 35 (1) of the European Convention on Human Rights. This does not, it seems, apply to interstate cases brought under article 33.

[470] E.g., in the field of commercial transactions and international transport. See United Nations Convention on the Limitation Period in the International Sale of Goods, New York, 14 June 1974, as amended by the Protocol of 11 April 1980: 1511 U.N.T.S. p. 99. By contrast in the field of individual crimes against international law, the tendency is to avoid time limits on prosecution: see F. Weiss, "Time Limits for the Prosecution of Crimes against International Law" (1982) 53 *B.Y.I.L.* 163.

[471] For statements of the distinction between notice of claim and commencement of proceedings see, e.g., *Oppenheim's International Law* (R. Jennings and A. D. Watts, eds., 9th ed., 1992) vol. I, p. 527; C. Rousseau, *Droit international public* (Paris, 1983) vol. V, p. 182.

[472] See para. 256 above.

[473] *Tagliaferro Case, U.N.R.I.A.A.*, vol. X, 593 (1903).

[474] See *Stevenson Case, U.N.R.I.A.A.*, vol. IX, p. 385 (1903); *Gentini Case, U.N.R.I.A.A.*, vol. X, p. 557 (1903).

[475] See, e.g., *Tagliaferro Case, U.N.R.I.A.A.*, vol. X, p. 593 (1903); similarly the actual decision in the *Stevenson Case, U.N.R.I.A.A.*, vol. IX, pp. 386-387 (1903).

interim protection and indicated a stay of execution.[476] The Court made its order although Germany had taken legal action literally at the last minute, 6½ years after the breach had occurred.[477]

259. The overall picture is one of considerable flexibility. A case will not be held inadmissible on grounds of delay unless the respondent State has been clearly disadvantaged and international courts have engaged in a flexible weighing of relevant circumstances in the given case, including, for example, the conduct of the respondent State and the importance of the right involved.[478] Contrary to what may be suggested by the expression "delay", international courts have not engaged in a mere exercise of measuring the lapse of time and applying clear-cut time limits. Rather, the decisive factor is whether the respondent could have *reasonably* expected that the claim would no longer be pursued.[479] Because of this, the distinction between delay on the one hand, and implied waiver or the more general idea of acquiescence on the other, is a relative one. Indeed, it is arguable that all the instances of non-admissibility discussed here could be treated as aspects of a general principle of waiver or acquiescence. For the purposes of the draft articles, however, it is proposed to adopt the traditional separation between waiver and delay. Moreover, given modern means of communication and the increased availability of third-party remedies in many cases, a somewhat more rigorous approach to the pursuit of available remedies seems justified, even in the context of inter-State claims. It is proposed that the draft articles provide that the responsibility of a State may not be invoked in respect of a claim if the claim was not notified to the responsible State within a reasonable time after the injured State had notice of the injury, and in the circumstances the responsible State could reasonably have believed that the claim would no longer be pursued. Such a provision strikes a fair balance between the interests of the injured State and the allegedly responsible State, and reflects the relevance of the idea of "reasonable expectation" in the context of delay.

(c) Settlement

260. A third clear basis of loss of the right to invoke responsibility arises where the responsible State offers some form of reparation in settlement of the claim and that offer is accepted. This may be the better explanation of the decision in the *Russian Indemnity* case: the arbitral tribunal laid some emphasis on the fact that, after

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[476] *LaGrand Case, Request for the Indication of Provisional Measures*, *I.C.J. Reports 1999*, p. 9.

[477] Germany's application was filed on 2 March 1999. Owing to the time constraints, the provisional measures phase was restricted to a meeting of the parties with the President of the Court. In a separate opinion, President Schwebel noted that "Germany could have brought its Application years ago, months ago, weeks ago, or days ago" and added that he had "profound reservations about the procedure followed ... by the Applicant"; ibid., p. 22.

[478] The importance of the right to life was no doubt highly relevant in the *LaGrand Case*.

[479] Another relevant factor has been the influence of private law analogies and of domestic rules concerning limitation of actions or laches. Where the underlying claim (e.g. in contract) is governed by some national system of law and the claim is prescribed, extinguished or barred under that law, there is no reason why a diplomatic protection claim by the State of nationality should be in a better position. But there is also the possibility that national limitation periods may be applied by analogy, and the general (though not universal) tendency has been towards shorter limitation periods, and the treatment of limitation periods as substantive rather than procedural. For a general review see E. Hondius (ed.), *Extinctive Prescription. On the Limitation of Actions* (Kluwer, The Hague, 1995), esp. pp. 22-25.

several years of Russian insistence on repayment of the capital sum, without any reference to moratory interest or damages for delay, the sum demanded was actually paid.[480] In the circumstances, the Tribunal was prepared to find that the tender and acceptance of the capital amounted to a full and final settlement, even in the absence of an express provision to that effect in a settlement agreement.[481] Indeed there may be circumstances where a full and final settlement could be inferred from a combination of unilateral acts on the part of the two States concerned.[482] On the other hand, for a settlement to be reached there has to be action by both States, or at the least clear acquiescence by one State in the action of the other taken with a view to the settlement of the dispute. Unilateral action by one State cannot be enough.[483]

261. Arguably such cases of tender and acceptance or other forms of settlement can be subsumed under the category of waiver. Plainly where a State requests that a case be discontinued "with prejudice", it waives the claim in question. On the other hand, it will often be unclear who is waiving what, as the frequent resort to formulas such as "without prejudice" in settlement agreements suggests. The question is whether a specific provision should be included, to the effect that the tender and acceptance of reparation entails the loss of any further right to invoke responsibility in respect of the claim concerned unless otherwise stipulated or agreed between the parties. In accordance with such a provision, a State accepting a tender of reparation would be required to make it clear if it does so only by way of partial settlement. In the alternative, the unqualified acceptance of reparation tendered by the responsible State, even on a without-prejudice basis, could be mentioned as a species of waiver in that subparagraph. On balance the Special Rapporteur prefers the second alternative as the more economical one.

(d) Termination or suspension of the obligation breached

262. Finally, it is necessary to say something about the situation where the primary obligation, the breach of which is invoked, has terminated or been suspended. This is more likely to occur with treaty than non-treaty obligations, but it cannot be entirely excluded even in relation to the latter. For example, an area previously subject to the regime of the high seas might come within the jurisdiction of a coastal State as a result of processes of claim and recognition, but questions of responsibility for seizure of foreign fishing vessels might be raised and remain live in respect of the "interim" period, before the questions of jurisdiction were

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[480] See para. 237 above.

[481] For cases of express provisions see, e.g., the General Agreement between Iran and the United States on the Settlement of Certain ICJ and Tribunal Cases of 9 February 1996, made an Award on Agreed Terms by order of the Iran-United States Claims Tribunal, 22 February 1996: 35 I.L.M. 553 (1996), and the Agreement between Australia and Nauru for the Settlement of the Phosphate Lands Case, 10 August 1993: 32 I.L.M. 1471 (1993).

[482] See, e.g., the apology issued by the United States on 4 November 1998 in respect of breach of article 35 (2) of the Vienna Convention on Consular Relations in the *Breard* case: text in http://Secretary.state.gov/www/briefings/statements/1998/ps981104.html. This coincided with Paraguay's request to discontinue the case "with prejudice"; see the Court's Order of 10 November 1998, *I.C.J. Reports 1998*, p. 427.

[483] Thus in the *Phosphate Lands* case, the three partner Governments expressed the view that "the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement"; cited in *I.C.J. Reports 1992*, para. 15. The Court held that this view was not opposable to Nauru in the absence of clear acceptance on its part. See para. 256 above.

resolved.[484] Other similar situations can be envisaged. So far as the law of treaties is concerned, article 70 of the Vienna Convention on the Law of Treaties provides that:

> "1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> "...
>
> "(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."[485]

It is true that article 73 of the Vienna Convention also provides that its provisions "shall not prejudge any question that may arise in regard to a treaty … from the international responsibility of a State"; moreover, article 70 (1) (b) addresses situations of the "execution" or performance of a treaty rather than its non-performance. Nonetheless, if the breach of an international obligation gives rise immediately to a secondary right to reparation in favour of an injured State, it is hard to see how such a right would be affected by the termination of the primary obligation breached. The Arbitral Tribunal expressly so held in the *Rainbow Warrior* case, where the bilateral treaty obligation terminated by effluxion of time after and notwithstanding its breach.[486] In such cases, far from the termination of the primary obligation producing a loss of the right to invoke responsibility, prima facie the secondary right to reparation continues to exist. The question is whether, by analogy with article 70 (1) (b) of the Vienna Convention, it is desirable to say so. On balance this does not seem necessary: the matter would seem to be covered, by inference at least, by articles 18 and 24 of the draft articles as provisionally adopted on second reading. Admittedly, article 18 is now formulated simply in negative terms.[487] But when it is read with article 24 (1),[488] it is clear that the breach of an international obligation is perfected at the time the act occurs, and the consequences referred to in chapters I and II of Part Two would follow automatically. No provision spelling this out seems to be required, though the point should be made clear in the commentary. In particular, in the case of a continuing wrongful act, it should be recalled that the breach ceases, by definition, with the termination or suspension of the obligation, without prejudice to the responsibility already incurred.

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[484] Cf. the *Anglo-Norwegian Fisheries* case, *I.C.J. Reports 1951*, p. 116. In fact the parties "agreed to leave this question [of compensation for seizures] to subsequent settlement if it should arise"; ibid., p. 126. Similarly in one of the *Fisheries Jurisdiction cases, (United Kingdom v. Iceland)*, the request for compensation for interference with fishing vessels was not maintained; see *I.C.J. Reports 1974*, p. 3, para. 12. In the second (*Federal Republic of Germany v. Iceland*, ibid., p. 175), the request was maintained but in such an abstract form that the Court declined to act on it; ibid., paras. 71-76.

[485] See also arts. 71 (2) (b), 72 (1) (b).

[486] *U.N.R.I.A.A.*, vol. XX, p. 217 (1990), para. 106, citing the dissenting opinion of President McNair in the *Ambatielos case (Jurisdiction), I.C.J. Reports 1952*, pp. 63-64. The majority in that case did not have to deal with the issue.

[487] It provides that:
"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."

[488] As provisionally adopted, this provides that:
"1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."

B. Cases involving a plurality of injured or responsible States

263. One matter not expressly dealt with in the draft articles adopted on first reading is the general topic of claims of responsibility relating to the same act or transaction but involving a plurality of States. This is a different problem from that of multilateral obligations, though it overlaps with it to a degree. The legal basis for asserting the responsibility of each of the States involved in a particular conduct might well be different, and even if it was the same, the obligation in question might be owed severally by each of the States responsible for the conduct to each of the States injured by it. The question is what difference does it make to the responsibility of one State, if another State (or indeed several other States) is also responsible for the very same conduct, or is also injured by it.[489]

264. The commentaries refer to the problem rather frequently. For example, the commentary to article 44 states that:

> "[w]here there is a plurality of injured States, difficulties may arise if the injured States opt for different forms of remedy. This question is part of a cluster of issues which are likely to come up whenever there are two or more injured States which may be equally or differently injured. It has implications in the context of both substantive and instrumental consequences of internationally wrongful acts and the Commission intends to revert to it in due course."[490]

265. Unfortunately, this "due course" never eventuated, and because the subject was not included in the draft articles adopted on first reading, it has not been the subject of detailed written comments by Governments. In the debate in the Sixth Committee in 1999, however, a number of Governments supported the inclusion of provisions dealing with a plurality of States. One Government, while supporting this course of action, noted "the scarcity of established international law on the subject".[491] Several Governments suggested that it would be sufficient to deal with the issue in the commentaries. [492]

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[489] In the literature this problem is often referred to using municipal law analogies, e.g., of joint and several liability. See I. Brownlie, *State Responsibility* (Oxford, Clarendon Press, 1983), 189-192 ("Joint Responsibility"); J. Noyes and B. D. Smith, "State Responsibility and the Principle of Joint and Several Liability", *Yale Journal of International Law,* vol. 13, 1988, pp. 225-267; and for a general review M. L. Padelletti, *Pluralità dei Stati nel fatto illecito internazionale* (Collana di studi/Istituto die Diritto Pubblico Internazionale, Facoltà die Giurisprudenza, Università degli Studi di Siena, vol. 7, Giuffré, Milano, 1990). But more than usual care is needed in the use of municipal law analogies here. Different legal traditions have developed in their own ways, subject to their own historical influences. For examples of earlier studies in different legal systems, see, e.g., Glanville Williams, *Joint Obligations* (London, Butterworths, 1949); M. Planiol, *Traité élémentaire de droit civil* (Paris, 10th ed., LGDJ, 1926) tome 2, pp. 241-267, and for a useful comparative review, T. Weir, "Complex Liabilities", in A. Tunc (ed.), *International Encyclopedia of Comparative Law*, vol. XI, Torts (Mohr, Tübingen, 1983), chap. 12.

[490] Commentary to article 44, para. (15).

[491] A/CN.4/504, para. 12.

[492] Ibid.

1. Overview of the legal issues

266. It is necessary to consider separately the question of the plurality of injured and of responsible States.

(a) Plurality of responsible States[493]

267. Under the draft articles as they stand, a number of specific aspects of the problem are already dealt with or at least referred to:

- Article 9 deals with the attribution to the State of the conduct of organs placed at its disposal by another State.[494] Where the organ is under the control of the receiving State and acts in the exercise of that State's separate authority, the receiving State is responsible for its acts. The implication is that in any other circumstance the sending State (or possibly both States) will be responsible.

- Article A (proposed in lieu of article 13 as adopted on first reading) would exclude from the scope of the draft articles any question of the responsibility of an international organization or of a State for the conduct of an international organization.[495] There is, however, a distinction between conduct performed by an international organization as such (e.g., the conclusion of a treaty or contract by an organization, or its commission of a civil wrong or of some internationally wrongful act) and conduct performed by State organs within the framework of or at the instigation of an international organization. The conduct of a State organ does not lose that quality because that conduct is, for example, coordinated by an international organization, or is even authorized by it.[496]

- Chapter IV of Part One deals with a number of cases where one State is responsible in respect of the act of another State.[497] These cases involve, respectively, aid or assistance (article 27), direction and control (article 27 *bis*) and coercion (article 28). These articles all proceed on the basis that, generally speaking, State A is not responsible for acts attributable to State B, but that in certain circumstances the principle that each State is responsible only for its own acts may be set aside. Chapter IV is stated to be without prejudice to the international responsibility of the acting State (article 28 *bis*); thus a State which is assisted, directed or even coerced to perform an act which injures a

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[493] For a preliminary discussion see Second Report, A/CN.4/498/Add.1, paras. 159-162 and 210-211.

[494] See First Report, A/CN.4/490/Add.5, paras. 222-234, and for consideration on second reading, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), paras. 412-415, 422-424 and 447.

[495] See First Report, A/CN.4/490/Add.5, paras. 256-262, and for consideration on second reading, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), paras. 414, 424 and 446. The location of article A is undecided; it may be better included in the proposed Part Four.

[496] Generally for the question of responsibility of member States for the acts of international organizations see the reports of Professor Higgins to the Institut de droit international ((1995) 66-I *Annuaire de l'Institut de Droit International* 249) and the Institut's resolution thereon: (1996) 66-II *Annuaire de l'Institut de Droit International* 444. See also P. Klein, *La Responsabilité des Organisations Internationales* (Bruylant, Brussels, 1998) pp. 428-524.

[497] See Second Report, A/CN.4/498/Add.1, paras. 157-212, and for consideration on second reading, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), paras. 244-278.

> third State will be responsible for that act, although at least in the case of coercion it may be able to plead force majeure as a circumstance precluding the wrongfulness of its conduct.

More fundamentally, the draft articles implicitly deal with the general issue, in the sense that as things stand *each* injured State can hold to account *each* responsible State for internationally wrongful conduct, even though in respect of the same conduct there may be several injured States and several States to which the conduct is attributable. This position is set out in the commentary to article 27, where joint conduct is distinguished from participation of one State in the wrongful act of another. As the commentary makes clear:

> "There can be no question … of the participation of a State in the internationally wrongful act of another State in cases where identical offences are committed in concert, or sometimes even simultaneously, by two or more States, each acting through its own organs … A similar conclusion is called for in cases of parallel attribution of a single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts."[498]

268. This seems to reflect the position under general international law, at least in the absence of agreement to the contrary between the States concerned. In the *Corfu Channel* case, the United Kingdom recovered to the full extent of the injuries suffered by its ships damaged by mines in transiting Albanian waters. The Court held that Albania was responsible to the United Kingdom for these losses on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.[499] The mines themselves, however, had not been laid by Albania (which had no mine-laying capacity at the time); they had in all probability been laid by a Yugoslavian vessel, as the Court briefly noted. It is probable that it in the (inferred) circumstances Yugoslavia would also have been responsible to the United Kingdom for the damage caused to the vessels by its mines. Yet no one suggested that Albania's responsibility for failure to warn was thereby reduced, let alone precluded. This was a standard case where two different States were each responsible for the direct consequences of their own conduct in respect of a single incident. Many other similar cases can be envisaged.[500]

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[498] Commentary to article 27 (as adopted on first reading), para. (2).

[499] *I.C.J. Reports 1949*, p. 4, at pp. 22-23.

[500] Nicaragua commenced three cases against neighbouring States in respect of the damage done to it by the activity of the Contras, on the basis that the Contras' actions were directed and supported by those States as well as by the United States. The three cases were eventually discontinued, although only after the Court had upheld its jurisdiction vis-à-vis Honduras (*Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, I.C.J. Reports 1988*, p. 69). The United States was held responsible for certain acts of the Contras, and for its own actions in supporting them. The question of the quantum of United States responsibility was, however, not determined, as the case was discontinued: see the Order of the Court of 26 September 1991, *I.C.J. Reports 1991*, p. 47.

269. In such cases, the responsibility of each participating State would have to be determined individually, on the basis of its own conduct. For example, in the *Corfu Channel* case, the question of Yugoslavia's responsibility for laying the mines was a different question from that of Albania's responsibility for failure to warn of their presence, even though the injury and damage to the United Kingdom arose from the same event. The question is whether the position is any different where the responsible States are acting together in a joint enterprise, or indeed where one is acting on the joint behalf of several others.[501]

270. That issue was raised in the *Case concerning Certain Phosphate Lands in Nauru*.[502] Australia, the sole respondent in that case, was one of three States parties to the Trusteeship Agreement for Nauru. Under article 2 of the Trusteeship Agreement, three Governments (Australia, New Zealand and the United Kingdom) were designated as "the joint Authority which will exercise the administration of the Territory". It was agreed that the Administering Authority so designated was not a separate legal person, but was nothing else than the three Governments acting jointly as provided for in the Agreement. Under article 4 of the Agreement, it was recognized that Australia "on behalf of the Administering Authority" would exercise "full powers of legislation, administration and jurisdiction in and over the territory". Thus Australia administered the Territory under the Trusteeship Agreement on behalf of all three States.[503] As one of its preliminary objections, Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. One reason was procedural: any determination of Australia's responsibility would necessarily entail that of the other two States. They were necessary parties to the case and in accordance with the principle formulated in the *Monetary Gold* case,[504] the claim against Australia alone was inadmissible. But there was a second reason: the responsibility of the three States making up the Administering Authority was "solidary" and a claim could not be made against only one of them.

271. The Court rejected both arguments, and upheld its jurisdiction. On the question of "solidary" responsibility it said:

> "Australia's preliminary objection in this respect appears to contain two branches, the first of which can be dealt with briefly. It is first contended by Australia that, in so far as Nauru's claims are based on the conduct of Australia as one of the three States making up the Administering Authority under the Trusteeship Agreement, the nature of the responsibility in that respect is such that a claim may only be brought against the three States jointly, and not against one of them individually. In this connection, Australia has raised the question whether the liability of the three States would be 'joint and several' *(solidaire)*, so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This is a question which the Court must reserve for the merits; but it is independent

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[501] It was not necessary in the *Corfu Channel* case to find the existence of a joint enterprise between Albania and Yugoslavia, since Albania's responsibility was sufficiently established by reference to its failure to warn. In any event the Court could not have found Yugoslavia responsible since it was not a party to the case.

[502] *I.C.J. Reports 1992*, p. 240.

[503] See ibid., paras. 42-47.

[504] *I.C.J. Reports 1954*, p. 16.

> of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia."[505]

It was careful to add, however, that its decision on jurisdiction "does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship systems … and, in particular, the special role played by Australia in the administration of the Territory".[506] In fact the Court never had to resolve those issues. The case was withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement.[507]

272. The extent of responsibility for conduct carried on in conjunction by a group of States is occasionally addressed in treaties. Perhaps the most interesting example is the Convention on Liability for Damage Caused by Objects Launched into Outer Space of 29 March 1972.[508] Article IV provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Paragraph 2 then provides:

> "In all cases of joint and several liability referred to in paragraph 1, the burden of compensation for the same shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable."

Similarly, article V provides for joint and several liability where two or more States jointly launch a space object which causes damage: the State from whose territory or facility a space object is launched is regarded as a participant in the joint launching. Article V, para. 2, provides that:

> "A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching. The participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligations in respect of which they are jointly and severally liable. Such agreements shall be

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[505] *I.C.J. Reports 1992*, p. 240, para. 48.

[506] Ibid., para. 56.

[507] For the removal of the list of the Court, see the Order of 13 September 1993, *I.C.J. Reports 1993*, p. 322, and for the Settlement Agreement of 10 August 1993, see (1993) 32 I.L.M. 1471.

[508] United Nations, *Treaty Series*, vol. 961, p. 187.

> without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable."

This is, no doubt, a *lex specialis* — but at the same time it is a useful indication of what the regime of "joint and several" liability might amount to, so far as an injured State is concerned. Moreover, the incidents of "joint and several liability" as reflected in the Convention generally correspond to the notion of joint and several liability in the common law, from which the term comes. At common law, persons who are jointly and severally liable (e.g., partners or trustees) are each responsible for the whole damage caused to third parties by the partnership or in breach of trust, and may each be sued by for the full amount without any requirement to join the other partners or trustees. Their liability is "joint" in that they take responsibility for each other's wrongful conduct vis-à-vis third parties; it is "several" in that they can be severally, i.e. separately, sued. Historically, however, there were other forms of liability at common law, including strict joint liability where the persons jointly liable normally had to be sued as a group and were not separately responsible for the actions of the group. Similarly in civil law systems, there are different forms of solidary responsibility, depending on the context.[509]

273. A possible example of "joint" inseverable responsibility under international law was the responsibility of the Four Powers for Germany as a whole and Berlin prior to 1990. In a series of cases, courts refused to hold that individual States could be sued alone for conduct arising from the quadripartite arrangements.[510]

274. Another "special case" is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name but responsibility for performance is distributed between them in ways not determined a priori. The most elaborate formulation of this responsibility so far is that set out in Annex IX to the United Nations Convention on the Law of the Sea of 1982.[511] Under these arrangements, responsibility for performance is allocated as between the Union and member States, though the basis for that allocation can change over time. There is provision by which other States can ascertain which of the Union and member States accepts responsibility at a given time; joint and several liability only arises in the case of "[f]ailure to provide this information within a reasonable time or the provision of contradictory information".[512]

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[509] See Weir, loc.cit., pp. 43-44 (§§ 79-81). For the German law see B. Markesinis, *The German Law of Obligations, vol. II, The Law of Torts: A Comparative Introduction* (3rd edn, Clarendon, Oxford) pp. 904-907 with references to the literature.

[510] See the cases cited in First Report, A/CN.4/490/Add.5, para. 232 note 126.

[511] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

[512] UNCLOS Annex IX, art. 6 (2). Generally on mixed agreements, see, e.g., A. Rosas, "Mixed Union — Mixed Agreements", in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (Kluwer, The Hague, 1998), p. 125.

275. The sources of international law as reflected in Article 38, paragraph 1, of the Statute of the International Court of Justice do not include analogy from national legal systems, and while such analogies may have a certain role to play, it is clearly subsidiary.[513] Particular care is needed with analogies from rules or concepts which are not widely shared and which depend in their national setting on historical considerations or on the powers and procedures of courts; this is certainly true of concepts such as "joint and several" or "solidary" responsibility. By contrast, what matters at the international level are the actual terms of any agreement or arrangement, interpreted in the light of the principles of consent, the independence of States and the *pacta tertiis* rule.

276. Before considering what, if any, provision should be made in the draft articles, several cognate issues need to be briefly mentioned.

(a) **Responsibility of member States for the conduct of an international organization**. This raises sensitive issues relating to the structure and functioning of international organizations which it is not appropriate to deal with in the context of the draft articles. As noted above, it is excluded from the scope of the draft articles by the proposed article A.[514]

(b) **Application of the Monetary Gold principle.** The *Monetary Gold* principle, as explained by the Court in the *Nauru* case[515] and applied by it in the *Case concerning East Timor*,[516] is a procedural barrier to the admissibility of a claim before an international court and not as such, part of the law of State responsibility. It arises because a court or tribunal exercising judicial power cannot determine the legal responsibility of a State not a party to the proceedings, nor has it the power to order that a necessary third party be joined. Lacking such powers, it cannot make a finding of responsibility against State A, which is a party to a case, if in order to do so it is necessary first to make a determination as to the responsibility of State B, which is not a party.

(c) **Existence of special rules of responsibility for "common adventures**". Where two persons jointly engage in a common adventure causing loss to another, it is usually held that the victim can recover its total losses against either of the participants, on the common sense ground that the victim should not be required to prove which particular elements of damage were attributable to each of them. International tribunals have reached similar results by reference to considerations of "equity" or by requiring a State responsible for wrongful conduct to show what consequences flowing from the breach should *not* be attributed to it.[517]

(d) **Contribution as between several States in cases of joint activity**. Where two or more States engage in a common activity and one of them is held responsible for damage arising, it is natural for that State to seek a contribution from the others on some basis. Such a contribution is specifically envisaged in articles IV (2) and V (2) of the 1972 Outer Space Convention.[518] As noted already, a contribution was actually made by the United Kingdom and New Zealand to

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[513] See *Status of South West Africa, I.C.J. Reports 1950,* p. 128, at p. 148 (Lord McNair).
[514] See para. 267 above.
[515] *I.C.J. Reports 1992,* p. 240.
[516] *I.C.J. Reports 1995,* p. 60.
[517] See para. 35 above.
[518] See para. 272 above.

Australia in respect of its settlement of the *Phosphate Lands* case.[519] On the other hand, there may be cases where as a matter of equity a court disallows any contribution, e.g., on the basis of the maxim *ex turpi causa non oritur actio*. In such cases the victim is compensated but as between the joint wrongdoers the loss lies where it falls.

277. This brief review of the current law suggests the following conclusion. In principle the normal rule appears to be that each State is separately responsible for conduct attributable to it under the rules set out in chapters II and IV of Part One, and that this responsibility is not diminished or reduced by the fact that some other State (or States) is also responsible for the same conduct. This was the conclusion tentatively reached by Judge Shahabuddeen in his separate opinion in the *Nauru* case. Referring to the work of this Commission, he said:

> "It is not necessary to enter into the general aspects of the difficult question carefully examined by the Commission as to when a State is to be regarded as participating in the internationally wrongful act of another State. It suffices to note that the Commission considered that, where States act through a common organ, each State is separately answerable for the wrongful act of the common organ. That view, it seems to me, runs in the direction of supporting Nauru's contention that each of the three States in this case is jointly and severally responsible for the way Nauru was administered on their behalf by Australia, whether or not Australia may be regarded technically as a common organ. Judicial pronouncements are scarce. However, speaking with reference to the possibility that a non-party State had contributed to the injury in the *Corfu Channel* case, Judge Azevedo did have occasion to say:
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> > "'The victim retains the right to submit a claim against any one of the responsible parties, *in solidum*, in accordance with the choice which is always left to the discretion of the victim, in the purely economic field; whereas a criminal judge cannot, in principle, pronounce an accomplice of a principal guilty without at the same time establishing the guilt of the main author or the actual perpetrator of the offence.' (*I.C.J. Reports 1949*, p. 92)
>
> "On the facts, the *Corfu Channel* case allows for a number of distinctions. However, it is to be observed that Judge Azevedo's basic view of the general law was that the right to sue 'one only of the responsible parties, *in solidum*' was available to the injured party 'in accordance with the choice which is *always* left to the discretion of the victim, in the purely economic field …' (emphasis added). This approach would seem to be consistent with the view that Nauru does have the right to sue Australia alone."[520]

However, there is no need to identify this situation with "joint and several liability" as it is understood in certain national legal systems. States are free to incorporate that principle into their agreements, but (apart from specific arrangements and the *lex specialis* principle) the normal case of responsibility arises because conduct attributable to a State under the principles set out in chapters II or IV of Part One is a breach of an international obligation of the State concerned vis-à-vis another State which is also a party to, or entitled to the benefit of, that obligation.

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[519] See para. 271 above.

[520] *I.C.J. Reports 1992*, p. 240, at pp. 284-285.

278. Apart from authority (admittedly sparse), a number of considerations support this conclusion:

(a) In each case it will be necessarily to consider the position of each respondent State, for example, to determine whether any circumstance precluding wrongfulness applies to that State. If State A coerces State B to join it in committing an internationally wrongful act vis-à-vis State C, it may be possible for State B to rely on the coercion as a circumstance precluding wrongfulness, but this will not be so for State A.[521]

(b) Similarly the legal position of the two co-participant States may be different in terms of the applicable legal rules. For example, one co-participating State may be bound by a particular rule (e.g., in a bilateral treaty with the injured State) whereas the other co-participant is not. Only in very limited circumstances could the latter State be responsible for the former's breach.[522]

(b) Plurality of injured States

279. Turning to the question of the plurality of injured States, for reasons explained above the problem with article 40 was significant. This was because, in the case of multilateral obligations, a large number of States was designated as "injured" and there was apparently no differentiation in the legal positions of any of them, irrespective of whether it was the primary victim of the breach or a concerned State seeking to ensure compliance in the "public" interest.[523] Now that it is proposed to distinguish between "injured" and other States, and to give priority to the reactions of the former, e.g., in terms of the choice of compensation over restitution, the problem is much reduced.

280. In practice, of course, several States could still qualify as "injured" under the proposed definition in respect of a single breach of a multilateral obligation. For example, all the States parties to an integral obligation would be injured by its breach, just as they would all be entitled to suspend a treaty for material breach of such an obligation by virtue of article 60 (2) (c) of the Vienna Convention on the Law of Treaties.[524] In such a case the Vienna Convention allows each State to take action on its own account, or all of them to do so together. Only in the latter case can the action result, in effect, in the expulsion of the responsible State from the treaty arrangement; otherwise the remedy, if it is one, lies in individual suspension of the treaty.[525]

281. Turning to the invocation of responsibility, where several States are harmed (e.g., because each is specially affected) by a single internationally wrongful act, there is no difficulty with each claiming cessation, or compensation in respect of the injury to itself (but for respect of the rule against double recovery).[526] Nor is there

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[521] See Second Report, A/CN.4/498/Add.1, para. 207.

[522] Ibid., paras. 181-184.

[523] See paras. 85 and 109 above.

[524] See paras. 91 and 111 above.

[525] As noted above, the suspension of a treaty may not help the injured State at all, and is not in general terms a "remedy" for a breach.

[526] In *The Wimbledon, P.C.I.J., Series A*, No. 1 (1923), four States brought proceedings in respect of a British ship under charter to a French company carrying munitions from Italy to Poland. Only France claimed compensation, no doubt because under the charter arrangements the French carrier bore the loss associated with the delay and rerouting.

any difficulty in principle with each seeking satisfaction in respect of the wrongful act (i.e., wrongful so far as it is concerned). The only problem that might arise would be if the injured States disagreed over whether to accept compensation in lieu of restitution, assuming restitution to be possible. In theory it could be argued that, given the principle of the priority of restitution over compensation, the applicable remedy is restitution unless all the injured States otherwise agree. In practice, however, the situation is likely to be the reverse. Thus in the *Forests of Central Rhodopia* case, the arbitrator declined to order restitution instead of compensation in a complex situation where several other persons had legal interests but had not claimed restitution.[527] Overall it does not seem that the situation where there are several injured States in respect of the same wrongful act has caused difficulties in practice, such as to require specific regulation in the draft articles.

2. Proposed provisions

282. To summarize, in the absence of a specific solution to the problem of the plurality of injured or responsible States, opposable by treaty or otherwise, the general position taken by international law seems to be a straightforward one. Each State is responsible for its own conduct in respect of its own international obligations. Each injured State (defined in the strict sense proposed) is entitled to claim against any responsible State for reparation in respect of the losses flowing from and properly attributable to the act of that State. Such claims are subject to the provisos, on the one hand, that the injured State may not recover from any source more compensation than the loss it has suffered, and on the other hand, that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. A complicating factor in claims involving a plurality of responsible States is the *Monetary Gold* rule, but that is a rule of judicial admissibility, not a determinant of responsibility as such.[528] These questions are quite distinct from the issue whether or in what circumstances member States may be held responsible for the acts of international organizations; that is properly considered part of the law relating to international organizations and is outside the scope of the draft articles.

283. The question is whether it is necessary to spell out these propositions in the draft articles, or whether an explanation in the commentary would suffice. In the Special Rapporteur's view, some clarification is desirable, in view of the frequency with which these issues arise, their importance and the uncertainty that has surrounded them. Provisions to that effect are accordingly proposed.

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[527] *U.N.R.I.A.A.*, vol. III, p. 1405 (1933); see para. 128 above.

[528] See para. 240 above for the distinction between admissibility of responsibility claims and admissibility of judicial proceedings.

C. Conclusions as to Part Two *bis*, chapter I

284. For these reasons, the Special Rapporteur proposes the following draft articles in chapter I of Part Two *bis*:

Part Two *bis*
The implementation of State responsibility]

Chapter I
Invocation of the responsibility of a State

Article 40 *bis*
Right to invoke the responsibility of a State[529]

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

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

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

(b) What form reparation should take.

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

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

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

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

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

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

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

[529] For the text of article 40 *bis* as proposed by the Special Rapporteur see para. 119 above.

Article 46 *quinquies*
Plurality of injured States

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

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

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

2. Paragraph 1:

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

(b) Is without prejudice to:

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

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