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State responsibility

Comments and observations received from Governments

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I. Introduction

1. On 12 December 2000, the General Assembly adopted resolution 55/152, entitled "Report of the International Law Commission on the work of its fifty-second session". In paragraph 2 of that resolution, the Assembly encouraged the Commission to complete its work on the topic "State responsibility" during its fifty-third session, taking into account the views expressed by Governments during the debates in the Sixth Committee at the fifty-fifth session of the General Assembly, and any written comments that might be submitted by 31 January 2001, as requested by the Commission.

2. In its report, the Commission had indicated that it would appreciate receiving from Governments comments and observations on the entire text of the draft articles provisionally adopted by the Drafting Committee on second reading in 2000, in particular on any aspect which it might need to consider further with a view to its completion of the second reading in 2001.[1] By a note dated 21 August 2000, the Secretariat invited Governments to submit their written comments by 31 January 2001.

3. As at 16 March 2001, replies had been received from the following 10 States (dates of submission in parentheses): Austria (27 February 2001); China (17 January 2001); Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark) (5 February 2001); Japan (9 February 2001); Netherlands (12 February 2001); Republic of Korea (20 February 2001); Slovakia (14 February 2001); Spain (27 February 2001); United Kingdom of Great Britain and Northern Ireland (1 March 2001); and United States of America (2 March 2001). These replies are reproduced in section II below, in an article-by-article manner. Additional replies received will be reproduced as addenda to the present report.

II. Comments and observations received from Governments

General remarks

Austria

Austria welcomes the fact that the International Law Commission (ILC) gave absolute priority to the subject of State responsibility during its annual session in 2000 and expresses its confidence that it will be possible, on the basis of the most recent report of the Special Rapporteur and of the recent work of the ILC, to bring the long discussions about this difficult subject to a successful conclusion.

China

At its fifty-second session, the International Law Commission completed a preliminary consideration of the draft articles on State responsibility adopted on first reading and provisionally adopted a revised text of the draft articles. The

[1] *Official Records of the General Assembly*, *Fifty-fifth Session*, *Supplement No. 10* (A/55/10), para. 23; chap. IV, appendix, contains the text of the draft articles provisionally adopted on second reading by the Drafting Committee.

Government of China commends the Commission for the progress achieved in its work.

The draft articles on State responsibility are nearing completion. We hope that the ILC will concentrate its time and energy on the question of State responsibility as a matter of priority at the forthcoming session, striving to complete the second reading of the draft articles as planned in 2001 with a view to submitting a complete text of draft articles and commentaries to the General Assembly.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The Nordic countries attach great importance to the successful conclusion of this monumental project, which constitutes the last major building block of the international legal order to be placed alongside the law of treaties and the law of the peaceful settlement of disputes.

Over the years the Nordic countries have urged the Commission to complete this topic by the end of the present term of office of its members, i.e. in 2001. We commend the Special Rapporteur, James Crawford, for having moved ahead at full speed since he took command of the subject matter in 1997. As a result of his energetic efforts and those of the Commission's Drafting Committee, we now have before us the outline of a full set of draft articles on second reading. And generally speaking, we are very satisfied with the result.

As to the present draft adopted by the Drafting Committee on second reading, the Nordic countries can agree to the new structure of the draft in four parts. The present draft is a considerable improvement compared to the draft adopted on first reading in 1996. The Special Rapporteur has made a much appreciated effort to streamline the draft articles in the light of comments made by Governments, development in State practice, judicial decisions and the literature.

The Nordic countries look forward to receiving the Commission's final draft together with its recommendation as to the further consideration of the articles. The Nordic countries are confident that the Commission will be able to finish the second and final reading of the draft articles during its forthcoming session and present a final draft on this monumental codification project. We urge the Commission to do its utmost to achieve this result.

Japan

In Japan's view, the draft articles should function in two ways. They should serve as a reference and guideline informing a State of its rights and obligations with regard to State responsibility. The draft should thus function to secure legal stability and predictability in international relations. But more important, this draft should also serve as a general standard for international courts to refer to in actual international disputes.

While the function of restoring the legality of the obligation breached has been recently emphasized, the traditional and still central function of State responsibility focuses on the conditions where injured States can invoke State responsibility and

what they can seek for reparation. Even though Part One of the draft articles reflects multilateral obligations in State responsibility, invocation of State responsibility is still in essence recognized in the context of bilateral relationships between the responsible State and the injured State.

Netherlands

At its fifty-second session, the International Law Commission asked Governments for their observations on the draft articles on State responsibility. In addition to the said draft articles, the Netherlands' observations take account of the chapter on State responsibility in the Commission's report on its fifty-second session.[2]

Republic of Korea

The Government of the Republic of Korea wishes to express its appreciation to the International Law Commission and, in particular, to the Special Rapporteur James Crawford, for the excellent work they have done on the draft articles on State responsibility, one of the most complicated and pivotal topics of international law today.

The Government of the Republic of Korea considers that the draft articles provisionally adopted by the Drafting Committee on second reading represent a considerable improvement on those adopted on first reading in 1996. They have become more simplified in a logically consistent way and are better suited to the needs of the international community, thereby enhancing their applicability in the practice of international relations.

In general, the Commission has not only brought the draft articles more in line with existing customary law, but has also struck an appropriate balance between codification and progressive development in the field of State responsibility.

In the light of the progress made so far, the Government of the Republic of Korea hopes that all outstanding issues will be resolved at the forthcoming session of the Commission and that the efforts of several decades will be fully rewarded.

Slovakia

The Slovak Republic acknowledges that the codification of international law in the field of State responsibility is of the utmost importance. It is a very difficult, challenging and, indeed, delicate task to identify and elaborate a set of rules determining internationally wrongful acts of States and providing for the consequences arising therefrom.

Slovakia would like to commend the International Law Commission and in particular its Special Rapporteur James Crawford for their work on this topic.

[2] *Official Records of the General Assembly*, *Fifty-fifth Session*, *Supplement No. 10* (A/55/10).

Spain

The Government of Spain wishes to reaffirm its interest in the codification process concerning State responsibility, which the International Law Commission undertook in the 1950s and which has thus far culminated in the provisional adoption of a set of draft articles with a total of 59 articles. The Government of Spain is convinced that codifying the law of State responsibility can help to foster stability and peace in international relations through the regulation by means of a treaty of a group of provisions of unquestionable importance for the smooth functioning of the international order.

For these reasons, the Government of Spain values the work accomplished by the International Law Commission and particularly by the Special Rapporteur, James Crawford, which has resulted in a clearer and better organized draft than the one submitted on first reading in 1996.

For the above reasons and with a view to facilitating the prompt conclusion of the work, the Government confines itself to reiterating some specific comments on the most important topics covered in the draft articles, omitting a detailed commentary on the draft as a whole.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom commends the International Law Commission on the revised draft articles on State responsibility provisionally adopted by the Drafting Committee. In many respects the revised draft articles are a considerable improvement on those adopted in 1996 on first reading. The decision to provide for a single category of internationally wrongful acts has brought the draft articles closer to State practice; and the decision to omit Part Three (settlement of disputes) has removed one significant obstacle to the acceptability of the draft articles by States. However, it is clear that, while many parts of the text reflect well-established rules of international law, other parts concern areas where the law is still developing and where there is little, if any, settled State practice. There are always difficulties in identifying general principles in such areas but these are compounded in the case of State responsibility by the great breadth of the subject and the wide variety of situations in which such responsibility may be incurred. In these circumstances it is essential that the draft articles do not purport to identify rules where none exist or, where rules are developing, seek to fix definitively their parameters when it is clear that they have yet to crystallize.

The statement of the Chairman of the Drafting Committee introducing the draft articles is a helpful explanation of the thinking behind the current draft. It is said in many places that questions arising from various draft articles will be dealt with in the commentary. These questions are numerous, and important. A final view on the draft can be taken only when the commentary is available.

The United Kingdom has a number of detailed observations on particular draft articles. It retains, however, a number of fundamental concerns that relate to the structure of the draft articles and to the approach to certain topics. In addition, to the extent that its earlier written and oral observations remain relevant to the present draft they are maintained (but not necessarily repeated here).

United States of America

The Government of the United States of America welcomes the opportunity to provide comments on the second reading text of the draft articles on State responsibility prepared by the International Law Commission. The Commission has made substantial progress in revising the draft articles; however, certain provisions continue to deviate from customary international law and State practice. The comments of the United States first address those provisions that raise the most serious concerns:

(a) *Countermeasures*. We continue to believe that the second reading draft articles on countermeasures contain unsupported restrictions on the use of countermeasures;

(b) *Serious breaches of essential obligations to the international community*. While we welcome the Commission's recognition that the concept of "international crime" has no place in the draft articles on State responsibility, we question the wisdom of drawing a distinction between breaches and "serious breaches". We particularly oppose any interpretation of these articles that would allow punitive damages as a remedy for serious breaches;

(c) *Injured States*. We welcome the Commission's decision to draw a distinction between States that are specifically injured by the acts of wrongdoing States and other States that do not directly sustain injury, but believe the Commission's definition of "injured State" should be narrowed even further to strengthen this distinction.

It is our hope that these comments will facilitate the Commission's continuing and important efforts to finalize the draft articles on State responsibility by aligning them more closely with customary international law and State practice.

The United States is pleased with the substantial progress the Commission has made in revising the draft articles to more accurately reflect existing customary international law. However, we believe that the particular provisions we have discussed continue to deviate from customary international law and State practice. In order to enhance prospects for broadest support of the Commission's work in this important area, we believe it critical that the Commission better align the provisions with customary international law in the areas discussed above, as well as below.

Dispute settlement provisions

China

In the revised text of the draft articles provisionally adopted by the Commission, all the articles on dispute settlement have been deleted. We believe that in view of the provisions of Article 33 of the Charter of the United Nations, parties to a dispute should have the right to freely choose the means that they deem appropriate to settle the dispute peacefully. It is therefore necessary to make changes to the draft articles of the former Part Three. However, we do not agree with the simple deletion of all the articles concerning dispute settlement. Since the question of State responsibility involves rights and obligations between States as well as their vital interests, it is a sensitive area of international law in which controversy arises

easily. In order to deal with these questions properly, it is necessary to set out general provisions to serve as principles for the settlement of disputes arising from State responsibility, including in particular strict compliance with the obligation to settle disputes peacefully as stipulated in Article 2, paragraph 3, and Article 33 of the Charter of the United Nations. We suggest that the ILC continue its consideration of the articles on dispute settlement, and add those articles back into the draft articles for final adoption.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The Nordic countries wish to reiterate that the proposed new structure of the draft articles represents a considerable improvement and should be maintained as the basis for the final presentation of the draft to the General Assembly at its fifty-sixth session. Thus we can accept that for the time being there will be no specific part dealing with peaceful settlement of disputes related to the draft articles.

Japan

A dispute settlement clause is not necessary, whether or not the draft articles will be adopted as a convention, since if a new dispute settlement mechanism were created, it would become a de facto second International Court of Justice, considering that almost all international legal disputes entail State responsibility.

Slovakia

Slovakia agrees with the approach to put aside the former Part Three (settlement of disputes). Slovakia also supports the decision of the Commission not to link the taking of countermeasures to the dispute settlement mechanism.

Spain

For the reasons stated above (see General remarks), Spain has been in favour of the Commission concluding its work with the adoption on second reading of a draft international convention, in which the provisions in Part Three concerning the settlement of disputes would occupy a special place.

Nevertheless, in submitting the draft articles adopted by the Drafting Committee on second reading and requesting comments from Governments, the Commission has deleted all references to the settlement of disputes and seems to lean towards adopting the draft as a declaration of the General Assembly (paras. 311 and 401 of the Commission's report). Moreover, despite the substantial progress made, the Commission, in the interest of achieving consensus, does not appear to contemplate extending the work beyond 2001. All of this appears to have prejudged the debate on the form that the draft should take and to have disposed many Governments to abandon the attainment of an international convention for the time being. In view of the vagueness of many of the draft provisions and the serious consequences which their application would entail in the absence of a third body

that arbitrates with regard to the interpretation and application of the articles, Spain believes that it would be appropriate to introduce some type of dispute settlement provision even if no agreement is reached to adopt a binding instrument. Such a provision would offer States valuable guidelines on conduct and guidance in this area, encouraging them to resort to judicial methods of settlement, while respecting the free choice of methods and the validity of special regimes.

United Kingdom of Great Britain and Northern Ireland

(*See General remarks*)

Final form of the draft articles

Austria

Regarding the question of the legal form to be chosen for the result of the work of the ILC on the subject of State responsibility, there is the possibility to opt either for a binding legal instrument in the form of a multilateral convention or for a non-binding solution, like a General Assembly resolution. There appears to be a tendency in today's progressive development of international law against the traditional form of a binding legal instrument, and for a text to be adopted as an annex to a General Assembly resolution. This could mean the General Assembly adopting a resolution which would take note of the articles on State responsibility as a "restatement of international law". This procedure would have the advantage that the careful and delicate balance would not be disturbed by a drafting exercise in the General Assembly. Austria is in favour of this solution.

As past experience in a number of specific conventions has shown, the general advantages of a binding legal instrument, which consist in essence in legal security, can easily be turned into the opposite effect. A diplomatic conference finalizing and adopting the text would in all likelihood imply the renewal, not to say repetition, of a very complicated discussion, which could endanger the balance of the text attained by the ILC.

China

As to the final form to be taken by the draft articles, we favour that of a General Assembly resolution or declaration, rather than a convention.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The draft as it now presents itself may no doubt still undergo changes, but by and large it is a draft worthy of being considered and eventually adopted as a legally binding convention alongside such basic codifications as the law of treaties, diplomatic and consular law and the law of the sea. The recent adoption of the Rome Statute of the International Criminal Court setting out the *individual* responsibility of persons committing the most serious international crimes would also seem to

suggest that the time has indeed come to adopt the basic instrument on *State* responsibility.

Japan

In the light of the functions expected of the draft articles, Japan believes that they should not be adopted as an "innovative" guideline that does not reflect State practice and established international law. Such an instrument would not gain the credibility necessary in the real exercise of international law. The task of the ILC is the codification and progressive development of international law. Japan considers that a non-binding declaration or guideline is a more suitable form for the topic. However, if the draft articles go beyond progressive development, they would entail a new political judgement and would need to be discussed and decided on by Governments.

Japan prefers a non-binding instrument (i.e., declaration, guideline) to a convention.

We should produce general principles of State responsibility that States can comfortably rely on. Whether or not the draft articles end up as a declaration or a convention, or even a study of authorities, the final product should be something that States count on and courts refer to.

Netherlands

One question that arises in connection with the draft is whether the draft articles should eventually take the form of an international treaty or a General Assembly declaration (or rather an annex to such a declaration). The aim of the ILC is to complete its work on State responsibility at its forthcoming session in 2001. The Netherlands welcomes this aim in principle. But it must be remembered that there is a drawback to the desire to complete the text. The pressure to play safe will undoubtedly grow; in other words, the elements in the draft that could be regarded as *de lege ferenda* or progressive development (for example, countermeasures and serious breaches) will come under pressure.

Given the ILC's eagerness to complete its work, a declaration would be the most obvious course of action. If the ILC opts for a treaty, it would run the risk that much of the *acquis* in the text would once again be open to doubt. It must also be remembered that a declaration by the General Assembly should be seen both as a codification of existing customary international law and, to the extent that the articles are still no more than emerging rules of customary law, a form of State practice which will make a significant contribution to the development of customary law in this area. A declaration would therefore hardly be less binding on States than a treaty. Moreover, with a treaty, there would be the danger of States being reluctant to ratify it and thus not being bound by the worldwide legal regime the treaty was intended to establish. Nor should we overestimate the advantage associated with a treaty, namely that it would automatically create a need to provide for a dispute settlement mechanism. A complicating factor here would then be the question of whether such a mechanism should apply to every specific dispute concerning alleged breaches of the primary rules or should be concerned solely with the interpretation and application of the treaty itself.

The Netherlands therefore advocates embodying the results of the activities of the ILC in an annex to a declaration by the General Assembly. The Netherlands is not in favour of a weaker instrument.

Republic of Korea

The Government of the Republic of Korea prefers the draft articles to be adopted as a binding legal instrument in the form of a multilateral convention rather than as non-binding guidelines. We have come such a long way in the struggle for codified rules of State responsibility that it would be extremely unfortunate to let the work of almost half a century be cast in a non-binding instrument. The Government of the Republic of Korea believes that the rule of State responsibility plays such an important role in international law that its effectiveness cannot be achieved merely through non-binding guidelines or model laws which could place the legal status of the rules embodied in them on uncertain ground.

Slovakia

Bearing in mind the importance of the topic, the overall system of public international law and the work done on this topic over the last 46 years, Slovakia is of the view that a legally binding instrument, i.e. a convention, would be the most appropriate in this regard. The adoption of a convention would complement the system of primary rules of international law and provide for a very much needed set of secondary rules. The instrument on State responsibility should represent, side by side with the Vienna Convention on the Law of Treaties, one of the pillars of international law.

Spain

(*See Dispute settlement provisions*)

United Kingdom of Great Britain and Northern Ireland

There appears to be widespread acknowledgement that the draft articles should not be the basis for a convention or other prescriptive document; one possible outcome would be to commend them to States in a General Assembly resolution.

The choice of form has implications for the content. In a convention it might have been appropriate to include both provisions declaratory of customary international law and provisions that develop the law or present entirely novel rules. Such a convention would derive much of its weight and authority from the number of parties it attracted. A text appended to a General Assembly resolution and commended to States, on the other hand, will derive its authority from the accuracy with which it is perceived to reflect customary international law. It is therefore important that the draft should be firmly based upon State practice.

United States of America

With regard to the question of what form the draft articles on State responsibility should ultimately assume, the United States believes it would be preferable to finalize the Commission's work in a form other than a convention, so as to enhance prospects for its acceptance by a broad group of States.

The United States believes that the draft articles on State responsibility should not be finalized in the form of a convention. Because the draft articles reflect secondary rules of international law, a convention is not necessary, as it might be with respect to an instrument establishing primary rules. Additionally, finalizing the draft articles in a form other than a convention would facilitate the Commission's efforts to complete its work and avoid contentious areas, such as the dispute settlement provisions currently omitted from the second reading text. Such an approach would make the draft articles amenable to wider agreement during negotiation.

Part One
The internationally wrongful act of a State

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

Part One does not appear to present major difficulties.

Chapter II
The act of the State under international law

Article 4
Attribution to the State of the conduct of its organs

United Kingdom of Great Britain and Northern Ireland

Draft article 4 provides that the conduct of State organs acting in that capacity shall be considered to be acts of the State; and that the category of State organs includes any person or body which has that status in accordance with the internal law of the State. The draft article does not indicate how it is to be determined whether an organ is acting "in that capacity". Nor does it indicate what, if any, persons or bodies *not* having the status of State organs under internal law are nonetheless to be regarded as State organs as a matter of international law (and on this question the classification of persons and bodies under internal law cannot be determinative). The problem is that there is no universally accepted conception of what the scope of governmental authority is.

Article 5
Attribution to the State of the conduct of entities exercising elements of the governmental authority

Japan

We suggest the deletion of the phrase "by the law of that State". To exercise elements of "governmental authority" is the determining factor whether the conduct of an entity is considered an act of the State. Article 5 only stipulates the case where an entity is empowered by the "law" of the State to exercise elements of the governmental authority. However, the internal "law" may be too narrow. For example, if a State privatizes an enforcement function with its non-legal internal guideline, such function should still be considered to be an act of State. It should be recalled that an internal law is only a presumptive factor in determining whether an act of an entity is attributed to the State. This should be made clear in the Commentary.

Netherlands

The phrases "empowered by the law" and "governmental authority" leave room for uncertainty. The scope of the term "governmental authority" in particular is open to discussion in the light of the trend in many States, including the Netherlands, towards privatization or semi-privatization of government agencies. At the same time, the Netherlands notes that this obscurity seems unavoidable and that the current text meets more of the potential objections than any alternative.

United Kingdom of Great Britain and Northern Ireland

Draft article 5 gives rise to similar questions (see article 4). The absence of clear criteria for determining what "governmental authority" is will lead to difficulty in applying the draft article in borderline situations. The Special Rapporteur comments that "international law has to accept, by and large, the actual systems adopted by States", and that this question must be answered by a *renvoi* to "the public institutions or organs in place in the different States" (see A/CN.4/490/Add.5, para. 158). This, however, brings in the same difficulty in a different way, when determining what is a "public institution or organ" acting as such.

There may be doubt as to whether a given function is a governmental function. For example, a State may establish an independent body — independent, that is, of the executive, legislature and judiciary — to perform a defined role in the administration or regulation of a particular activity: for example, a broadcasting commission with powers to lay down guidelines or impose decisions on acceptable programme content, or a body administering a national lottery. Those functions may not be fulfilled by any body in many other States. Another difficulty concerns bodies exercising what is indisputably a typical State function, but with their authority resting wholly or largely upon voluntary acceptance rather than upon legal compulsion: for example, a religious court, or a body concerned with the self-regulation of a particular industry. The requirement in draft article 5 that the body be empowered by law offers some assistance but cannot resolve the problem, because it

too invites the question whether whatever is specifically empowered is an exercise of a governmental authority. The same difficulty also arises in the case of draft articles 7, 8 and 9.

It would be helpful if further guidance could be provided in the commentaries on the approach that should be taken to the determination of the status of such bodies. The principles developed for the purpose of deciding whether bodies are entitled to State immunity are not necessarily applicable for the purpose of deciding whether the State is responsible for the acts and omissions of those bodies.

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

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

In defining acts attributable to the State under international law, some further streamlining may be considered, for example, by merging articles 6 and 7 and placing articles 8 and 9 in the context of articles 4 and 5.

Netherlands

The Netherlands is pleased to note that the words "direction or control" allow for the application of both a strict standard of "effective control", as used by the International Court of Justice in the *Nicaragua* case, and a more flexible standard as applied by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadic* case. This inbuilt ambiguity is a positive element and offers scope for progressive development of the legal rules on State responsibility.

Article 7
Attribution to the State of certain conduct carried out in the absence of the official authorities

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

(*See article 6*)

Netherlands

The Netherlands considers this to be a useful article. Situations occasionally arise, for example in Somalia, to which this article could be applicable.

(*See also article 10*)

United Kingdom of Great Britain and Northern Ireland

(*See article 5*)

United States of America

Article 7 allows the conduct of private parties to be attributed to a State when private parties exercise "elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority". The commentary to first reading article 8 (b) (the predecessor to article 7) noted that international practice in this area is very limited and thus acknowledged that there is little authority to support this article.[3] Moreover, the commentary noted that this article would apply only in exceptional circumstances, such as when organs of administration are lacking as a result of war or natural disaster. Because the persons to whom this article would apply "have no prior link to the machinery of the State or to any of the other entities entrusted under internal law with the exercise of elements of the governmental authority, the attribution of their conduct to the State is admissible only in exceptional cases". Idem. The United States believes article 7 should be redrafted to more explicitly convey this exceptional nature.

Title

Republic of Korea

The title of this article would better reflect its contents if the words "or default" were added after the words "in the absence".

Article 8
Attribution to the State of the conduct of organs placed at its disposal by another State

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

(*See article 6*)

Netherlands

The Netherlands believes that the current wording is too limited. Situations of joint responsibility can arise at any time. There are two possible solutions to this problem. First, the scope of the saving clause in article 19 which relates to chapter IV of Part One could be extended to cover chapter II as well. Second, the words

[3] See "Draft articles on State responsibility with commentaries thereto adopted by the International Law Commission on first reading", informal paper prepared by the Secretariat, January 1997, p. 34.

"without prejudice to the other State's international responsibility" could be added to article 8. The Netherlands is in favour of the second solution.

United Kingdom of Great Britain and Northern Ireland

(*See article 5*)

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

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

(*See article 6*)

United Kingdom of Great Britain and Northern Ireland

(*See article 5*)

Article 10
Conduct of an insurrectional or other movement

Netherlands

This article, taken in conjunction with article 7, leads to the conclusion that every internationally wrongful act of an insurrectional movement which does not succeed in becoming the new government will immediately be directly attributed in full to the State. This is in contrast to article 14 (1) of the previous draft.[4] The Netherlands doubts whether support for this can be found in case law.

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

Netherlands

This article uses the words "act of (that) State under international law" whereas the words "act of (that) State" appear elsewhere in the draft. The wording should be harmonized.

[4] "The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law."

Chapter III
Breach of an international obligation

Article 14
Extension in time of the breach of an international obligation

Title

Republic of Korea

As to the title of this article, the phrase "the moment and duration of the breach of an international obligation" is preferred to the phrase "extension in time of the breach of an international obligation".

Paragraph 2

Netherlands

Although paragraph 2 discusses the duration of the breach, it does not consider at what point responsibility is triggered. The intention of the text is clear, but the wording leaves something to be desired. However, the Netherlands has no alternative wording to propose.

Article 15
Breach consisting of a composite act

Paragraph 1

United States of America

The United States commends the Commission for substantially revising and streamlining the articles concerning the moment and duration of breach. In particular, the United States notes that article 15 (1) defines breach of an international obligation as occurring in the context of "a series of actions or omissions defined in aggregate as wrongful" only when an action or omission taken with all other actions or omissions is sufficient to constitute the wrongful act. This is, for example, inherently so with regard to judicial actions. A lower court decision may be the first action in a series of actions that will ultimately be determined in the aggregate to be internationally wrongful. The lower court decision, in and of itself, may be attributable to the State pursuant to article 4; whether it constitutes, in and of itself, an internationally wrongful act is a separate question, as recognized in article 2. Except in extraordinary circumstances, there is no question of breach of an international obligation until the lower court decision becomes the final expression of the court system as a whole, i.e. until there has been a decision of the court of last resort available in the case. The United States also wishes to note its understanding that, consistent with article 13, the series of actions or omissions defined in

aggregate as wrongful cannot include actions or omissions that occur before the existence of the obligation in question.

Paragraph 2

United States of America

While the United States approves of article 15 (1), we believe that article 15 (2) requires further consideration. The current draft does not differentiate between categories of action which clearly lend themselves to consideration as composite acts, such as genocide, and other categories of action where such characterization is not so clearly appropriate under customary international law. This could result in inappropriately extending liability in certain situations.

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

Article 16
Aid or assistance in the commission of an internationally wrongful act

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

In Chapter IV, on the responsibility of a State in respect of the act of another State, one may question the wisdom of introducing the qualification of "knowledge of the circumstances" in articles 16 to 18 as this requirement does not figure — and rightly so — in article 2 stating the essential elements of an internationally wrongful act.

Republic of Korea

The meaning of the phrase "with knowledge of the circumstances of the internationally wrongful act" is rather vague and it does not seem to provide any practical guidance to determine the "responsibility of a State in respect of the act of another State".

United Kingdom of Great Britain and Northern Ireland

While the drafting of this article has been improved, further clarity, both in the article and in the commentary, is necessary. The expressions "in the commission" and "knowledge of the circumstances of" should be clarified so as to ensure that the aid or assistance must be clearly and unequivocally connected to the subsequent internationally wrongful act. As regards intention, it should be made clear that the "assisting" State must be aware that the act in question is planned and must further

intend to facilitate the commission of that act by its assistance. It is not clear that there is a distinction between "aiding" and "assisting".

United States of America

Article 16 allows a State which aids or assists another State in committing an internationally wrongful act to be held responsible for the latter State's wrongful act if the assisting State does so "with knowledge of the circumstances of the internationally wrongful act" and if the act would be internationally wrongful had it been committed by the assisting State itself. The United States welcomes the improvements in article 16 over its first reading predecessor (article 27), particularly the incorporation of an intent requirement in the language of article 16 (a) which requires "knowledge of the circumstances of the internationally wrongful act". The United States is also pleased to note that article 16 is "limited to aid or assistance in the breach of obligations by which the assisting State is itself bound". (See A/CN.4/498/Add.1, para. 186.)

The United States believes that article 16 can be further improved by providing additional clarification in the commentary to article 16 as to what "knowledge of the circumstances" means and what constitutes the threshold of actual participation required by the phrase "aids or assists". We note that in both the commentary to the first reading article 27 and in the Special Rapporteur's discussion of this article in his second report, it has been stressed that the intent requirement must be narrowly construed. An assisting State must be both aware that its assistance will be used for an unlawful purpose and so intend its assistance to be used. The United States believes that article 16 should cover only those cases where "the assistance is clearly and unequivocally connected to the subsequent wrongful act" (ibid., para. 178). The inclusion of the phrase "of the circumstances" as a qualifier to the term "knowledge" should not undercut this narrow interpretation of the intent requirement, and the commentary to article 16 should make this clear.

As to the threshold of participation required by the phrase "aids or assists", the commentary to first reading article 27 drew a distinction between "incitement or encouragement" which article 27 did not cover, and noted that aid or assistance must make it "materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act". (See commentary to article 27, para. 17.) The United States urges the Commission to fully develop the issue of what threshold of participation is required by the phrase "aids or assists" in the commentary to article 16, as the current draft of article 16 provides little guidance on this issue.

Subparagraph (a)

Netherlands

The Netherlands suggests that article 16 (a) should read: "That State does so when it knows or should have known the circumstances of the internationally wrongful act."

Article 17
Direction and control exercised over the commission of an internationally wrongful act

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

(*See article 16*)

Netherlands

The Netherlands observes that the progressive development implied in article 6 by the ambiguity of the control standard is missing here. The phrase "a State which directs and controls" is cumulative and should be replaced by "directs or controls".

Republic of Korea

(*See article 16*)

Article 18
Coercion of another State

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

(*See article 16*)

Article 19
Effect of this Chapter

Netherlands

(*See article 8*)

Chapter V
Circumstances precluding wrongfulness

Japan

Since there is a risk that circumstances precluding wrongfulness may be abused as an excuse to commit internationally wrongful acts, the list of circumstances under chapter V should be exhaustive. This should be made clear in the Commentary.

Netherlands

In connection with this chapter, which deals with circumstances precluding wrongfulness, the Netherlands would draw attention to the debate currently under way, for example, in the Security Council about the concept of humanitarian intervention. This is because humanitarian intervention, without prior authorization by the Security Council and without permission from the legitimate Government of the State on whose territory the intervention takes place, can be seen — in exceptional situations, because of large-scale violations of fundamental human rights or the immediate threat of such violations — as a potential justification for an internationally wrongful act, namely the actual or threatened use of force if this is required for humanitarian ends and satisfies a series of conditions. The Netherlands takes the view that an article containing such a ground for justification should be included.

Article 20
Consent

Slovakia

In Part One, chapter V, Slovakia supports the inclusion in article 20 (consent) of an exception for peremptory norms of international law, as was stipulated in article 29 of the 1996 draft articles.

Spain

We consider that the current wording unquestionably improves the 1996 draft. All that is missing is paragraph 2 of former article 29 of the 1996 draft (current article 20), which linked consent to the obligations arising under peremptory norms of international law. The deletion of this important principle of international law does not appear to be fully justified.

Article 21
Compliance with peremptory norms

Slovakia

Slovakia is of the view that article 21 (compliance with peremptory rules) is superfluous since conduct (an act) required by law is by definition allowed by law and cannot be wrongful.

Article 22
Self-defence

Japan

We suggest the deletion of the words "taken in conformity with the Charter of the United Nations".

Reference to the Charter of the United Nations may be confusing and unnecessary. In the commentary to the first reading text (article 34, "Self-defence", para. (25)), the ILC explained that it inserted the words "in conformity with the Charter of the United Nations" in order to avoid the problem of the content of "lawful" self-defence because such a question was a matter of the primary law on self-defence, not a matter of a secondary rule of State responsibility. Japan fully shares such view of the ILC. However, if the article refers to the Charter of the United Nations as it is, contrary to the ILC's intention, there is a risk that the Commission will be wrongly accused of taking a certain position on the relationship between self-defence under the Charter and that under international law. Therefore it would be better to avoid any reference to the content of lawfulness.

In any event, article 59 makes it clear that the draft articles are without prejudice to the Charter of the United Nations. Thus, there is no concern that self-defence under article 22 with the suggested deletion would affect the primary rules on self-defence.

Article 23
Countermeasures in respect of an internationally wrongful act

United Kingdom of Great Britain and Northern Ireland

The basic provision in draft article 23 might be expanded so as to make clear that countermeasures must be proportionate to the injury suffered, limited in their aim to inducing the responsible State to comply with its obligations, and not aimed at third States. The draft article, or its commentary, could also make clear that no State may impose countermeasures that violate peremptory norms of international law or other obligations essential for the protection of the fundamental interests of the international community of States as a whole, or that violate its obligations concerning the protection of fundamental human rights or humanitarian law.

For the reasons given above (see Part Two bis, chapter II, and articles 51, 53 and 54, paragraph 2), it would be helpful to increase the detail with which draft article 23 deals with countermeasures, to bring this provision more closely in line with the approach adopted in the other draft articles in this chapter.

United States of America

Countermeasures are acts of a State that would otherwise be considered wrongful under international law, but are permitted and considered lawful to allow

an injured State to bring about the compliance of a wrongdoing State with its international obligations. Article 23 defines countermeasures as those acts whose wrongfulness is precluded to the extent that the act constitutes a countermeasure under the conditions set forth in articles 50 to 55. The United States prefaces its remarks by noting that any actions by a State that are not otherwise prohibited under international law are outside the scope of articles 23 and 50 to 55 as these actions would not, by definition, constitute countermeasures.

Article 24
Force majeure

United Kingdom of Great Britain and Northern Ireland

The Special Rapporteur rightly states (A/CN.4/498/Add.2, para. 261) that "article 31 should provide that *force majeure* is only excluded if the State has produced or contributed to producing the situation through its *wrongful* conduct" (emphasis added). The wording of paragraph (2) (a) is, furthermore, awkward: it is the conduct of the State, rather than the *force majeure*, to which the phrase "either alone or in combination with other factors" should relate. The paragraph might accordingly read as follows:

> "Wrongful conduct of the State invoking *force majeure*, either alone or in combination with other factors, has caused the irresistible force or unforeseen event."

Article 25
Distress

United Kingdom of Great Britain and Northern Ireland

The point made in relation to draft article 24 is applicable also to draft article 25 (2) (a), which would be better phrased as follows:

> "Wrongful conduct of the State invoking the situation of distress, either alone or in combination with other factors, has caused that situation."

Article 26
State of necessity

United Kingdom of Great Britain and Northern Ireland

A defence of necessity is open to very serious abuse. It is unlike the other circumstances precluding wrongfulness set out in the draft articles, both because of the extreme — indeed, practically unlimited — breadth of the circumstances in which the defence might be invoked, and because of the wide range of interests that might be said to be protectable. The defence of necessity stands at the very edge of the rule of law; it should not be included in a set of draft articles that describe the routine framework of legal responsibility between States. Without prejudice to that

position, however, if a provision on the defence of necessity were to be retained in the draft articles, the current text has to be substantially revised.

A provision on the defence of necessity could be accepted (though it is highly undesirable) if it were made absolutely clear that the defence could operate only to protect interests so essential that a breach of them threatens the economic or social stability of the State, or serious personal injury or environmental damage on a massive scale. In particular, it should be emphasized that the interests protected are those of the State, and not those of the Government or any other group within the State. It should also be emphasized that it is a matter for international law, and not for each State, to determine whether any given circumstances justify the invocation of the defence of necessity.

A clear indication of the nature of the "essential" interests must be given, in draft article 26 and/or in the commentary. In particular, it would be helpful to indicate specifically whether a State may invoke the defence of necessity in order to exculpate conduct intended to safeguard global interests, such as high seas fisheries or the environment, in which the State may have a particular interest but no particular rights; and if so, within what limits. The previous commentary avoids a definition of "essential interest", stating merely that "the extent to which a given interest is 'essential' naturally depends on all the circumstances in which the State is placed in different specific situations; the extent must therefore be judged in the light of the particular case into which the interest enters, rather than be predetermined in the abstract". That is nowhere near being an adequate safeguard against the risk of an excessively wide interpretation of the defence.

It would be helpful to indicate in the commentary the relationship between the concepts of an essential interest (draft article 26), a fundamental interest (draft article 41) and a collective interest (draft article 49).

Certain other drafting changes would be desirable if a provision is retained as discussed below.

The reference in draft article 26 (1) (b) to "the international community as a whole" is wholly unclear. Another term is needed. One possibility would be to refer, here and elsewhere, to "the international community of States as a whole", the terminology used in the Vienna Convention on the Law of Treaties. It is highly undesirable that a distinction of uncertain scope or purpose be drawn between "the international community as a whole" and "the international community of States as a whole".

Draft article 26 (2) (b) states expressly that the defence of necessity is not available in relation to obligations that exclude the possibility of invoking necessity. If that provision were to be retained, it should be made clear at the appropriate points that the same exception may apply in relation to other circumstances precluding wrongfulness, notably *force majeure*.

Draft article 26 (2) (c) would need to be reformulated to bring it into line with draft articles 24 (2) (a) and 25 (2) (a). It might read:

> "Wrongful conduct of the State, either alone or in combination with other factors, has caused the situation of necessity."

Article 27
Consequences of invoking a circumstance precluding wrongfulness

Japan

As pointed out in the first reading commentary, "the articles on circumstances precluding wrongfulness should be understood as not affecting the possibility that the State committing the act may, on grounds other than that of responsibility for a wrongful act, incur certain obligations, such as an obligation to make reparation for damage caused by the act in question". Unlike previous article 35, the current article 27 does not specify in which circumstances precluding wrongfulness a State may incur an obligation to make compensation. We support this approach. However, since the work for international liability is not likely to develop soon, the commentary should explain in what cases of circumstances precluding wrongfulness compensation is not expected. In particular, article 21 on peremptory norms is a new category and needs certain explanation in this regard.

Also, it should be made clear in the commentary that self-defence and countermeasures do not preclude any wrongfulness of, so to speak, indirect injury that might be suffered by a third State in connection with a measure of self-defence or countermeasures taken against a State.

Subparagraph (a)

United Kingdom of Great Britain and Northern Ireland

Subparagraph (a) would be more accurate if it read "the duty to comply with the obligation".

Subparagraph (b)

Netherlands

The Netherlands is of the opinion that article 27 (b) should relate not to chapter V in its entirety but solely (as proposed by the Special Rapporteur) to articles 24 to 26 (see A/CN.4/L.569, p. 16).

Part Two
Content of international responsibility of a State

Chapter I
General principles

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

In Part Two on the content of international responsibility of a State, chapters I and II, concerning general principles and the various forms of reparation, are particularly clear, concise and well structured.

Slovakia

Slovakia is generally satisfied with the structural changes in Part Two of the draft articles. Slovakia welcomes and supports the inclusion of new Part Two bis (implementation of State responsibility).

Article 29
Duty of continued performance

Netherlands

In response to paragraph 76 of the commentary on article 36 bis (corresponding to the present articles 29 and 30) in the ILC report, the Netherlands would draw attention to the sentence "In terms of its placement, the general principle of cessation should logically come before reparation since there would be cases in which a breach was drawn to the attention of the responsible State, which would immediately cease the conduct and the matter would go no further". The Netherlands takes the view that the clause "and the matter would go no further" is not correct, for the other legal consequences of an internationally wrongful act would stand, even if the responsible State immediately ceased its wrongful conduct.

Article 30
Cessation and non-repetition

Netherlands

Paragraph 91 of the ILC report makes a connection between the "assurances and guarantees of non-repetition" and, inter alia, the "seriousness of the breach". In the Netherlands' view, reference should also be made in article 30 to the "gravity of the breach" as referred to in article 42. Conversely, article 42 (3) should contain a cross-reference to chapter I, and not only to chapter II as is currently the case.

(*See also article 29*)

Subparagraph (b)

United Kingdom of Great Britain and Northern Ireland

Subparagraph (b) would be more accurate if it read "to give appropriate assurances and guarantees".

United States of America

In addition to these areas (see General remarks), the United States would like to draw the attention of the Commission to other provisions, including article 30 (b) on assurances and guarantees of non-repetition, which we believe should be deleted as it reflects neither customary international law nor State practice.

Article 30 (b) requires the State responsible for an internationally wrongful act "to offer appropriate assurances and guarantees of non-repetition, if circumstances so require". The United States urges the deletion of this provision because it does not codify customary international law, and there is fundamental scepticism, even among the Commission itself, as to whether there can be any legal obligation to provide assurances and guarantees of non-repetition.[5] There are no examples of cases in which courts have ordered that a State give assurances and guarantees of non-repetition (idem). With regard to State practice, assurances and guarantees of non-repetition appear to be "directly inherited from nineteenth-century diplomacy", and while Governments may provide such assurances in diplomatic practice, it is questionable whether such political commitments can be regarded as legal requirements (idem). In fact, use of the term "appropriate" to modify "assurances and guarantees" is a further indication that article 30 (b) does not reflect a legal rule, but rather a diplomatic practice. Finally, even the Third Report of the current Special Rapporteur raises the question as to whether assurances and guarantees can properly be formulated as obligations (A/CN.4/507, para. 58). The United States submits that assurances and guarantees of non-repetition cannot be formulated as legal obligations, have no place in the draft articles on State responsibility and should remain as an aspect of diplomatic practice.

Article 31
Reparation

Japan

(*See article 43*)

Netherlands

Paragraph 93 of the ILC report (commentary on article 37 bis: the current article 31 combined with article 35) examines the factors of "intention" and

[5] See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 88.

"negligence", stating that the distinction between them should come into play in the question of reparation. This is not reflected in the text of either article 31 or article 35 (or in chapter II of Part Two in general). The Netherlands proposes that chapter II focus on the role of intention and negligence, for example by adding the following words to article 35: "The determination of the reparation shall take into account the nature (and gravity) of the internationally wrongful act".

Spain

The Government of Spain is in favour of maintaining the restriction contained in article 42, paragraph 3, of the 1996 draft, whereby "[i]n no case shall reparation result in depriving the population of a State of its own means of subsistence".

United Kingdom of Great Britain and Northern Ireland

Paragraph 1 is concerned with the injury "caused" by the wrongful act; and paragraph 2 with the damage "arising in consequence of" the wrongful act. The Chairman of the Drafting Committee has suggested that "the requirement of a causal link is usually addressed by primary rules". Whether or not that is so, it is desirable that the complex question of causation not be addressed in these draft articles, and that the commentary make this clear.

Paragraph 2, while not defining either of the terms "injury" or "damage", does state that injury includes non-material damage. The Chairman of the Drafting Committee has stated that "'moral' damage may be taken to include not only pain and suffering but also the broader notion of injury which some may call 'legal injury' to the States". It is not clear what is meant by "legal injury", but it is possible that the term may be understood to include that type of legal injury which is suffered by each party to a treaty by virtue only of the fact that the treaty is violated by another party. Such an interpretation would entail a conflation of the categories of "injured State" (draft article 43) and "interested State" (draft article 49). Indeed, it would be more in conformity with State practice, and more desirable, not to base the draft articles upon a distinction between "injured" States and "interested" States but to proceed instead on the basis of the distinction between the remedies available in different circumstances to the various States to whom the obligation that has been breached is owed. Nonetheless, if the distinction between injured and interested States is to be retained, draft article 31 will need to be re-examined in the light of the definition of the "injured State" in draft article 41, and in the light of the definition of damage implicit in draft article 37.

Paragraph 2

Austria

It is generally said in textbooks that in international law there is no material reparation for moral damage suffered by States and that reparation for such damage is granted in the specific form of "satisfaction". Looking at the draft, and in particular at article 31, paragraph 2, article 37 and article 38, paragraph 1, it could possibly be interpreted in a different way. Article 37, paragraph 2, refers to

"financially assessable damage" which any compensation shall cover. The problem is, however, whether the definition of moral damage only depends on the financial assessability, or on other criteria. The answer to this question depends on the legal tradition and the existing laws of each legal system, and it has to be said that in many municipal legal systems also moral damages are regarded as financially assessable. It is therefore possible that lawyers from such States will interpret the draft as meaning exactly that, i.e., as stipulating the obligation to compensate also for moral damage. Such interpretation seems to find support in article 38, paragraph 1, which envisages satisfaction insofar as the injury "cannot be made good by restitution or compensation".

That would be a change of existing international law; Austria has its doubts that such a change would be warranted or practical.

United States of America

The United States notes that moral damages are encompassed by a responsible State's duty to make full reparation under article 31 (2), which provides that "injury consists of any damage, whether material or moral".

Article 33
Other consequences of an internationally wrongful act

Netherlands

The Netherlands accepts the suggestion made in paragraph 108 of the ILC report that article 38 (current article 33) should be incorporated in the general provisions in Part Four. This would mean making the wording more general so as to apply not only to the consequences of internationally wrongful acts but also to the entire legal regime governing State responsibility.

United Kingdom of Great Britain and Northern Ireland

It will be widely presumed that the draft articles are intended to set out a comprehensive framework, covering all aspects of State responsibility in greater or lesser detail. It may therefore be assumed that any legal consequences of wrongful acts (other than those resulting from a *lex specialis* such as the law of treaties) that are not set out in the draft articles were intended to be excluded. It would therefore be helpful to make clear in the commentary what kinds of additional rules of the customary international law of State responsibility are intended to be preserved by draft article 33. If there are none, this provision should be deleted. If retained, it is not obvious that it should be placed where it is and limited to the legal consequences of an internationally wrongful act. It could be retained as a general provision.

Chapter II
The forms of reparation

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

(*See Part Two, Chapter I*)

Netherlands

The Netherlands approves of the fact that the articles in this chapter take the form of obligations on the responsible State and not, as in the previous draft, of rights of the injured State.

Article 35
Forms of reparations

Japan

(*See article 43*)

Netherlands

(*See article 31*)

Article 36
Restitution

Netherlands

It is clear from paragraph 172 of the ILC report that the Special Rapporteur was of the opinion that there was no requirement that all attempts to secure restitution should be first exhausted and that any election by the injured State to seek compensation rather than restitution should be legally effective. This opinion is not reflected in the wording of article 36. While the Netherlands does not object to the current wording of article 36 or to incorporating the Special Rapporteur's opinion, it does feel that if the responsible State opts for restitution, it should be entitled to do so, and that the injured State cannot deprive the responsible State of this right.

Paragraphs 182 and 184 of the ILC report show that the Commission discussed whether "legal" impossibility was included in the phrase "material impossibility" and whether a "legal impossibility" could therefore impede the fulfilment of a responsible State's obligation to make restitution. It is the view of the Netherlands that, just as a State cannot, under article 3 of the draft articles, evade its responsibility by describing its internationally wrongful acts as lawful under national law, so too it cannot hide behind national law to avoid making restitution.

The only way in which "material impossibility" could be regarded as including "legal impossibility" would be if restitution were to entail a breach of an obligation under international law.

Spain

The Government of Spain views as positive the deletion from the draft adopted in 1996 of some vaguely worded provisions, such as subparagraph (d) of former article 43, which contained an exception to restitution in kind whose verification in practice would be highly problematic ("would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitutions in kind"). The regulation contained in new article 36 is much better suited to contemporary international practice.

Subparagraph (b)

United Kingdom of Great Britain and Northern Ireland

The principle set out in draft article 36 (b) is accepted. There is, however, doubt as to the factors that may be weighed in deciding whether restitution is disproportionately onerous. There is a question of practical importance that may arise, for instance, where responsibility results from the defective exercise of a power by a State, in contexts such as the adoption of measures expropriating or regulating foreign property rights. For example, if property is taken by a State as part of a nationalization programme that is legally defective only because of the lateness or inadequacy of compensation, re-establishment of the status quo ante might be possible, and the burden upon the State of doing so may not be great. Restitution may appear to be the appropriate remedy. On the other hand, it might be said that there is little practical point in demanding restitution, because the State could immediately issue a new expropriation measure or regulation, accompanied this time by proper provisions for the payment of compensation. The position might be complicated by the acquisition of rights in respect of the property by third parties. It would be helpful if these points, of considerable practical importance, were fully addressed in the commentary.

Article 37
Compensation

Netherlands

The Netherlands concurs with the wording of article 37, which regulates "compensation" in general rather than detailed terms.

The commentary should clarify the respective scope of and the distinction between articles 37 and 38 as regards material vis-à-vis immaterial damage and as regards damage caused to an individual or to the State.

In response to paragraph 212 of the ILC report on the Special Rapporteur's proposed text for articles 44 and 45 (corresponding to current articles 37 and 38), the Netherlands would observe that the phrase "gravity of the injury" can apply equally to the gravity of the wrongful act and the gravity of the damage incurred.

Republic of Korea

The Government of the Republic of Korea considers that this article has achieved an appropriate balance between an attempt to elaborate the detailed criteria for the amount of compensation and a flexible approach intended to allow such criteria to develop over time.

United Kingdom of Great Britain and Northern Ireland

The question whether any particular form of damage is financially assessable is not answered in the same way in all legal systems. While the position in international law is best worked out through decisions on concrete cases, the commentary might usefully indicate that assessability is a matter for international, and not for national law.

Paragraph 1

Republic of Korea

In paragraph 1, the Government of the Republic of Korea prefers the phrase "if and to the extent that" to the phrase "insofar as", without wishing to alter the substance of the provision.

Paragraph 2

Austria

(*See article 31, paragraph 2*)

United States of America

The United States would urge the Commission to clarify that moral damages are included as financially assessable damages under article 37 (2) on compensation.

The United States urges the Commission to make explicit that moral damages are likewise included in a responsible State's duty to provide compensation for damage to injured States by clarifying in article 37 (2) that moral damages are "financially assessable damage[s]". The United States also believes it would be important to clarify in this article that moral damages are limited to damages for mental pain and anguish and do not include "punitive damages".

Article 38
Satisfaction

Japan

(*See article 43*)

Netherlands

(*See article 37*)

Spain

With regard to satisfaction, as regulated in new article 38, it was a wise decision to delete the reference to punishment of those responsible for a wrongful act as one of the forms of satisfaction, a measure which certainly does not appear to have been confirmed in State practice thus far. The same can be said of damages, as regulated in article 45 of the 1996 draft. This provision, which has not been confirmed in practice either, does not appear to be necessary, since article 35 sets forth the principle of full reparation and article 37 provides that compensation shall cover "the damage caused [by an internationally wrongful act], insofar as such damage is not made good by restitution". Only the reference in article 42, paragraph 1, to the obligation to pay "damages reflecting the gravity of the breach", in the context of the regime of aggravated responsibility for breaches of obligations to the international community as a whole, is acceptable.

United States of America

The United States welcomes the Commission's removal of moral damages from article 38 concerning satisfaction.

Paragraph 1

Austria

(*See article 31, paragraph 2*)

Republic of Korea

In paragraph 1, the phrase "insofar as" should be replaced by the phrase "if and to the extent", as noted above under article 37.

Paragraph 3

Republic of Korea

In paragraph 3, the drafting of this article could be improved by replacing the phrase "humiliating to the responsible State" with the phrase "impairing the dignity of the responsible State", since the former phrase does not appear to fit within current legal terminology.

Spain

The wording of paragraph 3 of article 38 also raises concerns for the Government of Spain in that it refers to measures of satisfaction which take "a form humiliating to the responsible State". This concept is undefined, as was the notion of "the dignity of the State" provided for in article 45 of the 1996 draft, which has found no application in more recent international practice. In this regard, the restriction contained in article 38, paragraph 3, of the 2000 proposal, whereby "[s]atisfaction shall not be out of proportion to the injury", appears to be sufficient.

Article 39
Interest

Republic of Korea

This article would be better placed under the rubric of compensation, preferably as paragraphs 3 and 4 of article 37, since interest is not an automatic form of reparation. Rather interest is primarily concerned with compensation, although the question of interest might arise in the other forms of reparation.

Article 40
Contribution to the damage

Republic of Korea

Although the Government of the Republic of Korea fully acknowledges its importance, this article applies to all forms of reparation and should therefore be included under article 31, which concerns the general principle of reparation.

Slovakia

Slovakia proposes to move current article 40 (contribution to the damage) from chapter II to chapter I. The principle of "contribution to the damage" does not belong to "forms of reparation", rather it may be subsumed under chapter I, general principles. The most suitable place for article 40 would perhaps be in current article 31 (reparation), as its paragraph 3. The notion of "contribution to the damage" was similarly part of article 42 on reparation in the 1996 draft articles.

Chapter III
Serious breaches of essential obligations to the international community

Austria

Austria approves of the change of direction introduced by the Special Rapporteur, away from any reference to "international crimes" in the draft and towards a more restricted category of *erga omnes* obligations. This avoids the difficult discussion as to the precise meaning of "international crimes". It has consistently been Austria's position that such a reference should not be made in the text. Austria is therefore in favour of the new solution proposed in the current text.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

Chapter III, concerning serious breaches of essential obligations to the international community, is an acceptable compromise to settle the earlier distinction between "delicts" and "crimes". The essential point is not the terminology, though the word "crime" in the context of State responsibility may give rise to false implications. The essential point is that some violations such as aggression and genocide are such an affront to the international community as a whole that they need to be distinguished from other violations, in the same way we know them from the laws of war, with the distinction drawn between "breaches" and "grave breaches" of those rules. The Nordic countries therefore continue to support the distinction also in the context of State responsibility and we agree with the solution now presented in chapter III of Part Two.

Netherlands

The Netherlands is in agreement with the deletion of article 19 as included in the draft adopted by the ILC on first reading. Article 19 introduced the term "international crime" of a State, defining it as "an internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of the fundamental interests of the international community that its breach is recognized as a crime by that community as a whole". Retaining the term "international crime of a State" is controversial within both the ILC and the Sixth Committee of the General Assembly, and does not therefore appear feasible. It would be inadvisable to risk jeopardizing what the ILC has now achieved in relation to the codification and progressive development of the doctrine of State responsibility by insisting on clinging to the term "international crime of a State". In the view of the Netherlands, the provisions on the legal consequences of "serious breaches by a State of obligations to the international community as a whole" (article 41 in conjunction with article 42), proposed by the Special Rapporteur and adopted by the Drafting Committee, are a good compromise, with the added advantage that this wording does not put what has been agreed at risk. However, the Netherlands does take the view that further consideration should be given to the definition of "serious breaches" in articles 41 and 42, in their chapeaux and in the

heading of chapter III of Part Two, in which the relevant articles are grouped. The ILC should harmonize the various definitions. The Netherlands also notes that the examples given in the previous article 19 to illustrate what was meant by an international crime have not been used to illustrate the corresponding concept of "serious breaches". This is regrettable because the examples clearly illustrated the term "international crime", which has now been abandoned. All that is left now, therefore, is a framework, thus leaving a great deal to be filled in by case law and development of the law in general. At the same time, the Netherlands understands the Special Rapporteur's wish to delete all the elements of the text that have no connection with secondary rules and to transfer them to the commentary.

(*See also article 41*)

Slovakia

With regard to chapter III of Part Two (consequences of serious breaches of obligations to the international community as a whole), Slovakia welcomes the abandonment of the dichotomy of international crimes and delicts. The distinction between crimes and delicts, and in particular the concept of an international crime, has received a controversial response from Member States and international scholars. In the view of Slovakia, the deletion of article 19 also appropriately reflects new developments in international law in the past decade, namely the concept of international individual criminal responsibility laid down in the 1998 Rome Statute of the International Criminal Court, as well as in the respective statutes of international criminal tribunals established by the United Nations Security Council. The previous concept of "States crimes" went beyond the scope of the draft articles with respect to the content of "State responsibility". While a responsible State was under an obligation to cease its internationally wrongful act and provide full reparation, the notion of "international crime of States" could have led to the conclusion that it provided for some punitive measures or sanctions against a responsible State, which apparently was not the intention of the Commission.

Though Slovakia considers new chapter III to be a promising step in the right direction, there are still some issues giving rise to concern. First of all, it is the notion of "international community as a whole" which is creating a certain degree of ambiguity and confusion. It is not clear how broad a range of subjects it does cover (except for States). It is not clear whether it includes international organizations, private entities or individuals. Slovakia believes that this issue should be clarified. One of the remedies could be the use of the notion of "international community of States as a whole", as in article 53 of the Vienna Convention on the Law of Treaties.

Spain

As the Spanish delegation to the Sixth Committee has stated on several occasions, the Government of Spain supports the regulation in the draft articles of an aggravated regime of international State responsibility. International practice shows that the legal consequences of, for example, breaches of a customs treaty differ quantitatively and qualitatively from those that arise where aggression is

committed by one State against another State or where acts of genocide are committed.

The name of this more aggravated regime of international State responsibility is not as important as its legal content. Spain has no difficulty with the use of the expression "serious breaches of essential obligations to the international community as a whole", as proposed by the Drafting Committee in the heading of Part Two, chapter III, of the draft.

United Kingdom of Great Britain and Northern Ireland

Draft articles 41 and 42 represent an attempt to find a compromise acceptable both to those within the Commission who supported and to those who opposed the concept of international crimes as that concept appeared in the draft articles adopted on a first reading. Compromise solutions in this context are, however, problematic. To the extent that the authority of draft articles annexed to a General Assembly resolution depends upon recognition of the "weight" of the articles as a codification of State practice, an innovative compromise, not rooted in such practice, would necessarily weaken the authority of the entire draft. The provisions relating to serious breaches of fundamental obligations go far beyond codification of customary international law. There are, moreover, practical difficulties with the provisions as drafted.

The first difficulty lies in knowing what would constitute a "serious breach". Accepting that international law recognizes a category of obligations *erga omnes*, owed to all States and in the performance of which all States have a legal interest (*Barcelona Traction* case), the content of that category is far from settled. Given the significance of this category of *erga omnes* obligations in the context of countermeasures, this point has very considerable practical importance.

This uncertainty is not resolved by the addition of further criteria in draft article 41. The requirement that the breach must be "serious" (i.e. involve "gross or systematic failure") is understandable; but quite rightly not all serious breaches fall within the category. The serious breach must also risk "substantial harm" to the "fundamental interests" protected by the *erga omnes* obligation, which must be fundamental interests of the "international community as a whole"; and the obligation must be "essential" for the protection of that interest. Every one of those conditions introduces a further element of uncertainty into the operation of the provisions. While every definition gives rise to doubts over borderline cases, the doubts here are so extensive as to render draft article 41 of little practical value as a definition of the category of breaches in relation to which the important consequences set out elsewhere in the draft articles attach. The uncertainty puts in doubt the viability of this innovative mechanism as a practical instrument.

Under the draft articles, the consequences of finding that a particular breach is a "serious breach" within the meaning of draft article 41 would be: (a) that any damages awarded may reflect the gravity of the breach (draft article 42); (b) that obligations of non-recognition and non-assistance are imposed on third States (draft article 41); and (c) that any State may impose countermeasures in response "in the interest of the beneficiaries of the obligation breached" (draft article 54 (2)).

As to the first consequence, it is questionable whether punitive damages are appropriate except in rare cases. Generally speaking it is not for an individual State or group of States, or a tribunal, to punish a State as such. State responsibility is concerned with the redress of wrongs, not the punishment of misdeeds. A provision permitting non-punitive damages that reflect the gravity of the breach would be acceptable; but any such provision clearly ought to permit the gravity of the breach to be taken into account in all cases, whether or not the breach falls within a special subcategory of serious breaches of certain *erga omnes* obligations defined by the cumulative criteria in draft article 41. There is no reason why damages in respect of a breach of an obligation owed to a single State or group of States (or to the international community of States as a whole, but not essential for the protection of its fundamental interests) should be governed by principles different from those that govern damages in respect of "serious breaches" under draft article 41. It is, moreover, noted that even as the draft articles stand, it is possible to award damages for moral injury in addition to compensation for material injury. That introduces a limited and principled means for taking into account particularly flagrant breaches of international obligations. If a revised provision concerning the award of damages reflecting the gravity of the breach were to be retained, it would be more appropriately located in Part Two, chapter I, or Part Two, chapter II.

As to the second consequence, it is clear in certain circumstances that States should not recognize as lawful situations created by breaches of international law, or assist the responsible State in maintaining the situation, and that States should cooperate to bring certain breaches to an end. Draft article 42 (2), however, gives rise to difficulties. Contrary to the impression created by draft article 42, the obligations there set out may attach equally to breaches other than those falling within the narrow range encompassed by draft article 41. Moreover, the circumstances in which breaches occur vary widely; and States are by no means always all affected in the same way. Furthermore, the temporal element cannot be ignored. Yet draft article 42 (2) prescribes a single rule with which every State must comply, without any limit in time, in every case of serious breach. The resilience and practical utility of the draft would be greatly increased if draft article 42 (2) were amended so as to provide that the draft articles are without prejudice to any further obligations that might arise under international law in respect of serious breaches. The particular obligations set out in draft article 42 (2) might be added as examples. This would preserve the substance of draft article 42 (2) but without the creation of an inflexible rule mandating the application of the same approach in every conceivable case that might arise, and without implying that similar obligations may not apply to breaches other than those falling within draft article 41.

The third consequence, concerning countermeasures, is considered below (see article 54, paragraph 2).

Article 41
Application of this Chapter

Austria

This new solution suffers from one deficiency: it builds upon the notion of a "serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests", as defined in article 41, paragraph 1. Paragraph 2 of the same article defines "serious breaches" as such involving a "gross or systematic" failure to fulfil the obligation concerned. In certain exceptional cases there will be no doubt as to whether a breach of an obligation is "gross or systematic" and therefore "serious", but there is no objective way of determining the borderline between "gross or systematic" and therefore "serious" and "other" breaches of obligations. Drawing the line in particular in the two areas where this concept is of the most important practical significance, in the areas of human rights and environmental protection, will certainly not be easy. As all States will have the right to invoke "serious breaches", one would have to expect that the notion of "serious breaches" will be applied by different States differently unless a mandatory third-party dispute settlement procedure is envisaged.

China

The Government of China, believing that it is inappropriate to introduce the concept of "State crimes" into international law, supported the proposal that the formulation of "State crimes" in draft article 19 adopted on first reading, as well as the provisions in Part Two relating to their legal consequences, should be appropriately amended.

The revised text reflects major changes to the former article 19. The new text replaces "State crimes" with "serious breaches of essential obligations to the international community", thus circumventing the controversial concept of "State crimes". It also differentiates between varying degrees of gravity of an internationally wrongful act. We appreciate this effort. However, some fundamental questions still remain in the current text. For example, what is "an obligation owed to the international community as a whole and essential for the protection of its fundamental interests"? To talk about consequences without a clear definition of the concept would very easily lead to controversy in practice.

Japan

We suggest the deletion of articles 41, 42, and 54, paragraph 2.

The Government of Japan has consistently objected to the introduction of the ambiguous notion of "international crime", which is not established under international law. Therefore, we appreciate that the term "international crime" has been deleted from the text.

However, a careful examination of the text shows that it is still haunted by the ghost of "international crime". In article 41, the new text creates a new category of "serious breaches of essential obligations to the international community". If an

obligation falls within this category, then such a breach of obligation entails special consequences under article 42. Such a breach may involve, for the responsible States, damages reflecting the "gravity" of the breach. Any State has an obligation not to recognize as lawful the situation created by the breach, not to render aid or assistance to the responsible State in maintaining the situation so created, to cooperate as far as possible to bring the breach to an end. And any State may take countermeasures "in the interest of the beneficiaries" of the obligation breached under article 54, paragraph 2, regardless of the existence or intent of an injured State, or even the intent of beneficiaries.

Thus, "serious breaches" under article 41 is only the equivalent of "international crime" barely disguised. It seems that an article 41 obligation is considered to be somehow of a higher value than the other obligations. The core question appears to be whether there exists a hierarchy among international obligations, and if so, whether a different regime of State responsibility may be applied to more serious breaches than are applied to less serious ones. This question relates to the concepts of *jus cogens* and *obligations erga omnes*; however, neither of their concrete contents has yet been sufficiently clarified. The relationship between these concepts and "serious breaches" under article 41 is not clear, either.

Accordingly, it might be too optimistic to assume that current international law has developed sufficiently to specify what kind of obligations fall within this category of "serious breaches of essential obligations to the international community".

From the viewpoint of the structure of the text, the actual significance in placing an article on "serious breaches" is to allow for the provision on consequences of serious breaches in article 42. In other words, if the consequences specially ascribed for serious breaches are not appropriate or necessary, there is no point in stipulating such a special category of obligation superior to the usual obligation. If we look at what we may call the "special consequences" in article 42, we can say, at least, that the obligation not to recognize as lawful the situation created by the breach, the obligation not to render assistance to maintain such situation, and the obligation to cooperate to bring the breach to an end, do not result exclusively from the "serious breaches". It is a matter of course that all internationally wrongful acts should not be recognized as lawful or assisted. Also, the obligation to cooperate is not logically limited to the case of serious breaches, but can be derived from breaches of multilateral obligations or obligations to the international community as a whole.

Damages reflecting the gravity of the breach seem scarcely different from "punitive damages", which is not a notion established under recognized international law. The draft provision apparently tries to avoid this problem by inserting the word "may" in paragraph 1 of article 42, which reads: "A serious breach within the meaning of article 41 may involve, for the responsible State, damages reflecting the gravity of the breach". However, it is not clear who will decide whether a certain obligation "may" involve damages reflecting the gravity.

By examining each item of the special consequences under article 42, which offer the raison d'être of creating a category of "serious breaches" under article 41, it should be concluded that they are neither special nor appropriate.

We do not deny the possibility of the existence of a more serious breach of obligation than the usual breach of obligation as a general matter. However, as a matter of law, it cannot be said that there is a consensus about what obligations fall into the category of "serious breaches" and, if such "serious breaches" ever exist, whether some special measures are allowed to be taken, and if so what the content of the special measures would be. In short, there is no consensus about setting a prior norm of obligation and its contents, even as a matter of primary law.

Under such a status quo, we should strictly refrain from creating a norm of higher obligation and special consequences in this draft that is expected to serve as a general secondary rule of general international law. To create such a special obligation and corresponding special consequences is not the task of general secondary rules, but is the task of primary rules. Japan believes that articles 41 and 42 have not succeeded in departing from the notion of "international crime", and have no place in this text.

As a possible solution, as the United Kingdom suggested at the Sixth Committee, it may be a good idea to create a saving clause for the existence of a category of obligation that has special consequences of State responsibility.

Netherlands

First, reference is made here to the observations on deleting the term "international crimes" and substituting "serious breaches" in Part Two (see Part Two, chapter III).

The Netherlands thinks it right for the definition of "serious breaches" to be included in Part Two. That would make clear the distinction between "internationally wrongful acts" and "serious breaches". Part One contains general provisions which also apply to this category of "serious breaches".

The Netherlands is aware that support exists for replacing the term "international community as a whole" by "international community of States as a whole", following the example of the Vienna Convention on the Law of Treaties. The Netherlands recognizes the analogy with the Convention, but fears that extending this analogy might create a restrictive interpretation of the term "international community". The Netherlands therefore favours retaining the existing wording.

Although the list of examples that appeared in article 19 (3)[6] of the previous version has been omitted, the adjective "serious" now appears in the definition itself and not simply in the examples (see also Part Two, chapter III). The word "serious" is a constituent part of the definition and presents an extra obstacle to the application of article 42. However, it is doubtful whether such an obstacle is always necessary. For example, aggression in any form constitutes a "serious breach" in itself. The Netherlands also thinks that the additional obstacle to responsibility for a "serious breach" that is represented by the words "a gross or systematic failure ... risking substantial harm" (in contrast to "causing significant harm") is appropriate.

Republic of Korea

The Government of the Republic of Korea fully supports the Commissions' decision to abandon the distinction between international crimes and international delicts. The controversy with regard to the existence and the possible regime of international crimes has been a stumbling block to the progress of the work of the Commission in the field of State responsibility.

The Government of the Republic of Korea considers that the notion of international crimes has not yet sufficiently developed to be codified at the current stage. A better solution would be to codify the law of State responsibility as a general rule and to allow the notion of international crimes to evolve. However, the Government of the Republic of Korea is convinced that the obligations *erga omnes* and the peremptory norms of general international law deserve special treatment in international law, and breaches of these norms should receive treatment more severe than breaches of less serious obligations. The Government of the Republic of Korea is therefore pleased to note that the Commission has embodied this view in the draft articles by referring to "serious breaches of essential obligations to the international community".

Notwithstanding the Government of the Republic of Korea's appreciation of this article, its specific meaning is not clear owing to the frequent use of qualifiers, such as "serious", "essential", "gross or systematic", "substantial" and "fundamental". In addition, there is a need for further clarification on how the term "essential obligations to the international community as a whole" differs from the ordinary obligations *erga omnes* or from the peremptory norms of general international law.

[6] "Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from: (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression; (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination; (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid; (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."

Spain

The definition of such wrongful acts should be based on an agreement among States, as reflected in international practice. Such a definition, as regulated definitively in article 41 proposed by the Drafting Committee, can only consist of a reference to the consensus established within the international community. The latter expression should, however, be clarified by a reference to the States which constitute the international community, as envisaged in article 53 of the Vienna Convention on the Law of Treaties of 1969. While such a definition is no doubt tautological, no other alternative seems possible at the current stage of evolution of the international order. It seems preferable, therefore, to delete the list of examples of international crimes, as contained in article 19, paragraph 3, of the 1996 draft. Nevertheless, international practice recognizes some breaches of international norms that are unquestionably covered by the definition contained in article 41, such as aggression or genocide, on which the Commission could take a position in its commentary on that provision.

United Kingdom of Great Britain and Northern Ireland

The main points of principle that are of concern have been set out above (see Part Two, chapter III). There remain some matters of detail that are of concern.

The commentary needs to explain clearly how it is to be determined whether an obligation is owed *erga omnes* or to "the international community of States as a whole" (which formula is preferable to that in draft article 41 — see article 26); whether the obligation protects the "fundamental interests" of the international community of States as a whole; and whether it is "essential" for that protection. The formula in draft article 41 differs from that in draft article 49 (1) (a), which requires that obligations be *established for the protection* of certain interests. It is not clear whether it is intended that "purposive establishment" should be required under draft article 49 but not be required here. The relationship between these fundamental interests and an "essential interest" (draft article 26) and a "collective interest" (draft article 49) also needs to be explained.

The commentary should also explain how the risk of substantial harm to the fundamental interests, referred to in draft article 41 (2), should be assessed. It is presumably not intended that the mere fact of the violation of an obligation should suffice to demonstrate the existence of the risk of substantial harm.

United States of America

The United States welcomes the removal of the concept of "international crimes" from the draft articles. Articles 41 and 42 dealing with "serious breaches of essential obligations to the international community" have replaced the first reading text article 19, which dealt with "international crimes". Though the replacement of "international crimes" with the category of "serious breaches" is undoubtedly an important improvement, the United States questions the merit of drawing a distinction between "serious" and other breaches.

There are no qualitative distinctions among wrongful acts, and there are already existing international institutions and regimes to respond to violations of

international obligations that the Commission would consider "serious breaches". For example, the efforts under way to establish a permanent International Criminal Court, and the Security Council's creation of the international criminal tribunals for the former Yugoslavia and Rwanda, are examples of special regimes of law better suited than the law of State responsibility to address serious violations of humanitarian law. Indeed, responsibility for dealing with violations of international obligations that the Commission interprets as rising to the level of "serious breaches" is better left to the Security Council rather than to the law of State responsibility. Furthermore, the description of some breaches as "serious" derogates from the status and importance of other obligations breached. The articles on State responsibility are an inappropriate vehicle for making such distinctions. Finally, the draft articles are intended to deal only with secondary rules. Articles 41 and 42 in attempting to define "serious breaches" infringe on this distinction between primary and secondary rules, as primary rules must be referenced in order to determine what constitutes a "serious breach".

The United States also notes that the definition of what constitutes a "serious breach" in article 41 (2) uses such broad language that any purpose of drawing a distinction between "serious" breaches and other breaches is essentially negated. Almost any breach of an international obligation could be described by an injured State as meeting the criteria for "serious breach", and given the additional remedies the draft articles provide for "serious breaches", injured States might have an incentive to argue that an ordinary breach is in fact a "serious breach". There is a little consensus under international law as to the meaning of the key phrases used to define "serious breach", such as "fundamental interests" and "substantial harm". This lack of consensus makes it nearly impossible for the Commission to draft a definition of "serious breach" that would be widely acceptable. This difficulty in arriving at an acceptable definition of "serious breach" provides additional strong grounds for the deletion of these articles.

The United States strongly urges the Commission to delete articles 41 and 42.

Article 42
Consequences of serious breaches of obligations to the international community as a whole

Japan

We suggest the deletion of articles 41, 42 and 54, paragraph 2.

(*See also article 41*)

Netherlands

The specific legal consequences of an "international crime", which were contained in article 52 of the previous draft (i.e. legal consequences for the responsible State, which were not subject to the restrictions applying to the consequences of internationally wrongful acts) have disappeared along with the term "international crime". The phrase "damages reflecting the gravity of the breach" is all that remains of specific consequences of a serious breach for the responsible

State in article 42, the corresponding article of the current draft. The Netherlands believes that the draft should be more specific on this point; in other words it should state (perhaps in the commentary) that in the event of serious breaches damages are payable over and above compensation for the material damage incurred. Strictly speaking, punitive damages should be an appropriate form of reparation for serious breaches. However, the Netherlands is aware that one of the consequences of deleting the term "international crime" is that punitive damages have become impossible. Nevertheless, the draft articles should indicate that in the event of serious breaches the legal consequences for the responsible State should be correspondingly serious. Apart from *restitutio in integrum* and satisfaction, options might include financial consequences exceeding the costs of compensation for material damage, or institutional measures such as being placed under control or restriction of the rights attached to membership of an international organization.

Spain

The definition of the more aggravated regime of international responsibility which comes into play where "serious breaches of essential obligations to the international community" are committed is extremely difficult. As correctly envisaged in general in article 59 of the draft adopted by the Drafting Committee, this regime will be complementary to action taken by the Security Council, although the inclusion of this provision may not necessary in the light of Article 103 of the Charter of the United Nations.

For the Government of Spain, this aggravated regime of international responsibility can be based on the following points: first, an express reference to the international provisions on individual criminal responsibility (Rome Statute of the International Criminal Court, the ad hoc tribunals and so on) should be included; the Commission should not concern itself with this matter in its draft articles on State responsibility. It is true that draft article 58 makes a general reference to the individual responsibility of any person acting in the capacity of an organ or agent of a State, but it would also be appropriate to make an express reference to this in Part Two, chapter III, of the draft.

Secondly, the proposal contained in article 54, whereby "[i]n the cases referred to in article 41, any State may take countermeasures, in accordance with the present Chapter, in the interest of the beneficiaries of the obligation breached", is correct. Where one of the obligations referred to in article 41 is breached, all States may take countermeasures, in accordance with the circumstances affecting the violation of the primary norm and provided that the restrictions set out in the draft are complied with.

With regard to the substantive consequences of the serious breaches regulated in article 41, they are, in accordance with the proposal made in article 42, largely undefined. The Commission should enlarge upon and clarify to the extent possible the obligations of all States provided for in article 42, either in the text of the article or in the commentaries. In particular, the Commission should streamline the content of the obligation not to recognize as lawful the situation created by the breach and the obligation not to render aid or assistance to the responsible State in maintaining the situation so created. The reference in paragraph 2 (c) to cooperation among States "to bring the breach to an end" is also problematic, as it is unclear whether a

separate obligation is involved or whether it is related to the taking of countermeasures under article 54. In the latter case it would be necessary to mention expressly the restrictions applying to the taking of countermeasures.

All of this should be understood as being without prejudice to the reference made in article 42, paragraph 3; thus, it is the evolution of the international order itself that is developing the legal regime of "serious breaches of essential obligations to the international community".

United States of America

The most troubling aspect of the articles on "serious breaches" is that these articles provide additional remedies against States found to have committed "serious breaches", above and beyond those provided for ordinary breaches. The United States is most concerned with article 42 (1), which includes language ("damages reflecting the gravity of the breach") that can be interpreted to allow punitive damages for serious breaches. There is scant support under customary international law (in contrast to domestic law) for the imposition of punitive damages in response to a "serious breach", and the United States believes it is crucial that this paragraph be deleted. The Special Rapporteur has acknowledged the lack of a basis under customary international law for the imposition of punitive damages, stating that "[t]here is no authority and very little justification for the award of punitive damages properly so called, in cases of States responsibility, in the absence of some special regime for their imposition". *See Third Report on State Responsibility*, International Law Commission, 52nd sess., at para. 190 and n. 157, U.N. Doc. A/CN.4/507/Add.1 (2000); *see also, First Report on State Responsibility*, International Law Commission, 50th sess., at para. 63, U.N. Doc. A/CN.4/490/Add.2 (1998), listing cases that have rejected claims for punitive damages under international law.

The United States notes that detailed proposals for the consequences that should attach to responsible States committing international crimes were rejected both in 1995 and in 1996 by the Commission (A/CN.4/507/Add.1, para. 190 and note 157; se also A/CN.4/490/Add.2, para. 63). The Commission should likewise reject any attempt at this late date to introduce what appears to be a special regime for the imposition of punitive damages into the draft articles as a potential remedy for "serious breaches". The United States strongly urges the Commission to delete articles 41 and 42.

(See also article 41)

Paragraph 1

Netherlands

The specific consequences contained in article 52 of the previous draft[7] disappeared with the deletion of the term "international crime". The phrase "damages reflecting the gravity of the breach" is all that remains in the corresponding article 42 of the current draft to indicate specific legal consequences of "serious breaches". The Netherlands considers it doubtful whether this can be regarded as a sufficiently effective form of reparation. Although there is no question of introducing the concept of punitive damages at the current stage, the text (or the commentary) should perhaps be more specific on this point. The draft articles should reflect the notion that in cases of serious breaches, damages are necessary over and above compensation for the material damage incurred (see Part Two, chapter III).

The Netherlands has reservations about the use of the word "may". The relatively open-ended nature of this word can only be explained if the serious breach in question inflicted no damage in itself, or if this paragraph anticipates legal consequences defined in the rest of article 42. Another explanation for the use of the word "may" would be that the injured State has a discretionary power to seek damages. However, the Netherlands believes that this interpretation contradicts the express obligation on the responsible State to make restitution or to compensate for the damage caused, as stated in articles 36 and 37, although what is involved in these articles is only "internationally wrongful acts". Lastly, the use of "may" could be explained by the Drafting Committee's consideration "that there might be situations in which the gravity of the breach called for heavy financial consequences". Nonetheless, the Netherlands suggests that the words "may involve" should be replaced by the word "involves".

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[7] "Where an internationally wrongful act of a State is an international crime:

(a) an injured State's entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of article 43;

(b) an injured State's entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of article 45."

Article 43, subparagraphs (c) and (d), read:

"The injured State is entitled to obtain from the State which has committed an internationally wrongful act, restitution in kind, that is, the establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

...

(c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind."

Article 45, paragraph 3, read:

"The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act."

Republic of Korea

It is not clear what the phrase "damages reflecting the gravity of the breach" implies. If the phrase is construed to mean punitive damages, the Government of the Republic of Korea is opposed to its inclusion in the draft articles.

Spain

(See article 38)

Paragraph 2

Austria

"Serious breaches" entail obligations not only for the States which have committed a wrongful act, but also for all other States (see article 42, para. 2), among which is the obligation "to cooperate as far as possible to bring the breach to an end" (article 42, para. 2 (c)). However, the relationship between article 54, paragraph 2, and article 42, paragraph 2 (c), is unclear. Probably it is possible to regard the obligation to bring the breach to an end (article 42, para. 2 (c)) as being "in the interest of the beneficiaries of the obligation breached" (article 54, para. 2); relevant action could then be regarded as falling under article 54, paragraph 2. But there is some doubt as to whether this is the intention of the drafters and whether actions "to bring the breach to an end" are only permitted within the limits of countermeasures. If not, the difficult problem of what has been called "humanitarian interventions" might have to be faced in this context. The practical implications of this question are evident and it is therefore important that no ambiguities are left in the text.

China

A question arises regarding the relationship of article 42, paragraph 2, with Security Council resolutions. For example, for an act that threatens international peace and security, would the obligations set out in article 42, paragraph 2, arise automatically, or only after a decision has been made by the Security Council? The current text is not clear on this. We suggest that the ILC provide the necessary definition and clarification in the commentary to this article.

Netherlands

Placing subparagraph (a) ("the obligation for all States not to recognize as lawful the situation created by the breach") in article 42 might create the impression that the obligation laid down in this subparagraph did not apply to breaches that were not serious. However, the Netherlands realizes that it would not be possible to transfer this obligation to the legal consequences of internationally wrongful acts, since chapter I of Part Two is concerned with the legal consequences for the responsible State.

The Netherlands assumes that the emphasis in subparagraph (c) ("the obligation for all States to cooperate as far as possible to bring the breach to and end" is on cooperation, i.e., maximizing the collective response, for example, through the collective security system of the United Nations, and preventing States from going it alone. The Netherlands proposes that, since "serious breaches" are involved, the restriction "as far as possible" should be deleted.

United Kingdom of Great Britain and Northern Ireland

As explained above (see Part Two, chapter III), draft article 42 (2) seeks to introduce an undesirable rigidity into international law. The draft articles would be of greater practical value if the paragraph were omitted. If any provision is retained, it would be better if it were less prescriptive, allowing a greater flexibility of response in the light of the nature of the breach and the circumstances of each State concerned.

Paragraph 3

Netherlands

Options could include institutional consequences, such as being placed under control, or restriction of the rights attached to membership of an international organization (see also article 30 and Part Two, chapter III).

United Kingdom of Great Britain and Northern Ireland

Paragraph 3 preserves the effect of articles 35 to 40, and of provisions of customary international law that may attach further consequences to serious breaches. The Special Rapporteur, finding examples of further consequences only in the field of treaty law (which is covered by draft article 56, on *lex specialis*), doubts the usefulness of this provision (A/CN.4/507, para. 65). He is clearly right. Unless concrete examples of further consequences, not covered by other draft articles, can be given, this paragraph should be deleted.

Part Two bis
The implementation of State responsibility

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The new Part Two bis, actually Part Three, on the implementation of State responsibility, also represents a clear improvement compared to the 1996 draft.

Slovakia

The new Part Two bis represents a logical continuation of the text after Part One (internationally wrongful act of State) and Part Three (content of international responsibility of a State).

Chapter I
Invocation of the State responsibility of a State

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

Chapter I, setting out the conditions for invoking the responsibility of a State, reads well.

United Kingdom of Great Britain and Northern Ireland

The draft refers at many points to the right to invoke responsibility. It is not clear in every context what is understood by "invocation of responsibility". Under the draft, in certain circumstances non-injured States that are parties to multilateral treaties or members of groups towards which an obligation is owed do not have the right to invoke responsibility. This is the case, in particular, regarding multilateral treaties that do not fall within the uncertain scope of the category of treaties established for the protection of a collective interest. While such States will in any event, by virtue of the principles of international law governing remedies, be unable to obtain certain remedies, such as damages, it is not desirable that they should be precluded from taking any formal action whatever in relation to breaches of the obligations in question. The provisions on injured and interested States, and on the invocation of responsibility and on damages, seem to have this result.

Given the pivotal significance of the concept of invocation of responsibility, it should be defined in the draft or at least in the commentary. The definition should make clear that for the purposes of the draft the invocation of responsibility means the making of a formal diplomatic claim or the initiation of judicial proceedings against the responsible State in order to obtain reparation from it.

It should be clear that informally calling upon a State to abide by its obligations does not count as an invocation of responsibility. It should also be clear that the initiation of actions such as the scrutiny of a State's actions in an international organization, or a proposal that a situation should be investigated by an international body, or the invocation of a dispute settlement mechanism that does not entail a binding decision (for instance, a fact-finding mission, or a conciliation commission) do not amount to an invocation of responsibility, and that the right to take such actions is not subject to the limitations set out in the draft.

Article 43
The injured State

Austria

As far as the notion of "injured States" is concerned, the draft contains different solutions depending on the character of the breach of the obligation: If it is "of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned" (article 43 (b) (ii)), all States concerned have the rights of "injured States". However, the definition of "the State concerned" may pose certain difficulties.

It is therefore suggested that the relation between this provision and the provisions concerning States other than the "injured States" should be clarified.

Japan

Japan supports the approach of the draft articles to narrow the meaning of "injured States".

The relationship between "injury", "(being) affected" and "damage" is unclear and confused.

The current draft articles on the entitlement to invoke State responsibility (article 43) stipulate "injured States" without defining the notion of "injury". From this provision, it is unclear whether "injured" States can be identified only by the types of obligation breached, as distinguished from "interested States" in article 49, or whether "injured States" are assumed to suffer from "injury" when a certain type of obligation is breached and such obligation is owed to another State, as the word "injured States" is used.

However, if article 43 assumes the existence of "injury" as defining an injured State, then it is again unclear whether "injury" assumed under article 43 and "injury" under article 31 are different notions or not. We believe that article 43 should more explicitly explain what is meant by an injured State: whether material or moral damage is necessary for a State to become an "injured State" entitled to invoke State responsibility, or rather, whether the breach of an obligation is enough.

From the structure of Part Two and Part Two bis, it seems that injury in article 43 is considered to be the legal concept that establishes the relationship of the responsible State and the injured State in State responsibility (or qualification to invoke State responsibility), whereas the latter means "damage", the legal concept that defines the extent to which the injured State is entitled to claim reparation. Article 31, paragraph 1, reads: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act". Thus, the "injury" in article 31, paragraph 1, intends to determine the scope of the reparation that States can claim. If "injury" assumed under article 43 and "injury" under article 31 are different, it would be better to use the term "damage" instead of "injury" to avoid confusion.

On the other hand, the report of the Drafting Committee says: "In the view of the Drafting Committee, the identification of the injured State in any particular case

depends, to some extent, on the primary rules and factual circumstances of the case. In the context of secondary rules, what can be done usefully is to identify the categories of injured States and their entitlement to invoke responsibility and specific remedies." (p. 29, para. 4); and: "The verb 'affect' in subparagraphs (i) and (ii) (article 43) is intended to imply that there are adverse and negative effects. This understanding will be explained in the commentary." (p. 31, para. 3).

This shows, at least the Drafting Committee draft article 43 with the understanding that the term "injured States" is meant to mean States that were affected, not injured. In this case, it is not clear whether "affect" under article 43 and "injury" for the purpose of implementing reparations are the same. If so, article 43 should use the term "injure" instead of "(being) affected".

If "injury" is different from "being affected", as pointed out above, this means that States entitled to invoke State responsibility are identified without the notion of "injury". However, from an examination of articles 31 to 40, which stipulate that the responsible States have an obligation to make reparation for "damage", not for "being affected", it would be concluded that States that can seek reparation are limited to those that actually suffer "damage". Then what is the relationship in the draft articles between States that are entitled to invoke State responsibility and States that are entitled to seek reparation? Article 31, paragraph 1, does not specify to which State the responsible State is under an obligation to make full reparation.

Article 43 is heavily influenced by article 60 of the Vienna Convention on the Law of Treaties. However, the qualification to terminate or suspend treaties under article 60 is a matter of primary law, and it might be different from the qualification to invoke State responsibility. If article 43 uses the same terminology of "affect", the commentary should make clear the difference between the texts.

Netherlands

The Netherlands notes that in the previous draft the term "injured State" was not confined to the State directly injured, but included all other States in cases of international crimes. Article 43 of the current draft limits the definition to the State directly injured or to a group of States or the international community as a whole, if the responsible State has breached obligations owed to all the States concerned, e.g., a disarmament treaty. A reading of article 43 of the current draft in conjunction with article 49 reveals that a distinction is now being made between two categories of State, namely, on the one hand, the directly injured State or group of States, which can all invoke the responsibility of a particular State, and on the other hand, States which, if the responsible State is in breach of *erga omnes* obligations, are affected to a degree in a more theoretical or "legal" way and can therefore invoke legal consequences only to a limited extent. The Netherlands has reservations about the desirability of this distinction, and wonders whether the price for deleting the term "international crime" is not too high. In the current draft, in cases of serious breaches of *erga omnes* obligations, not only is the category of injured States very limited, but the array of forms of reparation available under article 49 to States that are "legally" affected is more restricted than that available to the directly injured State and is also much more restricted than those permitted to all States by the previous draft in cases of international crimes. The Netherlands sees these changes to the previous draft as a retrograde step and advises the ILC to reconsider.

In addition, the Netherlands takes the view that the drafters have here lost sight of the connection with article 31 (2), which defines "injury". Article 31 (2) also expressly acknowledges "moral damage" as an element of "injury". If this is incorporated in the term "injured State" in article 43, this concept should also embrace "any State other than an injured State" as referred to in article 49. The Netherlands therefore proposes incorporating a new subparagraph (c) in article 43, to cover the category of States currently referred to in article 49. A distinction would then have to be made between "directly injured States" — the category mentioned in subparagraphs (a) and (b) — and "injured States other than the directly injured States" in the new subparagraph (c).

Articles 44 to 48 would then have to apply to injured States in general. Article 49 would have to be amended in line with new article 43 (c).

Republic of Korea

The Government of the Republic of Korea essentially agrees with the distinction between "the injured States" as defined in article 43 and "States other than the injured State" referred to in article 49, which is one of the improvements on the draft articles adopted on first reading. It seems natural to make the right of invocation of States depend on the extent to which they are affected by the breach of the obligation concerned. However, in the view of the Government of the Republic of Korea, it is important to make the distinction even clearer. This is particularly so because, in the context of the draft articles, the invocation of the responsibility of the State and the right to remedies or countermeasures are predicated upon this distinction.

Slovakia

We support the distinction made in the draft between "injured States" (article 43) and those States that may have a legal interest in invoking responsibility even though they are not themselves specifically affected by the breach (article 49). The Commission abandoned its endeavour to define the term "injured State" for a good reason: a very complicated broad definition in article 40 of the 1996 draft articles created broad room for too many States to claim to be injured. This distinction is in our view legitimately justified: a situation may arise when States other than the "State victim" have a legitimate interest in the primary obligation at stake. The other reason for this distinction is that while recognizing the rights of those States to invoke responsibility, the "State victim" should always have a broader range of remedies, in particular the right to full reparation, than the States which do not suffer the actual injury. The weakness of previous article 40 was that it provided the same remedies and rights equally for all States which fell within the scope of the definition of "injured State", whether it was a directly injured State or a State with a legal interest.

United Kingdom of Great Britain and Northern Ireland

It is necessary to draw a distinction between injured and interested States in order to determine what remedies might be available to each. It is not helpful to apply that distinction more generally in other contexts relating to the invocation of responsibility and the imposition of countermeasures. According to draft article 2, harm or injury is not a necessary element of a wrongful act. It would be inappropriate and inconsistent with this approach, which conforms with State practice, to prescribe injury as a necessary prerequisite of the right to invoke responsibility.

In the case of bilateral treaties, a State may invoke the responsibility of another State whether or not it sustains any material injury as a result of the alleged breach (draft article 43 (a)). The implication is that the mere fact of the alleged breach is sufficient to justify the invocation of responsibility: proof of injury is not necessary. If that is so in respect of bilateral obligations, it is difficult to see why it should not also be true in respect of multilateral obligations. The draft articles, however, appear not to adopt this view. They require proof either that the breach caused the applicant State to be an "injured" State, or alternatively that the obligation breached was owed to a group of States including the "interested State" and was established for the protection of a collective interest, or that the obligation was owed to the international community (of States) as a whole (although in the case of a breach of an obligation owed to the international community (of States) as a whole any State may invoke responsibility, regardless of whether it was injured and regardless of whether the obligation was established for the protection of a collective interest (draft article 49 (1) (b)). The logic of this system makes sense in the context of distinguishing between entitlements to remedies; but it is neither necessary nor helpful in the context of establishing *locus standi*. The following comments are made without prejudice to this view.

First, if draft article 43 in fact defines the concept of injured State, so that only a State that falls within draft article 43 (a) or (b) is an injured State, it would be preferable that it say so, first by defining the concept, and then setting out its consequences.

Secondly, it is not clear how it is to be determined whether an obligation is owned to a State "individually". The case of a bilateral treaty is clear; but the Chairman of the Drafting Committee, in his remarks on draft article 43, referred to the case of a "multilateral treaty that gives rise to a bundle of bilateral relations". Practically all multilateral treaties, and customary law obligations, could be analysed in terms of bilateral obligations. That is reflected in the operation of concepts such as consent, waiver and persistent objection. It is therefore of crucial importance to the utility of this draft article that a clear and workable test for distinguishing individual obligations from "group" obligations should be set out in the commentary.

A similar point might be made in relation to the difficulty of determining which obligations are owed to what is better phrased as "the international community of States as a whole", in paragraph (b).

United States of America

The United States welcomes the important distinction that the Commission has drawn between States that are specifically injured by the acts of the responsible State and other States that do not directly sustain injury. We believe that this distinction is a sound one. We also support the Commission's decision to structure article 43 in terms of bilateral obligations dealt with in paragraph (a) and multilateral obligations dealt with in paragraph (b). We share the view noted in the Special Rapporteur's Third Report that article 43 (b) pertaining to multilateral obligations would not apply "in legal contexts (e.g. diplomatic protection) recognized as pertaining specifically to the relations of two States *inter se*" (A/CN.4/507, para. 107, table 1). Thus, there is nothing in article 43 that would change the doctrine of espousal.

The definition of "injured State" was narrowed in the revised draft articles, and we welcome this improvement. We believe, however, that the draft articles would benefit from an even further focusing of this definition. Article 43 (b) (ii) provides that if an obligation breached is owed to a group of States of the international community as a whole and "is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned", then a State may claim injured status. The broad language of this provision allows almost any State to claim status as an injured State, and thereby undermines the important distinction being drawn between States specifically injured and those States not directly sustaining an injury. Further, it inappropriately allows States to invoke the principles of State responsibility even when they have not been specially affected by the breach. Article 43 (b) (i) provides an adequate standard for invoking State responsibility for a breach owed to a group of States that is more in keeping with established international law and practice. The United States urges that article 43 (b) (ii) be deleted.

Subparagraph (b)

Japan

We suggest the deletion of article 43 (b) (ii).

To distinguish between "an injured State" and "an interested State" is very important since it determines whether a State can seek reparation or not. In the new text, this distinction is made automatically based on the category of obligation breached. In other words, under article 43, "injury" is not required for a State to be defined as "an injured State". As a result, from the wording of articles 43 and 49, it is difficult in reality to make a distinction between an "integral obligation" as defined in article 43 and an "obligation to establish collective interest" in article 49. Almost all multilateral treaties usually establish certain collective interests. Also, it seems possible in many cases to formulate obligations for collective interests under article 49 as integral obligations under article 43.

It is very doubtful whether such a distinction is in reality possible without the notion of "injury" (infringement of rights). It is assumed that one of the reasons why the notion of "injury" has been dropped is that a breach of the integral obligation defined in article 43 (b) (ii) can hardly be explained by the traditional notion of

"injury". Also, it may be because the draft faithfully pursues the systematic construction of the law of State responsibility based on the types of obligation breached. However, we have to carefully examine the cost and benefit involved in pursuing this highly theoretical approach. Has the notion of "integral obligation" become an accepted notion of international law to such an extent that the deletion of the notion of "injury" is justified? Can we specify what falls in the category of an integral obligation as such? It appears that an integral obligation shares only a small part of international law that is difficult to specify. Also, because of the inclusion of "integral obligations", article 43 seems to contain two fundamentally different types of obligations. If we totally rely on the types of obligation breached to determine a State's status either as an injured State or as an interested State, it would be better to have obligations of a similar nature defined in one article. Thus, it appears that there is more to lose than to gain.

Also, considering what a State, which is a party to an integral obligation, can seek for reparation, the significance of stipulating integral obligations becomes all the more doubtful. Almost by definition, a breach of an integral obligation (i.e. disarmament treaties) entails only legal injury; therefore, restitution and compensation would be irrelevant. Also, it is unlikely that a State would ask for satisfaction only to itself in the case of an integral obligation. Thus, in reality, a State would be able to seek only cessation and non-repetition. Then, there would be no substantial difference between the case of article 43 (b) (ii) and article 49. Rather, an interested State in the meaning of article 49 can seek compliance with the obligation for the reparation to the injured State. Thus, it appears that article 49 offers greater consequences than article 43 (b) (ii). In this sense, article 43 (b) (ii) is not realistically meaningful.

If article 43 (b) (ii) remains, the distinction between an integral obligation and an obligation to establish collective rights should be clarified in the commentary.

Considering the views expressed on articles 43 and 49, and on the understanding that the term "injury" is used in a different sense in articles 31 and 43 (though the word "injury" does not appear in article 43), we would like to suggest some options, as follows:

Option 1

(Articles 31, 35-40)

– Replace "injury" in article 31, paragraph 1, by "damage, whether material or moral". Replace "injury" in articles 35 and 38 by "damage".

– Delete article 31, paragraph 2.

(Articles 43, 49)

– Delete article 43 (b) (ii) and article 49, paragraph 2 (b).

– Replace "affected" by "injured" in article 43.

The revised article 43 now will read:

"*Article 43*

"A State is entitled as an injured State to invoke the responsibility of another State as provided in Part Two if the obligation breached is owed:

(a) to that State individually; or

(b) collectively to a group of States including that State, or to the international community as a whole, and the breach of the obligation specifically injures that State."

Option 2

The commentary should make clear that "injury" in articles 31 and 35 to 40 means "injury for the purposes of reparation", which is different from the "injury" assumed under article 43 "for the purposes of implementation of responsibility".

Republic of Korea

Subparagraph (b) (ii) of article 43 is so loosely formulated that it would in practice be difficult to distinguish it from paragraph 1 of article 49. "The obligation established for the protection of a collective interest" or "the obligation owed to the international community as a whole" under article 49 (1) may, by definition, affect the enjoyment of the rights or the performance of the obligations of all States concerned under article 43 (b) (ii).

Article 44
Invocation of responsibility by an injured State

Netherlands

The Netherlands agrees with the Special Rapporteur (see para. 244 of the ILC report) that article 44 means that the injured State has the right to opt for compensation rather than restitution but, having regard to the Netherlands' observations on article 36, the Netherlands believes that this right is subordinate to the responsible State's right to elect to make restitution. This does not affect the injured State's right to seek additional compensation.

United Kingdom of Great Britain and Northern Ireland

The title of this draft article suggests that it will define what the invocation of responsibility means, which it does not. If the distinction between injured and interested States were to be maintained, this draft article should list all the remedies that the State entitled to invoke responsibility may seek from the responsible State, so as to establish clearly the contrast with the list in draft article 49 (2).

Article 45
Admissibility of claims

Republic of Korea

For reasons of precision, the words "by an injured State" should be inserted between the words "may not be invoked" and "if".

Spain

The Government of Spain considers that the exhaustion of local remedies is a rule of fundamental importance to the regime of international State responsibility. It is true that the current wording of paragraph (b) leaves open the question of the legal character of this rule, which will be substantive or procedural depending on the primary norm or norms breached. By the same token, however, the advisability of including the rule of exhaustion of local remedies in article 45 as one of the conditions for the admissibility of claims is doubtful, as that would seem to imply that a purely procedural character has been attributed to it. It would be preferable to include the prior exhaustion rule among the provisions in Part One, as in the 1996 draft, or in the general provisions.

United States of America

Article 45 addresses the admissibility of claims and provides that State responsibility may not be invoked if (a) a claim is not brought in accordance with applicable rules relating to nationality of claims and (b) the claim is "one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted". The Special Rapporteur's comments to this provision make clear that exhaustion of local remedies is "a standard procedural condition to the admissibility of the claim" rather than a substantive requirement (A/CN.4/498, para. 143). The United States welcomes this clarification by the Special Rapporteur, and further notes that the precise parameters of this procedural rule should be dealt with in detail under the topic of diplomatic protection (see A/CN.4/507/Add.2, para. 241).

Article 46
Loss of the right to invoke responsibility

Netherlands

The Netherlands would point to a certain discrepancy between articles 46 and 49. Article 46 is based on the idea that responsibility may not be invoked if the injured State has validly waived its claim. However, article 49 allows a third State to invoke responsibility, for example, in cases where the responsible State has violated an obligation owed to the international community as a whole (*erga omnes*) and, in the interests of the directly injured State, to seek compliance with the obligation of reparation. The Netherlands believes that in cases of breaches of *erga omnes* obligations the directly injured State does not have the right to waive its claim. It can only do so for itself; it cannot set aside the rights of third States and/or of the international community as a whole to invoke the responsibility of the State which committed the breach of an *erga omnes* obligation.

Republic of Korea

A question arises as to whether "States other than the injured State" within the meaning of article 49 may seek from the responsible State the cessation of a wrongful act and assurances of non-repetition, where "the injured State" has validly waived its claim pursuant to article 46.

In the view of the Government of the Republic of Korea , where a peremptory norm has been breached, States with a legal interest should retain the right to seek cessation and assurances of non-repetition, even if the injured State has waived its claim. In this case, it would be more appropriate to state that the injured State cannot validly waive the right to seek cessation and assurances of non-repetition. However, the draft articles do not explicitly deal with the question of what happens when a breach of obligations falling short of the peremptory norms occurs. The Commission may wish to consider whether the actual text of the draft articles can be further clarified in this respect.

United Kingdom of Great Britain and Northern Ireland

The requirement in subparagraph (a) that a waiver must be "valid" is unnecessary, being plainly implicit in the term "waiver". The requirement that waiver must be "unequivocal" either sets out a condition implicit in a waiver, in which case it is unnecessary, or qualifies the term "waiver" and limits the application of draft article 46 to a subcategory of waiver, in which case it is undesirable.

Article 48
Invocation of responsibility against several States

United States of America

The United States is concerned that article 48, which deals with invocation of responsibility against several States, could be interpreted to allow joint and several liability. Under common law, persons who are jointly and severally liable may each be held responsible for the entire amount of damage caused to third parties. As noted by the Special Rapporteur in his third report, States should be free to incorporate joint and several liability into their specific agreements, but apart from such agreements, which are *lex specialis*, States should only be held liable to the extent the degree of injury suffered by a wronged State can be attributed to the conduct of the breaching State (A/CN.4/507/Add.2, para. 277). To clarify that article 48 does not impose joint and several liability on States, the United States proposed that article 48 (1) be redrafted to read as follows:

> "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may only be invoked to the extent that injuries are properly attributable to that State's conduct."

Paragraph 1

Republic of Korea

It is not clear whether article 48 (1) also applies to situations where there were several wrongful acts by several States, each causing the same damage. If so, the words "the same internationally wrongful act" should be amended accordingly to reflect such a meaning.

Article 49
Invocation of responsibility by States other than the injured State

Austria

From a doctrinal as well as from a practical, political point of view, the issue of *erga omnes* obligations has played an important role for a long time in the Commission's work on State responsibility, not in the least because this doctrine has evolved in the last few years such that nobody could have foreseen. The Special Rapporteur has reduced the concept of *erga omnes* obligations to a viable, realistic level. States invoking responsibility with regard to such obligations are no longer only referred to as "injured States". Article 49 dealing with "States other than the injured State" entitles such States to invoke responsibility if the obligation breached is owed to a group of States or to the international community as a whole. While a "group of States" may be the parties to a multilateral treaty concerning human rights or the environment provided that this can be viewed as a collective interest, only *jus cogens*, some rules of customary international law and very few treaties of a nearly universal character will obviously qualify as obligations owed to the international community as a whole.

China

Article 49 would allow any State other than the injured State to invoke the responsibility of another State, while article 54 would further allow such States to take countermeasures at the request and on behalf of an injured State. These provisions would obviously introduce elements akin to "collective sanctions" or "collective intervention" into the regime of State responsibility, broadening the category of States entitled to take countermeasures, and establishing so-called "collective countermeasures". This would run counter to the basic principle that countermeasures should and can only be taken by States injured by an internationally wrongful act. More seriously, "collective countermeasures" could become one more pretext for power politics in international relations, for only powerful States and blocs of States are in a position to take countermeasures against weaker States. Furthermore, "collective countermeasures" are inconsistent with the principle of proportionality enunciated in article 52. The same countermeasures would become tougher when non-injured States join in, leading to undesirable consequences greatly exceeding the injury. Finally, as "collective countermeasures" further complicates the already complex question of countermeasures, and taking

into account the objection to "collective countermeasures" expressed by many States, we suggest that draft articles 49 and 54 in the revised text be deleted entirely.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The somewhat controversial article 49 providing for the invocation of responsibility by States other than the injured State is acceptable to the Nordic countries and indeed necessary, seen in the context of the provisions concerning serious breaches of obligations to the international community as a whole.

Japan

It should be recalled that in essence, the law of State responsibility is the secondary rule to regulate the relationship between wrongful States and injured States. This draft has now turned out to be the law regulating the relationship among wrongful States, injured States and affected States other than injured States (hereinafter referred to as "interested States"). Accepting that there exists a category of "interested States", it is doubtful whether such category of States should be dealt with in the law of State responsibility.

In fact, setting aside countermeasures, interested States can seek only "cessation" and "assurances and guarantees of non-repetition". Cessation is, in other words, to reaffirm the continued observance of the primary obligation. It is only natural that all the States that have agreed on the primary obligation should abide by that obligation. The relations between the State that breached the obligation and the State requesting its compliance can be recognized in the context of the relationship in the primary rule, not necessarily in the context of the secondary rule.

The inclusion of provisions on interested States may be legitimized by the objective of enhancing the function of restoring legality by State responsibility; however, it is not desirable to bestow too much power on the law of State responsibility. Rather, this might blur the importance of its core function, which is to define the relationship between injured States and responsible States.

(*See also article 43*)

Netherlands

The Netherlands has also noted the observation by the Special Rapporteur in paragraph 127 of the ILC report, that a saving clause should be inserted to indicate that entities other than States may also invoke responsibility in cases involving breaches of obligations owed to the international community as a whole (*erga omnes*). He gives the example of persons who are victims of human rights abuses, who have certain procedures available to them in international law. Although there is a saving clause in article 34 (2), it applies to Part Two only. A similar saving clause should also be included in Part Two bis.

The Netherlands agrees with the three scenarios regarding the invocation of State responsibility for breaches of *erga omnes* obligations described in paragraph 352 of the ILC report.

The Netherlands notes that in its current form article 49, paragraph 2 (b), applies solely to chapter II of Part Two, and not to reparation for serious breaches.

(*See also articles 43 and 46*)

Republic of Korea

(*See articles 43 and 46*)

Slovakia

(*See article 43*)

United Kingdom of Great Britain and Northern Ireland

Observations of a general nature on the concept of the "interested" State have been made above (see article 43). The following comments relate to matters of detail (see article 49, paras. 1 and 2, below).

Paragraph 1

Republic of Korea

(*See article 43, subparagraph (b)*)

United Kingdom of Great Britain and Northern Ireland

It is not clear what is meant, in paragraph (1) (a), by "the protection of a collective interest". It is presumably intended to establish a subcategory of multilateral treaties; but it is not apparent what the criterion is or how it should be applied. It is neither necessary nor desirable to establish such a subcategory of multilateral treaties. The words "and is established for the protection of a collective interest" should be omitted, thus allowing all parties to all multilateral treaties and other multilateral obligations to have the status of "interested States", although in the absence of injury a State would not, of course, be entitled to the full range of remedies available to an injured State.

The term "may seek" in paragraph (1) (a) is wrong. It implies that, for example, some parties to multilateral treaties not established for the protection of collective interests may not even request that another party cease its violation of the treaty.

Paragraph 2

Austria

States other than the injured State may request the cessation of the internationally wrongful act and guarantees of non-repetition (see article 49, para. 2 (a)). Of special interest is the fact that the draft introduces a new right to request compliance with the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached (article 49, para. 2 (b)). This would refer to victims of human rights violations or of violations of the environment. Whereas in the case of the environment this could concern nationals of the State invoking the responsibility, the first case — victims of human rights violations — will mainly concern nationals of other States, most importantly nationals of the State which has committed the wrongful act.

This concept is very interesting and worth pursuing, but probably has not yet been fully explored. In most cases of human rights violations, States will act in favour of victims who are nationals of the State which has committed the wrongful act. Each party to the multilateral human rights treaty concerned would be entitled to invoke this right, so that there could be a multitude of claimants. In this case, the draft does not envisage an obligation to cooperate between the States invoking responsibility, as article 54, paragraph 3, with its — relatively weak — obligation to cooperate applies only to countermeasures. It must be borne in mind that the problem of many States entitled to invoke State responsibility with regard to one single wrongful act seems to raise more problems than are solved by the draft articles. Further reflection and the introduction of a more precise regime is therefore required.

United Kingdom of Great Britain and Northern Ireland

The comments on paragraph 2 made in the debate in the Sixth Committee suggest that paragraph 2 (b) is highly ambiguous. It might be seen as entitling an interested State to demand reparation, to be made to itself, thereby advancing the interest "of the injured State or of the beneficiaries of the obligation breached". The State might subsequently make over all or part of the fruits of reparation to the injured State or to the "beneficiaries". This would be a wholly novel form of action in international law. Alternatively, paragraph 2 (b) might be seen as entitling an interested State to demand that the responsible State make reparation directly to the injured State or to the beneficiaries of the obligation. It is not clear how it is envisaged that paragraph 2 (b) would operate in practice.

A further difficulty concerns the relevance of the wishes of the injured State. If there is an injured State, it can make the claim itself. If it chooses not to claim, the position should be treated as analogous to a waiver under draft article 46 and, just as the injured State loses thereby the right to invoke the responsibility of the claim, so should the possibility of the claim being made by others on its behalf be extinguished. Exceptional circumstances, such as the invasion of a State and the destruction of the capacity of its Government to invoke responsibility or otherwise act on behalf of the State, might be dealt with in the commentary.

A similar point might be made concerning the wishes of the beneficiaries of the obligation; but there is a more fundamental concern in relation to that provision. The proposed right to invoke responsibility "in ... the interests of the beneficiaries of the obligation breached" is novel. The United Kingdom is sympathetic to the aim of ensuring that there are States entitled to claim in all cases of injury to common interests, such as the high seas and its resources and the atmosphere. There are, on the other hand, concerns that the current formula would have unintended and undesirable effects.

In the context of human rights obligations falling within draft article 49 (1), for example, draft article 49 (2) (b) appears to entitle all States not merely to call for cessation and assurances and guarantees of non-repetition, but also to demand compliance with obligations concerning reparation "in the interest" of the abused nationals or residents of the responsible State. It may involve decisions on the form of repatriation that intrude deeply into the internal affairs of other States. That provision goes further than is warranted by customary international law. It also goes further than is necessary for the safeguarding of human rights: for that purpose, cessation of the wrongdoing is the crucial step. There is a serious risk that this provision may disrupt the established frameworks for the enforcement of human rights obligations, with the consequence that States will become less willing to develop instruments setting out primary norms of human rights law. Paragraph 2 (b) goes further than is warranted in the current state of international law, and is unnecessary. It is hoped that the Commission will reconsider draft article 49 (2) (b), with a view to omitting it or at least narrowing its scope.

United States of America

The United States notes that under article 49 (2) (a) States other than injured States may seek from the responsible State assurances and guarantees of non-repetition in addition to cessation of the internationally wrongful act. For the reasons expressed above with respect to article 30 (b), the United States believes that the "assurances and guarantees of non-repetition" provision of article 49 (2) (a) should likewise be deleted.

Paragraph 3

Austria

Owing to the lack of an obligation to cooperate in the context of article 49, it is possible to imagine that various States formulate various, even contradictory, requests, or, in the case of requests for compensation, that they demand compensation at very different financial levels. It must be asked how the State which has committed the wrongful act is to deal with such a situation, and what would be the effects of the compliance with one of these requests and not with the others. If it is not possible to solve this problem in a clear way, at least article 49, paragraph 3, should be revised so as to comprise also a provision about cooperation similar to the provision contained in article 54, paragraph 3. It would be an even better solution to envisage an obligation to negotiate a joint request of all States interested in exercising their rights under article 49, paragraph 3.

Republic of Korea

This paragraph would be more straightforward if the words "mutatis mutandis" were inserted between the words "under articles 44, 45 and 46 apply" and "to an invocation of responsibility", since some modification might be needed in the process of the application of articles 44, 45 and 46 to the invocation of responsibility by States other than the injured State.

Chapter II
Countermeasures

China

The Government of China believes that in the context of respect for international law and the basic principles of international relations, countermeasures can be one of the legitimate means available to a State injured by an internationally wrongful act to redress the injury and protect its interests. However, in view of past and possible future abuses of countermeasures, recognition of the right of an injured State to take countermeasures must be accompanied by appropriate restrictions on their use, in order to strike a balance between the recognition of the legitimacy of countermeasures and the need to prevent their abuse. We have noted that the relevant provisions in the revised text have been improved in this regard. For example, the new text has added a number of qualifying conditions, clearly setting out the purposes of and limitations on the use of countermeasures. In addition, the reference to "interim measures of protection" has been deleted. We welcome these improvements, but the text on countermeasures still needs further refinement and improvement. In particular, the desirability of the newly added article 54 on "collective countermeasures" and the related article 49 needs further consideration.

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The second chapter on countermeasures contains all the essential elements for regulating this most sensitive issue and it is placed in the right context of implementing State responsibility instead of in the chapter on circumstances precluding wrongfulness.

Japan

Provisions regarding countermeasures have the most important actual significance in international disputes related to State responsibility. Also, they necessarily entail risk of abuse. Therefore, provisions on countermeasures require the most careful and strict examination.

We are sceptical as to whether countermeasures are part of the law of State responsibility. Countermeasures and self-defence have one thing in common; both are preceded by an internationally wrongful act and both can target only the wrongdoing State. Unlike reparation, a countermeasure is not an automatic logical

legal consequence of State responsibility. Countermeasures are taken as wilful acts by an injured State. There is no provision of self-defence in Part Two bis because the contents and the conditions to resort to self-defence are determined by the primary rule on self-defence itself and are outside the scope of State responsibility. The same applies to countermeasures. The contents and the conditions to take countermeasures are a matter of the primary rule and are outside the scope of this draft. We fully share the concern expressed by quite a few States in the Sixth Committee on the risk of the abuse of countermeasures and believe that they need certain substantial and procedural restrictions. However, in a world where there is no central supreme government over States, States are entitled to protect their interests by themselves and countermeasures are permitted under international law. It is not necessary or appropriate to place countermeasures in the section of the invocation of State responsibility in Part Two bis. Considering the debate over the necessity of chapter II, Part Two bis, as shown in the Sixth Committee, it may be a good idea to delete the entire chapter II and insert in article 23 only the elements on which there was consensus among States.

However, if chapter II were to remain in Part Two bis, we would like to make several points.

(*See article 50, paragraph 1; article 52; article 53; and article 54, paragraph 1*)

Netherlands

The statements made in the Sixth Committee show that a number of permanent members of the Security Council, in particular, are concerned that the legal regime of countermeasures now being proposed (as a way of convincing the responsible State to respect the secondary rules contained in the draft) is too severely restricted. The members in question allege that the draft articles differ on this point from the customary international law currently applicable in this area. The Netherlands takes the view that countermeasures are a useful instrument with which to implement State responsibility. However, they are an instrument which must be used with appropriate safeguards. The Netherlands feels that the draft has, on the whole, struck the right balance between the use of this instrument and the provision of the necessary guarantees against its misuse. This matter is examined further in the article-by-article discussion (see articles 50, 52, 53 and 54).

Slovakia

Part Two bis is, in the view of Slovakia, an appropriate place for inclusion of the institution of countermeasures. Slovakia approves the transposition of countermeasures from Part Two, since they bore no relation to the content or forms of international responsibility of States.

The institution of countermeasures was confirmed as a part of international law by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case. The Court laid down conditions upon which countermeasures may be imposed. According to the ICJ ruling, countermeasures must be, first of all, taken only in response to a previous internationally wrongful act of another State and must be directed against that State. The purpose of countermeasures must be to induce the

wrongdoing State to comply with its obligations. These principles laid down by the Court are correctly reflected in article 50. Similarly, the principle of proportionality confirmed by ICJ was embodied in article 52 ("countermeasures must be commensurate with the injury suffered"), although the Court refers to *the effects* of countermeasures which from the drafting point of view, is more precise.

Spain

With regard to chapter II of Part Two bis, in general, the Government of Spain considers that an effort should be made in the rules on countermeasures — a topic that undoubtedly should be included in the draft — to strike a balance between the rights and interests of the injured State and those of the responsible State. Excessively rigid regulation of the conditions and restrictions relating to the use of countermeasures can favour the responsible State, while overly permissive regulation means opening the door to possible abuses. The Government of Spain welcomes the fact that this matter has been placed in the context of "the implementation of State responsibility" and not in the chapter on circumstances precluding wrongfulness. This emphasizes that the only object of countermeasures is to induce States to comply with their international obligations.

The regime of countermeasures contained in the draft is properly restrictive, although what is lacking is a specific provision on the consequences for third States of countermeasures taken against the responsible State.

United Kingdom of Great Britain and Northern Ireland

The provisions concerning countermeasures are a striking anomaly in the draft articles. Alone among the circumstances precluding wrongfulness in Part One, chapter V, they are singled out for lengthy elaboration, in Part Two bis, chapter II. There is no good reason why countermeasures should be treated in this way, while self-defence, force majeure and necessity are not.

It is clearly necessary to refer in general terms to the right to take countermeasures, and in this connection reference may be made to the constraints that are necessary to protect States against possible abuses of the right to take countermeasures. The manner in which the draft articles approach this task is, however, unsatisfactory. The United Kingdom has concerns relating to several aspects of these provisions, including the role of the injured State in deciding whether or not countermeasures are to be taken "on its behalf", and certain other matters (see articles 25, 51, 53 and 54, paragraph 2).

United States of America

The United States continues to believe that the restrictions in articles 50 to 55 that have been placed on the use of countermeasures do not reflect customary international law or State practice, and could undermine efforts by States to peacefully settle disputes. We therefore strongly believe that these articles should be deleted. However, should the Commission nonetheless decide to retain them, we believe that, at a minimum, the following revisions must be made: (a) delete article

51, which lists five obligations that are not subject to countermeasures, because this article is unnecessary given the constraints already imposed on States by the Charter of the United Nations, and because the article suffers from considerable vagueness; (b) recast article 52 on proportionality to reflect the important purpose of inducement in countermeasures; (c) revise article 53, which sets forth conditions governing a State's resort to countermeasures, to (i) either delete the requirement for suspension of countermeasures or clarify that "provisional and urgent" countermeasures need not be suspended when a dispute is submitted to a tribunal and (ii) reflect that under customary international law a State may take countermeasures both prior to and during negotiations with a wrongdoing State.

(*See also article 23*)

Article 50
Object and limits of countermeasures

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

We are satisfied to see the opening paragraph (article 50, para. 1) stating that the only purpose of any countermeasure must be that of inducing the wrongdoing State to comply with its international obligations; in other words, punitive actions are outlawed. It is nevertheless essential that strong safeguards be established against possible abuses of countermeasures. We have to keep in mind that this legal institution favours powerful States which in most instances are the only ones having the means to avail themselves of the use of countermeasures to protect their interests.

Netherlands

In response to paragraph 295 of the ILC report, which states that the Special Rapporteur drew a distinction between the suspension of an obligation and the suspension of its performance, the Netherlands would point out that in the *Gabčíkovo-Nagymaros* case the International Court of Justice dismissed the distinction that Hungary made between "suspension of the application of the treaty" (i.e., a treaty obligation) and "suspension of activities" (i.e., performance of the obligation).

The Netherlands endorses the view expressed in paragraph 302 of the ILC report, viz., that countermeasures must not impair the rights of third parties, and suggests that this view should be reflected in the draft articles.

Slovakia

(*See Part Two bis, chapter II*)

Paragraph 1

Japan

As to the purpose of countermeasures under article 50, paragraph 1, countermeasures are usually taken to induce compliance with the primary obligation, not the obligation of reparation. Thus, the purpose of countermeasures defined in article 50, paragraph 1, does not really conform to State practice. For example, if a State restricts trade in violation of a bilateral trade agreement, the other State would request cessation. However, if it is not successful and decides to take countermeasures, they are often not intended to induce compensation for the trade loss caused by the wrongful act, but to induce compliance with the agreement.

Article 51
Obligations not subject to countermeasures

Spain

The regulation of obligations not subject to countermeasures, as contained in article 51, should be assessed in a positive light. Nevertheless, we wish to note, with regard to subparagraphs (b) and (c) of article 51 proposed by the Drafting Committee, that for Spain the fundamental rights and humanitarian obligations referred to in these two provisions are those designed to protect the lives and physical integrity of human beings. This is in accordance with article 60, paragraph 5, of the Vienna Convention on the Law of Treaties of 1969 and with a good number of international treaties on human rights and humanitarian law, which envisage a number of human rights that States parties may not derogate from under any circumstances. We believe that these provisions should be accompanied by the commentary that the Commission made on this provision in 1996, where it notes that the exceptions of a humanitarian character that should be envisaged when measures of an economic character are taken should be included under this assumption. Such exceptions consist of the supply of food and medicines to the population of the State that is the target of countermeasures.

United Kingdom of Great Britain and Northern Ireland

Draft article 51 forbids the imposition of countermeasures involving derogation from obligations falling within certain categories, some of which are generic while others (notably para. 1 (e)) are so specific that the list may appear to be exhaustive. A simple generic formula describing the kind of obligations from which countermeasures may not derogate would be preferable. It would keep open the possibility of the content of the category developing through State practice. Examples, such as obligations concerning the threat or use of force and fundamental human rights, might usefully be given in the commentary.

United States of America

Article 51 (1) lists five obligations that are not subject to countermeasures. This article is not necessary. First, the Charter of the United Nations already establishes overriding constraints on behaviour by States. Secondly, by exempting certain measures from countermeasures, article 51 (1) implies that there is a distinction between various classes of obligations, where no such distinction is reflected under customary international law. Thirdly, the remaining articles on countermeasures already impose constraints on the use of countermeasures. It would be anomalous to prevent a State from using a countermeasure, consistent with the other parameters provided in these articles, and in response to another State's breach, particularly where that breach involved graver consequences than those in the proposed countermeasure. Finally, article 51 (1) has the potential to complicate rather than facilitate the resolution of disputes. There is no accepted definition of the terms the article uses, inviting disagreements and conflicting expectations among States. There is no consensus, for example, as to what constitutes "fundamental human rights". In fact, no international legal instrument defines the phrase "fundamental human rights", and the concept underlying this phrase is usually referred to as "human rights and fundamental freedoms". Likewise, the content of peremptory norms in areas other than genocide, slavery and torture is not well defined or accepted. Moreover, article 51 (1) would inhibit the ability of States, through countermeasures, to peacefully induce a State to remedy breaches of fundamental obligations. The United States recommends the deletion of this article.

Paragraph 1

Japan

Article 54, paragraph 1, allows "States other than injured States" (referred to in this document as "interested States") to take countermeasures "at the request and on behalf of the injured State to the extent that that State may itself take countermeasures" in the case of a "multilateral obligation established for the protection of a collective interest" and of an "obligation to the international community as a whole". This is, in essence, to entitle an "interested State" to surrogate a right of an injured State to take countermeasures. This may have a certain meaning, in that unlawful situations will not be left unresolved, in case an injured State is not able to take countermeasures by itself. However, such a subrogation system of countermeasures does not have a basis established in international law. Such a development is a matter of primary rules. Introducing such a new system as a secondary rule may negatively affect the development of the primary rules. Also, it may involve more risk of abuse than the benefit.

Republic of Korea

It is clear from the draft articles that States are not allowed to take countermeasures of a non-reversible nature, or in breach of obligations under peremptory norms of general international law. However, in the light of the growing importance of the environment, the Government of the Republic of Korea would like to see the inclusion of "obligations to protect the natural environment against

widespread, long-term and severe damage" between subparagraphs (d) and (e) as one of the obligations not subject to countermeasures.

Article 52
Proportionality

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

In article 52 on proportionality, we would prefer a more negative approach to the taking of countermeasures by substituting the words "be commensurate with" by "not be disproportionate to" and leaving out the last qualifying part of this provision.

Japan

If we define the object of countermeasures as inducing a responsible State to comply with its obligations under Part Two (article 50), then countermeasures should be allowed to the extent necessary to induce such compliance. "Countermeasures that are commensurate with the injury suffered (article 52)" are not necessarily strong enough to induce compliance. For example, a weak State would not be able to take effective countermeasures against a strong State, since a strong State is not likely to be induced by the countermeasures in proportion to the injury when the injury was not serious for the strong State.

Also, the essence of the "gravity" of the wrongfulness is another element reminiscent of "international crime". "Gravity" is irrelevant for the purpose of inducing compliance.

Netherlands

The Netherlands concurs with this article which, in its opinion, reflects one of the conclusions of the International Court of Justice in the *Gabčíkovo-Nagymaros* case.

Republic of Korea

The term "the rights in question" is not readily comprehensible. If the rights in question involve the rights of the injured State, the rights of other States which may be affected by the wrongful act and the rights of the responsible State, this should be more clearly reflected in this article. Considering countermeasures taken only towards the responsible State, the words "the effects of the internationally wrongful act on the injured State" would be more preferable to the words "the rights in question".

Slovakia

(*See Part Two bis, chapter II*)

Spain

For the same reason (see article 53), the concept of "proportionality" contained in article 52 requires clarification in each specific case by the party applying the law. For this reason, the Government of Spain considers that other criteria should be added to the two envisaged in this provision — gravity of the wrongful act and the rights in question — in order to evaluate the requirement of proportionality, such as, for example, the effects of countermeasures on the responsible State.

More specifically, we welcome the deletion, in the provision regulating prohibited countermeasures, of what was referred to in the 1996 draft as measures of "extreme economic or political coercion designed to endanger the ... political independence of the State which has committed the internationally wrongful act". On the other hand, a prohibition on such measures where they are designed to endanger the territorial integrity of the State does appear to be justified and is, for that matter, already included in the principle of proportionality contained in article 52. It would undoubtedly be wholly disproportionate to apply countermeasures aimed at cutting off part of the territory of the responsible State.

United States of America

The United States agrees that under customary international law a rule of proportionality applies to the exercise of countermeasures, but customary international law also includes an inducement element in the contours of the rule of proportionality. As stated in our 1997 comments on the first reading text, proportionality may require, under certain circumstances, that countermeasures be related to the initial wrongdoing by the responsible State (A/CN.4/488, p. 126). Likewise, proportionality may also require that countermeasures be "tailored to induce the wrongdoer to meet its obligations" (idem). In his Third Report, the Special Rapporteur addresses the question of whether it would be useful to introduce a "notion of purpose" or the inducement prong into the proportionality article (A/CN.4/507/Add.3, para. 346). He concludes that while it is indeed a requirement for countermeasures to be "tailored to induce the wrongdoer to meet its obligations", this requirement is an aspect of necessity (formulated in the first reading text draft article 47 and second reading text draft article 50), and not of proportionality (idem). The United States respectfully disagrees. The requirement of necessity deals with the initial decision to resort to countermeasures by asking whether countermeasures are necessary (A/CN.4/488, p. 127, note 113). In contrast, whether the countermeasure chosen by the injured State "is necessary to induce the wrongdoing State to meet its obligations" is an aspect of proportionality (idem). The United States continues to believe that this aspect of proportionality should be included in article 52.

Article 52, as revised, incorporates language from the case concerning the *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*.[8] In *Gabčíkovo-Nagymaros*, the International Court noted that "the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question".[9] In his Third Report, the Special Rapporteur notes that, in response to the proposals of several Governments that "the requirement of proportionality be more strictly formulated", the double negative formulation of the first reading text ("[c]ountermeasures ... shall not be out of proportion" to the internationally wrongful act) should be replaced by the positive formulation of *Gabčíkovo-Nagymaros* (countermeasures should be "commensurate with the injury suffered") (A/CN.4/507, para. 346).

The International Court's analysis does not clearly indicate what is meant by the term "commensurate", and this term likewise is not defined in article 52. A useful discussion of the term "commensurate" in the context of the rule of proportionality can be found in Judge Schwebel's dissenting opinion in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.[10] Judge Schwebel (citing Judge Ago) notes that "[i]n the case of conduct adopted for punitive purposes ... it is self-evident that the punitive action and the wrong should be commensurate with each other, but in the case of action taken for the specific purpose of halting and repelling an armed attack, this does not mean that the action should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result."[11] Although Judge Schwebel's analysis of proportionality arose in the context of collective self-defence, his reasoning is equally applicable to countermeasures.

The United States is concerned that the term "commensurate" may be interpreted incorrectly to have a narrower meaning than the term "proportional". Under such a view, a countermeasure might need to be the exact equivalent of the breaching act by the responsible State. The United States does not believe such an interpretation is in accord with international law and practice. We believe that the rule of proportionality permits acts that are tailored to induce the wrongdoing State's compliance with its international obligations, and that therefore a countermeasure need not be the exact equivalent of the breaching act. To avoid any ambiguity, the United States recommends that the phrase "commensurate with" in article 52 be replaced with the traditional phrase "proportional to".

The United States also notes that the phrase "rights in question", taken from *Gabčíkovo-Nagymaros*, is not defined by the case itself or by article 52. While the phrase "rights in question" generally refers to the rights alleged to have been violated by the parties to a particular dispute brought before the ICJ, in *Gabčíkovo-Nagymaros*, the phrase is not used to refer to the rights of Hungary or Slovakia but rather is used as part of the Court's general definition of countermeasures. The United States understands the phrase "rights in question" to preserve the notion that customary international law recognizes that a degree of response greater than the precipitating wrong may sometimes be required to bring a wrongdoing State into

[8] *I.C.J. Reports 1997*, p. 56.
[9] Idem.
[10] *I.C.J. Reports 1986*, p. 259.
[11] Ibid., p. 368.

compliance with its obligations if the principles implicated by the antecedent breach so warrant (A/CN.4/488, para. 127; see also *Case Concerning the Air Services Agreement of March 27, 1946 Between the United States of America and France*).[12]

Accordingly, with the changes the United States proposes, article 52 would read: "Countermeasures must be proportional to the injury suffered, taking into account both the gravity of the internationally wrongful act and the rights in question as well as the degree of response necessary to induce the State responsible for the internationally wrongful act to comply with its obligations".

Article 53
Conditions relating to resort to countermeasures

Austria

Article 53 concerning the conditions for countermeasures has to be redrafted in any event, as it refers only to the "injured State", whereas the duty to cooperate according to article 54, paragraph 3, is only applicable if several States "other than the injured State" take countermeasures. Strictly speaking, a single such State is under no duty to negotiate under article 53 or under article 54, paragraph 3.

(*See also article 54, paragraph 3*)

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The present draft appears to have a certain leaning in favour of resorting to countermeasures. In particular, we would like to see the provision in article 53 (5) about the effect of binding dispute settlement procedures on the taking of countermeasures, be moved into a separate article following directly after the opening article 50. We firmly believe that there should be no room for countermeasures where a mandatory system of dispute settlement exists. The only exceptions would be if the procedure is obstructed by the other party and if countermeasures are urgent and necessary to protect that party's interest and the dispute has not yet been submitted to an institution with the authority to make decisions which can protect such interests. Following this line of reasoning, article 51 (2) may become redundant.

Japan

We have concerns with regard to the procedural requirements in taking countermeasures under article 53, according to which injured States shall "offer" to negotiate with responsible States and cannot take countermeasures while negotiations are being pursued in good faith. Since responsible States are likely to accept the offer to negotiate, it seems quite difficult in fact to resort to countermeasures. As a result, if a State is in need of taking countermeasures, it can easily resort to provisional measures avoiding formal countermeasures, thus making

[12] *U.N.R.I.A.A.*, vol. XVIII, pp. 417 and 443-444.

formal countermeasures a hollow procedure. In one way, the procedural requirement for countermeasures looks too strict, but in another way, there seems to be a loophole. We need careful examination on this point.

Netherlands

Criticism has been voiced in various quarters of the prohibition on the taking or continuing of countermeasures by the injured State during negotiations with the responsible State, since such a prohibition does not reflect State practice. The Netherlands cannot support this criticism, and would regard the deletion or amendment of paragraphs 2 to 6 of article 53 as a retrograde step.

Slovakia

Slovakia has some doubts with regard to paragraphs 4 and 5 of article 53. A proposed prohibition or suspension of countermeasures while negotiations are being pursued in good faith would put too much pressure on a State invoking countermeasures; and it should not be forgotten that a State invoking countermeasures is an "injured State", injured by a wrongful act of a State towards which countermeasures are aiming. In view of the treatment of countermeasures by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, paragraph 5 (b) does not correspond to the customary law in the field of countermeasures.

Spain

From this standpoint, draft article 53, which regulates the conditions relating to resort to countermeasures, as the latter are correctly defined in article 50, seeks to achieve a certain balance between the rights of the injured State and the State in breach of an international obligation, and therefore should be assessed in an overall positive light. It is true that the rights of the injured State can be adversely affected while it is complying with the obligation to notify the responsible State of its decision to take countermeasures and offering to negotiate with that State, as provided for in article 53, paragraph 2, or if the dispute is resolved through the settlement mechanisms provided for in article 53, paragraph 5. In order for that not to occur, however, the injured State may take "such provisional and urgent countermeasures as may be necessary to preserve its rights" (article 53, para. 3).

There can be no doubt that "provisional and urgent countermeasures" is an indeterminate legal concept; however, it is no less so than many of the other concepts included in the draft, a problem that only a dispute settlement regime can resolve in a satisfactory manner.

United Kingdom of Great Britain and Northern Ireland

The main concern relates to draft article 53. The conditions set out in paragraphs 1, 2, 4 and 5 (b) of draft article 53 do not reflect international law and are formulated in a manner that will in many cases render the objectives of chapter

II of Part Two bis unattainable. Draft article 53 is so fundamentally flawed as to render the provisions on countermeasures, as currently drafted, wholly unacceptable.

While it is necessary to guard against the abuse of the right to take countermeasures, this has to be done in a way that does not impede the imposition of countermeasures in cases where their imposition is justified. For example, it is clearly not acceptable that the taking of countermeasures in the face of genocide should have to be postponed while the "injured" or "interested" State makes an offer (which a wrongdoing State would no doubt accept with alacrity) to negotiate, or while States engage in negotiations despite the continuation of the killing. Similarly, the duty to postpone countermeasures whenever a dispute has been submitted to a court or tribunal (or any other form of dispute settlement process) is open to the most serious abuse. It would discourage acceptance of or reference to dispute settlement mechanisms. The requirements set out in draft article 53 that negotiations and dispute settlement procedures be pursued in good faith by the responsible State are wholly inadequate as safeguards. It may take a good deal of time to establish bad faith; and it cannot be right to insist that the imposition of countermeasures must be suspended while that time elapses. The provision entitling an injured State to take provisional and urgent countermeasures does not resolve this difficulty, as such countermeasures are limited to those "necessary to preserve its rights".

For these reasons, draft article 53 needs to be replaced by a provision setting out the main points of principle concerning the existence of and limits upon the right to take countermeasures, at a level of detail consistent with the treatment that is given, for example, to necessity in draft article 26.

United States of America

1. Negotiation

Article 53 (2) requires that an injured State offer to negotiate with the breaching State prior to taking countermeasures, and article 53 (4) requires that countermeasures not be undertaken while negotiations are being pursued in good faith. These articles contravene customary international law, which permits an injured State to take countermeasures prior to seeking negotiations with the responsible State, and also permits countermeasures during negotiations (see *Air Services Case*, footnote 11 above, pp. 444-446). The *Air Services* tribunal noted that it "does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of countermeasures during negotiations" (ibid., p. 445). The reason for the *Air Services* rule is clear: it prevents the breaching State from controlling the duration and impact caused by its breach by deciding when and for how long to engage in "good-faith negotiations". The United States believes it is essential that the Commission delete the negotiation clause from article 53 (2), and article 53 (4) in its entirety, in order to bring the draft articles into conformity with customary international law.

2. Provisional and urgent countermeasures

Article 53 (3) creates an exception to articles 53 (2) and 53 (4) for "such provisional and urgent countermeasures as may be necessary to preserve" the injured State's rights. The United States commends the Commission's decision to replace the language of the first reading text, which referred to "interim measures of

protection", with the reference in article 53 (3) to "provisional and urgent countermeasures". Nonetheless, several problems with this provision still remain. First, there is nothing under customary international law to support limiting the countermeasures that may be taken prior to and during negotiations only to those countermeasures that would qualify as "provisional and urgent". The United States maintains that the negotiation clause in article 53 (2) and article 53 (4) in its entirety should be deleted. The inclusion of article 53 (3) does not satisfy these objections.

Secondly, it would appear that even "provisional and urgent" countermeasures would be required to be suspended under article 53 (5) (b) if the dispute "is submitted to a court or tribunal which has the authority to make decisions binding on the parties". As discussed below, the United States strongly believes that article 53 (5) (b) should be deleted, but, at a minimum, if article 53 (5) (b) is retained, article 53 (3) needs to be exempt from the suspension requirement of article 53 (5) (b). The purpose of article 53 (3) is to enable an injured State to preserve its rights during negotiations with the responsible State. The injured State's need for preservation of these rights does not disappear when the responsible State submits the dispute to a court or tribunal with the authority to make binding decisions on the parties. Otherwise a breaching State could control the duration and impact of the injury it is causing through its breach.

That provisional and urgent countermeasures appear to be subject to article 53 (5) (b)'s suspension requirement may well be a drafting error. Under the first reading text, in article 48 (l) "interim measures of protection" could be taken to preserve an injured State's rights, but these "interim measures of protection" were not subject to the suspension requirement of first reading text article 48 (3). Article 48 (3) required only "countermeasures" but not "interim measures of protection" to be suspended when the relevant dispute was submitted to a tribunal. Because the language "interim measures of protection" has been replaced in the second reading text with the language "provisional and urgent countermeasures", these countermeasures, as all other countermeasures, now appear to have been made subject to article 53 (5) (b)'s suspension requirement. The Commission at a minimum needs to make explicit that article 53 (3) is exempt from article 53 (5) (b).

3. Suspension of countermeasures

Under article 53 (5) (b), once a dispute is submitted to a court or tribunal with the authority to make binding decisions, no new countermeasures may be taken and countermeasures already taken must be suspended within a reasonable time. The United States believes that this provision needs to be deleted, as there is no basis for such an absolute rule. The *Air Services* tribunal noted that, once a dispute is submitted to a tribunal that has the "means to achieve the objectives justifying the countermeasures", the right to initiate countermeasures disappears, and countermeasures already initiated "*may*" be "eliminated" but only to the extent the tribunal provides equivalent "interim measures of protection" (see footnote 11 above, pp. 445-446, emphasis added). Furthermore, the *Air Services* tribunal noted that "[a]s the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the parties to initiate or maintain countermeasures, too, may not disappear completely" (ibid., p. 446). This approach appropriately reflects the need to ensure that an injured party is able to respond to a continuing injury caused by another State's breach. The United States submits that the requirement to suspend countermeasures

is not so much related to a tribunal's authority to make binding decisions on the parties, as it is to whether a tribunal actually orders equivalent "interim measures of protection" to replace the suspended countermeasures in protecting the injured State's rights. Likewise, the right to initiate countermeasures does not disappear completely if a tribunal's ability to impose interim measures of protection is insufficient to address the injury to the State caused by the breach. As these determinations can only be made on a case-by-case basis, the United States urges the Commission to delete article 53 (5) (b).

Paragraph 3

Republic of Korea

The Government of the Republic of Korea is concerned about the possible abuses of the provisional and urgent countermeasures. The genuine necessity of the urgent countermeasures is not likely to be high. Furthermore, the conditions for such countermeasures in this article are couched broadly enough to enable States to rely on them whenever they find it necessary, therefore leaving it open to abuse.

Paragraph 5

Netherlands

In the interests of being systematic, it would be advisable to add a subparagraph to paragraph 5 indicating that countermeasures are not permitted or should be suspended "if the Security Council has taken a binding decision with regard to the dispute".

Article 54
Countermeasures by States other than the injured State

China

(*See article 49*)

Netherlands

The Netherlands respects the innovative nature of this article's provisions. The same problem occurs here, mutatis mutandis, as was identified in connection with the relationship between articles 46 and 49: what is the legal situation if the directly injured State has waived its claim against the responsible State? The Netherlands is of the opinion that if the responsible State has breached *erga omnes* obligations, the directly injured State cannot frustrate the right of third States and/or of the international community as a whole to take countermeasures.

The Netherlands raises the question of whether the three scenarios which the Special Rapporteur suggested for the invocation of responsibility for breaches of

erga omnes obligations (see article 49) also apply here mutatis mutandis to the taking of countermeasures against such a breach.

Spain

(*See article 42*)

Paragraph 1

Austria

The draft provisions on countermeasures as a means of obtaining respect for *erga omnes* obligations deal with a difficult problem, as they represent a specific justification for an intervention. The draft has evolved considerably since its first reading, and simple breaches of *erga omnes* obligations no longer entitle States to take countermeasures unless one of them is an injured State, such as the State of which the victim is a national. As far as the States other than the injured State are concerned, they are not entitled to take countermeasures except if requested to do so by the injured State (see article 54, para. 1). They normally have only the right contained in article 49, paragraph 2 (a), to seek cessation of the internationally wrongful act and guarantees of non-repetition. Hence these rights become a mere exhortation, with no specific consequences attached to it. Austria has doubts whether this is the result that should be achieved.

Paragraph 2

Austria

In the case of "serious breaches" according to article 41, not only the directly injured States may take countermeasures, but any State may do so in the interest of the beneficiaries of the obligation breached (article 54, para. 2). This rule is rather confusing, because it comprises two different situations: if the "serious breach" also fulfils the conditions set out in article 43 (b), i.e., if it is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned, any State is injured and therefore entitled to take countermeasures; but nothing in the present draft entitles such a State to make requests in the interest of the beneficiaries of the obligation breached. Depending on the clarification of the relation between the entitlement of States under article 43 and article 49 (see article 43), it may be necessary to add the wording "in the interest ... of the beneficiaries of the obligation breached" to article 44, paragraph 2, concerning the possible requests of an injured State.

In view of all this, the mentioning of article 41 in article 54, paragraph 2, must be understood as referring only to such breaches of *erga omnes* violations which do not fulfil the conditions of article 43 (b) and, therefore, fall under article 49. But also with this understanding the current wording of the draft is not without problems: "Countermeasures" are defined as measures which should induce a State to comply with its secondary obligations arising from its responsibility (see article 50, para. 1); countermeasures are no sanctions. Therefore, in the case of a breach of

an *erga omnes* obligation, only if a State has availed itself of its right under article 49, paragraph 2 (b) to demand reparation "in the interest of the beneficiaries of the obligation breached" and if such request was contested or simply not complied with, only then there would be a breach of secondary obligations which could be responded to with countermeasures.

In article 54, paragraph 2, as currently drafted, there is no clear connection with article 49, paragraph 2 (b), and this could create the impression that a State could take countermeasures without previously having made requests in accordance with article 49, paragraph 2 (b). It is probably arguable that such an interpretation is excluded indirectly in view of article 53, paragraph 1, but in Austria's view the connection should be made more evident through an explicit reference.

(*See also article 42, paragraph 2*)

Japan

We suggest the deletion of articles 41, 42 and 54, paragraph 2.

Article 54, paragraph 2, is another element reminiscent of "international crime". Under article 54, paragraph 2, if "any State" considers that taking countermeasures contributes to the "interest" of beneficiaries, then it is entitled to take full countermeasures against the responsible State. It does not matter whether the State taking countermeasures has been injured, whether there exists an injured State or not, an injured State's consent, or even whether the intention of beneficiaries exists.

Entitlement of any State to countermeasures in such a manner stipulated in article 54, paragraph 2, goes far beyond the progressive development of international law. Rather, it should be called "innovative" or "revolutionary" development of international law.

(*See also article 41*)

Republic of Korea

As to collective countermeasures in paragraph 2, further efforts should be made to find a way to reduce arbitrariness in the process of their implementation, and to alleviate the influence of the more powerful States.

United Kingdom of Great Britain and Northern Ireland

A further substantial difficulty concerns the provision in draft article 54 (2) which would permit any State, in the case of "serious breach", to take countermeasures "in the interests of the beneficiaries of the obligation breached". Even where, on the basis of the *Barcelona Traction* dictum, there may be a legal interest of States at large in respect of violations of certain obligations, it does not necessarily follow that all States can vindicate those interests in the same way as directly injured States. Moreover, the current proposal would enable any State to take countermeasures even when an injured State itself chose not to do so. This is potentially highly destabilizing of treaty relations.

Paragraph 3

Austria

There are problems relating to article 54, paragraph 3, concerning cooperation between several States in taking countermeasures. Such countermeasures must also comply with the rule of proportionality, laid down in article 52. The application of this rule is difficult enough if one State takes countermeasures and it is unclear how it should be applied if several States do so, let alone if they are applying different countermeasures. A possible solution could be to redraft article 53, envisaging an obligation of all States intending to take countermeasures to negotiate joint countermeasures prior to taking them.

(*See also article 53*)

Netherlands

Article 54, paragraph 3, can, in the opinion of the Netherlands, also be held to be relevant to cooperation on measures in the framework of the collective security system of the United Nations. This would include measures decided upon by the Security Council itself pursuant to Chapter VII of the Charter of the United Nations and measures by States that are authorized by the Security Council, also pursuant to Chapter VII. Such measures are deemed to be subject to the conditions laid down in the chapter on countermeasures, in particular article 51. The view that Security Council collective sanctions should be subject to restrictions is gaining ground. Like States, the Security Council is bound by peremptory norms of international law, and it cannot empower States to breach such norms. This problem cannot be dismissed by saying that article 59 of the draft articles serves as a saving clause for the applicability and precedence accorded to the Charter of the United Nations.

Part Four
General provisions

Denmark, on behalf of the Nordic countries (Finland, Iceland, Norway, Sweden and Denmark)

The Nordic countries can accept the four saving clauses contained in the final Part Four of the draft articles.

Netherlands

The Netherlands is in agreement with the general provisions contained in Part Four. However, it believes that an article should be added to the existing provisions to make clear the reflexive nature of the legal rules on State responsibility. This means that the various elements of the ILC draft also apply to the operationalization of State responsibility. For example, if a responsible State does not fulfil the obligations flowing from the secondary rules, it can also invoke “circumstances precluding wrongfulness”.

The question also arises of whether an article similar to article 34 (2) should be added to this part, to ensure that the entire text is without prejudice to any right, arising from the international responsibility of a State, which accrues to any person or any entity other than a State.

(*See also article 33*)

Article 56
Lex specialis

Netherlands

The Netherlands believes that the option of taking collective countermeasures in cases of serious breaches of *erga omnes* obligations (article 50 B as originally proposed by the Special Rapporteur; see paragraphs 357 and 369 of the ILC report) is adequately expressed by the *lex specialis* rule in article 56. An example would be multilateral sanctions in the framework of the United Nations.

Spain

The wording of draft article 56, entitled "*Lex specialis*", does not seem to be the most appropriate, in that it implies that the draft articles as a whole have a subsidiary or subordinate character in relation to any other norms of international law which deal with the conditions for the existence of a wrongful act or its legal consequences. The wording of article 37 of the 1996 draft is preferable, in that it was based on the principle of the application of the draft "without prejudice" to other special regimes that might spell out in greater detail the conditions for the existence and the consequences of a wrongful act. It would also be preferable to keep the provision in Part Two or at least to make it clear that specific regimes do not take precedence over peremptory norms of international law.

Article 59
Relation to the Charter of the United Nations

Austria

The drafting of article 59 on the relation of the draft articles to the Charter of the United Nations seems rather ambiguous. It is not clear what it means that the legal consequences of an internationally wrongful act of a State are "without prejudice to the Charter of the United Nations".

This wording lends itself to such a variety of interpretations, some of which are even contradictory: does it refer to the obligation to refrain from a threat or use of force; but this obligation is already contained in article 51, paragraph 1 (a), of the draft. Does it refer to the competence of the organs of the United Nations to deal with breaches of an obligation, even if States are applying the provisions of the draft outside any United Nations procedures? Does article 59 aim at establishing priority for the United Nations or does it only try to ensure the possibility of parallel action?

And what happens if the Security Council decides that measures of States according to article 54, paragraphs 2 and 3 — and possibly also under article 42, paragraph 2 (c) — are a threat to the peace and takes action accordingly? Would this affect application of the rules contained in the draft? Furthermore, it has to be made clear that countermeasures taken outside the United Nations system and those taken within the system must also be subject to the rule of proportionality.

If it is not possible to express the precise meaning of the phrase "without prejudice to the Charter of the United Nations", it would be advisable to delete the provision.

Slovakia

Taking into account Article 103 of the Charter of the United Nations, Slovakia finds article 59 superfluous, and is thus proposing its deletion.

Spain

The relationship between the regime of responsibility laid down in the draft and in the Charter of the United Nations should be formulated with greater precision, for while the Security Council is authorized to take "enforcement measures" under Chapter VII, such measures are not subordinated to the general regime of countermeasures, since they do not necessarily respond to the commission of internationally wrongful acts. In any event, while the Council is not a judicial body, but a political body which takes action with respect to "threats to the peace, breaches of the peace, and acts of aggression", it must act in accordance with *jus cogens* norms.

(*See also article 42*)