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# Fourth report on State responsibility

## by Mr. James Crawford, Special Rapporteur

**Addendum**

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# Annex

## Specific amendments to the draft Articles in the light of comments received

| *Title/ Article* | *Suggestion* | *Comment* |
|---|---|---|
| Part One | The title, in French, should read: "Fait générateur de la responsabilité internationale des États"; the existing title is too general. (France) | Title could be reconsidered by the Drafting Committee; no ready English equivalent of the phrase "fait générateur" exists. |
| Chapter II, titles | The titles to articles 4 to 9 are too long and should be brought into line with the title to article 10 ("Conduct of …"). | To be reconsidered by the Drafting Committee. |
| Article 2 | This should make reference also to the circumstances precluding wrongfulness under Chapter V. (Guatemala) | These are certainly relevant to responsibility, but it seems sufficient to note this in the commentary. |
| Articles 4 and 5 | The draft articles should provide guidance on what is meant by the term "exercising governmental authority"; there is at present no agreed definition. (United Kingdom) | No specific form of words can resolve the problem of application; the matter can be addressed in the commentary. |
| Article 5 | The phrase "by the law of that State" should be deleted; generally, the influence of internal law should not be overestimated. (Japan) | Article 4 seeks to strike a balance between the role of internal and international law, both of which are relevant. Article 5 is to be read along with articles 6 (actual direction or control) and 7 (de facto organs). |
| Article 7 | In the title of the provision, the words "or default" should be added after the words "in the absence". (Republic of Korea) | To be considered by the Drafting Committee. |
| | The exceptional character of the provision should be stressed. (United States) | The provision is indeed intended to be exceptional; at least this should be made clear in the commentary, but the Drafting Committee may wish to consider whether some further change in the language of article 7 is required. |
| Article 8 | There should be a proviso for "joint responsibility" of both States involved, e.g., by inserting the words "without prejudice to that other State's international responsibility". (Netherlands) | All of the articles in Part Two are cumulative; each applies separately in relation to conduct potentially attributable to a given State. The point can be made clear in the commentary. |
| Article 10 | Articles 7 and 10 create the impression that all acts of unsuccessful insurrectional movements are attributable to the State; this is not the position under international law. (Netherlands, Australia) | Clearly, it is only in exceptional cases that the conduct of an insurrectional movement is attributable to the State; articles 7 and 10 specify those exceptional cases. The point can be clarified in the commentary. The Drafting |

| *Title/ Article* | *Suggestion* | *Comment* |
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| | | Committee may wish to consider whether paragraph 10 (3) is necessary. |
| Article 11 | Instead of speaking of "an act of that State under international law", the provision should refer to "an act of that State", as elsewhere in the text. (Netherlands) | This seems right; the matter should be considered by the Drafting Committee. |
| Article 14 | The title should be replaced by "The moment and duration of the breach of an international obligation". (Republic of Korea) | To be considered by the Drafting Committee. |
| Article 15 (2) | This should be limited to categories of composite acts which clearly appear as such (e.g., genocide). (United States) | To be considered by the Drafting Committee. |
| Chapter IV in general | Chapter IV contains primary rules and should be deleted. (Guatemala) | Part Four is concerned with a form of ancillary responsibility; its inclusion in the text has been generally approved. |
| | Articles 16 and 17 should not require that the obligation breached be binding on the assisting State. (Israel) | The absence of such a requirement would raise even more difficult issues of knowledge; in the context of ancillary responsibility and having regard to the *pacta tertiis* rule, the text can be defended. See further the Special Rapporteur's Second Report (A/CN.4/498/Add.1, paras. 178-184 and 199-200). |
| | The title, in French, should read: "Responsabilité d'un État <u>à raison</u> du fait d'un autre État". (France) | To be considered by the Drafting Committee. |
| Article 16 | It is suggested to delete the phrase "knowledge of the circumstances". (Denmark, on behalf of the Nordic countries) | In general, a State is not responsible for the conduct of another State; article 16 is one of a limited number of exceptions to this rule. It is very doubtful whether under existing international law a State takes the risk that aid or assistance will be used for purposes which happen to be unlawful; hence some requirement of knowledge, or at least notice, seems inevitable. It is for consideration whether article 16 currently strikes the right balance; any eventual decision on the point must be adequately reflected in the commentary. |
| | Alternatively, article 16 (a) should read: "That State does so when it knows <u>or should have known</u> the circumstances of the internationally wrongful act". (Netherlands) | |
| | The expression "knowledge of the circumstances" needs to be clarified (United Kingdom, Republic of Korea); similarly "in the commission"; both phrases should be read restrictively (United Kingdom, United States). | |
| | The commentary to the provision should make clear what threshold of participation in the commission of the wrongful act is required. (United States) | One possibility is to spell out the standard of materiality in relation to the aid or assistance; in any event the matter should be addressed in the commentary. |

| *Title/ Article* | *Suggestion* | *Comment* |
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| Article 17 | Reference should be to "direction or control". (Netherlands) | The current formulation responds to the need for narrowly drawn criteria for responsibility under Chapter IV, as contrasted, e.g., with article 6. |
| | The reference to "knowledge of the circumstances" of the internationally wrongful act in article 17 (a) should be deleted, as knowledge is implicit if a State directs and controls another State. (Mexico) | The fact of direction and control of another State in doing a particular act does not necessarily imply awareness of all the circumstances, including circumstances entailing the wrongfulness of the act. |
| Article 18 | The reference to "knowledge of the circumstances of the act" in article 18 (b) should be deleted; knowledge is implicit if a State coerces another State. (Mexico) | The fact of coercion of another State in doing a particular act does not necessarily imply awareness of all the circumstances, including circumstances entailing the wrongfulness of the act. |
| Chapter V in general | It would be more in line with the general aim of the draft if Chapter V dealt with "Circonstances excluant la responsabilité". (France, Burkina Faso) | To be considered by the Drafting Committee. |
| | It is doubtful whether the provisions on consent, compliance with peremptory norms, self-defence and countermeasures should be included in the draft at all, as they evidently exclude the wrongfulness of an act entirely, and not merely responsibility for it. (France) | The Commission decided in the context of article 20 (consent) to take a broader view of Chapter V, and this approach has been generally endorsed. |
| | There should be a new provision on humanitarian intervention as an exceptional circumstance excluding wrongfulness. (Netherlands) | Chapter V does not deal with the substantive primary rules relating to the use of force, or indeed generally with the international law of humanitarian assistance. Cases not otherwise provided for may be dealt with in accordance with the criteria in article 26 (necessity). |
| | The commentary should state clearly that the list of circumstances is meant to be exhaustive. (Japan) | In accordance with articles 33 and 56, the draft does not intend to preclude further developments in international law. On the other hand, Chapter V is thought to be exhaustive of the justifications or excuses generally available under international law as it stands, and this should be made clear in the commentary. |
| | The commentary should safeguard the rights of third States which might be affected by self-defence or countermeasures. (Japan) | The Special Rapporteur agrees; the point will be covered in the draft commentary. |

| *Title/ Article* | *Suggestion* | *Comment* |
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| Article 20 | The old proviso as to peremptory norms (old article 29, para. 2) should be reintroduced. (Cyprus, Israel, Slovakia, Spain) | The reference to "valid" consent is intended, inter alia, to cover the point, which will also be made clear in the commentary. |
| Article 21 | Could be deleted as superfluous: a conduct required by law is by definition not wrongful. (Slovakia) | Part Five is not confined to excuses such as *force majeure* but extends to justifications (consent, self-defence) which where applicable render conduct lawful by definition. In addition, circumstances can be envisaged where article 21 will resolve conflicts between generally valid obligations, thus going beyond article 53 of the Vienna Convention on the Law of Treaties. |
| | Reference should also be made to decisions of the Security Council under Chapter VII. (Guatemala) | This is not necessary in the light of article 59; in any event article 21 raises distinct issues. |
| Article 22 | The phrase "taken in conformity with the Charter of the United Nations" should be reconsidered. It is confusing and, because of article 59, unnecessary. (Japan, Republic of Korea) | To be considered by the Drafting Committee in conjunction with article 59 itself. |
| Article 23 | Those Governments favouring the deletion of Part Two bis, Chapter II, on countermeasures would considerably expand this provision. (United Kingdom, United States) | See main document, chap. V. |
| Article 24 | Paragraph 2 (a) should be redrafted 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". (United Kingdom) | To be considered by the Drafting Committee. |
| Article 25 | Paragraph 2 (a) should be redrafted as follows: "Wrongful conduct of the State invoking distress, either alone or in combination with other factors, has caused the situation". (United Kingdom) | To be considered by the Drafting Committee. |
| Article 26 | Article 26 (necessity) should not be included in the draft articles as it is prone to abuse. (United Kingdom) | Most Governments have supported the inclusion of article 26, and the Court likewise endorsed the principle in the *Case concerning the Gabčíkovo-Nagymaros Project* (*I.C.J. Reports 1997*, p. 7). |
| | If it is included, it should be titled simply "Necessity". (United Kingdom) | To be considered by the Drafting Committee. |

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| | If it is included, then the reference, in paragraph 1 (b), to the "international community as a whole" should be changed to "the international community of States as a whole". (France, Mexico, United Kingdom) | The International Court used the phrase in the *Barcelona Traction* case (*I.C.J. Reports 1970*, p. 32 (para. 33)), and it is used in subsequent multilateral treaties such as the Rome Statute of the International Criminal Court, 1998, art. 5 (1). See also paragraph 36 in the main document. |
| | The phrase "essential interest" raises questions by comparison with "fundamental interests" as in article 41. (Australia, United Kingdom) | An "essential interest" may be particular to one State, unlike the "fundamental interests" referred to in Part Two, Chapter III. |
| | Paragraph 2 (b) should apply to other circumstances precluding wrongfulness, e.g., *force majeure*. (United Kingdom) | This may be covered by article 24 (2) (b); the matter, however, merits consideration by the Drafting Committee. |
| | Paragraph 2 (c) should be redrafted as follows: "Wrongful conduct of the State, either alone or in combination with other factors, has caused the situation of necessity". (United Kingdom) | To be considered by the Drafting Committee. |
| Article 27 | Deletion proposed. (France) | Article 27 (a) assists in avoiding confusion between circumstances precluding wrongfulness and the termination or suspension of the underlying obligation; this seems useful. |
| | Article 27 (a) should read: "the duty to comply with the obligation". (United Kingdom) | To be considered by the Drafting Committee. |
| | The circumstances in which article 27 (b) may apply need further explanation. | To be taken up in the commentary. |
| | Article 27 (b) should only refer to articles 24 to 26 (Netherlands); similarly France, which wants to delete article 27 (b) because it is too general. | To be considered by the Drafting Committee; however, article 27 (b) is a mere saving clause, and the point can be explained in the commentary. |
| Article 30 | Article 30 (b) (assurances and guarantees of non-repetition) should be deleted as it does not reflect international practice. (United States) | To be considered in the light of the pending decision of the International Court in the *LaGrand* case; article 30 (b) makes it clear in any event that this remedy is only available where the circumstances require. |
| | Article 30 (b) should read "<u>to give</u> appropriate assurances and guarantees". (United Kingdom) | The Special Rapporteur is inclined to agree with this suggestion; it should be considered by the Drafting Committee. |

| *Title/ Article* | *Suggestion* | *Comment* |
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| | The commentary to article 30 (b) should also refer to the gravity of the breach as one of the relevant circumstances. (Netherlands) | The Special Rapporteur agrees. |
| Article 31 | In view of the problems relating to the term "injury" (see article 43 below), article 31 should speak of "damage, whether material or moral". | See Chapter III above. |
| | Paragraph 2 is unhelpful and should be deleted. (Japan, India, Slovenia) | |
| | The requirement of proportionality (articles 36 (b), 38 (3)) should be applied generally to reparation. (Czech Republic, Italy, Poland) | Compensation has its own built-in limitation, relating to the actual damage suffered. How the general principle of proportionality applies to restitution and satisfaction may differ; the issue is better addressed in the specific articles. |
| Article 32 | The idea that the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under Part Two should be formulated in more general terms, possibly as a general provision which would belong in Part Four (France, Poland). Mexico, on the other hand, proposes that it be moved to a new article 28 bis, to stress its basic character. | The Drafting Committee should reconsider whether articles 3 and 32 should be merged into a single provision stating the irrelevance of internal law in more general terms, or whether article 32 should be relocated. |
| Article 33 | Article 33 (other consequences) should be placed in Part Four and formulated more generally. (Netherlands, Poland, United Kingdom) | This is dealt with in a preambular paragraph of the Vienna Convention, and it seems necessary to clarify the point for present purposes. There is a case for transferring it to Part Four: this might be considered by the Drafting Committee. |
| | It should spell out more clearly what additional consequences could derive from customary international law. (United Kingdom) | This can be dealt with in the commentary. |
| | If the Commission intends to codify the law of responsibility, article 33 is not helpful, as it limits the value of the draft. (Mexico) | This depends in part on the eventual form of the articles; in any event, they do not intend to preclude developments in the law of responsibility, and thus some form of saving clause seems necessary. |
| Article 34 | Paragraph 2 should be deleted as unnecessary in a text on State responsibility. (Poland) | Article 34, which was new in 2000, has been generally welcomed, and clarifies the scope of Parts Two and Two bis. |

| *Title/ Article* | *Suggestion* | *Comment* |
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| Article 35 | Add the following sentence: "The determination of reparation shall take into account the nature (and gravity) of the internationally wrongful act"; this would highlight the relevance of the intentional or negligent character of the breach. (Netherlands) | Chapter I is concerned with the forms of reparation in general. The extent to which questions of intention or fault are relevant in determining the modality or amount of reparation in any given case is a matter for Chapter II, as well as for the primary rules. This point should be added, by way of explanation, in the commentary. |
| | "Injury" should be replaced by "damage". (Japan; see also article 31 above) | See main document, chap. III. |
| Article 36 | The application of article 36 to questions of expropriation of foreign property is unclear (United Kingdom) and should be addressed at least in the commentary. | The articles are of course only applicable to breaches of international obligations, and thus not to that category of expropriations which are lawful per se. The relevant points should be covered, at least in general terms, in the commentary. |
| | A third exception should be added according to which restitution is not owed if it would necessarily entail the violation by the State of another obligation ("... n'entraîne pas nécessairement la violation par cet État d'une autre obligation internationale"). (France) | It is true that conflicting secondary obligations can be envisaged; restitution in respect of one State may preclude it in respect of another. Such conflicts, cannot, however be resolved by article 36, nor is it always a matter for the free choice of the responsible State. It seems better not to specify a precise rule on the point, but (as with other conflicting obligations) to leave it to the parties to resolve. See the Special Rapporteur's Second Report, A/CN.4/498, para. 9. |
| Article 37 | The draft should more clearly state that international law does not recognize compensation for moral damages. (Austria) The opposite view (that moral damages are covered) is taken by the United States. Mexico also proposes that the position taken by the draft articles should be clarified, in particular taking into account the formulation of article 31 (2). | See main document, chap. III. |
| | The term "financial assessability" is unhelpful and should be reviewed. (Austria, Republic of Korea) | See main document, chap. III. |
| | It should stress that "financial assessability" is to be determined by international law, not by national laws. (United Kingdom) | This is plainly correct; the point can be covered in the commentary. |

| *Title/ Article* | *Suggestion* | *Comment* |
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| | The words “insofar as” should be replaced by the phrase “if and to the extent that”. (Republic of Korea) | To be considered by the Drafting Committee. |
| Article 38 | Other forms of satisfaction, such as nominal damages, might be added. (Israel) | To be considered by the Drafting Committee. |
| | The words “of a similar character” should be inserted at the end of paragraph 2. (Mexico) | To be considered by the Drafting Committee. |
| | Delete the proviso pursuant to which satisfaction must not be “humiliating”, as this is not defined (Spain); it could be replaced by the phrase “impairing the dignity of the responsible State”. (Republic of Korea) | The principle that satisfaction should not take a form which is “humiliating” or “impairs the dignity of the responsible State” seems important and was generally accepted within the Commission. Its precise formulation could be considered further by the Drafting Committee. |
| | The words “insofar as” should be replaced by the phrase “if and to the extent that”. (Republic of Korea) | To be considered by the Drafting Committee. |
| | The word “injury” should be replaced by the word “damage”. (Japan; see also article 31 above) | See main document, chap. III. |
| Article 39 | Provision for interest should be included under the rubric of compensation under article 38 (3) and (4). (Israel, Republic of Korea, Slovenia) | Interest can play a distinct role in the framework of reparation and a separate provision seems justified. See the Special Rapporteur’s Third Report, A/CN.4/507/Add.1, paras. 195-214. |
| Article 40 | Article 40 (contribution to the damage) should be moved to Chapter I, possibly as article 31 (3), since it touches upon a general point. (Republic of Korea, Slovakia) | Article 40 is concerned with the mitigation of responsibility which has arisen under Part One, rather than its exclusion. Its language might, however, be reconsidered by the Drafting Committee in the light of a review of the terms “injury” and “damage” in the draft articles. |
| Chapter III generally | A number of Governments favour the deletion of Chapter III (serious breaches): Japan, United Kingdom, United States, France (but suggesting that the idea of “serious breaches” should be reformulated in a reformulated article 49). | See main document, chap. IV. |
| Article 41 | The proposed definition is full of ambiguous terms, such as “essential”, “serious”, etc. (Republic of Korea, United Kingdom; Austria, Mexico, United States). In particular: | See main document, chap. IV. |

| *Title/ Article* | *Suggestion* | *Comment* |
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| | • The relationship between "fundamental interests" (article 41), "essential interests" (article 26) and "collective interests" (article 49) needs to be explained. (United Kingdom) | |
| | • There is a difference between the formulation of articles 49 ("established for the protection of a collective interest") and 41 ("essential for the protection ..."). (United Kingdom) | |
| | • The relationship between obligations covered by article 41 and obligations *erga omnes* or peremptory norms needs to be clarified. (Republic of Korea) | |
| | • The commentary should explain how the "risk of substantial harm" should be assessed. (United Kingdom) | |
| | • The term "serious" is not always necessary; aggression would, e.g., per se be "serious". (Netherlands) | |
| Article 42 | Include in article 42 (and not merely in article 58) an express reference to the provisions on international criminal responsibility under the Rome Statute. (Spain) | The distinction between State responsibility and individual criminal responsibility appears worth preserving. |
| Article 42 (1) | In paragraph 1 the words "may involve" should be replaced by "involves". (Netherlands) | Exemplary or expressive damages are not necessarily entailed by every breach to which Chapter III applies. |
| | If non-punitive damages providing for damages reflecting the gravity of a breach are recognized, this cannot be restricted to "serious breaches" in the sense of article 41. (United Kingdom) | Article 42 (1) does not exclude other possibilities, depending on the circumstances and the content of the relevant primary rules. |
| | The draft should state clearly that punitive damages are not recognized under international law. (Austria, Republic of Korea, United States) | This should be made clear in the commentary, which should also explain the intent underlying paragraph 1. |
| Article 42 (2) | Paragraph 2 could be deleted as it does not add obligations of substance. (France) | See main document, chap. IV. |
| | The duty of non-recognition also may apply to breaches, which are not "serious" in the | Article 42 (2) (a) does not exclude consequences of internationally wrongful acts |

| *Title/ Article* | *Suggestion* | *Comment* |
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| | sense of article 41; on the other hand, it seems too inflexible to cover all cases of serious breaches. Article 42 (2) generally should be replaced by a saving clause setting out possible further consequences. (United Kingdom) | attaching to breaches which are not "serious" in the sense of Article 41. See main document, chap. V. |
| | Clarify the relation between article 42 (2) (c) and article 54. (Austria, Spain) | See main document, chap. IV. |
| | Delete the restriction "as far as possible". (Netherlands) | The qualification seems to be necessary, as the exact scope of the duty to cooperate is difficult to determine. |
| Article 42 (3) | Unless concrete examples of further consequences can be envisaged, the provision should be deleted. (United Kingdom) | See main document, chap. IV. |
| Part Two bis | Part Two bis should become Part Three, consequent upon the deletion of existing Part Three. (France) | The Special Rapporteur agrees. |
| Article 43 | Articles 43 and 31 (2) need to be harmonized. (Japan, Netherlands) | See generally main document, chap. III. |
| | The relation between article 43 and article 60 of the Vienna Convention on the Law of Treaties (which influences the drafting of article 43) should be addressed. (Japan) | |
| | The concept of "injury" should include all instances of article 49, which could be seen as "indirect injury". (Netherlands) | |
| | There should be a new subparagraph (c) which takes up the substance of what is now article 49 (1). (France) | |
| | The term "injury" should be defined by reference to concepts such as material, moral damage; the relation between the terms "affected" and "injured" is unclear. (Japan) | |
| | The term "invocation of responsibility" should be defined. (United Kingdom) Some forms of invocation would not require "injury" as defined in article 43. (United Kingdom) | |
| | The internal structure of the provision should be changed: It should first set out when a | |

| *Title/ Article* | *Suggestion* | *Comment* |
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| | State is injured and second spell out the consequences. (United Kingdom) | |
| Article 43 (a) | Outside the case of bilateral treaties, it is not clear when obligations are owed to a State "individually", e.g., in cases of "multilateral treaties bilateral in application". (United Kingdom) | This will need to be clarified in the commentary; it is not the function of the text itself to give examples. See also main document, chap. III. |
| Article 43 (b) (ii) | The provision should be deleted as the category is controversial (Japan) or too broadly formulated (United States). | See generally main document, chap. III. |
| | The relation between "integral obligations" and situations coming within the scope of article 49 needs to be clarified. (Austria, Mexico, Republic of Korea) | |
| Article 44 | Contrary to its title, the provision does not define "invocation". (United Kingdom) | The meaning of "invocation" should be made clear, either in the text or the commentary; in this context the title to article 44 may also require reconsideration. |
| | The provision should list all remedies that an injured State has. (United Kingdom) | In principle an injured State may claim all or any of the available forms of reparation in accordance with Part Two; this should be made clear. |
| Article 45 | The earlier version (article 22 of the 1996 draft) of the local remedies rule should be reintroduced. (Spain) | Former article 22 embodied a "substantivist" conception of local remedies; the adoption of a more neutral formulation has been generally welcomed by Governments and writers. |
| | The words "by an injured State" ought to be included after "may not be invoked". (Republic of Korea) | The addition does not seem necessary in view of article 49 (3). |
| | The term "nationalité des réclamations", which has no clear meaning in French, should be replaced by "nationalité dans le cadre de l'exercise de la protection diplomatique". (France) | The exhaustion of local remedies rule is not limited to diplomatic protection; however, the question of terminology should be further considered by the Drafting Committee. |
| | A new subparagraph should expressly state that the responsibility for violations of the rights of foreign nationals may not be invoked unless local remedies have been exhausted. (Mexico) | Having regard to the Commission's proposed work on diplomatic protection, it does not seem necessary to spell out here the detailed content of the rule and of the exceptions to it. Some further clarification can be offered in the commentary. |

| *Title/ Article* | *Suggestion* | *Comment* |
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| Article 46 | The possibility of waiving rights should be excluded in cases involving obligations *erga omnes* (Netherlands), or of peremptory norms. (Republic of Korea) | As with article 20, the issue is covered by the term "valid"; it is not the function of the articles to spell out in which cases consent or waiver may operate in relation to these norms. However, something should be said on the point in the commentary. |
| | The expression "valid" is redundant; the qualification "unequivocal" is problematic. (United Kingdom) | For the reasons given above, the term "valid" adds something. It seems that as a matter of international law a waiver must be unequivocal, although whether that is so in a given case is a question of interpretation. |
| Article 48 | It is not clear whether paragraph 1 is intended to apply to situations where several wrongful acts by several States each cause the same damage. If this is so, the words "the same internationally wrongful act" should be amended. (Republic of Korea) | The situations are at least analogous; the matter should be considered by the Drafting Committee in the light of its reconsideration of the terms "injury", "damage", etc. |
| | Paragraph 1 should not be read as a recognition of joint and several liability under international law; an alternative formulation is proposed. | As made clear in the Third Report, A/CN.4/507/Add.2, paras. 277-278 and 282 (and as will be further clarified in the commentary), this article is not intended to impose a regime of joint and several liability in all cases. |
| Article 49 | Article 49 should be deleted, as it is not a core issue of the law of State responsibility. (Japan) | See generally main document, chap. III. |
| | All parties to all multilateral treaties should have the status of "interested States", although they would not necessarily have the same rights as "injured States". (United Kingdom) | |
| | Article 49 should be changed so as to entitle "other States" to invoke responsibility if the breach in question is "a serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests". (France) | |
| | There should be a saving clause in Part Two bis indicating that non-State entities may also be entitled to invoke responsibility. (Netherlands) | This is covered in article 34 (2); the Drafting Committee may consider whether this belongs in Part Four. |

| *Title/ Article* | *Suggestion* | *Comment* |
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| Article 49 (1) | The expression "protection of a collective interest" is not clearly defined. (United Kingdom) | See generally main document, chap. III. |
| Article 49 (2) | It is questionable whether the right to demand reparation under article 49, paragraph 2 (b), is really recognized in international law. (France, United Kingdom) | See generally main document, chap. III. |
| | There ought to be a procedure governing cases in which a multitude of States is entitled to demand compliance under article 49 (2) (b), possibly along the lines of article 54 (3). (Austria; see also United Kingdom) | |
| | Paragraph 2 (b) ought to apply to cases of serious breaches (articles 41-42) as well. (Netherlands) | |
| | The procedure for claims for reparation under paragraph 2 (b) is unclear. (United Kingdom) | |
| Article 49 (3) | The words "*mutatis mutandis*" should be added after "under articles 44, 45, and 46 apply". (Republic of Korea) | This is clearly the intent of the article and can be explained in the commentary. |
| Chapter II generally | A number of States argue against a detailed regulation of countermeasures in a separate chapter and instead favour an expanded version of article 23 (Japan, United Kingdom, United States); conversely, Mexico opposes any regulation, on the basis that this would tend to legitimize countermeasures. | See main document, chap. V. |
| Article 50 | Rights of third States should be more clearly safeguarded. (Netherlands) | This is covered in paragraphs 1 and 2, and can be further clarified in the commentary. |
| | The object of countermeasures should be defined as "inducing compliance with the primary obligation"; countermeasures cannot be taken just to ensure reparation. (Japan) | Inducing compliance with the primary obligation is covered by article 30; however, in certain circumstances countermeasures might also be justified in response to a failure to comply with other obligations in Part Two, provided the general conditions for taking countermeasures are met. |
| | The exceptional character of countermeasures should be stressed. (Mexico) | See main document, chap. V. |

| *Title/ Article* | *Suggestion* | *Comment* |
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| | It is necessary to ensure consistency between article 41 (1), article 49 (1) (b) and article 50 (1), especially as concerns "indirectly injured" States. (Germany) | To be considered by the Drafting Committee. |
| | In article 50 (1), the phrase "to comply with its obligations under Part Two" should be replaced by the phrase "to comply with its obligations under international law". (Greece) | The existing phrase seems more precise; nonetheless the point should be considered by the Drafting Committee. |
| | In article 50 (3), the words "the resumption of performance of the obligation or obligations in question" should be replaced by the words "subsequent compliance with the obligation or obligations in question", since some of the obligations might be instantaneous in character. (Guatemala) | To be considered by the Drafting Committee. |
| Article 51 | Delete the provision, which is unnecessary (as it would be covered by the Charter of the United Nations and/or an application of Article 52) and introduces many uncertainties. (United States) | See main document, chap. V. |
| | The reference to "derogation" in the chapeau invites confusion with human rights derogability clauses; it should also be made clearer that the article refers to the obligations of the State taking the countermeasures. (United Kingdom) | The Special Rapporteur agrees in principle; to be considered by the Drafting Committee. |
| | A proviso prohibiting countermeasures endangering the territorial integrity of another State should be reintroduced. (Spain) | See generally main document, chap. V. |
| | Include a reference to the prohibition of countermeasures concerning cultural property. (comment by UNESCO) | |
| | A new subparagraph should exclude countermeasures violating "obligations to protect the environment against widespread, long-term and severe damage". (Republic of Korea) | |
| | Subparagraph 1 (d) should become 1 (e), as the core of obligations in the field of diplomatic/consular intercourse is of a peremptory character. (Mexico) | |

| *Title/ Article* | *Suggestion* | *Comment* |
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| Article 52 | Countermeasures should be justified to the extent that they are necessary to induce compliance with the obligation breached. (Japan, United States) | This is implicit in article 50 (1); the criteria for proportionality in article 52 do not mean that the particular situation, including the relative situation of the States concerned, should not be taken into account, and this can be further clarified in the commentary. |
| | The term "commensurate", which seems to suggest a more restrictive meaning, should be replaced by "proportional". (United States) | The term was used by the International Court in the *Case concerning the Gabčíkovo-Nagymaros Project*, and seems useful. |
| | It would be more precise to refer to the "effects of countermeasures". (Slovakia, similarly Spain) | This may well be right, and should be considered by the Drafting Committee. |
| | The words "the rights in question" should be replaced by "the effects of the internationally wrongful act on the injured State"; otherwise it has to be explained more clearly what rights are envisaged. (Republic of Korea; see also United States) | The term was used by the International Court in the *Case concerning the Gabčíkovo-Nagymaros Project*, and seems useful. |
| | The provision should be couched in negative terms: "not disproportionate", etc. (Denmark, on behalf of the Nordic countries) | A negative formulation may allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures. |
| | The reference to "gravity" should be dropped. (Japan) | It does not seem unreasonable to take account of the gravity of a breach in determining the permissibility of countermeasures. |
| | The United States proposes a reformulation of article 52: "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." | To be considered by the Drafting Committee. |
| Article 53 | Article 53 needs to be redrafted so as to include references to States which are not injured, but which may nevertheless take countermeasures. (Austria) | See main document, chaps. III and V. |
| | Paragraph 5 should also include a reference to situations in which the Security Council has taken a binding decision. (Netherlands) | This is covered by article 59. |
| | The conditions set out in paras. 1, 2, 4 and 5 (b) are not recognized in present-day | See generally main document, chap. V. |

| *Title/ Article* | *Suggestion* | *Comment* |
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| | international law (United Kingdom). The United States agrees with this criticism with respect to paragraphs 2, 4 and 5 (b); Slovakia with respect to paragraphs 4 and 5 (b). Japan disagrees with the reference, in paragraph 2, to "offers of negotiation". | |
| | Paragraph 3 should be formulated more restrictively, so as to prevent abuse (Republic of Korea). In the view of the United States, paragraph 3 should be expressly exempted from paragraph 5 (b). | See generally main document, chap. V. |
| | Paragraph 5 should become a separate provision, possibly as article 50 bis. (Denmark, on behalf of the Nordic countries) | This could be considered by the Drafting Committee in the light of the general debate on countermeasures. |
| | Paragraph 5 (b) should be incorporated in paragraph 4; consequently urgent countermeasures could still be taken if a dispute was submitted to a binding dispute settlement procedure. (France) | This could be considered by the Drafting Committee in the light of the general debate on countermeasures. |
| | Paragraph 5 (a) and (b) should be disjunctive, not cumulative. (Poland) | To be considered by the Drafting Committee; the comment also encompasses Japan's view that countermeasures should not apply to disputes concerning reparation as distinct from cessation. |
| Article 54 (1) | Article 54 (1) does not have a basis in international law and should be deleted. (Japan) | See generally main document, chap. V. |
| | Countermeasures as an exceptional remedy may only be taken by "injured States"; hence paragraph 1 should be deleted. Article 54 generally does not do justice to the role of the United Nations as a guardian of international peace and security. (Mexico) | |
| | States which are entitled to invoke the responsibility of a State responsible for a "serious breach" may resort to countermeasures irrespective of a request of an injured State, or of the conditions attaching to countermeasures by that injured State. (France) | |

| *Title/ Article* | *Suggestion* | *Comment* |
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| Article 54 (2) | Those Governments which reject articles 41 and 42 also favour the deletion of article 54 (2). (e.g., Japan; see also Mexico) | See main document, chaps. IV and V. |
| | There should be an express cross-reference to article 49 (2); countermeasures may only be taken after requests have produced no result. (Austria) | This is covered by the phrase "in accordance with the present Chapter". |
| Article 54 (3) | The procedure ought to be more precise; perhaps there should be (in article 54 or 53) an obligation to negotiate joint countermeasures. (Austria) | See main document, chap. V. |
| Part Four generally | An additional article should elaborate on the "reflexive" nature of the draft articles, e.g., by clarifying that circumstances precluding wrongfulness equally apply to secondary obligations. (Netherlands) | This can be made clear in the commentary. |
| | A new provision, along the lines of article 34 (2), should safeguard the rights of non-State entities. (Netherlands) | This seems unnecessary given the scope of the draft articles as well as article 34 (2); the Drafting Committee may wish to consider whether article 34 (2) should be moved to Part Four. |
| | The irrelevance of internal law should be expressed in a general provision. (France; see also France's comments on article 32) | See comment above, on France's suggestion relating to article 32. |
| Article 56 | Preference for former article 37 (of the 1996 draft). (Italy, Spain) | This can be considered by the Drafting Committee. |
| | The provision should be kept within Part Two. (Spain) | The principle has potential application to issues arising under other Parts. |
| | It should contain an exception for peremptory norms. (Spain) | The word "determined" means "validly determined"; cf. article 53 of the Vienna Convention on the Law of Treaties. |
| | Article 56 as it currently stands seems to refer to Part One and Part Two only. At least, no mention is made of "implementation", and "legal consequences" only covers Part Two. | This should be considered by the Drafting Committee. |
| Article 57 | In the French text, the words "pour le comportement d'une organisation internationale" should be replaced by "à raison du comportement d'une organisation internationale". (France) | This can be considered by the Drafting Committee. |

| *Title/ Article* | *Suggestion* | *Comment* |
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| Article 59 | Article 59 is superfluous because of Article 103 of the Charter of the United Nations. (Slovakia) | This may be considered by the Drafting Committee in the light of the debate as to the form of the articles. A possible solution is to merge articles 56 and 59. |
| | The phrase "without prejudice to the Charter of the United Nations" should be more precise (Austria, Spain): in particular the relation between Security Council action and article 54 is unclear (Austria). | This can be considered by the Drafting Committee. |
| | Article 59 has to cover Part Two bis as well; there should be a reference to peremptory norms. (Spain) | This can be considered by the Drafting Committee. |